

SECILE

Securing Europe through
Counter-Terrorism: Impact,
Legitimacy and Effectiveness

Report on Operational Perspectives on Impact, Legitimacy and Effectiveness in Counter-Terrorism

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INTRODUCTION

Understanding the impact, effectiveness and legitimacy of a counter-terrorist measure or a collection of measures requires an appreciation of the operational perspective, i.e. the perspective of those entities, individuals and institutions that are tasked with putting these measures and policies into effect. As outlined in D2.1, 88 of the counter-terrorist measures introduced by the EU since 2001 are ‘hard’ legal measures, many of which require legal incorporation in the member states; the implementation of the remainder required a mixture of different actions to be taken not only by the civil and military actors of member states, and European institutions such as EUROPOL, but also in some cases by private entities such as banks, universities and corporations. In each case the process of giving effect to the EU measure is one of what we can term *operationalisation*.

Operationalisation is a process by which abstract or imprecise commitments, principles, measures and policies are translated into ‘on the ground’ action. As a process it can be characterised as having three core elements: (1) the translation into concrete measures, steps and commitments of abstract policies, principles and obligations; (2) the execution of these concrete measures, steps and commitments, and (3) the measurement of the implications of executing these measures, steps and commitments (often considered by reference to multiple forms of measurement). Operationalisation then has three core elements: translation, execution and measurement. This report uses the particular example of the operationalisation of COM(2009)538 (Towards the integration of maritime surveillance: A common information sharing environment for the EU maritime domain) by the Irish Naval Service in order to illustrate these three elements of the operationalisation of EU counter-terrorism. This approach allows for preliminary conclusions on the meaning of impact, legitimacy and effectiveness from an operational perspective to be drawn.

Understanding the operational terrain in EU counter-terrorism is also important. Not only has the EU’s counter-terrorist infrastructure not yet been comprehensively mapped, but the threat from terrorism and the commitment to counter-terrorism within the EU remain strong; the threat is constantly evolving from ‘structured groups and networks to smaller EU-based groups and solo terrorists or lone actors’.¹ According to the TE-SAT report for that year, 17 people died as a result of terrorist attacks in Europe in 2012 and 219 terrorist attacks were carried out in the EU, leading to the arrest of 537 individuals for terrorist related offences. This report first outlines what is meant by the operational perspective, before focusing on the nature of the EU counter-terrorist infrastructure including the agencies and entities within the EU that are involved in operationalisation and considering the maritime surveillance case study mentioned above. Working definitions of impact, legitimacy and effectiveness are then drawn from this and outlined in the closing section.

UNDERSTANDING THE OPERATIONAL PERSPECTIVE

In this report we conceive of the operational perspective as relating to the perspectives and experiences of all actors that are involved in the process of operationalising EU counter-terrorism measures, broadly understood. At its widest level, operationalisation can be defined as ‘the process of translating theoretical concepts into more practical and observable or measureable forms’.² In the context of EU counter-terrorism this definition captures all entities that are involved in the translation of an EU counter-terrorist measure (which include measures that are in some cases somewhat vague commitments to ‘counter’, for example, radicalisation or to enhance social cohesion) into actionable commitments that can be observed or measured. This can involve not only European institutions (as outlined below), but also actors operating at the member state level including but not limited to border agencies, police, military, aviation authorities, banks, corporations, and police forces. These actors are involved in progressing the measure from its original articulation into its practical form, in assessing the operation of the measure (including in

¹ Europol, TE-SAT 2013 EU Terrorism Situation and Trend Report.

² Jonker, J and Pennink, BJW *The Essence of Research Methodology: A Concise Guide for Master and PhD Students in Management Science* (Springer-Verlag 2010), at 51.

determining what benchmarks would be used to measure it again), and in some cases in proposing reforms and revisions. Analysis of the ways in which these stages of operationalisation take place allows us to discern some key insights into the operational perceptions of impact, legitimacy and effectiveness.

In the EU counter-terrorist context, operationalisation is one part of a longer cycle of events and stages that largely comprise of the identification of a problem and making of policy to address it (addressed in the democratic report³), the implementation of the measure with implications for both implementers themselves (addressed in this report) and society (addressed in the societal report⁴), and finally (where appropriate) the legalisation of these approaches either through legislative change or through legal review of the measure and its implementation (addressed in the legal report⁵). Within this 'life cycle' of EU counter-terrorism measures, the operationalisation and legalisation elements can be characterised as a period of what Dubin terms empirical verification, i.e. a phase of developing propositions or logical deductions that could be made from the theory, developing empirical indicators, generating hypotheses, and testing.⁶

Understanding and appreciating the operational perspective on the impact, legitimacy and effectiveness of EU counter-terrorism measures is vital to the articulation of a methodologically sound understanding of these three concepts. This is because these measures have critical implications for operational actors within the overall scheme. These operational actors are often acting on the national rather than the European level. In such circumstances they are *not* European institutions; rather, they are domestic institutions and agencies, or transnational corporations acting at a domestic level, which are tasked with actually giving effect to a state's obligations under EU law and as part of EU policy. Thus, while the report outlines the institutional architecture of the EU in order to illustrate the context in which EU policy is made, it places an operational focus on the national level through a case study approach.

THE INSTITUTIONAL FRAMEWORK OF EU COUNTER-TERRORISM

SECILE is concerned with the creation, implementation and review of counter-terrorism measures emanating from the European Union. Although a large portion of the operationalisation of EU counter-terrorism occurs on the national level—which is the focus of the case study in this report—an understanding of the operation of EU counter-terrorism infrastructures and, in particular, of the institutional structure of the EU as it relates to counter-terrorism is important. This section of the report aims to provide this by concentrating, within an EU institutional context, on the following questions. Who proposes EU counter-terrorism legislation? Who adopts it? Who makes the decisions regarding legislation? What groups contribute to this decision-making process? Who oversees the implementation of the legislation? In this way it attempts to penetrate the institutional complexity that is the EU security architecture and provide an accessible overview of the existing actors and their roles. It does so by outlining the institutional framework for countering terrorism within the general EU structure of European Commission, European Council, and European Parliament.

1. European Commission

The European Commission is the executive arm of the EU and acts as 'the driving force' within the EU's institutional system.⁷ It is responsible for proposing legislation, policies and programmes of

³ Chistyakova, Y., "Report on Democratic Perspectives on Impact, Legitimacy and Effectiveness in Counter-Terrorism", Deliverable 3.6, SECILE. Available at www.secile.eu

⁴ Martin-Mazé, M., "Report on Societal Understandings of Impact, Legitimacy and Effectiveness in Counter-Terrorism", Deliverable 3.5, SECILE. Available at www.secile.eu

⁵ Vermeulen, M., Deering, D., & McCarthy, S., "Report on Legal Understandings of Impact, Legitimacy and Effectiveness in Counter-Terrorism", Deliverable 3.3, SECILE. Available at www.secile.eu

⁶ Dubin, R., *Theory building* (Free Press 1978); see also Lynham, S., 'Quantitative research and theory building: Dubin's method (2002) 4 (3) *Advances in Developing Human Resources* 242–276

⁷ European Union, *The European Union Explained, How the European Union Works*, July 2012, p. 19.

action to Parliament and Council and for implementing the decisions of the European Parliament and European Council. The Commission is composed of 28 Commissioners each responsible for a particular policy area. These Commissioners are drawn from the member states but act on behalf of the Union and not on behalf of national interests. The Commission is answerable to the Parliament. The staff are organised into departments known as Directorates-General. In 2010 the former Directorate-General (DG) for Justice, Liberty and Security was divided into two Directorates-Generals (DGs) – one for Home Affairs (Commissioner Cecilia Malmström) and one for Justice (Commissioner Francoise Le Bail). Counter-terrorism sits within the crisis and terrorism policy at Home Affairs. Other DGs can play a role in the preparation of counter-terrorism policies such as DG for Humanitarian Aid and Civil Protection (ECHO). A large part of the Commission's activity in the field of counter-terrorism takes place within DG Home, although given the complex nature of counter-terrorism activities can be spread across different DGs. For example, the data retention directive (which forms the basis of a SECILE case study⁸) implicates DG Information Society and Media and DG Internal Market and Services.

