

# **Border Controls as a Dimension of the European Union's Counter-Terrorism Policy:**

## **A Critical Assessment**

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### ***Abstract***

*This article critically examines the use and effectiveness of border controls in the European Union (EU)'s counter-terrorism policy. It shows that the EU has made substantial progress towards achieving the objectives that it had set for itself in this policy area, but has not managed to fulfil all of them, and certainly not by the deadlines originally set. It further argues that, contrary to their usual depiction in EU official documents, these border control measures only make a limited contribution to the actual fight against terrorism, whilst having some negative effects. From that viewpoint, the fact that the EU has failed to meet all its objectives in the use of border controls for counter-terrorist purposes may paradoxically be seen as a rather positive outcome.*

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## Introduction

In autumn 2011, British Home Secretary Theresa May came under fire after it emerged that border controls had been relaxed in the previous summer in order to limit queues of travellers at border checks. Shadow Home Secretary Yvette Cooper stated in a letter to the Home Secretary that it was important ‘to know whether anyone posing a threat to Britain’s national security was allowed to enter the UK’.<sup>2</sup> Several tabloid newspapers also sharply criticised the relaxed border controls that, in the words of a *Daily Mail* journalist, had made it ‘easier for illegal immigrants, criminals and terrorists to enter the country unchallenged’.<sup>3</sup> Similar concerns were voiced again on 30 November 2011, when a significant number of public sector employees, including from the UK Border Agency, went on strike. The *Daily Mail* tabloid claimed that there were ‘fears that terrorists and criminals could sneak into the country’ as a result.<sup>4</sup> These two stories aptly illustrate the importance that is often attributed to border controls for preventing terrorism in Europe. The significant role of border controls in the fight against terrorism has also been acknowledged at the global level. In the immediate aftermath of 9/11, the United Nations Security Council decided that all states should ‘[prevent] the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents’.<sup>5</sup> The logic underpinning the inclusion of border controls in counter-terrorism policies is straightforward: those representing a terrorist threat to a given country can be stopped by appropriate border checks

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<sup>2</sup> *Guardian*, ‘Theresa May to be grilled over terror threat from relaxed border controls’, 6 November 2011.

<sup>3</sup> *Daily Mail*, ‘Fresh embarrassment for Theresa May as it emerges she approved SECOND relaxation of passport checks at UK airports’, 11 November 2011.

<sup>4</sup> *Daily Mail*, ‘Heathrow has never been more efficient! Passengers' glee as border agency strike SPEEDS UP passport control’, 30 November 2011.

<sup>5</sup> United Nations Security Council Resolution 1373, S/RES/1373 (2001), 28 September 2001, p. 2.

and prevented from entering it, which contributes to decreasing the terrorist threat in this country.

Border controls have now been part of the European Union (EU)'s counter-terrorism arsenal for a few years. Whilst they had not originally been identified as a priority dimension of the nascent EU counter-terrorism policy, the importance of border controls has grown since then, especially following the Madrid terrorist attacks in March 2004. It is important to critically examine their contribution to the EU's counter-terrorism efforts because they represent a dimension of the EU's counter-terrorism policy that has not been given much attention to date. The existing literature has tended to focus on other components of the EU's counter-terrorism policy, such as law enforcement and judicial cooperation, intelligence cooperation, or the measures aiming to combating the financing of terrorism.<sup>6</sup> This has notably been due to the commonly held perception that European countries rely less on such measures than other countries, the United States in particular.<sup>7</sup> Contrary to this perception, border controls have actually become increasingly important in the counter-terrorism arsenal of European states in the last decade. To a large extent, the lack of attention to the contribution of border controls

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<sup>6</sup> M. Deflem, 'Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective', *Justice Quarterly* 23/3 (2006) pp. 336-359; C. Kaunert, 'Europol and EU Counterterrorism: International Security Actorship in the External Dimension', *Studies in Conflict & Terrorism* 33/7 (2010) pp. 1-34; B. Müller-Wille, 'The Effect of International Terrorism on EU Intelligence Co-Operation', *Journal of Common Market Studies* 46/1 (2008) pp. 49-73; O. Bures, *EU Counterterrorism Policy: A Paper Tiger?* (Farnham: Ashgate 2011); C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford: Oxford University Press 2009).

<sup>7</sup> A. Chebel d'Appollonia and S. Reich, 'The Securitization of Immigration: Multiple Countries, Multiple Dimensions' in A. Chebel d'Appollonia and S. Reich (eds) *Immigration, Integration, and Security: America and Europe in Comparative Perspective* (Pittsburgh, PA: University of Pittsburgh Press 2008), pp. 1-22 at p. 7.

in the EU counter-terrorism policy also mirrors the state of the literature on counter-terrorism in general, as it has paid little attention to the role of border controls in counter-terrorism strategies.<sup>8</sup> This is rather puzzling given that border controls can evidently play an important role in counter-terrorism by not allowing the entry into a country of persons intending to commit terrorist acts.<sup>9</sup> Border checks also represent opportunities to apprehend wanted criminals and terrorists.

This article aims to fill this gap in the literature by critically analysing the role of border controls in the EU counter-terrorism policy. For that purpose, it is structured into five main sections. Firstly, it defines what border controls are and how they are organised in the EU. Secondly, it analyses the aims and priorities of the EU regarding the use of border controls for counter-terrorism purposes. Thirdly, it examines the extent to which the EU has achieved its self-proclaimed aims in this policy area. Fourthly, it critically assesses the EU's use of border controls for counter-terrorism purposes by questioning their contribution to counter-terrorism efforts in the light of the nature of the terrorist threat in the EU. Finally, the article offers some concluding thoughts. Before proceeding further, it is important to specify that, whilst border controls may be used in order to screen persons, animals or goods, this article is only concerned with the application of border controls to persons.

## **Borders controls and the EU**

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<sup>8</sup> See, for example, G. Martin, *Understanding Terrorism: Challenges, Perspectives, and Issues*, 2<sup>nd</sup> edition (London: Sage 2006); C.C. Harmon, *Terrorism Today*, 2<sup>nd</sup> edition (London: Routledge 2008).

<sup>9</sup> J.A. Bullock *et al.*, *Introduction to Homeland Security*, 2<sup>nd</sup> edition (Oxford: Elsevier Butterworth-Heinemann 2006), p. 205.

Border controls can be broadly defined as the measures adopted by a state to regulate the crossing of its borders. Those encompass border checks at the border crossing points and border surveillance activities alongside the entire length of the border. In the context of the EU, it is crucial to distinguish between the arrangements governing internal borders and those being applied to external borders. Internal border controls have been abolished in principle amongst most EU Member States, whereas external border controls, that is, those at the borders between EU Member States and non-EU Member States (*i.e.* ‘third states’ in EU jargon), have been gradually reinforced over the years.

Most EU Member States belong to the Schengen area, inside which, in principle, no border controls take place. Schengen cooperation started in 1985, when five Member States - namely France, the Federal Republic of Germany, Belgium, Luxembourg, and the Netherlands - signed the Agreement on the gradual abolition of checks at common borders, which was followed by the signing of the Convention implementing that Agreement in 1990. The Schengen *acquis*, *i.e.* the various legal provisions adopted by the members of the Schengen group, was later incorporated into the body of EU rules by the Amsterdam Treaty, which came into force in 1999. Since 2006, all the rules concerning border controls at both internal and external borders have been consolidated in the Schengen Borders Code<sup>10</sup>, which is currently under revision. At the time of writing, the Schengen area comprises 26 states - all the EU Member States, apart from the United Kingdom, the Republic of Ireland, Cyprus, Romania and Bulgaria, as well as four states that are not members of the EU, namely

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<sup>10</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *Official Journal of the European Union* L105, 13 April 2006.

Norway, Iceland, Switzerland, and Liechtenstein.<sup>11</sup> Thus, in practice, this means that not all EU Member States take part in the border control dimension of the EU counter-terrorism policy, since it builds on the Schengen *acquis* in which not all Member States - most notably the United Kingdom – participate. It is worth emphasising that, although EU official document may refer to ‘EU’ border control measures, those generally apply only to the members of the Schengen area.

