



Converging and conflicting ethical values in the
internal/external security continuum in Europe

European Commission, 7th Framework Programme

Milestone report 2.1: Evolution of the concept of security in European legal principles

**Milestone report submitted September 2009 (M19) in fulfillment of requirements of the
FP7 Project, Converging and Conflicting Ethical Values in the Internal/External
Security Continuum in Europe (INEX)**

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SUMMARY

This milestone report highlights the academic findings of in the work produced by the *Work Package 2 (WP2) on Cross-border legal dilemmas of the internal/external security continuum*. It also sets out the path that the forthcoming deliverable/s within the work package will aim to pursue. The work by WP2 has so far been guided towards producing its first deliverable D.2.1 titled: *The Law-Security Nexus in Europe: State-of-the-art report state-of-the-art-report*. It has been acknowledged that that there seems to be a common understanding that certain rights are an integral part of European security policies, and that security is integrated into European law principles. However, since 9/11, with the special attention for counterterrorism, new European security policies tend to move in the direction at odds with existing European legal principles. A crucial element here is the impact of new security technologies on to civil liberties and human rights. A tighter grip of border controls and an increasing cooperation, in the name of security, with third states, most notable with the US, creates challenges for EU law and the European community as a whole. A set of issues corresponding to the current trends in European security and law that is of crucial importance in forthcoming work are here listed: 1) the use of the mobility, security, and privacy triangle metaphor; 2) the double nature of data protection law, which at the same time limits and enables data processing; 3) the risk of allowing the establishment an impossibility of privacy of design; 4) profiling and predicting data mining; 5) criteria and principles recently provided by case law of the European Court of Human rights and the European Court of Justice. The WP2 will continue to develop and benefit from the synergies it shares with other work packages in particular with the WP1.

I. INTRODUCTION

The INEX project serves to contribute to the existing understandings of European security through an analysis of the value-based premises and ethical consequences of the ‘internal/external security continuum’. The main objective of work package 2 (WP2) as stipulated in the INEX Annex: ‘description of work’, is ‘to document and analyze the challenges to European legal thinking brought by the internal / external security continuum and to generate political recommendations to address them’. This general objective comprise several sub-objectives amongst them is ‘a documentation and analysis of the evolution of the concept of security in European legal principles’.¹

This milestone report titled ‘the evolution of the concept of security in European legal principles’ is based on the progress and workflow so far produced under the WP2 until the period M12 that in particular correspond to the above mentioned sub-objective. The report sets out the key findings and presents the key issues identified by the work produced so far, that contains the deliverable 2.1 titled *The Law-Security Nexus in Europe: State-of-the art report*.² The deliverable 2.1 is mainly concerned with the transnational legal dilemmas inherent in European security practices.³ The aim with D.2.1. was to review the current state of knowledge on the relationship between security and law in Europe. This milestone report also identifies how completed work of WP2 relates to other work packages and the overall project objective.

The report is divided into two main sections. First, the key findings from the work produced by the WP2 will be presented. These are here structured around two sub-chapters. Second, the report present what paths the forthcoming work by the WP2 will take, together with an outline how the work correlates with other work packages in the INEX Project.

¹ Annex I: Description of Work, INEX Project: Converging and conflicting ethical values in the internal / external security continuum in Europe, prepared 31st January 2008.

² Project Periodic Report, INEX, converging and Conflicting Ethical Values in the Internal / External Security Continuum in Europe, 2009.p.6.

³ Annex I: Description of Work, INEX Project: Converging and conflicting ethical values in the internal / external security continuum in Europe, prepared 31st January 2008.

II. KEY FINDINGS

The work produced so far by the WP2 understands that there seems to be a common understanding that certain rights (such as human rights) are incorporated into European security policies, and that security is integrated into European law principles. The balancing paradigm has received anew attention with the event of 9/11 and its aftermath, leaving many to interpret the favoring of security measures on the expenses of legal principles⁴. Particular attention has been given to counter terrorism initiatives. This have caused emerging challenges and a growing number of initiatives in regard to first and third pillar issues, at the same time as having implications for the climate within the EU and outside its borders in its external relations with other actors in the name of security.

Before looking closer into the security trends it might be necessary to present a documentation of the relations between security and law in the EU based on the work made so far by WP2.

