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Proposals to strengthen the fight against terrorism

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With the terrorist attacks that have recently hit in particular France, Belgium, Germany, the UK and Spain, the countries of Europe are confronted with an unprecedented challenge to the terms of their collective security. The transnational nature of the terrorist threat that took on a new dimension as of 11th September 2001 has rarely been as evident.

Without negating the central role played by the States in combating terrorism, the reality of common security interests that bring the various countries of the continent together has to be recognised, including the need to consider certain “regalian” issues in close cooperation with the various E.U. Member States so that State action finds its legitimate extension and full efficacy in a powerful Europe that will at last assert itself as an area of strengthened security, effective protection of its citizens and sovereignty.

1. THE IMPERATIVES OF THE FIGHT AGAINST TERRORISM AND THE NEED FOR A NEW PROJECT THAT LEGITIMATES THE INTERVENTION OF MEMBER STATES AND THE EU TO PROVIDE CITIZENS WITH BETTER PROTECTION

The present period has made it more vital than ever before to provide a strong “regalian” narrative in response to citizens’ legitimate expectations in terms of their protection and security both at national and European level. The European Union has to assert itself, not just via the economy (and notably via free trade), but also as a strengthened security area to form, via close cooperation between countries, a complementary protective barrier guaranteed by the States to their citizens, particularly against terrorist threats.

If we challenge the populist and nationalist theories that artificially pitch State sovereignty against the strength of the European project, the interest of a strong narrative around “Sovereign Europe” or “Protective Europe” is manifold:

- there is an evident continuity between the internal dimension of security challenges in general and the fight against terrorism in particular, and the means to manage it at European level, notably

via the increased pooling of the means available to the Member States (justice, police, intelligence, diplomacy, defence etc.);

- France’s assertion that security and defence issues must form the heart of the “new” European project, since terrorism is now the main challenge that threatens the peace of the continent (peace that the creation of the European Union after the Second World War, aimed quite precisely to protect and preserve), would provide a real answer to the decline over the last 10 years in Europe’s citizens’ confidence in European integration and more widely their view of “politics” and its ability to act effectively at national, European and international level;

- the wish, notably expressed by Germany regarding these regalian issues, in terms of defence and the fight against terrorism, leads us to believe that this addresses major questions regarding the future of Europe, via which the Franco-German couple can recover a degree of unity and credibility and even create a strong domino effect as well as leverage, amongst its partners within the European Union;

- the importance of the issue might lead to the recovery of support on the part of Member States which are less in favour of integration (notably those outside of the euro zone), since it also responds to

an overall European demand: 82% of citizens expect greater involvement by the EU in the fight against terrorism, 74% regarding the migratory issue, 71% regarding the protection of the external borders and 66% regarding security and defence[1];

- Finally, this narrative might help to bring debate over sovereignty back to its proper position: indeed the project means defining a Europe which strengthens the role of public powers, whether this is exercised at national or European level. Hence according to our democratic and liberal model, it is both the EU and the Member States' role to protect the security of the citizens, by guaranteeing both their physical security and their economic wealth, by offering as wide a margin as possible to individual freedom within the framework of the values that have structured our society.

Since modern threats – that are different due to their scale – to collective security, obviously cannot be managed individually by the Member States, it is also via a united EU that the sovereignty of the Member States might find its full expression once again. In this regard the paths and targets of those behind the terrorist attacks undertaken over the last three years have illustrated the need for irreproachable European cooperation to guarantee citizens' security.

2. THE NEED FOR CLOSE, STRUCTURED EUROPEAN COOPERATION TO MAKE THE MEMBER STATES' ACTION TOTALLY EFFECTIVE IN THE FIGHT AGAINST TERRORISM

Although security is the vital responsibility of the States, in the future it will only be effectively guaranteed, increasingly, via European cooperation: a cooperation which should be both structured and systematic between all State actors (intelligence, police, justice), as the quality of cooperation still depends too often, nowadays, on the national interest of each State.

The phase of building a European area of freedom, security and justice initiated by the European Summit in Tampere on 15th and 16th October 1999 has clearly come to an end nowadays. The European Investigation

Order that entered into force on 22nd May 2017 modernised and accelerated mutual assistance in criminal matters and concluded a normative phase that started just after the attacks on 11th September 2001, via the creation of the European arrest warrant.

However this intense normative phase on the part of the EU in the area of "justice and internal affairs" during this period has changed many balances and has created a gap between Europe's "practitioners" and the population, since Europe is now often seen as a permanent source of legal uncertainty.

From an institutional point of view, there is no credible alternative to the intergovernmental model, which protects States' sovereignty in these "regalian" areas.

The outcome of negotiations over the establishment of a European Public Prosecutor's Office, which would investigate or prosecute cases in a centralised, integrated manner "on behalf of the European Union" in the area of protecting its financial interests, have illustrated the limits of the latter. This project that was provided for within the Lisbon Treaty would only work mid-term as part of an enhanced cooperation programme.