As a result of the implementation of the Schengen Agreement and the Schengen Convention, checks at the internal borders of the signatory states have been abolished, whilst a single external border has been created, where immigration checks are organised according to identical rules and procedures.<sup>12</sup> As it would be impossible in practice to limit the right to crossing internal borders without checks to European citizens alone, any person of any nationality who has entered the Schengen area can freely travel within it. However, it is important to note that the abolition of internal border controls does not preclude the exercise of police powers by the competent authorities of each member of the Schengen area, which can still conduct spot-checks within their territory under certain conditions.<sup>13</sup> In addition, from the beginning, there have been exceptions to the principle of the abolition of internal border controls. Article 2.2 of the Schengen Convention specified that states could reintroduce border checks at internal borders if required by ‘public policy or national security’ ‘for a limited period’. The Schengen Borders Code did not significantly alter this aspect of the Schengen regime. Article 23 stipulates that a Member State may exceptionally reintroduce border controls at its internal borders in case of a ‘serious threat to public policy

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<sup>11</sup> At the time of writing, Romania and Bulgaria are in the process of joining the Schengen area.

<sup>12</sup> Those are now detailed in the Schengen Borders Code.

<sup>13</sup> Schengen Borders Code, Article 21.

or internal security'. It also introduced a procedural distinction between cases requiring urgent action and those where the reintroduction of internal border controls is due to foreseeable events.<sup>14</sup> In any case, the Member State reintroducing internal border controls is required to inform the other Member States and the Commission as soon as possible and to communicate the reasons justifying this decision, whilst the European Parliament will also be informed. A report on the reintroduction of internal border controls also has to be presented by the Member State concerned to the European Parliament, the Council and the Commission. In practice, Member States have mainly reintroduced temporary internal border controls in cases of important sporting or political events.<sup>15</sup>

With regard to the external borders, the members of the Schengen area have agreed to reinforce border controls in accordance with a single set of rules. In particular, members of the Schengen area have harmonised the conditions of entry and the rules on visas for short stays (up to three months), as well as the procedures for carrying out checks at the external borders. With regard to the short-term visas, they have cooperated on the list of countries whose nationals must have a visa to enter the EU, the procedures for issuing visas, as well as the definition of a uniform visa format. Since 2001, there have been two visa lists: a 'white' list comprising countries whose nationals are not required to have a visa to enter the Schengen area and a 'black' list comprising the countries whose nationals are required to have a visa to cross the external borders of the Schengen area. As of 2008, the black list comprised 130 countries, that is, almost all the countries of the Middle East, South Asia, Central Asia and Africa. The procedures and conditions for issuing visas are defined in the

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<sup>14</sup> See Chapter II of the Schengen Borders Code.

<sup>15</sup> K. Groenendijk, 'Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?', *European Law Journal* 10/2 (2004), pp. 150-170 at p. 159.

Visa Code.<sup>16</sup> In order to be granted a visa, applicants must possess valid travel documents and may be asked to justify and document the purpose of their visit, as well as their means of subsistence. In addition, they must not be registered in the Schengen Information System (SIS), which contains alerts for the purpose of refusing entry, as further explained below. According to Article 21 of the Visa Code, ‘particular consideration shall be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States’. The same article also requires consulates to specifically verify that ‘the applicant is not considered to be a threat to public policy, internal security or public health (...) or to the international relations of any of the Member States’.

Concerning the conduct of checks at the external borders, all third country nationals are subject at entry to a ‘thorough check’ according to the Schengen Borders Code. In addition to examining the travel documents and their validity, border guards verify the purpose and length of stay of the travellers and whether they possess sufficient means of subsistence. In addition to questioning travellers, they also systematically search the SIS and national databases to check that travellers from a third country do not represent a threat to public policy, internal security, public health and the international relations of the Schengen states. Border guards also manually stamp the travel documents of third country nationals crossing the external border in order to indicate the date and place of entry and exit.

Finally, as previously mentioned, the members of the Schengen area have also established the SIS, which contains information used by border guards, but also customs, police, judicial and visa authorities to support the implementation of the Schengen area. The SIS comprises a

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<sup>16</sup> Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), *Official Journal of the European Union* L243, 15 September 2009.



central system (C-SIS), which is located in Strasbourg, and national databases (N-SIS) in each of the states of the Schengen area. The SIS facilitates the collection and exchange of information concerning immigration, policing and criminal law for the purpose of law enforcement and immigration control. It is a 'hit/no hit' system, which enables its users to verify whether an alert concerning a person or an object has been recorded. In case of a 'hit', additional information is exchanged through the SIRENE (Supplementary Information Request at National Entry) network of national contact points. The Schengen Convention established five main categories of individuals for whom alerts may be recorded in the SIS: persons wanted for arrest or extradition (Art. 95), persons to be refused entry to the Schengen area as unwanted aliens (Art. 96), missing persons or persons who need to be placed under protection (Art. 97), persons sought by judicial authorities in connection with criminal proceedings (Art. 98), persons who are to be subject to discreet surveillance or a specific check (Art. 99). In addition, alerts can be recorded for stolen or lost objects, such as stolen identity cards, firearms, bank notes and vehicles (Art. 100). By far, the largest category of alerts is Article 96 alerts as shown by official statistical data.<sup>17</sup> Having briefly presented how border controls are organised in the EU, it is now possible to examine which aims and priorities the EU has set for itself in this dimension of counter-terrorism following 9/11.

### **Using border controls for counter-terrorism purposes: aims and priorities of the EU**

For the sake of the argument developed in this article, it is not necessary to examine in detail the evolution of the place of border controls in EU official documents on counter-terrorism.<sup>18</sup>

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<sup>17</sup> Council of the European Union, 'Schengen Information System database statistics dd. 01/01/2011', 6434/1/11, 4 March 2011.

<sup>18</sup> See S. Léonard, 'The Use and Effectiveness of Migration Controls as a Counter-Terrorism Instrument in the European Union', *Central European Journal of International and Security Studies* 4/1 (2010) pp. 32-50.

It suffices to say that, in the immediate aftermath of the terrorist attacks on 11 September 2001, border controls were not given much prominence in the EU's counter-terrorism arsenal. Five other issues were identified as the main components of the nascent EU counter-terrorism policy, namely police and judicial cooperation, international legal instruments, measures against the financing of terrorism, air security, and the coordination of the EU's global action.<sup>19</sup> Thus, initially, border controls were only identified as adjunct measures of secondary importance.

However, the role of border controls in EU counter-terrorism was significantly increased following the terrorist attacks in Madrid in March 2004. This notably resulted from the fact that most perpetrators of the Madrid terrorist attacks were non-EU nationals, more precisely Moroccan, Algerian, Syrian and Lebanese migrants.<sup>20</sup> The Declaration on Combating Terrorism, which was subsequently adopted on 25 March 2004, was the first EU official counter-terrorism document to identify border controls as a priority. Section 6 of the Declaration, which was entitled 'Strengthening border controls and document security', emphasised the importance of '[expediting] work on measures in this area'.<sup>21</sup> This emphasis on border controls as an instrument of EU counter-terrorism was reiterated in Annex 1 of the Declaration, which identified '[ensuring] effective systems of border control' as one of the seven 'strategic objectives' of the EU's fight against terrorism.<sup>22</sup> In the revised Plan of Action on Combating Terrorism adopted in June 2004, the importance of ensuring effective systems of border control was once more presented as one of the seven EU strategic objectives to

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<sup>19</sup> European Council, 'Conclusions and plan of action of the extraordinary European Council meeting on 21 September 2001', SN 140/01, pp. 1-3.

<sup>20</sup> *BBC News*, 'Madrid Bombings: Defendants', 17 July 2008.

<sup>21</sup> European Council, 'Declaration on Combating Terrorism', 25 March 2004, pp. 7-8.

<sup>22</sup> European Council, 'Declaration on Combating Terrorism', p. 15.

combat terrorism ('Objective 4: To protect the security of international transport and ensure effective systems of border control').<sup>23</sup> In addition, as this Action Plan was considerably more detailed than any of its predecessors, the objectives of the EU in this policy area were presented in greater detail for the first time and most of them were assigned deadlines for their completion. The growing importance of border controls in the EU's counter-terrorism efforts was also confirmed by the EU Counter-Terrorism Strategy of December 2005, which is based on four pillars - 'prevent', 'protect', 'pursue' and 'respond'.<sup>24</sup> Migration control measures were given a prominent place under the 'protect' and 'pursue' headings.<sup>25</sup>

From these various EU official documents, it can be summarised that the EU has gradually identified five main objectives regarding the use of border controls for counter-terrorism purposes, namely (1) strengthening external border controls, (2) enhancing capacities for identifying terrorists at borders, (3) improving identity document security, (4) strengthening the exchange of information relating to border controls, and (5) coordinating the re-introduction of internal border controls. The next section assesses the extent to which the EU has been successful in meeting each of these objectives.

