

A CENTRAL COUNTERTERRORISM COALITION: AN ANALYSIS OF INTELLIGENCE SHARING AND THE CHALLENGES IT FACES IN THE EUROPEAN UNION

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I. INTRODUCTION

Recouping from two destructive world wars in the 20th century, the founders of the European Union sought to create a strong bond between Europe's nations. Centered on the principles of European integration,¹ they aimed to create a "framework and process upon which to build Regional Europe."² However, from the notion of regional unity arose national security concerns.

On January 7, 2015, two gunmen forced their way into a French publication's headquarters leaving twelve dead and eleven injured.³ Dubbed the *Charlie Hebdo* Shooting, the casualties of the attack included the editor of the magazine and three well-known cartoonists.⁴ Later that year, on the night of November 13, 2015, a series of six coordinated attacks broke out across the city of Paris leaving 130 dead and scores wounded.⁵ This tragedy is known as the Paris Attacks.⁶ Shortly thereafter, in March 2016, coordinated bombers struck Belgium at the Brussels Zaventem Airport and the metro center in Maelbeek.⁷ These public tragedies left more than

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1. RALPH H. FOLSOM, *PRINCIPLES OF THE EUROPEAN UNION BEYOND BREXIT* 5 (6th ed. 2021).

2. *Id.* at 7.

3. *Charlie Hebdo Attack: Witness Accounts*, BBC NEWS (Jan. 7, 2015), <https://www.bbc.com/news/world-europe-30720706>.

4. *Id.*

5. *November 2015 Attacks: A Timeline of the Night that Shook the French Capital*, FRANCE24 (Sep. 8, 2021), <https://www.france24.com/en/france/20210908-paris-november-2015-attacks-a-timeline-of-the-night-that-shook-the-city>.

6. *Id.*

7. Laura Wagner & Bill Chappell, *Terrorist Bombings Strike Brussels: What We Know*, NPR (Mar. 22, 2016), <https://www.npr.org/sections/thetwo->

thirty dead and roughly 200 injured.⁸ The Islamic State ultimately claimed responsibility for the attacks.⁹

It emerged that the identity of several Foreign Terrorist Fighters (“FTFs”)¹⁰ involved in the Paris Attacks was known to both French and Belgian officials.¹¹ The perpetrators of the Paris Attacks were based in Molenbeek, a municipality of the Brussels region, and prior to the attack, “Belgian law enforcement had identified some of the men who carried out [the Paris Attacks] as radical Islamists. They had questioned and monitored them. But they never detained them. Nor did the Belgians inform French authorities of their concerns.”¹²

This oversight made it clear that gaps exist between Member States’ intelligence sharing networks. Even though centralized organizations operate as platforms to share intelligence and even though EU governing bodies mandate agencies, notably Europol,¹³ to combat threats of terrorism, lapses in communication and coordination persist. In short, organizations are met with fraught challenges when compelling states to share intelligence because such cooperation has the potential to impede national sovereignty.

This article explores the intelligence system the EU built in recent years, especially in the wake of increased terrorist activity, and it ultimately addresses several issues that coordinated, transnational intelligence systems face. The article concludes that to facilitate a successful counterterrorism strategy, EU Member States will need to further strengthen their shared intelligence systems despite certain apprehensions regarding state sovereignty. Part I first reviews the EU

way/2016/03/22/471391497/what-we-know-terrorist-bombing-at-brussels-airport.

8. These are only three examples of a larger regional issue intensifying in Europe. *Id.*

9. *Id.*

10. Foreign Terrorist Fighters are defined as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.” S.C. Res. 2178, at 2 (Sept. 24, 2014).

11. Vivienne Walt, *Belgian Police Knew Where Paris Attacker Was Likely Hiding—and Did Nothing*, TIME (Mar. 25, 2016), <https://time.com/4272149/brussels-attacks-terror-investigation-mistake/> (noting that Belgian police knew where one of the Paris attackers was hiding, yet they did nothing with the information).

12. Maïa de la Baume & Giulia Paravicini, *The Belgian Intelligence Gap*, POLITICO (Nov. 18, 2015), <https://www.politico.eu/article/two-paris-attackers-were-questioned-freed-this-year-isil-terrorism-attacks/>.