Security and law in Europe

One may say that the development of European security started with the signing of the Schengen agreement in 1985 that supported the abolition of internal border controls, and called for common control of the external borders. This was soon to follow by the treaty on the European Union agreed in Maastricht in 1992 which not only shifted immigration, asylum and civil law issues from the third pillar to the first pillar, but also established an area of activity for the EU Justice and Home Affairs, thus having a great impact on European security. Security understood by European law under the Treaty on the European Union stipulates in its article 2 that *“the Union shall set itself the following objectives: (...) to maintain and develop the Union as an area of freedom security and justice, in which the free movement persons is assured in conjunction with appropriate measures with respect to external border controls, asylum immigration and the prevention of combating crime” provides an institutional framework to develop common actions among member states*⁵. The aim with this provision is to create an institutional framework that is set to *“develop common actions among member states”*⁶ in order to provide the citizens of the European Union with a high level of safety.⁷ This objective shall be fulfilled *“...by developing common action among member states in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia”*.⁸ In particular the European Union refers to cooperation in combating terrorism, thus one shall not disregard that it is a crucial element

⁴ Bronitt, Simon (2008), “Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform” in Mirian Gani and Penelope Nathex (ed), *Fresh Perspectives on the War on Terror*, p.65

⁵ Fuster, Gonzales, Gloria, Paul De Hert, and Serge Gutwirth (2008), *State-of-the-art-report on the current scholarship on the Law-Security Nexus in Europe*. INEX Deliverable: D.2.1. Vrije Universiteit Brussel. 6.

⁶ Justice and Home Affairs Council (1999), Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, adopted on 3 December 1998, OJ C 19, 23.1.1999, p.3.

⁷ Mathijssen, P. (2004). *A Guide to European Union Law*, Eight Edition, London: Sweet & Maxwell. p.187.

⁸ Fuster, Gonzales, Gloria, Paul De Hert, and Serge Gutwirth (2008), *State-of-the-art-report on the current scholarship on the Law-Security Nexus in Europe*. INEX Deliverable: D.2.1. Vrije Universiteit Brussel. p.7.

of EU Area of Freedom, Security and Justice.⁹ This has especially been held true since 9/11 after which the EU made particular progress on activity regarding judicial and police cooperation, the prevention of financing terrorism, border control and cooperation with the US.¹⁰

An additional important instrument in understanding the relationship between security and law in Europe is the European Convention for the protection of Human Rights (ECHR). The ECHR provides a strong framework for the protection of human rights at the same time as it allow for states to protect national security¹¹. An example is the premises that allow for states to call on suspension of certain rights, found in the right ‘to derogate’. The ECHR only allows for the suspension of human right leaving states with the right to derogate in “*time of war or other public emergency threatening the life of the, provided this is strictly required by the exigencies of the situation*”.¹² Moreover, it is a fact that the legality of any exceptions allowing a state for the suspension of certain right shall eventually become the subject of examination by the European Court of Human Rights (ECtHR). As a basic principle interference with fundamental rights can hence only be justified if they are in accordance with the objectives of the national security of a state, public safety, the economic well-being of the country, prevention of crime and disorder, and the protection of the right and freedom of others. ECHR also provides for the respect of privacy. However several security measures are believed to potentially impinging on this particular right, especially in respect to data protection.¹³

Internationally the EU in the area of Justice and Home Affairs (JHA), have increased its activities. In 2005 a counterterrorism strategy was established recognizing “that internal and external aspects of security are intimately linked”¹⁴. The EU has increased its cooperation with other actors and it has followed through on UN resolutions calling for targeted sanctions against groups and individuals considered to be involved in terrorists’ activities. The UN resolutions have been implemented in the institutional structure of the EU under the Common Foreign and Security Policy (CFSP) as well as under the Commission and Council regulations. As many of these measures frequently have been a subject to the Court of First Instance a significant case law has been developed regarding clarifications on smart sanctions and the relationship between EU law and International law. At the same time, in regard to external relations, there are a growing number of questions rising regarding human rights and the relation with third states. Concerns that here have been under debate are issues surrounding the death penalty, and the prohibition of torture. Other important elements in JHA are connected to extradition and deportation outside the EU where certain EU standards concerning human rights might be at odds. At the time of writing the EU is on its way of developing a five year plan for its JHA policy. The final strategy shall cover the period 2009-

⁹ Deliverable p. 7, Mathijsen, P. (2004). A Guide to European Union Law, Eight Edition, London: Sweet & Maxwell. pp. 187-188.