The general role of the Commission in the context of counter-terrorism is to draft legislation implementing the EU counter-terrorism action plan.⁹ To this end it is involved in developing targeted actions and initiatives, primarily within the 'prevent' and 'protect' strands of the plan. The Commission has played an important role in developing the legislative framework within which counter terrorism policies and actions operate at EU level. A key example is the Council Framework Decision on Combating Terrorism which provides a common definition of terrorist and terrorist-linked offences.¹⁰ It has developed policies in all sectors related to the prevention of terrorist attacks and the management of their consequences, e.g. in countering terrorist financing¹¹ and in hindering access to explosives¹² and to Chemical, Biological, Radiological and Nuclear materials.¹³ The Commission is also responsible for the European Programme for the Protection of Critical Infrastructure¹⁴ and the EU-US Agreement on Terrorist Finance Tracking Programme.¹⁵ It is currently developing a European equivalent of the latter programme.¹⁶ Other important roles that the Commission is involved in include providing assistance to victims of terrorism, supporting security research projects and coordinating European Crisis Management.

2. The European Council

The European Council is the 'overarching authority' in relation to strategies involving external Area of Freedom, Security and Justice issues.¹⁷ Article 68 of The Treaty on the Functioning of the European Union outlines the role of the European Council to 'define the strategic guidelines for

⁸ Hayes, B. and Jones, C., "Case Study on the Data Retention Directive", Deliverable 2.4, SECILE. Available at www.secile.eu

⁹ Council of the European Union, EU Action Plan on Combating Terrorism, 7233/1/07 REV 1, 29 March 2007.

¹⁰ Commission of the European Communities, Proposal For A Council Framework Decision On Combating Terrorism, Brussels, 19.9.2001, COM(2001) 521 final. 2001/0217 (CNS).

¹¹ Commission of the European Communities, Communication From The Commission To The Council And The European Parliament on the Prevention of and the Fight against Terrorist Financing through measures to improve the exchange of information, to strengthen transparency and enhance the traceability of financial transactions Brussels, 20.10.2004, COM(2004) 700 final.

¹² Commission of the European Communities, Communication From The Commission On Measures To Ensure Greater Security In Explosives, Detonators, Bomb-Making Equipment And Fire-Arms, Brussels, 18.07.2005, COM(2005) 329 final.

¹³ Commission of the European Communities, Communication From The Commission To The European Parliament And The Council On Strengthening Chemical, Biological, Radiological And Nuclear Security In The European Union – An EU CBRN Action Plan. Brussels, 24.6.2009, COM(2009) 273 final.

¹⁴ Commission of the European Communities, Communication From The Commission On A European Programme For Critical Infrastructure Protection, Brussels, 12.12.2006 COM(2006) 786 final.

¹⁵ Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program.

¹⁶ European Commission, Communication From The Commission To The European Parliament And The Council A European Terrorist Finance Tracking System: Available Options. Brussels, 13.7.2011
Com(2011) 429 Final. For further information on the role of the Commission in relation to terrorism see http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/crisis-and-terrorism/index_en.htm

¹⁷ Monar, J., 2012 (1), 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon' Swedish Institute for European Policy Studies, p.35.

legislative and operational planning within the area of freedom, security and justice'.¹⁸ The European Council consists of heads of state or government from each member state joining with the President of the European Council (currently Herman Van Rompuy) and the President of the European Commission (currently José Manuel Barroso). Together they represent the highest level of political cooperation between member states. Based in Brussels, the role of the European Council is to define the political direction and priorities of the EU but it has no powers to pass laws *per se*. It does however issue Council Conclusions, which as outlined in D2.1 form a very substantial part of the EU's body of counter-terrorism measures and are highly influential in the creation of *both* legislative measures within the EU *and* operational agreements and arrangements concluded by member states, often with the coordinating assistance of agencies such as Europol. The Council meets every six months and a number of its organisations and working groups are involved in counter-terrorism.

The Council of Ministers

The Council of Ministers, also known as simply 'the Council', is composed of government ministers from all the EU countries. Based in Brussels and Luxembourg, the role of the Council is to decide on proposals from the Commission and in collaboration with the Parliament to adopt decisions. There are ten different Council configurations within the Council of Ministers including for example Foreign Affairs, Agriculture and Fisheries and Competitiveness. The configurations of interest with relation to terrorism are the Justice and Home Affairs Council, the Foreign Affairs Council and the General Affairs Council.

The work of the Council of Ministers is prepared by the Permanent Representatives Committee (COREPER). It is composed of member states' ambassadors and works in two configurations: COREPER I consists of deputy permanent representatives and deals with technical matters. COREPER II consists of the ambassadors and deals with political, commercial, economic and institutional matters. There are over 150 different working groups and parties assisting COREPER in its work.¹⁹

The Political and Security Committee (PSC) is a permanent structure of the Council of the European Union (EU), the creation of which is provided for by Article 38 of the Treaty on EU (formerly Article 25 of the EU Treaty).²⁰ The PSC contributes to the drafting and implementation of the Common Foreign and Security Policy (CFSP), and the Common Security and Defence Policy (CSDP). In particular, it defines and follows up the EU's response in the event of a crisis. The mission of the PSC is to monitor the international situation in the areas covered by the CFSP. In particular it delivers opinions to the Council in order to help define policies; coordinates, supervises and monitors the work led by the different Council working groups in the area of the CFSP and examines the draft conclusions of the General Affairs Council.²¹

This section describes the Council configurations with a particular focus on terrorism, namely Justice and Home Affairs (JHA), Foreign Affairs and General Affairs, and the corresponding working groups that assist that Council.

¹⁸ Article 68, European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2012:326:SOM:EN:HTML> [accessed 24 October 2013]

¹⁹ For full list of council preparatory bodies please see Council of the European Union, Note from General Secretariat of the Council to Delegations, 5581/13, 22 January 2013.

²⁰ Article 38 states: 'Without prejudice to Article 240 of the Treaty on the Functioning of the European Union, a Political and Security Committee shall monitor the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or of the High Representative of the Union for Foreign Affairs and Security Policy or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the powers of the High Representative'. European Union, *Treaty on European Union (Consolidated Version)*, *Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:en:PDF> [accessed 24 October 2013].

²¹ See further

http://europa.eu/legislation_summaries/foreign_and_security_policy/cfsp_and_esdp_implementation/r00005_en.htm

Justice and Home Affairs

In terms of implementation of counter-terrorism legislation, the JHA Council is the principal decision-making institution. It comprises ministers of interior and of justice. The JHA Council is responsible for a number of key tasks. This grouping is required to 'to approve all programming documents for the JHA external dimension,(...) adopt all relevant legislative acts, take the decisions on the opening, signing and conclusion of international agreements in the AFSJ domain, approve the Commission's negotiation mandates, decide on external risk assessments and define action priorities regarding specific third-countries or –regions'.²² Within the Justice and Home Affairs Council configuration there are five working groups of interest from a counter-terrorist perspective: CATS, The Terrorism working group, The Working Party on Civil Protection, The Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and The Standing Committee on Internal Security (COSI).

(i) CATS / Article 36 Committee

The role of CATS (or Article 36 Committee in honour of the article of the Treaty on European Union (Maastricht Treaty) that established it) is to assist COREPER in relation to law enforcement and judicial cooperation in criminal matters. It acts as a useful network for senior officials in the field and focuses in particular on 'horizontal or cross cutting issues in the field of law enforcement and judicial cooperation in criminal matters and on politically important legislative proposals and non-legislative initiatives'.²³ Its role is to:

- be involved in in-depth discussions on relevant multiannual programs and their respective evaluation;
- facilitate work in the field of law enforcement and judicial cooperation matters by clearing the number of outstanding questions and thus narrowing down the issues to be examined by COREPER and Council;
- serve as a forum for an initial exchange of views in case of politically important legislative proposals and initiatives in order to set the direction for work at expert level in the relevant working parties;
- serve as a complementary forum for the purpose of informing and/or consulting Member States by the Commission in relation to important forthcoming initiatives;
- be a forum for the exchange of information on developments of interest in the areas of its mandate, in particular pending cases and developments in the case law of the Court of Justice / European Court of Human Rights²⁴

(ii) Terrorism Working Group (TWG)

The Terrorism working group comprises interior ministry representatives and law enforcement agencies of member states focusing on internal terrorism threats. This group meets three times per Presidency and deals with internal threat assessments, practical cooperation and coordination among EU bodies.²⁵

(iii) Working Party on Civil Protection (PROCIV)

The Working Party on Civil Protection works on early warning mechanism and consequence management as a whole.²⁶

²² Monar, J., 2012 (1), 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon' Swedish Institute for European Policy Studies, p.37.