13. See *About Europol*, EUROPOL, <https://www.europol.europa.eu/about-europol> (Feb. 4, 2022) (explaining that one of Europol’s unique services is being a focal point and hub for criminal activity information).

law-making process including a brief overview of where the EU, as a supranational entity, derives its power and how legislative acts parachute from the higher EU tier directly into domestic policy. It will also provide relevant caselaw that legitimizes the power of the EU as a regional unit. Furthermore, Section I will discuss the current state of terrorism in the EU and will illustrate how officials have responded to the growing threat of terrorist attacks through the law-making process, especially through the strengthening of shared intelligence systems. Section II highlights why the sharing of intelligence might not be instinctive to individual Member States who cling desperately to their sovereignty. Section II further asserts that, despite these apprehensions, it is in the best interests of the Member States to continue to work towards a coordinated intelligence system, and though the sharing of intelligence requires the divulgence of sensitive data across borders, such a system is crucial to upholding the safety of European Union citizens.

II. OVERVIEW OF EU LAW-MAKING AND BACKGROUND ON MODERN-DAY TERRORISM

A. TRADITIONAL NOTIONS OF STATE SOVEREIGNTY

Customarily, international law recognizes and upholds the sovereignty of states.¹⁴ For instance, one can turn to the Vienna Convention on the Law of Treaties to ascertain this notion.¹⁵ The Vienna Convention is an international agreement governing the force of treaties between states.¹⁶ In its text, the Vienna Convention recognizes and codifies a state's ability to enter into international agreements.¹⁷ Rather than allowing political organizations or private actors to participate in the treaty-making process, the Vienna Convention vests treaty-making power solely in states.¹⁸

An additional example is the principle of *par in parem non habet imperium* translating to "equals have no sovereignty over each other."¹⁹ This adage serves as the basis for sovereign immunity

14. Sovereignty is defined as "a country's independent authority and right of self-control." *Sovereignty*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sovereignty> (last visited Sept. 25, 2022).

15. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

16. *Id.*

17. *Id.* at art. 6.

18. *Id.*

19. AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW

wherein state officials and heads of governments cannot be subjected to the jurisdiction of another state because states are considered to be on equal footing.²⁰ Moreover, *par in parem non habet imperium* “has been construed to mean, or associated with, a whole spectrum of attributes of the State, such as sovereignty (or sovereign authority), equality, independence, ‘rights of liberty’, . . . ‘and independence of States one from the other.’”²¹

B. PRINCIPLES OF EUROPEAN POWER

The European Union model departs from this notion of individualized state sovereignty. Rather, the EU is regarded as a supranational entity.²² As a supranational entity, the governing bodies of the EU operate and construct relationships between states and even yield power over states.²³ The power comes from the consent of the states, and vis-à-vis their assent into international agreements codifying the formation of the European Union, Member States relinquish fragments of their sovereignty to the Union.²⁴

The EU derives its power from several sources including treaties and international caselaw.²⁵ The history of EU treaties is extensive²⁶ though two treaties, in particular, serve as the primary sources of law within the region: The Treaty on the Functioning of the European

224 (2021).

20. XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 54 (2012).

21. *Id.* at 55.

22. *E.g.*, *Supranational Decision-Making Procedures*, EUR. PARLIAMENT, <https://www.europarl.europa.eu/factsheets/en/sheet/8/supranational-decision-making-procedures> (last visited Mar. 6, 2022).

23. *Id.* (“Thus, EU institutions make supranational binding decisions in their legislative and executive procedures, budgetary procedures, appointment procedures and quasi-constitutional procedures.”).

24. *Id.* (“The Member States of the European Union have agreed, as a result of their membership of the EU, to transfer some of their powers to the EU institutions in specified policy areas. Thus, EU institutions make supranational binding decisions in their legislative and executive procedures, budgetary procedures, appointment procedures and quasi-constitutional procedures.”).

25. *See Founding Agreements*, EUR. UNION, https://european-union.europa.eu/principles-countries-history/principles-and-values/founding-agreements_en (last visited Mar. 6, 2022) (listing the governing treaties of the EU); *The European Union: What It Is and What It Does*, EUR. PARLIAMENT, <https://op.europa.eu/webpub/com/eu-what-it-is/en/> (last visited Mar. 6, 2022) (“Every action taken by the EU is founded on treaties that have been approved voluntarily and democratically by all EU countries.”).

26. The history spans from the Treaty of Paris establishing the European Coal and Steel Community in 1951 to the Treaty of Lisbon which came into force in 2009.

