chapter 12

The Fight against Terror and the Space of Individual Freedom: A (Classic) Word of Caution

Michal Bobek

1 Introduction: The Changed Face of Terror

For more than a decade now, Europe has been learning to live with terrorism. Naturally, terrorism was not born out of the events of September 11 in New York. Before 2001, however, for most of the European population, terrorism was something to be watched on the news but something that happened either somewhere else or was largely dormant after the turbulent 1970s and 1980s. Moreover, perverse as it was in moral terms, ‘European-born’ terrorism, in particular its past extreme left-wing or nationalistic/separatist varieties, remained residually rational, as they aimed primarily at law-enforcement, political, business or other representatives of the believed and hated ‘system’.

The situation changed dramatically after 2001. The general population ceased to be an accidental and suffering bystander or collateral damage of terrorist attacks. It became the target. The omnipresent fight against terror rhetoric and measures adopted on its basis also brought the issue into people's minds in all European countries without exception. All individuals started feeling the consequences of measures adopted at various levels with the stated aim of combating terrorism, ranging from enhanced surveillance measures and strong police presence to, at first glance, banal issues like lack of rubbish bins in public spaces, airports, railway stations etc. Some fifteen or twenty years ago, the idea that there would be, as a matter of routine, police officers armed with machine guns patrolling airports or railway stations would seem odd to most Europeans, as would the idea that all the private communications of all Europeans would be monitored.

In recent years, the European Union has been both reacting to these changes and, on the legislative level, it has also been the generator of such changes. In the name of the fight against terror(ism) and prevention or adequate reaction to emergencies caused by it, new pieces of legislation have been adopted and new instruments and tools inserted into the Treaties, in particular the Lisbon Treaty. In analysing these new instruments and legislation, first and foremost attention is being paid to the fight against terror measures in the context of
the Common Foreign and Security Policy and the external dimensions of the EU fight against terrorism. Such a focus is understandable and natural, as new powers, competences and areas need to be analysed and filled with content.

The aim of this contribution is, however, different. It focuses on the internal dimension of EU law and the impact which the declared aim of the ‘fight against terror’ and legislative measures adopted on its basis have had on the state and the ‘quality’ of the EU legal order internally. The interest of this contribution lies in the classical or traditional EU legal instruments (regulations, directives) which have been adopted as measures in the fight against terror since 2001 and their internal life within the EU and its Member States.

A comprehensive study of all such measures is naturally outside the scope of this short contribution. It therefore takes just two significant examples of legislative measures, which have been adopted in recent years with the explicit ‘fight against terror’ rhetoric and justification: regulation(s) on airport and aviation security and the Data Retention Directive. Critically examining the operation of both of these instruments, it is suggested that the considerable inroads into individual freedom which both of these measures have required can hardly be justified by their appropriateness or their necessity. Furthermore, taking into account the historical sensibilities with regard to such measures in a number of post-dictatorial states and societies in Europe, it is suggested that such measures should not only be carefully and duly weighed up in the legislative process. Such measures and above all their actual application after their adoption must be made subject to critical scrutiny by the Court of Justice of the EU.

2 Example One: Airport Security and Secret Legislation

Regulation No 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security was adopted in the aftermath of the September 11 attacks in New York and Washington. The very first recital of the Regulation referred to the September 11 attacks. It stated that “terrorism is one of the greatest threats to the ideals of democracy and freedom and the values of peace”. The prevention of (terrorist) acts of interference with civil aviation was thus the primary aim of the Regulation, as is also apparent from Article 1(1) of the Regulation.

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1 See further on this topic the respective contributions of C. Hillion, J. Czuczai, J. Wouters, and S. Duquet to this volume.