²³ Council of the European Union, 'I' item note from the General Secretariat of the Council to COREPER, The Future of CATS, 17187/11, 18 November 2011.

²⁴ Council of the European Union, 'I' item note from the General Secretariat of the Council to COREPER, The Future of CATS, 17187/11, 18 November 2011.

²⁵ The Council of the European Union (05.2004), Working Structures of the Council in terrorism matters - Options paper, Note from EU Counter-Terrorism Coordinator to COREPER. Doc. 9791/04,25.05.2004, p.2.

²⁶ The Council of the European Union (05.2004), Working Structures of the Council in terrorism matters - Options paper, Note from EU Counter-Terrorism Coordinator to COREPER. Doc. 9791/04,25.05.2004, p.2.

(iv) Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)

The Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) coordinates the work of the various working groups in the field of migration, visa, borders and asylum.²⁷

(v) COSI

The Standing Committee on Internal Security was created by the Lisbon Treaty in order to 'ensure that operational cooperation on internal security is promoted and strengthened' within the EU.²⁸ It is composed of representatives from national security services who coordinate operational cooperation in criminal matters in internal security. If the situation requires it, expertise can be sought from the Working group on external JHA issues (JAIEX).

General Affairs Council

The second Council configuration of interest in relation to counter-terrorism is the General Affairs Council. It deals with dossiers that affect more than one of the Union's policies, such as negotiations on EU enlargement, preparation of the Union's multi-annual budgetary perspective or institutional and administrative issues. It co-ordinates preparation for and follow-up to meetings of the European Council. It also exercises a role in co-ordinating work on different policy areas carried out by the Council's other configurations. The Security Committee is the key working group assisting the General Affairs Council in its work for the Council of Ministers.

The Security Committee examines and assesses any security matter and makes recommendations to the Council when appropriate. The Security Committee has established 3 expert sub-groups within the areas of Information Assurance, GNSS (Global Satellite Navigation System) and Security Accreditation.

Foreign Affairs

Within the Foreign Affairs configuration of the Council there are three working groups that contribute to the preparation of counter-terrorism legislation: the Working Party on Terrorism (International aspects)(COTER); the Working Party on the application of specific measures to combat terrorism, and the Working Party of Foreign Relations Counsellors.

(i) Working Party on Terrorism (International Aspects) (COTER)

The Working party on terrorism (International aspects), also known as COTER, is composed of foreign ministry representatives working on external aspects of counter-terrorism. This group meets once a month and deals with issues relating to external matters, threat assessments and policy recommendations as regards third countries and regions, implementation of UN Conventions and coordination of work, in particular in the UN, seminars on financing of terrorism.²⁹

(ii) The Foreign Relations Counsellors Working Party (RELEX)

The Relex group deals with legal, financial and institutional issues in the external field with the main focus on the Common Foreign and Security Policy (CFSP). Priorities include the financing of external activities, EU crisis management operations, non-proliferation, sanctions, EU Special Representatives and other crosscutting issues.

²⁷ The Council of the European Union (05.2004), Working Structures of the Council in terrorism matters - Options paper, Note from EU Counter-Terrorism Coordinator to COREPER. Doc. 9791/04,25.05.2004, p.2.

²⁸ Article 71 states: 'A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies, offices and agencies concerned may be involved in the proceedings of this committee. The European Parliament and national Parliaments shall be kept informed of the proceedings.' European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF> [accessed 24 October 2013].

²⁹ The Council of the European Union (05.2004), Working Structures of the Council in terrorism matters - Options paper, Note from EU Counter-Terrorism Coordinator to COREPER. Doc. 9791/04,25.05.2004, p.2.

(iii) *The Working Party on the application of specific measures to combat terrorism (CP 931 WP)*

The role of the working party on the application of specific measures to combat terrorism is to implement Common Position 2001/931/CFSP.³⁰ In particular its mandate is to:

- examine and evaluate information with a view to listing and de-listing of persons, groups and entities pursuant to Common Position 2001/931/CFSP;
- assess whether the information meets the criteria set out in Common Position 2001/931/CFSP and in the Council's statement agreed when the Common Position was adopted;
- prepare the regular review of the list as foreseen in Article 1(6) of the Common Position;
- and make recommendations for listings and de-listings to be reflected in the necessary legal instruments, which will be endorsed by the Permanent Representatives Committee with a view to their adoption by the Council.³¹

The Council Secretariat**(i) *EU Counter-terrorism Coordinator***

The position of EU counter-terrorism coordinator was established in 2004 in the aftermath of the Madrid bombings.³² Gijs de Vries was the first incumbent and was succeeded by Gilles de Kerchove in 2007. The EU Counter-terrorism Coordinator is situated in the Council's General Secretariat and works under the authority of the High Representative of the Union for Foreign Affairs and Security Policy / Vice-President of the European Commission (Catherine Ashton) but takes instruction from and reports to the JHA Council. The role of the CTC is to coordinate counter-terrorism activities within the Council, monitor the implementation of measures, communicate and ensure cooperation. The importance of this position was reaffirmed in the Stockholm Programme.³³

3. European Parliament

The European Parliament is the directly elected legislative arm of the EU. Members of the European Parliament (MEPs) are elected every five years to represent their interests. The Parliament currently has 766 members across 28 countries. The Parliament has three main roles. It shares with the Council the power to legislate; secondly, it exercises democratic supervision over all EU institutions; and finally it manages the EU budget alongside the Council.³⁴ Much of the work of the Parliament is organised by committee. The Civil Liberties, Justice and Home Affairs Committee (LIBE) is in charge of most of the legislation and democratic oversight for policies linked to the transformation of the European Union in the area of freedom, security and justice (AFSJ). Current work themes of the Committee include voting on the EU Data Protection Package and a hearing on the situation of fundamental rights in the EU, both reflecting the Parliament's traditional role of human rights and civil liberties monitor.³⁵ The second relevant committee is the Committee

³⁰ Council of the European Union, Fight Against the Financing of Terrorism: Implementation of Common Position 2001/931/CFSP, Doc. 10826/1/07, Rev. 1, 28th June 2007 available at <http://register.consilium.europa.eu/pdf/en/07/st10/st10826-re01.en07.pdf>

³¹ Council of the European Union, Fight Against the Financing of Terrorism: Implementation of Common Position 2001/931/CFSP, Doc. 10826/1/07, Rev. 1, 28th June 2007, pg. 4 available at <http://register.consilium.europa.eu/pdf/en/07/st10/st10826-re01.en07.pdf>. Although not their core business, a number of other grounds under Foreign Affairs may engage to some degree with counter-terrorism, such as the European Union Military Committee (which directs all EU military activity and advises the Political and Security Committee), the Politico-Military Group (which handles politico-military aspects of the Common Security and Defence Policy), and the European Union Military Committee Working Group (which prepares materials relating to many of the issues dealt with by the EUMC).

³² The Council of the European Union (03.2004). Declaration on combating terrorism adopted by the European Council at its meeting on 25 March 2004. Doc. 7906/04, p.14.

³³ The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens [Official Journal C 115 of 4.5.2010], pg. 85: 'The European Council reaffirms the importance of the role of the EU Counter Terrorism Coordinator in ensuring implementation and evaluation of the Counter Terrorist strategy, coordinating Counter Terrorist work within the Union, and fostering better communication between the Union and third countries'.

³⁴ European Union, The European Union Explained, How the European Union Works, July 2012, p.10.

³⁵ For more information about the LIBE committee see: <http://www.europarl.europa.eu/committees/en/libe/home.html>

on Foreign Affairs which helps to formulate and monitor a foreign policy that addresses the interests of the Union, the security expectations of its citizens and the stability of its neighbours while ensuring an overall coherence and effectiveness.³⁶ This committee is currently absorbed in the issue of transatlantic spying and citizens privacy implications.