Union²⁷ (“TFEU”) and the Maastricht Treaty on the European Union²⁸ (“TEU”). Of importance, the TEU establishes that:

By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called ‘the Union’ . . . This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe . . . [The Union’s] task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.²⁹

The Treaty on the Functioning of the European Union further reiterates the notion of a unified Europe. At its forefront, the TFEU states that:

[The parties to the agreement] determined to lay the foundations of an ever closer union among the peoples of Europe, resolved to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe . . . anxious to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions . . . [and] intending to confirm the solidarity which binds Europe . . .³⁰

Furthermore, these treaties establish institutions within the European Union such as the Council,³¹ the Commission,³² and the Parliament³³ and each body is designated with specific responsibilities.³⁴ Supplemented by national legislatures, courts, and

27. Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

28. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1.

29. *Id.* at art. A.

30. TFEU, *supra* note 27, at pmb1.

31. Consolidated Version of the Treaty on European Union art. 16, May 9, 2008, 2008 O.J. (C 115) 13 [hereinafter TEU]; TFEU, *supra* note 27, at arts. 237–43.

32. TEU, *supra* note 31, at art. 17; TFEU, *supra* note 27, at arts. 234, 244–50, 290–91.

33. TFEU, *supra* note 27, at arts. 223–234, 314.

34. For instance, the Parliament “shares with the Council the power to legislate — to pass laws.” EUR. UNION, THE EUROPEAN UNION EXPLAINED – HOW THE EUROPEAN UNION WORKS 10 (2012), https://eeas.europa.eu/archives/delegations/singapore/documents/more_info/eu_publications/how_the_european_union_works_en.pdf. While, on the other hand, the Commission has the power “to propose legislation to

tribunals, the EU institutions enact laws that permeate through EU Member States, and through these political organs, the treaties allow for the creation of broadly sweeping EU-wide legislation.³⁵ The treaties recognize two primary types of legislative acts: directives and regulations. A regulation “shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”³⁶ On the other hand, directives require additional national action and “shall be binding, *as to the result to be achieved*, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”³⁷ Once a directive is passed, it must be transposed into domestic legislation and implemented by local authorities and administrators.³⁸

In comparison to the United States legislative system, EU directives can be likened to US agency regulations (despite the similarity of name to EU regulations).³⁹ First, Congress delegates power to a relevant federal agency via an enabling statute.⁴⁰ The enabling statute defines the boundaries of the agency’s regulatory power.⁴¹ From there, the agency promulgates intricate rules since agencies have more refined expertise on relevant subject matters—agencies essentially have their boots on the ground while Congress considers issues at a higher level.⁴² Additionally, EU regulations have a strength akin to that of the US Constitution since the Constitution “explicitly places federal law above state law, even state

Parliament and the Council; to manage and implement EU policies and the budget; to enforce European law (jointly with the Court of Justice); to represent the Union around the world.” *Id.* at 20. The Council also has the power to legislate, but additionally, it can develop a foreign and security policy and coordinates between Member States’ policies. *Id.* at 15.

35. FOLSOM, *supra* note 1, at 34.

36. TFEU, *supra* note 27, at art. 288.

37. *Id.* (emphasis added).

38. EUR. PARLIAMENT, BRIEFING REQUESTED BY THE JURI COMMITTEE: CHALLENGES IN THE IMPLEMENTATION OF EU LAW AT NATIONAL LEVEL 2 (2018) (“*Transposition* of EU law – ensuring that directives are transposed into domestic legislation – is a crucial first step to ensuring effective implementation and application of EU law on the ground. Once transposition has taken place, implementation takes place when local decision makers, administrators and national courts apply the law in practice.”).

39. Just as domestic legislatures in EU Member States must implement directives at the state level, so too must US federal agencies enact intricate regulations flowing from the broad mandates given from Congress. See LINDA D. JELLUM, *MASTERING LEGISLATION, REGULATION, AND STATUTORY INTERPRETATION* 316 (3d ed. 2020) (describing the federal agency process).

40. *Id.*

41. *Id.*

42. *Id.* at 349.

constitutions.”⁴³

In the EU, issues of state sovereignty have been brought before the Court of Justice of the European Union (“CJEU”).⁴⁴ Ripe for adjudication, the main issue the adjudicatory body faced was that “[n]one of the European Union treaties address[ed] the question of what to do when national and Union laws are in conflict . . . it was merely left to the European Court to resolve.”⁴⁵ Two cases in particular call attention to this issue, and they emphasize the supranational governing characteristics of the European Union.