### **Using border controls for counter-terrorism purposes: the EU's achievements**

In contrast with the ambitious objectives of the EU, policy developments in the 'border control' dimension of counter-terrorism have been rather slow. As previously mentioned, border controls had not been initially identified as a priority in the development of the EU

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<sup>23</sup> Council of the European Union, 'EU Plan of Action on Combating Terrorism', 10010/3/04 REV 3, 11 June 2004.

<sup>24</sup> Council of the European Union, 'The European Union Counter-Terrorism Strategy', 14469/4/05 REV 4, 30 November 2005.

<sup>25</sup> *Ibidem*, pp. 10-13.

counter-terrorism policy. Nevertheless, four border control measures had been included in the Anti-Terrorism Roadmap of September 2001, although no precise deadline had been identified for their implementation. It is therefore perhaps unsurprising that, by early 2004, which corresponds to the end of the first, 'pre-Madrid' phase of the development of the EU counter-terrorism policy, none of them had been achieved. This led to their reinsertion in the updated Action Plan of June 2004, alongside other measures. In the second, 'post-Madrid' phase of the development of the EU counter-terrorism policy, more progress has been achieved, albeit generally not as fast as had been planned by EU policy-makers in the revised EU Action Plan and its subsequent updates. The remainder of this section examines the EU's achievements with regard to each of its key-objectives in the 'border control' dimension of its counter-terrorism policy.

### ***Strengthening external border controls***

Immediately after the terrorist attacks on 11 September 2001, the EU Heads of State and Government called for the reinforcement of controls at the external borders in order to combat terrorism. As previously mentioned, external border controls had already been strengthened as part of Schengen cooperation. This included the harmonisation of the conditions of entry, the rules on visas for short stays (up to three months), and the procedures for the conduct of external border checks.

The main objective that the EU had set itself with regard to reinforcing border controls following 9/11 was the establishment of Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU. It was created by Council Regulation EC 2007/2004 of 26 October 2004 - only a few months later than the original deadline - and began its operations in 2005. It was originally given six main

tasks, namely coordinating operational cooperation between Member States regarding the management of external borders, assisting Member States in the training of national border guards, including establishing common training standards, conducting risk analyses, following up on developments in research relevant for the control and surveillance of external borders, assisting Member States when increased technical and operational assistance at external borders is required, and assisting Member States in organising joint return operations.<sup>26</sup> Frontex has generally been seen by European policy-makers as a success overall – a viewpoint confirmed by the first external evaluation of the Agency in 2009.<sup>27</sup> Although non-governmental organisations have sometimes sharply criticised its activities from a human rights standpoint<sup>28</sup>, the Member States and the European Parliament have supported its rapid growth in staffing and budget since its launch.<sup>29</sup> In 2011, a revised Frontex Regulation was adopted, which has strengthened the capacities of the agency, as well as put more emphasis on the issue of respect for human rights in its activities. Frontex has also been given the competence to process personal data under certain conditions and has been tasked with developing and operating an information system to exchange classified information, including personal data, with the European Commission, the Member States and other Union

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<sup>26</sup> S. Léonard, 'EU Border Security and Migration into the European Union: Frontex and Securitisation through Practices', *European Security* 19/2 (2010) pp. 231-254.

<sup>27</sup> COWI, 'Frontex: External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union – Final Report' (Denmark: COWI A/S 2009), p. 6.

<sup>28</sup> Migreurop, *Frontex Agency: Which Guarantees for Human Rights?* (Paris: Migreurop 2011); Amnesty International, *S.O.S. Europe: Human Rights and Migration Control* (London: Amnesty International 2012).

<sup>29</sup> S. Léonard, 'The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy', *Journal of Contemporary European Research* 5/3 (2009), pp. 371-388.

agencies.<sup>30</sup> In addition, the activities of Frontex are set to be complemented by a new European Border Surveillance System (EUROSUR), which was proposed by the European Commission in 2011. The main aim of this system is to establish a common framework for information exchange and cooperation amongst Member States, Frontex and neighbouring countries in order to strengthen external border controls, in particular at the southern maritime and eastern land borders.<sup>31</sup>

### ***Enhancing capacities for identifying terrorists at borders***

This objective covered a series of specific measures, several of which had already been identified in the Anti-Terrorism Roadmap of 2001. However, despite being long-standing items on the agenda, not much progress has been made towards their achievement. The revised Action Plan of 2004 had identified three specific measures in that area, which were also given a deadline: (1) ‘review of criteria that should be applied for the purposes of Article 96 of the Schengen Convention in relation to certain persons for the purpose of being refused entry’ (by the end of 2004), (2) ‘development of terrorist profiles with a view to developing an operational tool’ (by December 2005), and (3) ‘coordinated recourse to Article 2(2) of the Schengen Convention (reestablishment of border checks)’ (‘without delay’).<sup>32</sup> To date, there has not been any evidence of significant progress on any of the three proposed measures. With regard to the first and the third proposed measures, they have both been caught in the

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<sup>30</sup> Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *Official Journal of the European Union* L304, 22 November 2011.

<sup>31</sup> European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council – Establishing the European Border Surveillance System (EUROSUR)’, COM(2011) 873, 12 December 2011.

<sup>32</sup> Council of the European Union, ‘EU Plan of Action on Combating Terrorism’, 10586/04, 15 June 2004, p. 60.

protracted debates about Schengen reform and the development of SIS II, which are examined below. As for the development of terrorist profiles, some updates of the EU Action Plan mention ongoing work on this topic within the Council working groups in 2004 and 2005. However, it does not appear to have led to any significant progress beyond the Council Recommendation of 28 November 2002 on the development of terrorist profiles, which aimed to share what was considered ‘best practice’ in this respect amongst Member States.<sup>33</sup> It notably listed a series of characteristics that could possibly be included in the development of terrorist profiles, such as nationality, age, sex, ‘physical distinguishing features’, and ‘psycho-sociological features’. The lack of further progress on terrorist profiling at the EU level has been mainly due to the sharp criticisms that such attempts have drawn, most notably because of the ‘major risk of discrimination’ entailed by terrorist profiling.<sup>34</sup>

### ***Improving identity document security***

The strengthening of the security of identity documents was already identified as an important measure for combating terrorism as early as September 2001.<sup>35</sup> In response, the EU has adopted various measures aiming to improve the security of identity documents for both EU citizens and third country nationals in order to prevent identity fraud. With regard to the security of the passports of EU citizens, the Council adopted Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States. This Regulation upgraded a previous Resolution on

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<sup>33</sup> Council Recommendation of 28 November 2002 on the development of terrorist profiles.

<sup>34</sup> EU Network of Independent Experts in Fundamental Rights, ‘The Balance between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats’ (Luxembourg: Office for Official Publications of the European Communities 2003), p. 21.

<sup>35</sup> ‘Conclusions adopted by the Council (Justice and Home Affairs), Brussels, 20 September 2001’, SN 3926/6/01 REV 6, p. 8.

minimum security standards for passports of 2000. It aimed to establish higher harmonised security standards for greater protection against falsification and to integrate biometric identifiers<sup>36</sup> in passports and travel documents in order to establish a reliable link between the documents and their genuine holder. It did so by laying down minimum security standards of passports and travel documents issued by the Member States with regard to the material, the biographical data page, printing techniques, protection against copying, and issuing technique.<sup>37</sup> The EU Member States having to comply with this legislation were required to issue passports containing a chip with the holder's facial image from 28 August 2006, as well as the holder's fingerprints from 28 June 2009 according to technical specifications adopted in June 2006. All EU Member States have complied with their obligations in that respect, apart from Belgium, which, at the time of writing, was still failing to meet the requirement to integrate fingerprints in its travel documents.<sup>38</sup>

As for residence permits delivered to third-country nationals, they are now required to conform to the uniform format established by the EU and to include the same biometric features as passports from May 2012 onwards. Various measures have also been adopted concerning visas. A uniform format for visas has been adopted. It also requires the use of biometric identifiers, which are not stored in the visa sticker itself, but in the VIS. The

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<sup>36</sup> Biometric identifiers are digital representations of human traits unique to their owner, such as fingerprints, facial and palm structure, iris, retina and DNA. See J. Goldstein *et al.*, *Large-scale Biometrics Deployment in Europe: Identifying Challenges and Threats* (Luxembourg: Office for Official Publications of the European Communities 2008).