Post Lisbon, the European Parliament now has full co-decision powers. The Parliament flexed its new found muscle in February 2010 when it rejected the SWIFT Interim Agreement between the EU and US intended to facilitate the transfer of financial data. The agreement was rejected by the LIBE committee on the grounds of inadequate data protection provision, lack of requirement of judicial authorisation, lack of rules on retention and oversight.³⁷ The Agreement was subsequently renegotiated and passed by Parliament in July 2010 leaving some to suggest that its earlier recalcitrance was more about 'affirming institutional prerogatives than substantive policy reasons'.³⁸ Regardless, the SWIFT case established a precedent for future negotiations involving the Parliament.

4. EU agencies

The European Defence Agency

The role of the EDA is to support the Council and member states in improving EU defence capabilities as part of the CSDP. It was established under a joint action of the Council of Ministers in 2004.³⁹ The head of the EDA, Catherine Ashton, is also the head of the EEAS.

Europol

Europol is the European Union's law enforcement agency assisting member states in their fight against terrorism.⁴⁰ Established by the Maastricht Treaty in 1992, it became operational in 1998, is based at The Hague, the Netherlands and has a staff of almost 800. They do not have direct powers of arrest but rather work closely with law enforcement agencies across the 28 member states and with non-EU partner states like Australia, Canada, USA and Norway. Europol officers gather, analyse and disseminate information and coordinate intelligence. Experts take part in Joint Investigation Teams. Europol can only work when national security and intelligence services share information with it. It has no power to oblige them to cooperate. A multi-agency approach draws personnel from different types of national law enforcement agencies. Each year they conduct over 13,500 cross-border investigations.

Europol is accountable to the European Council of Ministers for Justice and Home Affairs who appoints the Director and Deputy Directors. The Council, together with the Parliament, approves the budget for Europol. Within Europol, the two key counter-terrorism instruments are the Counter-Terrorism Unit and the Counter-Terrorism Task Force.⁴¹ Europol publishes annually a detailed account of the state of terrorism in the EU called the EU Terrorism Situation and Trend Report (TE-SAT).⁴²

³⁶ For more information about the Committee on Foreign Affairs see:

<http://www.europarl.europa.eu/committees/en/afet/home.html>

³⁷ European Parliament: Draft Recommendation on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Jeanine Hennis-Plasschaert, PE438.440v01-00, 3.2.2010.

³⁸ See for example the discussion on the SWIFT case in Monar, J., 2012 (1), 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon' Swedish Institute for European Policy Studies, p.42.

³⁹ Council Joint Action 2004/551/CFSP Of 12 July 2004 On The Establishment Of The European Defence Agency. And later Council Decision 2011/411/CFSP of 12 July 2011 defining the statute, seat and operational rules of the European Defence Agency and repealing Joint Action 2004/551/CFSP.

⁴⁰ Legal basis is Article 23 of the Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121/37-66 of 15.5.2009.

⁴¹ Casale, D., 2008, EU Institutional and Legal Counter-terrorism Framework, Defence Against Terrorism Review, Vol. 1, No. 1, p.55.

⁴² See for example Europol, TE-SAT 2013 EU Terrorism Situation and Trend Report.

The Lisbon Treaty conferred a legal personality to Europol allowing it to enter into international agreements. Europol's work in the field of counter terrorism is conducted through the negotiation of such agreements with third countries or third-country authorities.⁴³ There are two types of agreements. Operational agreements are far reaching permitting the exchange of personal data between cooperation partners. These agreements have been signed with nine non-EU states: the Former Yugoslav Republic of Macedonia, Monaco, Australia, Croatia, Canada, Iceland, Norway, the Swiss Confederation, USA, one European organisation, Eurojust and one international organisation, Interpol.

Less far reaching strategic agreements permit the exchange of strategic and technical information and provide for training but they do not permit the exchange of personal data. These agreements have been signed with nine non-EU states: Ukraine, Republic of Serbia, Montenegro, Moldova, Albania, Bosnia and Herzegovina, Colombia, Russia and Turkey. They have been signed with four European agencies: European Monitoring Centre for Drugs and Drug Addiction, European Centre for Disease Prevention and Control, The European Agency for the management of operational cooperation at the external borders of the member states of the European Union, European Anti-Fraud Office, Cepol; two European institutions: European Central Bank, the European Commission and two international organisations UN Office on Drugs and Crime, World Customs Organisation.

Eurojust

Eurojust was established in 2002 replacing its forerunner Pro-Eurojust.⁴⁴ Acting as a cross-border judicial coordination unit, its mission is 'to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States [...]'.⁴⁵ Based at The Hague, it works with member states assisting them in dealing with cross-border threats such as that posed by terrorism. It is staffed by lawyers, judges and other legal experts seconded from each member state. Each member state designates a National Correspondent for terrorism.⁴⁶ Eurojust's competencies have expanded and strengthened with various Council amendments in 2003 and 2008.⁴⁷ The Lisbon Treaty envisages further development of Eurojust with Article 86 stating "in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust".⁴⁸

The Lisbon Treaty conferred a legal personality to Eurojust permitting it to enter into international agreements. Eurojust has been active in negotiating cooperation agreements with third States and other EU agencies, allowing the exchange of judicial information and personal data.⁴⁹ Agreements were concluded with a number of EU partners including Europol, the European Commission, CEPOL, OLAF and the European Judicial Training Network. Third States agreements have been entered into with Lichtenstein, the Swiss Confederation, the former Yugoslav Republic of Macedonia, Croatia, the USA, Iceland and Norway. Agreements have been reached with a number of international organisations including Interpol, the UN Office on Drugs and Crime and Iberoamerican Network of International Legal Cooperation. Liaison prosecutors from Norway and

⁴³ Current list (Oct. 2013) taken from Europol website: <https://www.europol.europa.eu/content/page/europol-eu-121>

⁴⁴ Eurojust was established by [Council Decision 2002/187/JHA of 28 February 2002](#). This was subsequently amended in 2003 ([Council Decision 2003/659/JHA of 18 June 2003](#)) and 2008 ([Council Decision 2009/426/JHA of 16 December 2008](#)).

⁴⁵ Article 85, European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01, available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML> [accessed 24 October 2013]

⁴⁶ Article 3 of Council Decision of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with article 4 of the Common Position 2001/931/CSFP.

⁴⁷ 2003 ([Council Decision 2003/659/JHA of 18 June 2003](#)) and 2008 ([Council Decision 2009/426/JHA of 16 December 2008](#)).

⁴⁸ Article 86, European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01, available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML> [accessed 24 October 2013].

⁴⁹ Current (October 2013) list taken from Eurojust website: <http://eurojust.europa.eu/about/legal-framework/Pages/eurojust-legal-framework.aspx>

the USA are now permanently based at Eurojust. In addition to cooperation agreements, Eurojust also maintains a network of contact points worldwide.

Frontex

The European Agency for the management of operational cooperation at the external borders of the Member States of the European Union (Frontex) was established in 2004.⁵⁰ Based in Warsaw, Poland, Frontex aims to balance the freedoms associated with the eradication of internal borders within the Schengen area with the potential security issues that such an arrangement can invite. Described as 'compensatory measures', Frontex focuses on cooperation and coordination of police and judicial authorities work.

Similar to Europol and Eurojust, Frontex has a legal personality and can enter into international agreements. Frontex has the authority to enter into working arrangements with third countries and as of June 2012 has concluded 17 such arrangements with: the Russian Federation, Ukraine, Croatia, Moldova, Georgia, the Former Yugoslav Republic of Macedonia, Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia and Turkey as well as with the CIS Border Troop Commanders Council and the MARRI Regional Centre in the Western Balkans. It is in various stages of negotiations with the authorities of a further eight countries: Libya, Morocco, Senegal, Mauritania, Egypt, Brazil, Tunisia and Azerbaijan.⁵¹

European External Action Service

The European External Action Service (EEAS) was introduced by the Lisbon Treaty and started to function in 2011.⁵² The HR/VP heads this service and the staff are drawn from the Commission, the Council and from member states foreign ministries. The EEAS is the EU's diplomatic arm assisting the HR/VP in the coordination of EU external action. There are two agencies and services within EEAS that are relevant to counterterrorism: EU SITCEN and EUMS Intelligence Directorate (EUMS INT). They were previously located within the Council's General Secretariat but were transferred to EEAS by the Lisbon Treaty.