First, decided in 1963, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* dealt with a Dutch transportation company having been charged a tariff for imports originating from Germany.⁴⁶ The company asserted that the duty rates were in clear violation of Article 12 of the Treaty of Rome.⁴⁷ *Van Gend en Loos* emphasized the power of “direct effect” and how regional decisions of the EU can parachute into national law.⁴⁸ Furthermore, by signing the Treaty of Rome, states agreed to a “new legal order . . . for the benefit of which the states have limited their sovereign rights . . .”⁴⁹ States, in effect, forfeited a degree of sovereignty to be a member of this international regional body.⁵⁰

A similar issue was subsequently raised in *Flaminio Costa v. Ente Nazionale per l’Energia Elettrica*.⁵¹ Following the nationalization of the electricity sector in Italy, Costa brought suit alleging that such

43. *Id.* at 316.

44. The Court of Justice of the European Union is tasked with “[e]nsuring EU law is interpreted and applied the same in every EU country . . . [and] ensuring countries and EU institutions abide by EU law.” Court of Justice of the European Union (CJEU), EUR. UNION (last visited Jan. 23, 2022), https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en.

45. FOLSOM, *supra* note 1, at 63.

46. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

47. Article 12 of the Treaty of Rome was replaced by Article 30 of the TFEU. Nonetheless, Article 12 of the Treaty of Rome states that “Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other.” Treaty Establishing the European Economic Community art 12, Mar. 25, 1957, 298 U.N.T.S. 3 (Treaty of Rome).

48. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

49. *Id.* at 12.

50. *Id.*

51. Case 6/64, *Flaminio Costa v. Ente Nazionale Energia Elettrica*, 1964 E.C.R. 585.

nationalization ran contrary to the Treaty of Rome.⁵² Conversely, the Italian government asserted that the law allowing for the nationalization was passed later in time, and since it was invoked after the Treaty of Rome, the domestic law should be controlling.⁵³ Calling upon Article 189 of the Treaty of Rome, the CJEU held that “[t]he precedence of Community law is confirmed by Article 189, whereby a regulation ‘shall be binding’ and ‘directly applicable in all Member States’.”⁵⁴ The Treaty of Rome, in effect, created its own legal system which was now an integral part of the Member States, and national courts were bound to comply with it after ratifying the agreement.⁵⁵ Member States could not simply nullify the Treaty of Rome by passing contradictory domestic laws since doing so would make the Treaty of Rome ineffective.⁵⁶

Thus, these two cases, coupled with the treaties establishing the formation of the European Union, created a supranational entity in which international law was comingled with domestic law.

C. COUNTERTERRORISM IN THE EUROPEAN UNION

1. Perpetrators of Terrorism in the EU

Per Directive 2017/541, the European Union defines terrorist offenses as acts “committed with [the aim of]:... seriously intimidating a population; unduly compelling a government or international organisation to perform or abstain from performing any act; seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.”⁵⁷ Several other acts are related to terrorist offenses, even if an act was not effectively committed.⁵⁸ Such other acts include, but are not limited to: distributing, whether online or offline, a message with the intention of inciting a terrorist offense, for example by glorifying terrorist acts;⁵⁹ providing or receiving

52. *Id.* at 588.

53. *Id.*

54. *Id.* at 594.

55. *Id.* at 593.

56. *Id.*

57. Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, art. 3, 2017 O.J. (L 88) 6 [hereinafter Directive 2017/541].

58. *See id.* at arts. 5–23.

59. *Id.* at art. 5.

training for terrorist purposes, for example, in the making or use of explosives, firearms or hazardous substances;⁶⁰ and travelling inside, outside or to the EU for purposes of terrorism.⁶¹

Furthermore, participants in terrorist offenses and terrorist-related activities are found to be both transnational and national in nature. Europol published a report in August 2021 detailing the current state of terrorism in Europe.⁶² According to the report, offenders both “entered the EU as asylum seekers or irregular migrants; in four cases they had entered the EU several years before carrying out their attack.”⁶³ Others already held EU citizenship and instead fell to the invitations proliferated through online terrorism propaganda.⁶⁴

Transnational attackers largely benefit from the Schengen System which operates throughout Europe.⁶⁵ Though non-EU members are part of the Schengen System and some EU members have opted out of the system,⁶⁶ the system was created with the intent of “free movement[,]” allowing “every EU citizen to travel, work and live in any EU country without special formalities. Schengen underpins this freedom by enabling citizens to move around the Schengen Area without being subject to border checks.”⁶⁷ Though checkpoints are available, the connectivity within the EU provides a gateway for malicious activity.⁶⁸ National governments lose track of suspected terrorists as they cross the border into different countries.⁶⁹ For example, Ibrahim el-Bakraoui, a participant in the

60. *Id.* at art. 6–8.