<sup>37</sup> Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, *OJ L385*, 29 December 2004, pp. 4-6.

<sup>38</sup> European Commission, 'Security features in travel documents: Belgium does not comply with the obligations to issue biometric passports', Press release IP/11/1098, 29 September 2011.



creation of such an information system, which is further examined below, is another important measure concerning visas, as it enables Member States to significantly increase their cooperation on various visa matters. Finally, it is also worth mentioning that Frontex plans to develop a virtual ‘centre of expertise for the detection of forged documents’ on the basis of its assessment that ‘there is a growing risk of abuse of travel documents’. This would address all aspects of document fraud, including information gathering and exchange, operational support, research, training and support to policy development.<sup>39</sup>

Thus, various measures have been taken by the members of the Schengen area in order to strengthen the security of the passports that they issue to their citizens, as well as the security of the residence permits and visas issued to third-country nationals. Although one Member State, namely Belgium, is still to comply with the obligation to issue biometric passports, the EU has largely met its objectives in the area of identity document security. However, this has been a time-consuming process, mainly because of technical and financial difficulties, as well as the reservations of the governments of some Nordic Member States concerning the mandatory use of fingerprints as a biometric identifier.<sup>40</sup> In addition, it is noteworthy that no legislation has been adopted to strengthen the security of the identity cards that the EU Member States deliver to their nationals, as this type of documents falls outside the scope of Regulation (EC) No 2252/2004. EU Member States have only agreed on a ‘soft law’ instrument, namely Council Conclusions on common minimum security standards for national identity cards.<sup>41</sup> This is a significant omission with regard to identity document

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<sup>39</sup> Frontex, ‘Programme of Work 2012’, p. 93.

<sup>40</sup> Council of the European Union, ‘Draft Council Regulation on standards for security features and biometrics in passports and travel documents issued by Member States’, 13490/04, 19 October 2004.

<sup>41</sup> Council of the European Union, Press release, 2696<sup>th</sup> Council meeting, Justice and Home Affairs, Brussels, 1-2 December 2005, 14390/05 (Presse 296), pp. 34-35.

security, as the national identity cards delivered by Schengen states notably allow their holder to re-enter the Schengen area.

### ***Strengthening the exchange of information relating to border controls***

Another priority identified by the EU in the aftermath of 9/11 was to improve the exchange of various categories of information relating to border controls. In the field of visas, Member States elected to establish a new database, whilst, for other categories of information, it was decided to add new functionalities to existing databases. In practice, the exchange of various categories of information relating to border controls has significantly developed in the last few years, in particular following the terrorist attacks in Madrid, albeit at a slower pace than originally planned.

### *Exchange of visa information and the Visa Information System (VIS)*

As early as 20 September 2001, the Justice and Home Affairs (JHA) Council had invited the European Commission to table proposals for ‘establishing a network for information exchanges concerning the visas issued’.<sup>42</sup> Actually, visa data was already exchanged, most notably through the VISION (Visa Inquiry Open-border Network) consultation network and through local consular cooperation. However, these arrangements were viewed as cumbersome and inefficient.<sup>43</sup> Progress towards the establishment of a new network was initially quite rapid. In February 2002, the Council approved a plan to combat illegal immigration and the trafficking of human beings in the EU, which notably called for the

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<sup>42</sup> Council of the European Union, ‘Conclusions adopted by the Council (Justice and Home Affairs), Brussels, 20 September 2001’, SN 3926/6/01 REV 6, 20 September 2001, p. 9.

<sup>43</sup> EPEC, ‘Study for the extended impact assessment of the Visa Information System: Final report’, Brussels: EPEC, December 2004, pp. 13-14.

development of a ‘European Visa Identification System’. It then adopted a set of guidelines ‘for the introduction of a common system for an exchange of visa data’, which was referred to as the ‘Visa Information System’ (VIS)<sup>44</sup>. The Council Decision establishing the VIS was adopted on 8 June 2004. Thus, the legal framework for the database was swiftly established. It had originally been anticipated that the VIS would be operational by the end of 2006. However, various political and technical issues caused delays, which meant that the VIS only began its operations in 2011. It was first deployed in six North-African countries, namely Algeria, Egypt, Libya, Mauritania, Morocco and Tunisia in October 2011. It is envisaged that it will be rolled out to the Middle East and then to a third region (Iran, Afghanistan and Arabic countries) in the near future.<sup>45</sup>

The VIS is an IT system for the exchange of visa information amongst Schengen States. It comprises a ‘Central Visa Information System’ (CS-VIS), an interface in each Member State (‘National Interface’ (NI-VIS)) and a communication infrastructure linking the central system to the national systems.<sup>46</sup> By connecting consulates in non-EU countries and all external border crossing points of Schengen States, it allows Schengen states to exchange data and decisions concerning applications for short-stay visas to visit or transit through the Schengen area in order to verify the authenticity of visas and the identity of their holder. The VIS records data such as alphanumeric data on the applicant and on the visas requested, issued, refused, annulled, revoked or extended; biometric data, including digital photographs and ten

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<sup>44</sup> Council of the European Union, ‘Guidelines for the introduction of a common system for the exchange of visa data’, 9243/02, 27 May 2002.

<sup>45</sup> Council of the European Union, ‘EU Action Plan on combating terrorism’, 17594/1/11, 9 December 2011, p. 11.

<sup>46</sup> Council Decision of 8 June 2004 establishing the Visa Information System (VIS), 2004/512/EC, *Official Journal of the European Union* L 213, 15 June 2004.

fingerprints (with some exceptions); and links to previous visa applications and to the application files of persons travelling together.

Thus, the VIS mainly aims to support the implementation of the common visa policy, although it can also contribute to the fight against terrorism by playing a role in ensuring that a suspected terrorist is not granted a visa, for example. In addition, the role of the VIS in the fight against terrorism was subsequently reinforced when it was decided in 2008 to give designated national authorities responsible for the prevention, detection or investigation of terrorist or other serious criminal offences, as well as Europol<sup>47</sup> officials, access to VIS data through central access points.<sup>48</sup> Member States considered that the information contained in the VIS may be necessary for the purposes of preventing and combating terrorism, as well as other forms of serious crime, and that it should therefore be available provided that the conditions set out in the Decision are fulfilled. Access to VIS data is normally only granted after a duly reasoned request has been made. It is only in urgent cases that verifications of the requests are carried out *ex post*. In addition, personal data may be transferred to third countries or to international organisations for the purpose of preventing and detecting terrorist and other serious offences. In such cases, the consent of the Member State that entered the data into the VIS has to be obtained.

*Exchange of immigration control information and the second-generation Schengen Information System (SIS II)*

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<sup>47</sup> Europol is the European Police Office – an EU law enforcement agency that handles criminal intelligence.

<sup>48</sup> Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, *Official Journal of the European Union* L 218, 13 August 2008.

In addition to exchanging visa data, EU Member States decided in September 2001 to improve the input of alerts into the SIS, in particular those related to Articles 95 (persons wanted for arrest or extradition), 96 (persons to be refused entry to the Schengen area as unwanted aliens) and 99 (persons who are to be subject to discreet surveillance or a specific check) of the Schengen Convention. No specific deadline was identified for the completion of this measure. In practice, from 2002 onwards, it became part of the broader discussions on the development of the second-generation Schengen Information System (SIS II).<sup>49</sup> Those were not prompted by terrorism concerns, but rather by the technical limitations of the existing system in the face of the growing number of EU Member States.

However, this project has encountered various technical, practical and political problems, which have delayed the start of the operations of SIS II. As a result, the EU has been unable to meet its original deadline of 2006 for the operational launch of SIS II.<sup>50</sup> Actually, it is only in December 2006 that Regulation (EC) No 1987/2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) was adopted. Various EU official documents then reported that SIS II was ‘undergoing extensive testing’.<sup>51</sup> It finally became operational in spring 2013. Compared to its predecessor, SIS II has been designed with enhanced functionalities, which are expected to ensure ‘greater effectiveness in combating terrorism’.<sup>52</sup> Those include the addition of new types of alerts on persons and on

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<sup>49</sup> Council of the European Union, ‘European Union Action Plan to Combat Terrorism – Update of the Roadmap’, 10773/2/02 REV 2, 17 July 2002, p. 21.

<sup>50</sup> J. Parkin, ‘The Difficult Road to the Schengen Information System II: The Legacy of “Laboratories” and the Cost for Fundamental Rights and the Rule of Law’ (Brussels: Centre for European Studies 2011), pp. 8-9.

