

Securing the Ever-Closer Union: Supranational Policy Entrepreneurship in Counter-Terrorism and Implications for the European Arrest Warrant

No. 59 October 2018

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As the Juncker Commission enters its final year, leaving a legacy of an effective and genuine Security Union is a paramount policy priority. In a period marked by mounting terrorism, the politics of asylum and migration, and rising euroskepticism, building consensus and delivering tangible solutions before the May 2019 European elections is crucial. These same challenges, on the other hand, create a window of opportunity to deepen integration in the post-Lisbon Area of Freedom, Security, and Justice (AFSJ). While intergovernmentalists traditionally invoked security as a national matter, the supranational argument for European sovereignty has effectively harnessed a similar pathos in support of integration. The recent statement of Security Union Commissioner Julian King employs this appeal to vulnerability and instead links it to a necessity for urgent EU solutions: “From chemical weapons being used on our streets to state-sponsored cyberattacks, Europe is under threat like never before, and Europeans are looking to us to act.”¹ Is this indeed the “hour of European sovereignty?”²

Commission and Council policy entrepreneurship has already deepened AFSJ integration significantly around the nexus of terrorism³, evidenced notably by the post-9/11 European Arrest Warrant (EAW) and the Framework Directive (FDEAW)⁴, which enables cross-border police and judicial cooperation on counter-terrorism and internal security via

expedited extradition. The EAW introduced the principle of mutual recognition to criminal law—meaning mutual trust that all member states equally meet standards guaranteeing fundamental rights and uphold the rule of law. Mutual recognition developed cross-border legal cooperation more softly, much like the *Cassis de Dijon* ruling harmonised national product standards.

With the EAW as the cornerstone of emerging supranational criminal justice instruments, almost all recently proposed and adopted counter-terrorism measures contain implications for the EAW. Directive 2017/541⁵ on combatting terrorism criminalised training or travelling for terrorism purposes, money laundering, drug trafficking, financing or aiding organised criminal and terrorist groups, hacking intended to seriously damage a country or international organisation, and the law extends jurisdiction for offenses committed remotely and envisions wide EAW application. Directive 2014/41⁶ on the European Investigation Order in criminal matters further develops mutual recognition for evidence gathering, working much like the EAW and also relying on the EAW to proceed, although Article 11(1) explicitly provides for a refusal based on fundamental rights. Articles 29–30 concern covert investigations and telecommunication interception, containing provisions for assistance to streamline this process, gather evidence, and issue an EAW for serious crimes delineated.

Proposal 2016/0409⁷ for a Regulation on using the Schengen Information System (SIS) in criminal matters, due for a first reading vote, addresses a key gap in information sharing by integrating the EAW system with the SIS database. Europol's current permission to access SIS for wanted persons expands to full access. Proposal 2018/0108⁸ for a Regulation on European Production and Preservation Orders for electronic evidence would complement the cybercrime, hybrid threat, and online components of terrorist offenses, in particular by formalising a new legal instrument for evidence gathering which necessitates cooperation with third countries and corporations. For example, applications such as Telegram which provide open channels for propaganda as well as encrypted message history and secret chats, are used as a virtual space for terrorist organising. With the ability to prosecute terrorists based upon suspicious online activity and the spectrum of emerging investigatory tools, the EAW has a real risk for unintended consequences, particularly with the murky definitions of terrorism, risks to fundamental rights, and potential rule of law violations.

The Court of Justice of the European Union (CJEU) until recent years was unwilling to rule on EAW compatibility with fundamental rights and before November 2014 was unable to issue preliminary rulings without member state approval.⁹ CJEU policy entrepreneurship is evident in the landmark Aranyosi and Căldăraru EAW ruling: mutual recognition is suspended if the executing judicial authority has “evidence of a real risk of inhuman or degrading treatment”¹⁰ in the issuing member state. This July, the CJEU held that due to Polish rule of law concerns, Ireland was not required to extradite LM, a Polish national, who had three outstanding EAWs, for crimes including cross-border trafficking of 80

kg of amphetamine and 250,000 ecstasy pills and organised crime in Poznań and Warsaw, i.e. crimes now also punishable as terrorism-related.¹¹ The Irish High Court held that LM's fundamental rights could not be guaranteed if extradited and sought preliminary ruling. The LM ruling is quite significant for supranational AFSJ policy since mutual recognition in EU-wide criminal matters is ironclad, barring “exceptional circumstances” where a “real risk” of breaching fundamental rights is demonstrated. LM established that executing judicial authorities must suspend the EAW “only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend [FDEAW] in respect of that Member State.”¹²

At face value, the LM ruling appears to better ensure fundamental rights. However, the narrow ruling, requiring a formal Council decision pursuant to Article 7(2) determining a “serious and persistent” breach, leaves uncertainty for future judicial challenges to fundamental rights. The first use of Article 7(1) marks new territory for the EU. Since the process took over two years for the Commission's Reasoned Proposal¹³ under 7(1), precedent shows that in the application of the EAW, the protection of fundamental rights is not guaranteed without prior application of 7(2) when an issuing country is experiencing systemic deficiencies in the rule of law. In this scheme the protection of fundamental rights relies upon the executing authority performing extraordinary duties to gather evidence of a “real risk” in the issuing country specific to the individual, all the while remaining impartial to vectors of political influence from a member state which is experiencing deficiencies in rule of

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law. While this may be a relatively small tradeoff for the Council's retention of a 7(2) monopoly, or a similar assessment of systemic deficiency, the interplay of the EAW and fundamental rights will persistently ebb and flow with a more robust Security Union. The EAW highlights that legislation cannot be designed only for fair weather, particularly as new supranational policies manage the impossible balance of liberty and security in the realm of counter-terrorism.

Europe has a misperception with regard to security concerns. While non-EU migrants total 7.2 per cent of residents, EU citizens as a whole believe that 16.7 per cent of Europe is occupied by non-EU migrants. In Poland, Hungary, Romania, and Bulgaria, citizens believe there are more than 500 per cent more non-EU migrants than in reality.¹⁴ Governance must contend with politics based in fear rather than fact. According to 2017 Europol terrorism statistics, 'jihadist' attacks comprise 16 per cent of terror attacks in Europe, whereas separatist and ethno-nationalist attacks total 67 per cent. To be sure, 'jihadist' incidents do cause the majority of bodily harm. However, arrest statistics for 'jihadist' offenses total nearly 90 per cent of all terrorism arrests and 50 per cent of those arrested are European citizens.¹⁵ Are fundamental rights ensured?

In the wake of the 2015 Paris attacks, the French government assumed emergency executive powers, extended the state of emergency six times, and President Macron subsequently signed much of this into national law. Hundreds of French citizens, mostly Muslims, have been erroneously placed under house arrest for suspicion of terrorist activity due to these emergency laws.¹⁶ In Juncker's final State of the Union address he invoked "the kind of patriotism that is used for good," toward deepened integration, European sovereignty, and

being strong and united against threats internal and external. As Europe capitalises on counter-terrorism as an engine for integration, the post-9/11 USA PATRIOT Act should serve as the perennial cautionary tale for the Security Union. The future of Europe, as a bastion of the rules-based global order, cannot sacrifice liberty on the altar of security.

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Endnotes:

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