61. *Id.* at art. 9.

62. EUROPOL, EUROPEAN UNION TERRORISM SITUATION AND TREND REPORT 2021 (2021) [hereinafter 2021 EUROPOL REPORT].

63. *Id.* at 14.

64. *Id.* at 16.

65. The Schengen Area is a “border-free” region and “[t]he Schengen provisions abolish checks at EU’s internal borders, while providing a single set of rules for controls at the external borders applicable to those who enter the Schengen area for a short period of time (up to 90 days).” *Schengen Area*, EUR. COMM’N, https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-area_en (last visited Oct. 6, 2022).

66. *Id.*

67. *Id.*

68. JOHN THEODORE ET AL., THE EUROPEAN UNION AND THE EUROZONE UNDER STRESS: CHALLENGES AND SOLUTIONS FOR REPAIRING FAULT LINES IN THE EUROPEAN PROJECT 59 (2017) (“[Schengen] has, therefore, facilitated a scenario by which people entering, legally or illegally, one nation of the EU have much easier access to the entire region.”).

69. Willemijn Tiekstra, *Free Movement Threatened by Terrorism: An Analysis of Measures Proposed to Improve EU Border Management*, INT’L CTR. FOR COUNTERTERRORISM 3–4 (2019).

2016 Brussels Airport bombings, had an extensive criminal record in Belgium.⁷⁰ In June 2015, prior to the bombings, el-Bakraoui was detained in Gaziantep, Turkey along the Syrian border and later deported to the Netherlands.⁷¹ He carried a passport of a Schengen state and could lawfully be deported to any of the Schengen countries.⁷² Turkish authorities, not having access to the Schengen Information System, notified the Netherlands that el-Bakraoui was a suspected FTF, but this notification went unnoticed.⁷³ Per Dutch intelligence officials, “his name did not appear on any blacklists so he was not detained.”⁷⁴

Additionally, the EU itself is a hotbed for homegrown terrorists as susceptible individuals find solace online.⁷⁵ Markedly with cases involving jihadist terrorism,⁷⁶ the 2021 Europol Report observed that “[p]ropaganda by jihadist terrorist groups outside the EU continued providing extremist narratives and online content to jihadists in Europe. The self-proclaimed Islamic State (IS) terrorist group and the al-Qaeda network continued inciting lone actor attacks in Western countries.”⁷⁷ One explanation for the success of online recruitment methods is that a number of second-generation persons find it difficult to assimilate into society, suffering from “social and personal grievances and issues of identity . . . [they] find it difficult to fit within either the traditional culture of their parents or the modern Western culture of the countries where they reside.”⁷⁸ Online recruiters take note of this fragility, as the 2021 Europol Report observes, and “[p]ropaganda activities continued to be one of the most prevalent

70. *Id.*

71. *Id.*

72. *Id.* at 4.

73. *Id.* at 4.

74. *FBI Warned Dutch About El Bakraoui Brothers Week Before Brussels Attacks*, REUTERS (Mar. 29, 2016), <https://www.reuters.com/article/us-belgium-blast-netherlands/fbi-warned-dutch-about-el-bakraoui-brothers-week-before-brussels-attacks-idUSKCN0WV1ZY>.

75. 2021 EUROPOL REPORT, *supra* note 62, at 50 (“Recruitment for jihadist terrorism takes place within online and offline networks, often without direct links to terrorist organisations.”).

76. *See id.* at 43 (“Jihadism is defined as a violent sub-current of Salafism, a revivalist Sunni Muslim movement that rejects democracy and elected parliaments, arguing that human legislation is at variance with God’s status as the sole lawgiver. Jihadists aim to create an Islamic state governed exclusively by Islamic law (shari’a), as interpreted by them. Major representatives of jihadist groups are the al-Qaeda network and the self-proclaimed Islamic State (IS) terrorist group.”).

77. *Id.* at 42.