(i) EU SITCEN

The EU Situation centre (SITCEN) is a strategic analytical body of 80 analysts who prepare intelligence reports on the basis of intelligence collected by member states, EU delegations, CSDP missions and open sources. It produces assessments of the internal and external security threat.⁵³

(ii) EUMS INT

Similar to EU SITCEN, EUMS INT has a staff of 40 analysts producing intelligence reports for the EEAS.⁵⁴

⁵⁰ FRONTEX was established by [Council Regulation \(EC\) 2007/2004/ \(26.10.2004, OJ L 349/25.11.2004\)](#) having regard to the [Treaty establishing the European Community](#). It was later amended by the [Regulation \(EC\) No 863/2007](#) of the European Parliament and of the Council of 11 July 2007 and last amended by the [Regulation \(EU\) No 1168/2011](#) of the European Parliament and of the Council of 25 October 2011.

⁵¹ Current (October 2013) list taken from Frontex website: <http://www.frontex.europa.eu/partners/third-countries>

⁵² European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01, available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML> [accessed 24 October 2013], article 13 (a) (3) states 'In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.' A Council Decision of 26 July 2010 established the organisation and functioning of the European External Action Service.

⁵³ Renard, T., 2012, EU Counterterrorism Policies and Institutions After the Lisbon Treaty, Center on Global Counterterrorism Cooperation Policy Brief, September 2012, p.9.

⁵⁴ Renard, T., 2012, EU Counterterrorism Policies and Institutions After the Lisbon Treaty, Center on Global Counterterrorism Cooperation Policy Brief, September 2012, p.10.

5. Outside of the EU

The Counter-Terrorism Group (CTG)

The Counter-Terrorism group facilitates cooperation between European internal intelligence services outside EU structures.⁵⁵ The intelligence services of the Member States have long co-operated in the fight against terrorism within the informal framework of the so-called 'Club of Bern', where some other European countries participate as well. This co-operation is based on mutual trust and flexibility. After 11 September 2001, Member States' intelligence services, following the conclusions of the European Council of 21 September 2001, have stepped up their counter-coordination within the "Counter-terrorism group" (CTG) of the Club of Bern, which brings together the counterterrorist experts of the intelligence services on a regular basis to facilitate cooperation. The group focuses specifically on Islamic extremist terrorism. Police services do not participate in this group but rather cooperate in the Police Chiefs' Task Force and the Police Working Group on Terrorism.⁵⁶

European Police Chiefs' Task Force

This is a forum for the heads of states' police forces where they meet to agree targets for action in the area of terrorism.⁵⁷ It was established at an EU Council Decision meeting in Tampere in 1999 and began to meet from 2000. Since the Lisbon Treaty, the Task Force meets under the European Police Chiefs Convention. It is not accountable to the Union as it has no Treaty basis but rather was formed on the basis of a Council Recommendation.⁵⁸

The Police Working Group on Terrorism

The Police Working Group on Terrorism was established in 1979 by the UK, Netherlands, Germany and Belgium following the assassination of the British Ambassador to Ireland in 1976.⁵⁹ Other countries followed suit by joining the group and formal cooperation was achieved in 1986 with the 'Political Declaration by the Governments of the Member States on the Free Movement of Persons'.⁶⁰

Contact Group (Network of Focal Points)

In addition to the above mentioned working groups of the Council, there is a Contact Group (network of focal points) of persons from the Member States' Brussels Permanent Representations dealing with all aspects of terrorism. It is, as the title suggests, a contact group of focal points for preparing the meetings of the Council preparatory bodies. It is not a Council working group. Its purpose is to act as a central contact point on issues related to counter-terrorism guaranteeing the flow of information to the relevant competent authorities in the member states.⁶¹

⁵⁵ Keohane, D., Special report 1: The EU and international terrorism, European Policy Analyst September 2005, The Economist Intelligence Unit Ltd. 2005, pg. 44.

⁵⁶ The Commission of the European Communities (05.2004). Communication from the Commission to the European Parliament and the Council. Enhancing police and customs cooperation in the European Union. Doc. COM(2004) 376 final, 18.05.2004, p.27.

⁵⁷ Keohane, D., Special report 1: The EU and international terrorism, European Policy Analyst September 2005, The Economist Intelligence Unit Ltd. 2005, pg. 44.

⁵⁸ Deflem, M., 2006, Europol and the Policing of International Terrorism: Counter-Terrorism is a Global Perspective, 23 Justice Quarterly 3 at p. 350.

⁵⁹ Deflem, M., 2006, Europol and the Policing of International Terrorism: Counter-Terrorism is a Global Perspective, 23 Justice Quarterly 3 at p. 341.

⁶⁰ The Political Declaration states: 'In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also cooperate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques'. See <http://www.eurotreaties.com/seafinalact.pdf>

⁶¹ Lugna, L., 2006, Institutional Framework of the European Union Counter-Terrorism Policy Setting, Baltic Security and Defence Review, vol. 8, p. 108.

CASE STUDY: IMPLEMENTING COM(2009)538 IN IRELAND

Ireland chose Maritime Security and Surveillance as one of its key 2012-2013 EU Presidency priorities.⁶² From a maritime perspective, this was a marked step forward as Ireland had previously suffered from 'sea blindness', i.e. a lack of appreciation and awareness at public and political levels of maritime issues. Identifying maritime security and surveillance as a priority area thus represented an increased awareness of the potential offered to the State by its maritime domain.

Maritime surveillance has been recognised by the EU as an area where existing systems can be used for many security as well as safety purposes, including counter terrorism.⁶³ In its Communication on the Integrated Maritime Policy for the European Union, the European Commission undertook to "take steps towards a more interoperable surveillance system to bring together existing monitoring and tracking systems used for maritime safety and security, protection of the marine environment, fisheries control, control of external borders and other law enforcement activities."⁶⁴

The General Affairs Council of 8 December 2008 encouraged the Commission to work towards interoperability between national and Community systems so as to increase the cost effectiveness of maritime surveillance operations. This approach towards further integration of maritime surveillance was confirmed in the roadmap for the development of the European Border Surveillance System (EUROSUR), which foresaw the gradual creation of a Common Information Sharing Environment (CISE) for the EU maritime domain,⁶⁵ as well as in the recent updating of the Community vessel traffic monitoring and information system.⁶⁶

The concentration on maritime surveillance reflects the fact that, on a daily basis, tens of thousands of activities take place in EU waters. To ensure that these activities take place in a safe manner and to assess and manage their impact on security, the economy, and the marine environment, it is considered that there is a critical need for these activities to be subjected to surveillance. In order to be effective, this surveillance must take place on both a national *and* a transnational basis, so that there is cooperation between states in terms of operations and information sharing. In advance of the Council Communication there was a recognised lack of maritime strategy and of recognised maritime picture⁶⁷ across the EU, and a need for the pooling and sharing of assets, information and other resources between national agencies. Although significant advances had been made in the collection and exchange of some maritime surveillance information (such as the position of ships) by control authorities and within specific maritime surveillance user communities, the sharing of surveillance data *between* user communities had not taken place to the same extent. One concern was that for many States within the EU the recognised maritime picture did not include complementary information gathered by other sectoral users due to the lack of mutual exchange. This led to situations where data which would have been useful to other user communities were not shared or where the same data were collected by several authorities. The need to develop an enhanced system of maritime surveillance was thus well accepted, and the existing regulatory structure was contingent on a level of pooling and sharing that had proved challenging to achieve. Thus the Council Communication focused on ameliorating the 'sea blindness' within the European security surveillance system.

⁶² Opening Address by the Minister for Justice, Equality and Defence, Mr Alan Shatter T.D - Challenges and Opportunities in Maritime Security and Surveillance for Effective Governance and Innovation in the EU's Maritime Domain, Dublin Castle – 8th & 9th April, 2013.

⁶³ See Action 4.2.6 of the EU Action Plan on Counter-Terrorism.

⁶⁴ COM (2007) 575 final of 10.10.2007

⁶⁵ COM(2008) 68 final of 13.2.2008, 9

⁶⁶ Directive 2009/17/EC amending Directive 2002/59/EC establishing a Community monitoring and information system, OJ L131, 28 5 2009, 101. Equally relevant is Regulation (EC) No 725/2004 of 31 March 2004 on enhancing ship and port facility security, OJ L129, 29.4.2004, 6

⁶⁷ The phrase 'recognised maritime picture' refers to a layered approach to identifying traffic within a state's area of responsibility and being able to distinguish between 'vessels of interests' and regular maritime traffic.