¹⁰ Fuster, Gonzales, Gloria, Paul De Hert, and Serge Gutwirth (2008), *State-of-the-art-report on the current scholarship on the Law-Security Nexus in Europe*. INEX Deliverable: D.2.1. Vrije Universiteit Brussel.p.16

¹¹ Ibidem, pp.7-8.

¹² Ibidem .p.8.

¹³ Ibidem, p9.

¹⁴ Ibidem, p.17.

2014. The important task of drafting initial consideration has been set to be performed by a special group called the Future Group.¹⁵ Their report was finalized in July 2008 in which they presented their initial findings (*titled: Freedom, Security and Privacy: European Home Affairs in an Open World*). The report contains a new vision of the balancing metaphor of Freedom vs. Security that is to be guided by a triangular vision of mobility, security and privacy¹⁶. It also suggests a new formulation of the balancing approach as “*balancing citizen’s expectations of privacy against their expectations of proactive protection*”. The WP2 has acknowledged that it is crucial to assess this vision with respect to the current knowledge on the “balancing approach”, as well as scholarship and finding on pro-active engagement in the name of security (see more on pro-active engagement below)¹⁷

A series of trends and paths especially requiring further consideration in the analysis of value assumptions linked to the cross-border legal dilemmas relevant to current and anticipated challenges of European security have been identified by the WP2. This report shall from here explore these findings further.

Security trends and European law

Development in the field of the protection of privacy in recent years indicates that, at least formally, extensive support is given to the right to data protection.¹⁸ However there seems to be a substantial gap in the EU legal framework developing it. By some data protection law has been referred to as having a character of “relativity” in respect to national security,¹⁹ thus making it difficult to implement. Another difficulty is how to successfully be able to implement the data protection law across “jurisdiction with different levels of protection”.²⁰ Further scrutiny of the development of EU data protection law can only confirm that there is an inherent double nature to the protection of data in Europe.²¹ In one way it may function as an obstacle to data processing by granting individuals subjective rights of privacy. However, at the same time it also enables and legitimizes such data processing in the name of security. In the Data Protection Directive Article 13 (1) a number of reasons are stipulated that allow for states to restrict data protection rights: “... (a) national security; (b) defence; (c) public security; (d) the prevention of investigation, detection and prosecution of criminal offence, or of breaches of ethics for regulated professions; (...) (g) the protection of the data subject or of the rights and freedoms of others”²² It is not to bold to state that security measures have a crucial impact on legal principles in data protection law. In this context it is necessary to explore how to maintain the core principles in data protection, referring to in particular the

¹⁵ Fuster, Gonzales, Gloria, Paul De Hert, and Serge Gutwirth (2008), *State-of-the-art-report on the current scholarship on the Law-Security Nexus in Europe*. INEX Deliverable: D.2.1. Vrije Universiteit Brussel. p.18.

¹⁶ Informal High Level Advisory Group on the Future of European Home Affairs Policy (‘The Future Group’) (2008), *Freedom, Security, Privacy: European Home Affairs in an open world*, Report, June.

¹⁷ Fuster, Gonzales, Gloria, Paul De Hert, and Serge Gutwirth (2008), *State-of-the-art-report on the current scholarship on the Law-Security Nexus in Europe*. INEX Deliverable: D.2.1. Vrije Universiteit Brussel. p33.

¹⁸ *Ibidem*, p.11

¹⁹ *Ibidem*, p.11,

²⁰ *Ibidem*, p.11

²¹ *Ibidem*, p.11

²² Fuster, Gonzales, Gloria, Paul De Hert, and Serge Gutwirth (2008), *State-of-the-art-report on the current scholarship on the Law-Security Nexus in Europe*. INEX Deliverable: D.2.1. Vrije Universiteit Brussel. 18p14.

subjective rights it gives to individuals, intact from slipping into constituting simply an enabler of data transfer, that are ‘deprived of any meaningful counter-powering strengths’. This is especially essential in the cross-border situation that the reinforcement of transatlantic cooperation with the US give rise to.²³