<sup>51</sup> Council of the European Union, ‘EU Action Plan on combating terrorism’, 17594/1/11, p. 9.

<sup>52</sup> ‘Council Conclusions of the 2442<sup>nd</sup> Council meeting, Ecofin, Madrid, 20 June 2002’, 10089/02 (Presse 181), p. III.

objects, the capacity to inter-link alerts, the possibility to use biometrics, namely photographs and fingerprints, and the granting of access to the system to new authorities.<sup>53</sup>

#### *Exchange of information on lost and stolen passports*

In its Declaration on Terrorism of 25 March 2004, the European Council had called for ‘tak[ing] forward work on the creation by end 2005 of an integrated system for the exchange of information on stolen and lost passports having recourse to the Schengen Information System and the Interpol database’. As a first step, the Council adopted Council Common Position 2005/69/JHA of 24 January 2005 on exchanging certain data with Interpol.<sup>54</sup> This Common Position laid down the obligation for the competent law enforcement authorities of the EU Member States to exchange data on issued and blank passports that have been stolen, lost or misappropriated with Interpol<sup>55</sup>, which has developed a database on Stolen Travel Documents that contains more than five million items.<sup>56</sup> On the basis of a report by the European Commission<sup>57</sup>, the EU Counter-Terrorism Coordinator reported ‘large improvements in Member States providing information on lost and stolen passports’ in

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<sup>53</sup> Council of the European Union, ‘Development of SIS II’, 9808/03, 26 May 2003, p. 4.

<sup>54</sup> Interpol is the International Criminal Police Organisation – an intergovernmental organisation, which comprises 182 members, including all EU Member States. Given the differences between the data protection regimes of these various members, each country supplying information may restrict the number of countries with which it may be shared.

<sup>55</sup> Council Common Position 2005/69/JHA of 24 January 2005 on exchanging certain data with Interpol, *Official Journal of the European Union* L27, 29 January 2005, Article 3.

<sup>56</sup> House of Lords, Select Committee on European Union, *After Madrid: The EU’s Response to Terrorism*, Fifth Report 2004-2005, HL Paper 53, p. 31.

<sup>57</sup> Commission of the European Communities, ‘Report from the Commission on the operation of Council Common Position 2005/69/JHA’, SEC(2006) 502, 21 April 2006.

2007.<sup>58</sup> As a second step, it was decided to include in the legislation establishing SIS II the possibility to exchange data with Interpol on lost and stolen passports and to set up the technical functionality to achieve this aim. However, as previously mentioned, the launch of SIS II was postponed until spring 2013, because of technical and financial difficulties, which means that the original deadline for the completion of this measure was missed.

#### *Exchange of fingerprint data through Eurodac*

Since 2009, the idea of allowing Europol and the authorities responsible for internal security measures to also access Eurodac has been under discussion.<sup>59</sup> Eurodac is a biometric database that has been in operation since 2003. It stores the fingerprint data of asylum-seekers, which is collected at the time of their application for asylum. It allows Member States to compare the fingerprints of asylum-seekers in order to determine whether a person applying for asylum or residing illegally in one of the Member States has previously applied for asylum within the EU. Thus, the main aim of Eurodac is to support the application of the Dublin Regulation, which lays down criteria for determining which EU Member State is responsible for examining an asylum application. The European Commission justified its 2009 proposal notably on the grounds that the law enforcement authorities of some Member States consult national databases containing the fingerprints of asylum-seekers for criminal investigations and ‘consider the hit rate significant’.<sup>60</sup> However, this proposal was sharply criticised, notably by the European Data Protection Supervisor who deplored that it ‘[constitutes] a further step in a tendency towards giving law enforcement authorities access to data of

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<sup>58</sup> Council of the European Union, ‘EU Action Plan on Combating Terrorism’, 7233/1/07, 29 March 2007, p. 19.

<sup>59</sup> Commission of the European Communities, ‘Proposal for a Council Decision on requesting comparisons with EURODAC data by Member States’ law enforcement authorities and Europol for law enforcement purposes’, COM(2009) 342, SEC(2009) 936, SEC(2009) 937, 10 September 2009.

<sup>60</sup> *Ibidem*, p. 2.

individuals who in principle are not suspected of committing any crime'.<sup>61</sup> After it became obsolete following the entry into force of the Lisbon Treaty in December 2009, the European Commission tabled a new Eurodac proposal, which aimed to ensure a more efficient use of the database, but did not include any provisions granting access to the law enforcement community to the database. Following negative reactions from the Council, the European Commission eventually tabled an amended proposal in May 2012. It now includes provisions aiming to authorise the comparison of fingerprints contained in Eurodac with fingerprints held by national law enforcement authorities or Europol for combating terrorism and serious crime.<sup>62</sup> This proposal is under discussion at the time of writing. However, it is evident that, as it has been seen in the cases of VIS and SIS II, there have been significant delays in the realisation of this EU objective.

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<sup>61</sup> 'Opinion of the European Data Protection Supervisor on the Amended Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EC) No [...] (establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person), and on the Proposal for a Council Decision on requesting comparisons with EURODAC data by Member States' law enforcement authorities and Europol for law enforcement purposes', *Official Journal of the European Union* C92, 10 April 2010, p. 4.

<sup>62</sup> European Commission, 'Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EU) [...] (establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person) and to request comparisons with EURODAC data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (Recast version)', COM(2012) 254, 30 May 2012.



### *Exchange of passenger information (API and PNR)*

EU Member States have also sought to exchange information concerning air passengers. Although EU official documents sometimes describe measures relating to the exchange of passenger information as mainly pertaining to transport security or crime-fighting<sup>63</sup>, they also play a significant role in the implementation of border controls. This is notably evidenced by the type of authorities that receive such passenger information - the national authorities handling border checks in the case of Advanced Passenger Information (API), for example.

Since 2004, the EU has made some progress in the field of exchange and analysis of passenger information, which was only identified as an important issue for EU cooperation in the revised Action Plan of June 2004. The main achievement in this area to date is the EU-wide sharing of Advanced Passenger Information (API). Council Directive 2004/82/EC of 29 April 2004 requires Member States to establish an obligation for carriers to transmit information concerning the passengers that they will carry, at the request of the authorities responsible for carrying out checks on persons at external borders. The data transmitted comprises the number and type of travel document used, the nationality, the full name, the date of birth, the border crossing point of entry into the territory of the Member States, the code of transport, the departure and arrival time of the transportation, the total number of passengers carried on that transport and the initial point of embarkation. Thus, this measure

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<sup>63</sup> For example, a recent Communication of the European Commission claimed that ‘PNR is not a border control instrument’ and that its aim is ‘to fight terrorism and serious crime’ (European Commission, ‘Communication from the Commission to the European Parliament and the Council – Smart border: Options and the way ahead’, COM(2011) 680, 25 October 2011, p. 6). This stands in sharp contrast to the situation in the United States, where PNR is presented as an important component of the border control policy.

can be considered an additional form of border control that applies to persons travelling by air into the EU.

In addition, the establishment of an EU Passenger Name Record (PNR) system has been under discussion for a few years. Like SIS II and VIS, this initiative has proved rather controversial and has led to protracted debates. The European Commission proposed a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes in 2007. However, this proposal was not adopted by the time of the entry into force of the Lisbon Treaty in December 2009, which rendered it obsolete. The Commission therefore replaced it with a new proposal for a Directive of the European Parliament and of the Council in February 2011.<sup>64</sup>

PNR data refers to ‘unverified information provided by passengers, and collected by and held in the carriers’ reservation and departure control systems for their own commercial purposes’, including notably travel dates, travel itinerary, ticket information, contact details, means of payment used, and baggage information.<sup>65</sup> The current PNR proposal aims to harmonise Member States’ provisions on obligations for air carriers operating flights between a third country and the territory of at least one Member State to transmit PNR data to the competent authorities for the purpose of preventing, detecting, investigating and prosecuting terrorist offences and serious crime. In addition, it contains a provision indicating that the

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<sup>64</sup> European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime’, COM(2011) 32, 2 February 2011.

<sup>65</sup> *Ibidem*, p. 3

Commission will review the necessity and feasibility of including internal flights in the scope of the Directive.