The Council Communication

COM(2009)538 (Towards the integration of maritime surveillance: A common information sharing environment for the EU maritime domain) reiterates that the aim of integrated maritime surveillance is the enhancement of situational awareness of sea activities that impact on maritime safety and security, border control, the marine environment, fisheries, trade and the EU's economic interests. Bearing this in mind the Communication aims to outline guiding principles that could be applied to the development of a common information sharing environment, building towards the establishment of such an environment. Across these principles—discussed below—was a commitment to ensuring interoperability between the new environment and existing systems, the improvement of situational awareness, efficiency, and subsidiarity.⁶⁸

Reflecting this, the communication outlines the following Principles:

1. The approach should interlink all user communities
2. A technical framework for interoperability and future integration should be built in
3. There should be information exchange between civilian and military authorities
4. Specific legal provisions that are both obstacles and aides to achievement should be identified and addressed

These principles were to be applied in the development of a common information sharing environment. The Communication defines the relevant elements as follows:⁶⁹

- 'Common': As the information is to be shared between the different user communities, data used for this information should be collected only once.
- 'Information' must enable user-defined situational awareness. Coming from disparate user communities, information should be identifiable, accessible, understandable and usable. Processing such information with the appropriate security safeguards must be ensured.
- 'Sharing' means that each community receives but also provides information on the basis of previously agreed standards and procedures.
- 'Environment' refers to interconnected sectoral information systems that allows for users to build up their specific situational awareness pictures, which enable them to identify trends and detect anomalies and threats.

The construction of a common information sharing environment is recognised as a challenging enterprise, with the Council Communication noting:

“Building a 'Common Information Sharing Environment' for the EU 'maritime domain' may be best achieved through a non-hierarchical technical framework of maritime monitoring and surveillance systems. Such architecture should be designed as a cost effective interaction of different information layers to enable the improvement of user defined pictures. The system architecture must allow data to be inter alia collected, merged, analysed, disseminated and managed at the appropriate level of decentralisation, depending on security concerns (e.g. intelligence) and in compliance with data protection regulations, international rules and functional requirements. Best use should be made of existing systems”⁷⁰

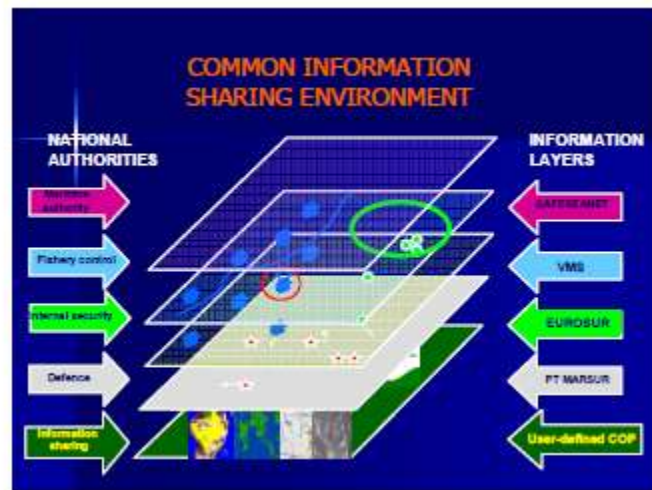
It is foreseen that upon completion the system will operate as follows:⁷¹

⁶⁸ COM (2009)538 p 4.

⁶⁹ COM(2009)538 final 'Towards the integration of maritime surveillance: A common information sharing environment for the EU maritime domain'.

⁷⁰ Ibid, pg.6

⁷¹ Diagram taken from Ibid p 8.



When implemented, the common information sharing environment will result in improved maritime situational awareness across the EU. 'Maritime situational awareness' is the effective understanding of activity on the sea that could impact the security, safety, economy, or environment of the European Union and its Member States. On the basis of clearly defined user needs and rights, it assists the authorities responsible for monitoring and surveillance activities in preventing and managing in a comprehensive way all such situations, events and actions related to the EU maritime domain. The EU maritime domain encompasses the EU Member States' Territorial Waters, Exclusive Economic Zones and Continental Platforms as defined by the 1982 United Nations Convention on Law of the Sea, as well as all maritime-related activities carried out therein, on the seabed, subsurface, surface and above the sea such as installations, cargo, small boats and vessels flagged, owned, managed by or bound to the EU. Beyond the above, it also comprises any Search and Rescue Area and any Area of Operations that has been designated for an EU Maritime Operation under civil or military authority.

Along with 17 other states, Ireland has decided to implement the Council Communication by participating in the development of systems entitled Maritime Surveillance (MARSUR) and Recognised Maritime Picture (RMP). MARSUR was originally developed by the European Defence Agency (EDA) as a response to the commitment to the Common Information Sharing Environment outlined in the Council Communication. Ireland is one of a number of countries implementing the Communication through these systems. Following a tasking by the EU Defence Ministers in late 2005, the EDA launched the Maritime Surveillance project (MARSUR) in September 2006, to create a network using existing naval and maritime information exchange systems. Overall goals are to avoid duplication of effort and the use of available technologies, data and information; to enhance cooperation in a simple, efficient and low-cost solution for civil-military cooperation; and to support safety and security.⁷² The MARSUR network is built by the navies and is meant to enhance the exchange of data and information for the conduct of maritime CSDP-operations. MARSUR has been handed over by the EDA to the participating countries, including Ireland, who signed up to implement and progress the project. This project is due for completion by 2014. At present there are 17 EU member states involved in the original MARSUR Project: Belgium, Cyprus, Germany, Spain, Finland, Greece, France, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Sweden, the UK, Bulgaria and Latvia. Norway is also a signatory to the Technical Arrangements. Thus a total of 18 countries currently participate in MARSUR. Engaging in MARSUR as a matter of policy has required the creation and implementation of new operational posts, systems and policies at national and transnational level to which we now turn.

From Policy to Operations: The Irish perspective

The Irish Naval Service has moved forward on the recommendations and requirements of the Council Communication and has set up a section dedicated to implementing the Maritime

⁷² http://www.eda.europa.eu/docs/eda-factsheets/marsur-factsheet-v2_09102012_cs5_bleu

Surveillance policy at an operational level. A Naval Officer of the rank of Lieutenant Commander was appointed as the 'subject matter expert' for maritime surveillance and is a member of all relevant committees of the syndicate of 18 states.⁷³ This Officer has been given the authority to act on behalf of the Naval Service to implement policy, training, software and hardware systems in order for Ireland to contribute as required to the maritime picture and engage with the transfer, request and sharing of relevant information. It is anticipated that MARSUR and RMP will reach full implementation in 2014,⁷⁴ but information sharing through Situation Reports (SitReps) is already taking place in advance of this.

MARSUR

The implementation of MARSUR by the syndicate of 18 states started on 15 December 2011 when the signature of the Technical Arrangement for the MARSUR Live Phase was completed by the authorised representative. In Ireland's case the authorised representative was the Assistant Secretary at the Department for Defence. The aim of MARSUR is to share maritime surveillance information and further develop the existing concepts, technical solutions and procedures as established by the demonstration phase run by the EDA. This is achieved by ensuring that the 18 members of the syndicate all gather the same information *and* by creating secure systems for data exchange between these states. Data is exchanged through both national SitReps and by requests for data verification between states so that, once it becomes fully implemented (2014), MARSUR will be a monitored, live system in each state running 24-hours a day.

The operational objectives of MARSUR are to

- Create and maintain 24/7 MARSUR networking
- Exchange maritime situational information
- Exchange maritime intelligence knowledge
- Archive relevant maritime information

MARSUR can be used as a tool to help to identify threats and help operators determine risks associated with them.⁷⁵ In operational terms for the Naval Service, this means that if one of our warships encounters a vessel of interest (VOI) then information can be quickly and securely passed from the ship, to the operations cell and on to other states' navies as required. This can be by several means, including voice, chat or email through the MARSUR exchange system (MEXS), illustrated below. A MARSUR exchange system or MEXS is a piece of hardware specifically developed and designed for the project in Ireland. The idea would be that each of the 18 countries involved has a similar exchange mechanism and each can exchange data using this 'point to point' system. The system can be used for queries as well as passing data over the secure network. There are a number of feeds into the system, which in Ireland include the Vessel Monitoring System (VMS) (predating the Council Communication), the Automatic Identification System (AIS) (predating the Council Communication), and the Recognised Maritime Picture (RMP). MARSUR will allow for maritime surveillance information to be exchanged in relation to security operations relating to, for example, illegal immigration, criminal or hostile acts, organized crime, pollution, proliferation of armament, narcotic trafficking, piracy and robbery at sea, distressed vessels, and terrorism.