Conversely the development of Europol and Eurojust shows that the intergovernmental model is not at all obsolete in these areas. The judicial authorities and investigators, who have to undertake investigations of a totally new scale and complexity, such as those regarding the Daesh networks in Europe, are increasingly making use of this model. These specialised agencies enable secure data analysis, the amount of which would clearly swamp the capacities of the police or intelligence services of one State alone, and, in a restricted budgetary context, prevent the risk of exhausting resources due to the rising number of individual demands made on European counterparts, the efficient coordination of whom is however of vital importance for investigations to move forwards.

And yet some major steps forward can still be made in terms of sharing information, as well as police and judicial coordination that is still often haphazard, since

1. Cf. "The Europeans in 2016", Special Eurobarometer – European Parliament, June 2016.

they are subject to individual “good will” and national interests. The promotion of professional practices aiming to use these more systematically would help fight more efficiently against organised criminal networks and laundering circuits that sustain terrorism.

3. CONCRETE OPERATIONAL PROPOSALS

This new dynamic might be formed according to several lines of interest:

- Developing operational support provided by the European agencies Eurojust and Europol.

To increase practitioners’ interest in using these structures we should develop the pooling of investigation support tools that can be adapted to the circumstances of each case and to the goals jointly set by the judicial authorities of the Member States in charge of linked investigations. Moreover, they should more systematically be given the responsibility to bear the work and costs of these investigations, notably if the criminal analysis undertaken proves to be useful only if centralised at European level.

To this end their activities should be realigned – particularly those of Eurojust – with operational support missions to national authorities. Amongst the areas that could potentially be improved there is the pooling at European level of access capacities by police services to encrypted data, which are an impediment in a great number of investigations. Some technologies protect criminals from detection or make it impossible to access the digital data they store. It would therefore be appropriate to invest massively in the R&D of technical solutions to this problem. The results of the Commission’s work on the means to counter the use of encryption by criminals are keenly anticipated. Secondly, it is necessary to facilitate the obtention of digital evidence at European level, and also from third States. Currently problems largely result from the fact that most internet service providers are based in the USA – and the time taken to obtain connection data is too long – the legal constraints to obtain content data are extensive (the “probable cause” rule). Again, it is vital that the work initiated by the European

Commission on legislative measures to enable the improvement of cross-border access to digital evidence be concluded rapidly, notably to facilitate requests targeting the delivery of content data from service providers established in Europe.

- Systematising the transmission of information to these agencies regarding ongoing transnational investigations, particularly in terms counter terrorism.

This would improve their analysis capacities (Europol) and foster the early detection of procedures requiring rapid European coordination (Eurojust). The legal base has existed for terrorism since the 2005/671 JAI decision, which was included in the new Directive for the fight against terrorism. It is also provided for concerning organised crime (Eurojust decision 2009/426 transposed into the French criminal procedure code). The increase in the use of the Europe secure messaging system SIENA, by police services and the gendarmerie, would foster the systemisation of information pooling in conditions that would guarantee the control and confidentiality. This information might be completed by granting total access by Europol to the Schengen Information System (SIS2) - consultation, research and flagging[2] - and via the development of solutions of interoperability for national databases. Regarding Eurojust the project for the interconnection of Eurojust’s database (“Case Management System” (CMS)) with the national judicial database CASSIOPEE should be operational shortly.

- Encouraging the rapprochement of the two agencies, whose missions are complementary but the effective cooperation remains too dependent on national authorities.

Apart from the development of mutual information sharing (including the association of Eurojust to all of Europol’s “focal points”), their systematic inclusion in joint investigation teams set up by the Member States would help them become more complementary and thereby increase the impact of investigations on organised crime. The creation of dedicated taskforces might also be considered in the most complicated investigations.

2. Cf. Proposal 36 by the Parliamentary Investigative Committee regarding the means employed by the State to counter terrorism since 7th January 2015.

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- "Politicising" the election of the President of the Eurojust college to strengthen its authority and legitimacy, by increasing the involvement on the part of the Member States who would provide their support on the strength of previously defined action priorities. It would also seem appropriate also to create a professional sector for specialised judicial authorities and prosecutors, also privileging the recruitment, within the operational support structure of professionals from the areas of justice, police or technical civil servants skilled in investigative techniques (tax, customs departments) and experienced in the judicial context and purpose of the coordination operations undertaken.

- Promoting information sharing between Member States regarding the convictions they make.

One of the main areas to work on and complete in the area of justice would be the interconnection of criminal records (European Criminal Records Information System (ECRIS), provided for by the 2009/315/JAI framework decision. This interconnection has been

effective since 2012 but does not allow integration in the exchange of convictions of third country citizens. One draft reform (ECRIS-TCN for Third Country National) has been ongoing since the JAI Council of February 2015 (after the attack on Charlie Hebdo). The present system is decentralised : each State is responsible for the registration and accessibility to other convictions made against its own citizens. As far as third country nationals are concerned it would seem appropriate therefore to introduce a centralised European based integrating finger prints unless a technical solution allows the present system to be copied.

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