The European Commission has presented such an EU PNR system as a major tool in the fight against terrorism and organised crime. In particular, it has argued that PNR data will enable the relevant authorities to perform three tasks: firstly, to identify persons who may be involved in serious crime and terrorism and who should therefore be subject to further examination; secondly, to prevent, detect, investigate and prosecute serious crime or terrorist acts after they have been committed; and thirdly, to assess the threat to security represented by a passenger, so that an appropriate screening can be performed.<sup>66</sup> The EU Counter-Terrorism Coordinator has also stated that, '[g]iven the threat posed by terrorists traveling from and into the EU and within the EU, an EU system for collecting and processing PNR data by the Member States would be of great value'.<sup>67</sup> However, the Commission proposals have attracted strong criticism from the private sector, including airline associations, the European Parliament, and the European Data Protection Supervisor amongst others<sup>68</sup>, as well as academics<sup>69</sup>. Compared to the API covered by the 2004 Directive, the PNR data would be

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<sup>66</sup> *Ibidem*, pp. 4-5

<sup>67</sup> Council of the European Union, 'EU Action Plan on combating terrorism', 17594/1/11, 9 December 2011, p. 28.

<sup>68</sup> European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime', pp. 9-11.

<sup>69</sup> See, for example, E. Brouwer, 'The EU Passenger Name Record (PNR) System and Human Rights: Transferring Passenger Data or Passenger Freedom?', *CEPS Working Document No. 320* (Brussels: Centre for European Policy Studies 2009); E. Brouwer, 'Ignoring Dissent and Legality: The EU's Proposal to Share the Personal Information of all Passengers', *CEPS Paper in Liberty and Security in Europe* (Brussels: Centre for European Policy Studies 2011).

more extensive. Another major difference between the two instruments is that the 2004 Directive concerning the API only requires the transmission of data in response to a prior request, whereas the proposed EU PNR system would include the obligation of systematically transmitting the required data for each flight concerned. This proposed Directive is still under negotiation at the time of writing.

This section has therefore shown that the EU has made significant progress towards increasing information exchange in the field of border controls through the establishment or updating of various databases. However, apart from the exchange of API - which did not require the setting up of any large-scale IT system -, all the other initiatives have seen major delays in their execution, be that VIS, SIS II, the EU PNR system or granting law enforcement authorities access to Eurodac. Actually, concerning the latter two, the EU has not completely fulfilled its objectives yet. In addition to the continued negotiations over access to Eurodac and the EU PNR system, the European Commission submitted proposals in February 2013 with a view to also establishing a Registered Traveller Programme (RTP)<sup>70</sup> and an Entry/Exit System (EES)<sup>71</sup>. At the same time as all these EU border-related databases have burgeoned, discussions have also been launched on how best to manage information

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<sup>70</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme', COM(2013) 97 final, 28 February 2013.

<sup>71</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union', COM(2013) 95 final, 28 February 2013.

exchange<sup>72</sup>, notably through the interoperability of databases<sup>73</sup>. This debate is still ongoing at the time of writing.

### ***Coordinating the re-introduction of internal border controls***

As previously indicated, the Anti-Terrorism Roadmap adopted by the European Council on 26 September 2001 had called for '[studying] the arrangements for coordinated recourse to Article 2(2) of [the] Schengen Convention'.<sup>74</sup> This formulation was different from that used by the Justice and Home Affairs Council on 20 September, which had mentioned the need to study using such arrangements 'in the event of a terrorist threat of exceptional gravity'.<sup>75</sup> Only limited progress appears to have been made with regard to that objective. One of the only actions taken was the adoption by the Article 36 Committee<sup>76</sup> of a definition of what constitutes a 'terrorist threat of exceptional gravity'.<sup>77</sup> The issue subsequently appears to have

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<sup>72</sup> European Commission, 'Communication from the Commission to the European Parliament and the Council – Overview of information management in the area of freedom, security and justice', COM(2010) 385, 20 July 2010.

<sup>73</sup> European Commission, 'Communication from the Commission to the Council and the European Parliament on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs', COM(2005) 597, 24 November 2005.

<sup>74</sup> European Council, 'Anti-Terrorism Roadmap', SN 4019/01, p. 10.

<sup>75</sup> 'Conclusions adopted by the Council (Justice and Home Affairs), Brussels, 20 September 2001', SN 3926/6/01 REV 6, p. 9.

<sup>76</sup> This Council Working Group, which had been provided for by Article 36 of the Treaty on European Union, used to coordinate the competent working groups in the field of police and judicial cooperation and prepare the relevant work of the Permanent Representatives Committee (COREPER). It ceased to exist following the entry into force of the Lisbon Treaty in December 2009.

<sup>77</sup> Council of the European Union, 'Triggering of checks at internal borders', 14181/1/01 REV 1, 20 November 2011, pp. 1-2.

fallen off the agenda without any significant progress having been made, since the EU Plan of Action on combating terrorism of June 2004 and its subsequent updated versions do not contain any reference to the possible re-introduction of internal border controls as a counter-terrorism measure. A major reason for this lack of progress was that the European Commission, which had been required by the Member States to make proposals on procedures regarding the recourse to Article 2(2) of the Schengen Convention<sup>78</sup>, failed to do so for a few years.<sup>79</sup> It is only in September 2011 that the European Commission tabled a Communication on Schengen governance<sup>80</sup>, as well as a legislative package including a proposal for a Regulation amending the Schengen Borders Code<sup>81</sup>. The Communication identified terrorist attacks as one of the ‘urgent unforeseen, short-term events’ that may justify the immediate re-introduction of internal border controls, notably in order to rapidly apprehend the perpetrators.<sup>82</sup> Nevertheless, overall, the proposal of the Commission was not driven by terrorism concerns. Rather, it was mainly prompted by the perceived need for ensuring better coordination in the re-introduction of border controls amongst Member States

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<sup>78</sup> Council of the European Union, ‘European Union Action Plan to Combat Terrorism – Update of the Roadmap’, 10773/2/02 REV 2, p. 20.

<sup>79</sup> Groenendijk, ‘Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?’, p. 167.

<sup>80</sup> European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Schengen governance: Strengthening the area without internal border control’, COM(2011) 561, 16 September 2011.

<sup>81</sup> European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances’, COM(2011) 560 final, 16 September 2011.

<sup>82</sup> ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Schengen governance: Strengthening the area without internal border control’, COM(2011) 561, p. 10.

in the event of significant irregular migration flows, following the controversial French unilateral re-introduction of controls at the border with Italy in April 2011. At the time of writing, the Commission's proposal is still the object of intense negotiations.

In conclusion, the EU has made substantial progress in the strengthening of border controls for counter-terrorism purposes, but has not managed to fulfill all the objectives that it had defined, and certainly not by the deadlines that had originally been set. The reinforcement of border controls through the establishment of Frontex and the improvement of identity document security can be considered successes. There has also been some progress made with regard to improving information exchange, but not all projects have been successfully completed yet, as various setbacks and delays have affected the development of some databases, SIS II in particular. Only very limited progress has been made with regard to the development of terrorist profiles and the improvement of coordination in the re-introduction of internal border controls. However, it is necessary to go further in the analysis by questioning to which extent these various activities in the field of border controls have truly contributed to combating terrorism. In other words, to what extent have these EU border control measures been effective in addressing the terrorist threat?

### **The effectiveness of EU border control measures for counter-terrorism purposes: a critical assessment**

EU official documents often present external border controls as playing an important role in counter-terrorism. For example, the European Commission argued in 2008 that '[b]order surveillance has not only the purpose to prevent unauthorised border crossings, but also to

counter cross-border crime such as the prevention of terrorism [...].<sup>83</sup> The Council has also emphasised the ‘need [for EU Member States] to enhance protection of [their] external borders to make it harder for known or suspected terrorists to enter or operate within the EU’.<sup>84</sup> Such a discourse is premised on the view that terrorism is essentially an external threat. Such a view was particularly widespread in the first years of the development of the EU counter-terrorism policy. For example, in September 2001, the European Council called for ‘in-depth political dialogue with *those countries and regions of the world in which terrorism comes into being*’<sup>85</sup>, whilst the 2005 Counter-Terrorism Strategy stated that ‘[much] of the terrorist threat to Europe originates outside the EU’<sup>86</sup>. From that viewpoint, any success in the strengthening of border controls also represents an achievement in the fight against terrorism.

However, some reservations have also occasionally been expressed as to the effectiveness of migration controls for combating terrorism. For example, in 2008, the European Commission observed that

[in] view of the latest terrorist acts in the EU, [...] the perpetrators have been mainly EU citizens or foreigners residing and living in the Member States with official permits. Usually

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<sup>83</sup> Commission of the European Communities, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Examining the creation of a European Border Surveillance System (EUROSUR)’, COM(2008) 68, 13 February 2008, p. 3.