Technology in the name of security has come to receive a key role in European security²⁴. A trend that has been seen in particular since 9/11 is that several EU member states, on the national level, have supported an expansion of the legal frameworks monitoring communications, thus “taking advantage of new technological possibilities”.²⁵ As an example the Schengen provisions (agreed in 1985) will soon be implemented through the SIS II which will substitute the former SIS with new forms of how to check peoples identities (on the basis of biometric information).²⁶ The growing technological applications and the time and efforts spent on border control have lead to a shift in the discussion surrounding the common border management to a mere sense and definition of a common border security. Putting technology in relation to the protection of individual rights one may here understand the current development as constituting a ‘parallel tendency’. The work by WP2 indicates that there seems to be a tendency in accordance with a strong promotion of “privacy by design”, at the same time as it being occasionally ignored. There are even tendencies that would favor what can be labeled as “impossibility of privacy by design”, where decision makers appear to be increasingly reserved to impose requirements of privacy on technological procedures. Also to be mentioned is that several decision makers seem to be carrying out processes that aim to consider law making on measures such as the compulsory withholding of communications data²⁷.

The development of surveillance practices in different forms and scope shall be considered to be of main importance of the European security since 9/11. The concept of surveillance embodies several different practises. These can be divided into soft surveillance practises in the name of crime control directed towards the general population, and hard surveillance practises directed towards a minority.²⁸ These developments have important consequences for European law. National and European judiciary needs to further assure that “security measures do not delineate a surveillance society and are not implemented in violation of human rights”.²⁹ In the light of the evolution of new security technologies it is suggested by

²³ Ibidem, p.33

²⁴ Bigo, Didier, Philippe Bonditti, Julien Jeandesboz and Francesco Ragazzi (2008), *State-of-Art Review of Scholarly Research on Security Technologies and Their Relation to the Societies Which They Serve*, INEX Deliverable D.1.1., Centre d'Etudes sur les Conflits, Paris, November, p.4

²⁵ Ibidem, p.18

²⁶ Bigo, Didier, Philippe Bonditti, Julien Jeandesboz and Francesco Ragazzi (2008), *State-of-Art Review of Scholarly Research on Security Technologies and Their Relation to the Societies Which They Serve*, INEX Deliverable D.1.1., Centre d'Etudes sur les Conflits, Paris, November, p. 4.

²⁷ Fuster, Gonzales, Gloria, Paul De Hert, and Serge Gutwirth (2008), *State-of-the-art-report on the current scholarship on the Law-Security Nexus in Europe*. INEX Deliverable: D.2.1. Vrije Universiteit Brussel. P. 33

²⁸ Ibidem, p33

²⁹ Ibidem, p32.

²⁹ Fuster, Gonzales, Gloria, Paul De Hert, and Serge Gutwirth (2008), *State-of-the-art-report on the current scholarship on the Law-Security Nexus in Europe*. INEX Deliverable: D.2.1. Vrije Universiteit Brussel, p.33.

²⁹ Ibidem, 32

WP2 that future studies on the right to privacy needs to be complemented with the analysis of new rights, such as confidentiality of information systems, and the right to integrity.³⁰

It has been acknowledged that several new counterterrorism initiatives in Europe (as for the rest of the world) have a tendency to deal with counterterrorism in a 'precautionary' way. An evidence for this can simply be traced to the recognition of a broad definition of terrorism. Here acknowledged is the Council of Europe's decision in 2005 to open for signature on its convention on the Prevention of Terrorism, 'banning not only incitement but also public provocation when it *causes a danger* that a terrorist incident *may be committed*'.³¹ The findings by the Future Group also points in the direction of proactive engagement and moreover the EU counterterrorism strategy establishes in 2005 emphasize (among others³²) the aim to prevent major terrorist attacks from happening by focusing on prevention. The ways in dealing with prevention and establishing proactive engagement may be labeled as forward-looking security strategies, and they have the potential to become a problematic element in respect to European legal principles. The difficulty occurs from the very notion of forward looking strategies as establishing ways of identifying events or acts illegal that has yet to happen. This has a negative impact on legitimate dissent as well as facilitating arbitrariness.³³

A concrete development that fall in line with the forward-looking security strategies is the use of predictive data mining. This evolution contains risks and dangers that falls outside the scope of both the right to privacy and data protection. Since it may provoke, by its very nature 'deep discrimination' which in turn may give rise to concerns of 'social justice', it is suggested that this form of counterterrorism needs to be a subject of judicial review at the same time as technical safe guards based on oversight and review needs to be further developed. In this context it is necessary that legal principles (related to criminal law) such as the 'presumption of innocence' needs to be brought into the discussion of the future development and applicability of these new practices.³⁴