⁷³ The relevant committees are MARSUR Operational Working Group, the MARSUR Technical Working Group and the Category B Project Working Group.

⁷⁴ http://www.eda.europa.eu/docs/eda-factsheets/marsur-factsheet-v2_09102012_cs5_bleu

⁷⁵ MARSUR Concept of Operations October 2012

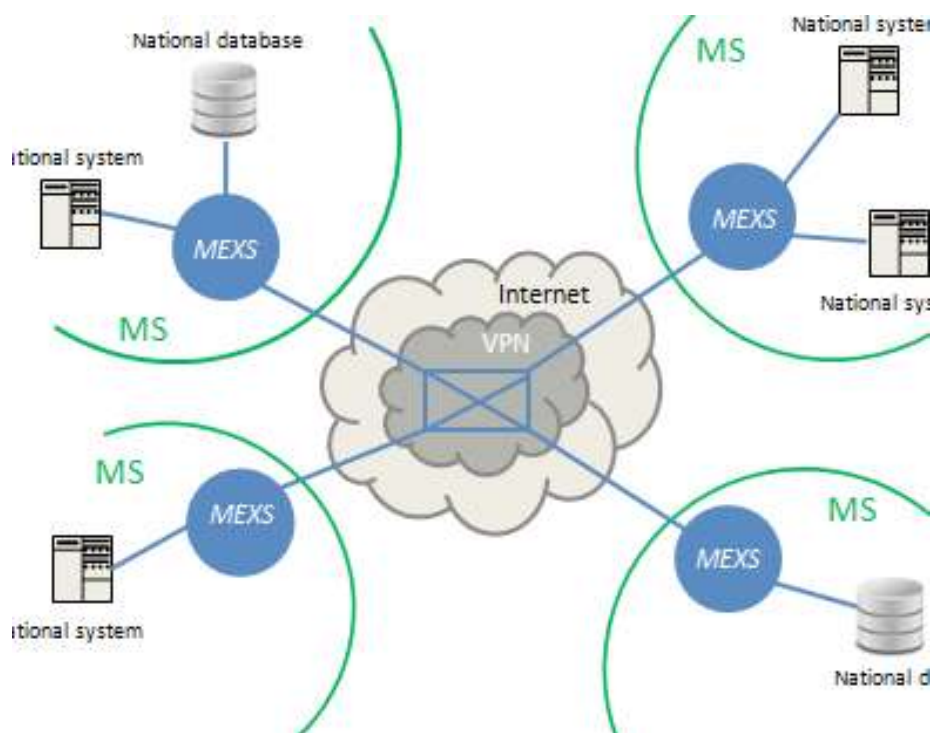


Diagram of MARSUR system operation from the MARSUR Factsheet (EDA)

Operationally MARSUR has been and is being developed according to protocols and technical agreements between the syndicate states. The relevant documents are the MARSUR Technical Arrangement between the various participants signed in Brussels 10 November 2011 (which outlines the general working of MARSUR following the demonstration phase), the Concept of Operations (CONOPS) draft dated 22 March 2012 (outlining how MARSUR will operate in practical terms and including the Standard Operating Procedures issued as Annex E to CONOPS). CONOPS was drafted through working groups of representatives from the 18 states participating in MARSUR, thus building in operational perspectives in order to maximise cooperation from the outset. The Concept of Operations Draft is an overarching operational document for the information exchange between the participants within the Maritime Surveillance (MARSUR). This concept provides terms and definitions in order to ensure common understanding as well as general guideline on how to plan, execute and access the exchange of sea surveillance information shared in MARSUR. In general administrative information and information regarding the exchange principles within MARSUR are regarded as unclassified in order to support and ensure future interoperability with other sea surveillance co-operations and/or involved agencies.⁷⁶ The CONOPS document is a draft 'living' document and is marked as unclassified. At a national level, Naval Service Standard Operating Procedures have been drafted in order to outline how the system will be developed, implemented and operated in Ireland in a manner compliant with Annex E to CONOPS. An equivalent process to outline national implementation is being undertaken in each of the 18 syndicate states.

Each state participating in the system has its own MARSUR Area Of Responsibility (AOR), where it has the role of reporting contact (i.e. vessels and aircraft under, on and over the sea). This area is still being fully defined as it can in some instances, span globally in terms of jurisdiction in line with UN Convention on the Law of the Sea.

This illustrates the trajectory to date of the CISE proposal from Council Communication, to EDA development of a protocol and demonstration phase, to member state buy-in to the live phase, technical agreement, cross-state operating procedures, and then national operational procedures.

⁷⁶ Concept of Operations para 3.2.5. 'Security Aspects'

After MARSUR

At the same time as the MARSUR live stage is being brought to completion, a 'Category B' project, complimentary to the main MARSUR project, is also being developed. As of October 2012,⁷⁷ 12 of the member States had signed up to the €1 million Project Arrangement known as Category B. This Category B Project (Cat B) aims to further develop the technical elements necessary to use MARSUR in a fully operational context. It will accommodate confidentiality issues and new requirements proposed by the member states. The project outlines the equipment and networks necessary to implement a secure, encrypted network for the exchange of classified information in the support of CSDP operations. This will allow for maximization of co operation while maintaining appropriate levels of security.

RMP – Recognised Maritime Picture

As mentioned above, one of the systems feeding information into MARSUR is the Recognised Maritime Picture (RMP). RMP is a constantly evolving technology. A recognised maritime picture gives a layered overview of marine traffic operating in an area at any one time. Vessels can be filtered using available feeds and information to ascertain if security threats exist. In Ireland a Next Generation Recognised Maritime Picture (RMP) project is now underway, funded through the European Space Agency's Integrated Applications Promotion (IAP) Programme. The project is led by Skytek, a private company based in Dublin, and partners include the Irish Naval Service, the Coastal Marine Resource Centre (CMRC), the National Space Centre Ltd. It thus involves a partnership of military, civilian and private actors in developing technologies to feed into MARSUR as well as for general maritime purposes. The project aims to greatly enhance the quality and accuracy of the recognised maritime picture for the Irish Naval Service through the integration of several additional data sources not currently used to generate an RMP, including satellite AIS (Automatic Identification System). Within this project through the application of state of the art data mining, data analysis and simulations it will be possible to provide for early identification of unusual behaviour of vessels and alerting RMP operators for planning of future investigation of these vessels by the Irish Naval Service. The project tasks are allocated across the partnership between Skytek (as overall system developer), CMRC (Data Mining and RMP expertise), National Space Centre Ireland (for satellite receiver infrastructure) and the Irish Naval Services (end user requirements and demonstrator testing).⁷⁸

Challenges in Implementing Maritime Security and Surveillance Measures

In improving maritime security and surveillance in order to fulfil the Council Communication, a number of challenges arise that must be grappled with by operational actors. The first is sea blindness. Most maritime stakeholders, be they member states or EU bodies, suffer the effects of sea blindness in the general population. To be convinced of the need for robust maritime security, and therefore of improved maritime surveillance, it is necessary first to be persuaded of the importance of the sea for the welfare and prosperity of the EU - as a means of commerce, as a source of energy and food and, conversely, as a conduit for many kinds of damaging, illegal, dangerous and criminal activities. Without this recognition policy change, resourcing and implementation are all difficult.⁷⁹

Second, changes in mindset continue to lag behind technology so that shifting the operational mindset on information exchange from secrecy to transparency is proving to be very slow. This was reported on by the Wise Pens Team in 2010⁸⁰ and continues to be an issue for Maritime Surveillance at an operational level today. The Wise Pens report warned that if the exchange of non-sensitive data or information is either insufficiently substantial or insufficiently prompt EU countries will continue to be at risk of a possible shock event which would expose and highlight the