<sup>84</sup> Council of the European Union, ‘The European Union Counter-Terrorism Strategy’, p. 11.

<sup>85</sup> European Council, ‘Conclusions and Plan of Action of the extraordinary European Council meeting on 21 September 2001’, SN 140/01, p. 3 (emphasis added).

<sup>86</sup> Council of the European Union, ‘The European Union Counter-Terrorism Strategy’, p. 14.



there has been no information about these people or about their terrorist connections in the registers, for example in the SIS or national databases.<sup>87</sup>

Beyond such passing (and partially contradictory) comments in various EU documents, there has not been any systematic reflection in the EU institutions on the exact role that border controls have played in the EU's counter-terrorism arsenal to date or on the contribution that they could (or should) make in the future. This has been implicitly confirmed by the EU Counter-Terrorism Coordinator, when, after more than ten years of EU counter-terrorism cooperation, he called for the Internal Security Committee (COSI) 'to define the contribution of border control in counter terrorism'.<sup>88</sup> To some extent, this is understandable given the difficulty, if not the impossibility, of such a task. Indeed, as is the case with other counter-terrorism measures such as financial sanctions against persons suspected of terrorism, the evidence for the success of such measures lies in the *absence* of terrorist attacks. However, it is impossible to conclusively prove that a terrorist attack did not take place because of counter-terrorism measures - or because of one specific counter-terrorism instrument, rather than another -, as information on non-existent terrorist attacks is by definition scarce. Equally, it is impossible to precisely assess the effectiveness of any specific border control measure in combating terrorism. For example, the security checks carried out before a visa is delivered to an applicant as part of the Schengen cooperation on short-term visas can contribute to combating terrorism. However, in order to precisely assess the success of such a

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<sup>87</sup> Commission of the European Communities, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Preparing the next steps in border management in the European Union', COM(2008) 69, 13 February 2008, p. 10.

<sup>88</sup> Council of the European Union, 'EU Counter-Terrorism Strategy – Discussion Paper', 9990/12, 23 May 2012, p. 17.

measure in preventing terrorists from receiving a Schengen visa and subsequently entering the EU, one would need to have a list of all terrorists applying for a Schengen visa in order to compare it to the list of all those who have been refused a visa because they have been correctly identified as terrorist. However, the first list does not exist for obvious reasons, whilst Eurostat, the statistical office of the EU, only provides statistical data on the numbers of visas refused on nine different grounds, which include the existence of an alert in the SIS or the assessment of the applicant as a public threat, but not the assessment of a person as a terrorist threat specifically.<sup>89</sup> For similar reasons, it is not possible to exactly evaluate the contribution of the Schengen Information System to the EU's fight against terrorism either.<sup>90</sup>

Nevertheless, although one cannot systematically assess or quantify the contribution of border control measures to the EU's counter-terrorism policy, it is possible to offer some reflections in that regard. This article develops four inter-related points. Firstly, border control measures have only played a limited role in the EU's counter-terrorism policy so far. Secondly, this trend is set to continue in the immediate future. Thirdly, this partly constitutes a missed opportunity for the EU, especially in light of some developments in international terrorism. However, and this is the fourth and final point, it is also important to acknowledge

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<sup>89</sup> This is in application of the Visa Code (Regulation EC 810/2009), which has established rules relating to the motivation of refusal of a visa. From 5 April 2011 onwards, the authorities processing short-term visa applications have been required to motivate their refusal decision by completing an EU standard form, laid down by Annex VI of the Visa Code. The form lists nine possible grounds for refusal, including 'an alert has been issued in the Schengen Information System (SIS) for the purpose of refusing entry (...) and 'one or more Member State(s) consider you to be a threat to public policy, internal security, public health (...) or the international relations of one or more of the Member States'.

<sup>90</sup> Léonard, 'The Use and Effectiveness of Migration Controls as a Counter-Terrorism Instrument in the European Union', p. 41.

the negative externalities of the use of border controls for counter-terrorism purposes – hence, the use of ‘partly’ in the previous sentence. The remainder of this section develops each point in turn.

First of all, although all the border control measures analysed here are presented in EU official documents as contributing to the fight against terrorism, the actual contribution of some of these measures is likely to be very limited in practice. Ultimately, the main aim of the EU border control measures adopted so far has been to prevent irregular migration, not to combat terrorism. This can be best demonstrated by considering the activities of what is now the ‘focal point’ for the development of EU cooperation on external border controls, namely Frontex.<sup>91</sup> Although its launch has been presented as an important achievement in the development of border control measures for counter-terrorism purposes, the activities of this European Agency have not had any impact on the terrorist threat yet. The largest share of its budget for operational activities has been dedicated to joint operations at the external borders, at sea borders in particular. For example, in 2011, Frontex’s budget for operational activities amounted to 86.7 million euros, 73.2 million of which were dedicated to joint operations, including 50.0 million for sea operations, whilst the equivalent figures for 2012 were 54.3, 43.5 and 25.1 respectively. Given that it is highly unlikely that prospective terrorists would be attempting to reach the EU on one of the unseaworthy boats in the Mediterranean on which the attention of FRONTEX has been focused in the last few years<sup>92</sup>, it can be concluded that the activities of Frontex do not make any substantial contribution to

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<sup>91</sup> COWI, ‘Frontex: External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union – Final Report’, p. 6.

<sup>92</sup> Léonard, ‘EU Border Security and Migration into the European Union: Frontex and Securitisation through Practices’.

combating terrorism. This assessment has been confirmed by the EU Counter-Terrorism Coordinator, who observed in May 2012 that ‘Frontex has not yet been involved directly in [counter-terrorism] work’.<sup>93</sup>

Furthermore, it appears that this situation is not likely to significantly change in the near future. Although the EU Counter-Terrorism Coordinator welcomes Frontex’s new competence to process personal data for ‘[opening] new avenues for operational cooperation’ between Europol and Frontex in the field of counter-terrorism<sup>94</sup>, a close reading of the revised Frontex Regulation reveals that ‘terrorism’ is not explicitly mentioned once in the whole document. It is true that terrorism might be covered by the ‘cross-border criminal activities’ mentioned in Article 11, but the context suggests that those rather refer to illegal migration and human trafficking. The same can be said about EUROSUR, which is expected to complement Frontex in the near future. Although this initiative has also been included in one of the updates on the EU Action Plan of the EU Counter-Terrorism Coordinator<sup>95</sup>, its contribution to the EU’s counter-terrorism efforts is likely to be very limited in the future. ‘Terrorism’ is only mentioned once in the 44-page proposal of the European Commission<sup>96</sup>, as the system is set to mainly focus on tackling irregular migration, as well as the cross-border criminal activities linked to it, such as trafficking in human beings. Thus, it can be concluded that the development of Frontex – and now of its complement, EUROSUR – has

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<sup>93</sup> Council of the European Union, ‘EU Counter-Terrorism Strategy – Discussion Paper’, 9990/12, p. 3.

<sup>94</sup> *Ibidem*, p. 4.

<sup>95</sup> Council of the European Union, ‘EU Action Plan on combating terrorism’, 17594/1/11, 9 December 2011, p. 11.

<sup>96</sup> European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council: Establishing the European Border Surveillance System (EUROSUR)’, COM(2011) 873, 12 December 2011, p. 26.

been overwhelmingly shaped by the overall aim of tackling irregular migration. Although one can agree with the EU Counter-Terrorism Coordinator that Frontex has potentially an important role to play in the EU counter-terrorism policy, it has not been developed yet and is not set to significantly evolve in the near future. As Frontex is now at the centre of the EU's cooperation on external border controls, this indicates that the actual contribution of the EU's border control instruments to the fight against terrorism is and will remain limited in the next few years.

It can be argued that it is a missed opportunity in some respect, especially in light of the 'emergence of "safe havens" outside the EU'<sup>97</sup> and the increasing phenomenon of 'terrorist travel'<sup>98</sup>. In the case of the EU, this refers to 'radicalised EU nationals and residents [...] travelling to conflict areas or attending terrorist training camps and returning to Europe'<sup>99</sup>, where they then attempt to use their skills to radicalise others or commit terrorist attacks. For example, Mohamed Merah, who conducted several terrorist attacks in France in March 2012, had previously travelled to Afghanistan and Pakistan.<sup>100</sup> Border control measures have potentially an important role to play in this context. This has led the EU Counter-Terrorism Coordinator to call for 'better analysing travel by terrorists and would be terrorists' since

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<sup>97</sup> Council of the European Union, 'EU Counter-Terrorism Strategy – Discussion Paper', 23 May 2012, p. 1.