Also to be said is that an increasing activity from both the ECHR and ECJ (see also CFI above) on issues directly linked to legal challenges faced by EU security has provided important insights. The provided case law from EU institutions and national judiciary indicates that the European judiciary shares an interest in offering tools 'for the enhanced deployment of security policies'. It is suggested that this important case law needs to be further scrutinized in order gain a better insight and understanding for the legal challenges mentioned above. This shall be done at the same time as new security measures needs to be 'examined in time to ensure their optimal legislative development', particularly in regard to

³⁰ Ibidem.p.33

³¹ , Gonzales, Gloria, Paul De Hert, and Serge Gutwirth (2008), *State-of-the-art-report on the current scholarship on the Law-Security Nexus in Europe*. INEX Deliverable: D.2.1. Vrije Universiteit Brussel. p27.

³² The other aims stipulated in the 2005 EU counterterrorism strategy as fundamental in the strategy are: 'pursue' and 'respond'.

³³ , Gonzales, Gloria, Paul De Hert, and Serge Gutwirth (2008), *State-of-the-art-report on the current scholarship on the Law-Security Nexus in Europe*. INEX Deliverable: D.2.1. Vrije Universiteit Brussel. p. 26-30, 33

³⁴ Ibidem.p.33.

transparency. At the same time one shall take into account the future necessity for new safe guards in legal principles or with respect to technology.³⁵

In sum, the work produced by the WP2 indicate that there is ‘a series of friction’ between emerging and current EU security initiatives and principles inherent in EU law particularly in respect to the protection of individual rights.³⁶ It shall also be said that many of the security measures / practices supported and carried out by the EU have the potential of intrusion on to civil liberties and human rights. Some EU member states decisions to reinstate a tighter grip of its borders and new security initiatives adapted after 9/11, most notable corresponding to counterterrorism measures, indicates that the evolution of security constitute a substantial challenge for current and future EU legal principles, and the European community as a whole.

III. THE WAY FORWARD

Structuring of future work

WP2 have identified several issues mentioned above that need to be further addressed when continuing to explore the legal dilemma of the internal / external security continuum in Europe. These have been summarized in the periodic report as follows: ‘1) the use of the mobility, security, and privacy triangle metaphor; 2) the double nature of data protection law, which at the same time limits and enables data processing; 3) the risk of allowing the establishment an impossibility of privacy of design; 4) profiling and predicting data mining; 5) criteria and principles recently provided by case law of the European Court of Human rights and the European Court of Justice’.³⁷ The forthcoming deliverable that will be provided by WP2 labeled: D.2.2. *Analysis of the value dimension of European law relevant to current and anticipated challenges of the internal/external security continuum*, will be structured around these issues with the aim of deepening current understanding and explore their ethical implication.

Future work and synergies with other Work packages

The importance of security technologies and its implication on European legal principles have led to a logical and natural synergy affect between the WP2 and the WP1 on *Ethical Premises and Consequences of Security Technologies*. In their initial preparations of the first set of deliverables within the INEX project (2.1. *The Law-Security Nexus in Europe: State-of-the art report* and respectively D.1.1. *State of the art review of scholarly research on security technologies and their relation to the societies which they serve*), cross referencing between the work packages have taken place. In the Forthcoming work by the WP2, which mainly will be to prepare for the second deliverable on the “*Analysis of the value dimensions of*

³⁵ Ibidem, p33.

³⁶ Fuster, Gonzales, Gloria, Paul De Hert, and Serge Gutwirth (2008), *State-of-the-art-report on the current scholarship on the Law-Security Nexus in Europe*. INEX Deliverable: D.2.1. Vrije Universiteit Brussel, p.32.

³⁷ Project Periodic Report, INEX, *converging and Conflicting Ethical Values in the Internal / External Security Continuum in Europe*, 2009 p.10.

*European Law relevant to current and anticipated challenges of the internal / external security continuum*³⁸ the close collaboration with other work packages will continue, in particular with the WP1.

³⁸ Annex I: Description of Work, INEX Project: Converging and conflicting ethical values in the internal / external security continuum in Europe, prepared 31st January 2008, p. 29

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