⁷⁷ www.eda.europa.eu MARSUR factsheet

⁷⁸ [http://www.cmrc.ie/projects/next-generation-recognised-maritime-picture-\(rmp\).html](http://www.cmrc.ie/projects/next-generation-recognised-maritime-picture-(rmp).html)

⁷⁹ Wise Pens Team Final Report Oct 2010, pg.15

⁸⁰ Wise Pens Team Report 'Maritime Surveillance in support of CSDP' dated 22 December 2010

current European inability to “join the dots” and provide warning intelligence by synthesising the available information held by different actors.⁸¹

A further challenge in the context of maritime surveillance and security is the lack of a specific European Security Strategy for maritime security. The European Security Strategy of 2003 does not explicitly address the maritime domain, where the complex span of threats, risks, vulnerabilities and challenges requires a fundamentally different approach to strategic monitoring and governance from that which applies ashore. The Lisbon Treaty's Clause 222 has also brought new solidarity obligations. The Wise Pens Team made a proposal for a new EU Maritime Security Strategy in their report, but until the emergence of maritime terrorism and the resurgence of high profile piracy, many states and the shipping community were relatively content with the sea remaining an essentially ungoverned space. Although technology is now enabling surveillance and monitoring of that space, effective governance depends on cooperative information sharing and coordinated enforcement (preferably far from EU shores) by different assets and capabilities, which has yet to develop in the EU and more widely. Enabling that development requires a maritime strategy.

A further general challenge was the translation from policy (contained in the Communication) to practice (MARSUR). The Communication lays out general principles (outlined above) and the general desirability of a common information sharing exchange, however the translation of this into action required significant agency innovation by the EDA and then by the syndicate of states engaging in MARSUR. The Category B Project also illustrates that small countries can innovate to find ways to share the burden of satisfying European security policy imperatives.

Beyond these general challenges two specific challenges have arisen in the context of MARSUR. The first relates to the process by which new members are permitted to join the MARSUR project, which is by a ballot of the members. If any ‘no’ votes are put forward, the application automatically fails. This may act as a disincentive towards applying to join MARSUR or otherwise act as a barrier to prevent full operational harmonisation across the EU.

Finally monitoring within MARSUR raises some challenges. In general command and control functions within MARSUR are subject to the participants’ national chain of command. The co-operation between the participants will be based upon the principle of consensus and no MARSUR command and control is established during the daily routine.⁸² MARSUR does have a discrete structure that exists as a separate layer to domestic structures. The MARSUR organisation consists of two different levels: the MARSUR Management Group, and ‘beneath’ this two working groups, the MARSUR Operational Working Group and the MARSUR Technical Working Group.

CONCLUSIONS: IMPACT, LEGITIMACY AND EFFECTIVENESS FROM AN OPERATIONAL PERSPECTIVE

Operationalising European counter-terrorism is challenging from a number of perspectives. First of all the European counter-terrorist infrastructure is, itself, sprawling and the sites of counter-terrorist activity are many. Thus, counter-terrorist policy can emanate from a large number of locations within the European Union and the precision with which this policy is expressed for operationalisation may vary accordingly. As outlined in D2.1 it was the case prior to the Lisbon Treaty that the Council Communication was a very prevalent mechanism of creating EU counter-terrorism, however these Communications are essentially political commitments emanating from a political institution so that they leave to the agencies of the EU and the member states a significant challenge in operational terms. These agencies must determine how the often general and vague commitments or aspirations enshrined in these documents are to be operationalised in practice. The operationalisation of what are essentially political commitments is also challenging, particularly as language barriers and resource inequalities across states become germane. Operationalisation

⁸¹ Wise Pens Team Final Report Oct 2010, pg.16

⁸² Ibid para 157

can have significant resource implications, and in some cases the EU counter-terrorism policy in question is of most immediate concern to only some of the states so that they carry a large proportion of the costs of operationalisation; a situation that is exacerbated where the policy is enshrined in a Council Communication rather than a legally binding instrument. This is reflected in the case study presented in this report, for example, where it was primarily states with significant territorial waters that participated in the development of MARSUR and smaller states within that sub-set that are subsequently involved in the development of the Category B Project.

These general observations together with the case study suggest that when considering the impact, legitimacy and effectiveness of EU counter-terrorism measures practical, measurable and observable matters ought to be taken heavily into account.

In terms of **impact** the case study illustrates that the operationalisation of EU counter-terrorism measures can have significant impacts within the nation state. In this respect, impact might be understood as the effect that operationalisation has on the operational framework (for example, does it create new institutions or practices within the broader framework of operation of the national authority itself), on roles (for example, does it necessitate the creation of new roles or offices at national level), and on resources (such as training needs and other compliance costs). At a national level the *impact* of operationalisation for the operationalising institution may, then, be empirically measurable inasmuch as a cost (in terms of time, personnel and resources) may be calculable. Operationalisation can also create impact at the European level, which might again be understood in terms of operational frameworks, roles and resources. The operationalisation of EU counter-terrorism law and policy may (and frequently does) require leadership from an EU agency for example (as was the case with the development of MARSUR) and may create new roles (such as the EU counter-terrorism coordinator considered above). So too may it result in either harmonisation or fragmentation of frameworks and systems used for particular purposes within the EU.

Thus, from an operational perspective impact might be understood as the effect of operationalising a measure on the institutional frameworks, roles, and resources when effect is understood as an empirical matter capable of measurement.

Operational perspectives on **legitimacy** may be connected to both process and output legitimacy, although output legitimacy seems likely to be of particular concern at national level. In terms of process legitimacy, the extent to which the creation of an EU counter-terrorist law or policy that must then be operationalised has been generated in appreciation of an existing need—as opposed to as a political matter—is likely to be taken into account when its legitimacy is being assessed by an operationalising entity. This is at least partially because, where the policy is created through a particularly political forum such as the Council, it is likely to be especially vague in its nature requiring substantial innovation and resource allocation by European and/or national authorities in order for operationalisation to take place. In other words, the degree to which the process of translation is onerous or challenging may be influenced by the process by which the measure or policy was generated. In contrast, regardless of the process by which the measure of policy was generated there is likely to be a concern with output legitimacy which, in turn, may address the workability of the measures required or obligations imposed. This is arguably connected to the extent to which the measure(s) answer general operational needs such as clarity of obligation, non-duplication, incentivisation of cooperation and coordination, and information sharing, which in turn may be enhanced by ensuring the participation of operational actors in the process of generating the measure/policy/output in the first place.

Thus, from an operational perspective legitimacy might be understood as referring to the workability of the measure/policy/obligation when seen from the perspective of the entity or entities required to operationalise it, where the extent to which operational needs are addressed is taken into account thus embracing both process legitimacy (in terms of participation and the taking account of operational perspectives) and output legitimacy.

Finally, from an operational perspective **effectiveness** appears to be connected with the extent to which the objective that was to be achieved by means of introducing the measure or policy has actually been achieved. Effectiveness here seems, thus, to be a non-abstract matter; rather it is measurable. However, this requires that a clear rationale for the measure or policy in question ought to have been outlined; one the satisfaction of which can in fact be assessed in a meaningful way. In addition, it requires there to be a way of measuring this effectiveness, most likely by means of a monitoring mechanism. As outlined in D2.3, EU counter-terrorist measures frequently lack built-in monitoring mechanisms and, where they do exist, these mechanisms are not always in fact given effect. Monitoring effectiveness from an operational perspective can happen at the level and instigation of the operationalising entities, or be structured into new institutions and frameworks that might be created in the course of operationalisation, and there is the potential for these to provide a discrete picture of whether the measure of policy is achieving its original objective at that level but will not necessarily provide an overview on effectiveness at the EU-level.

Thus, from an operational perspective effectiveness might be understood as the satisfaction at operational level(s) of the original objectives that were to be achieved by the introduction of the EU policy or measure.

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ANNEX**Glossary of Terms**

NS	Naval Service
SME	Subject Matter Expert
CT	Counter Terrorism
EDA	European Defence Agency
MARSUR	Maritime Surveillance Networking
RMP	Recognised Maritime Picture
AIS	Automatic Identification System
VMS	Vessel Monitoring System
CSDP	Common Security and Defence Policy
EMSA	The European Maritime Safety Agency
CISE	Common information Sharing Environment