<sup>98</sup> Council of the European Union, 'EU Counter-Terrorism Strategy – Discussion Paper', 15894/1/10, 29 November 2010, p. 3.

<sup>99</sup> Council of the European Union, 'EU Counter-Terrorism Strategy – Discussion Paper', 9685/10, 10 May 2010, p. 5.

<sup>100</sup> *The Telegraph*, 'Toulouse shootings: the making of a French jihadi killer with a double life', 24 March 2012.

2010.<sup>101</sup> However, his various suggestions have not had any significant impact on the political debates and the legislative process yet. One challenge in that respect is that many EU border control measures have exclusively focused on third country nationals, including the Schengen cooperation on short-term visas and the various databases that have been developed such as SIS, VIS and Eurodac. In contrast, there have not been many measures concerning the nationals of EU Member States. For example, there has not been any legislation for strengthening the security of the identity cards delivered to EU nationals by their own state. However, this stands in contrast to the fact that several recent terrorist attacks were carried out by persons – like Anders Breivik in Norway, Mohamed Merah in France and Mohammad Sidique Khan in the United Kingdom - who were not third country nationals, but nationals of the country in which they carried out their attacks. Consequently, none of the EU databases, like VIS, SIS and Eurodac, would have contained any information concerning these terrorists. This is not to argue that the EU should create an enormous database that would comprise a record for every citizen of every EU Member State, as this would be extremely problematic from the standpoint of human rights, in particular the right to privacy. This is merely to emphasise that there may have been too much emphasis on third-country nationals as potential terrorists compared to the terrorist threat represented by some EU nationals. This has left the EU Member States without the equivalent infrastructure to exchange information on potentially dangerous EU nationals, notably when they travel back from conflict areas or terrorist training camps outside the EU. However, any attempt at addressing this problem immediately highlights one of the broader challenges inherent to

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<sup>101</sup> Council of the European Union, 'EU Counter-Terrorism Strategy – Discussion Paper', 9685/10, p. 5; Council of the European Union, 'EU Counter-Terrorism Strategy – Discussion Paper', 29 November 2010, p. 3-6; Council of the European Union, 'EU Counter-Terrorism Strategy – Discussion Paper', 23 May 2012.

using border control measures for fighting terrorism – how to balance security and human rights.

Indeed, whilst it is not possible to assess the exact contribution of these border control measures to the fight against terrorism, it has become increasingly evident that they have some negative effects, which should also be fully taken into account. Using an economics concept, those can be termed ‘negative externalities’, that is, the negative side-effects or costs experienced by unrelated parties - *i.e.* all those who are not involved in terrorist activities, but are affected by the strengthening of border controls. One can identify three main categories of negative externalities. First of all, the strengthening of migration controls has made it more difficult to travel and enter the EU in general, including for some *bona fide* travellers without any connection to terrorism. This has notably been well-documented by scholars examining the development of the EU cooperation on visas.<sup>102</sup> Thorough checks at the external borders, as well as at the internal borders in exceptional cases, can also lead to long queues. Those are likely to inconvenience travellers - not only third-country nationals, but also EU citizens in some cases - and may lead to disturbances as reported by Groenendijk<sup>103</sup>. This problem has been acknowledged by the European Commission, which has proposed various measures to facilitate border crossing for *bona fide* travellers, such as the introduction of a ‘Registered

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<sup>102</sup> D. Bigo and E. Guild (eds), *La mise à l'écart des étrangers: la logique du visa Schengen* (Paris: L'Harmattan 2003); D. Bigo and E. Guild, ‘Policing at Distance: Schengen Visa Policies’, in D. Bigo and E. Guild (eds) *Controlling Frontiers: Free Movement into and within Europe* (Aldershot: Ashgate); F. Trauner and I. Kruse, ‘EC Visa Facilitation and Readmission Agreements: Implementing a new EU Security Approach in the Neighbourhood’, *CEPS Working Paper No. 290* (Brussels: Centre for European Policy Studies).

<sup>103</sup> Groenendijk, ‘Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?’, p. 164.

Traveller' status and a simplified and automated border check.<sup>104</sup> However, this new 'border package' is still under discussion. In addition, it can be argued that using migration controls as a counter-terrorism instrument may have a harmful effect on the relations between various ethnic groups in multicultural societies by presenting asylum-seekers and migrants as being particularly likely to engage in terrorist activities.<sup>105</sup> This concern has been raised in particular in relation to the controversial issue of the access of law enforcement authorities to Eurodac in order to fight against terrorist offences and serious criminal offences. Finally, the development of migration control measures to fight terrorism raises significant questions with regard to the right to privacy and data protection. A growing amount of personal data, including biometric data<sup>106</sup>, is already being collected from those wishing to enter the EU and stored in increasingly sophisticated databases. This trend will be further reinforced if the new EU instruments currently under discussion are adopted and enter into force. In addition, as notably denounced by the European Data Protection Supervisor in various Opinions, there has been a tendency to give an increasingly wide access to such data to law enforcement authorities, including data that is not related to a specific crime and had originally been

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<sup>104</sup> Commission of the European Communities, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Preparing the next steps in border management in the European Union'.

<sup>105</sup> E. Guild, 'International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001', *European Foreign Affairs Review* 8/3 (2003) pp. 331-346.

<sup>106</sup> Article 29 Data Protection Working Party, 'Opinion 3/2012 on developments in biometric technologies', 00720/12/EN WP193, 27 April 2012.



collected for other purposes. This puts the data protection principle of ‘purpose limitation’ in jeopardy.<sup>107</sup>

## **Conclusion**

Migration controls have become an increasingly important component of the EU counter-terrorism policy over the last few years. In the immediate aftermath of 9/11, strengthening EU cooperation on migration controls was identified amongst various actions to be taken, but was not prioritised. It is only after the terrorist attacks in Madrid in March 2004 that it was identified as a strategic objective for the EU’s fight against terrorism. The EU set several objectives for itself in this policy area and has made significant progress towards achieving them. Nevertheless, it has not managed to fulfil all of them. Whilst Frontex has been successfully launched and considerable progress has been made to strengthen identity document security, the exchange of border-related information has not improved as much and as rapidly as expected because of the technical and financial difficulties encountered in the development of various databases. Hardly any progress has been registered when it comes to developing terrorist profiles and coordinating the re-introduction of internal border controls. In that respect, the case of border controls confirms some of the most common criticisms of the EU counter-terrorism policy, such as its development as ‘a patchwork of measures and

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<sup>107</sup> V. Mitsilegas ‘Borders, Security and Transatlantic Cooperation in the Twenty-First Century: Identity and Privacy in an Era of Globalised Surveillance’, in T.E. Givens, G.P. Freeman and D.L. Leal (eds) *Immigration Policy and Security: US, European and Commonwealth Perspectives* (London: Routledge 2009), pp. 148-166.

mechanisms (...) without an overall design'<sup>108</sup> and an overloaded agenda resulting in a 'capability-expectations gap'<sup>109</sup>.

In addition, going beyond this initial assessment, the article has also shown that it is not clear to what extent these border control measures have actually contributed to combating terrorism. There has not been any official assessment by the EU of the effectiveness of these instruments. It is perhaps not surprising given the challenges inherent to such a task, as acknowledged earlier. Nevertheless, it can be argued that most EU border control measures have only made a limited contribution to the EU's fight against terrorism so far. Although combating terrorism may have been initially used to justify and expedite the adoption of some of them, the EU border control instruments have mainly had an impact on irregular migration to date, as aptly shown by the case of Frontex. Also, with their focus on third-country nationals, their efficiency is particularly questionable when it comes to EU homegrown terrorists, even those engaging in 'terrorist travelling' to conflict areas. However, what has become increasingly evident is that the strengthening of border controls has significant negative externalities, notably with regard to the right to privacy and data protection. From that viewpoint, the fact that the EU has failed to meet all its objectives in the use of border controls for counter-terrorist purposes may paradoxically be seen as a rather positive outcome.

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<sup>108</sup> R. Coolsaet, 'EU Counterterrorism Strategy: Value Added or Chimera?', *International Affairs* 86/4 (2010), pp. 857-873 at p. 858.

<sup>109</sup> R. Bossong, 'The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance', *Journal of Common Market Studies* 45/3 (2008) pp. 27-48.