78. ANGEL RABASA & CHERYL BENARD, EUROJIHAD: PATTERNS OF ISLAMIST RADICALIZATION AND TERRORISM IN EUROPE 58 (2015).

charges in jihadist terrorism-related arrests in 2020.”⁷⁹

2. EU Counterterrorism Measures

The governing texts of the EU provide direction for combatting terrorism. First, the original Treaty of the European Union specifically mandates that:

For the purposes of achieving the objectives of the Union, . . . Member States shall regard the following as matters of common interest: . . . police cooperation for the purposes of preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).⁸⁰

Following the mandate of the treaty and in the wake of various attacks, EU officials specifically enacted counterterrorism measures to address the developing nature of terrorists.⁸¹ Through legislation, EU officials created both binding and non-binding obligations.⁸² For an example of non-binding guidance, Member States can reference the EU Counter-Terrorism Strategy 2005 adopted by the European Council.⁸³ It commits the Union to combatting terrorism globally and is built around four strategies: to Prevent, to Protect, to Pursue, and to Respond.⁸⁴

More importantly, EU legislative organizations enacted a series of binding obligations through the promulgation of directives and

79. 2021 EUROPOL REPORT, *supra* note 62, at 51.

80. Treaty on European Union art K.1, Feb. 7, 1992, 1992 O.J. (C 191) 1 (emphasis added).

81. Christine Andreeva, *The Evolution of Information-Sharing in EU Counterterrorism Post-2015: A Paradigm Shift?*, 7 GLOB. AFFS. 751, 758 (2021) (noting the timeline of attacks in Europe that were ultimately followed by legislation, strategies, and the creation of institutions).

82. Compare Directive 2017/541, *supra* note 57, at 20 (demonstrating that as a “directive” per EU legislation, enactment of the measure is mandatory and binding), with Council of the European Union, *The European Counter-Terrorism Strategy*, at 3, 14469/4/05 REV 4 (Nov. 30, 2005) (demonstrating that as a strategy, this document is influential but technically non-binding).

83. Council of the European Union, *The European Counter-Terrorism Strategy*, 14469/4/05 REV 4 (Nov. 30, 2005).

84. *Id.* at 3.

regulations.⁸⁵ For example, in March 2017, the Council adopted a directive to combat terrorism which strengthens the existing legal framework the EU employs to prevent terrorist attacks and addresses the phenomenon of FTFs.⁸⁶

As a result of the widespread nature of terrorist attacks, intelligence sharing was notably expanded vis-à-vis binding obligations.⁸⁷ The U.N. Office on Drugs and Crime has defined intelligence as: “Information that is capable of being understood[;] [i]nformation with added value[;] [i]nformation that has been evaluated in context to its source and reliabilityInformation is quite simply raw data of any type, whilst in contrast intelligence is data which has been worked on, given added value or significance.”⁸⁸ Intelligence sharing is further defined as “a form of international cooperationIntelligence sharing delivers to at least one participating state the benefits of more or better intelligenceIntelligence is shared when one state—the sender—gives intelligence in its possession to another state—the recipient.”⁸⁹

The following developments are several critical intelligence sharing mandates. First, adjustments to the Schengen Information System (“SIS”) were made.⁹⁰ SIS is a data tool that helps police officials

85. See, e.g., Directive 2017/541, *supra* note 57; Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the Use of Passenger Name Record (PNR) Data for the Prevention, Detection, Investigation and Prosecution of Terrorist Offences and Serious crime, 2016 O.J. (L 119) 132 [hereinafter Directive 2016/681]; Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the Establishment, Operation and Use of the Schengen Information System (SIS) in the Field of Police Cooperation and Judicial Cooperation in Criminal Matters, Amending and Repealing Council Decision 2007/533/JHA, and Repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, 2018 O.J. (L312) 56 [hereinafter Regulation 2018/1862].

86. Directive 2017/541, *supra* note 57.

87. Andreeva, *supra* note 81, at 769 (“[T]his critical juncture also produced a long-lasting bracket of reforms, impacted by (and further impacting) shifts of perception on terrorism and counter-terrorism in Europe, leading to a paradigm shift of beliefs and practices.”).

88. E.g., U.N. OFF. ON DRUGS & CRIME, CRIMINAL INTELLIGENCE: MANUAL FOR ANALYSTS, 1 (2011); see also JAMES IGOE WALSH, THE INTERNATIONAL POLITICS OF INTELLIGENCE SHARING 5–6 (2010) (“[T]he collection, protection, and analysis of both publicly available and secret information, with the goal of reducing decision makers’ uncertainty about a foreign policy problem. Intelligence is a type of, but is not synonymous with, information. Intelligence is information, or a process of obtaining information, that someone prefers to be kept secret.”).

89. JAMES IGOE WALSH, THE INTERNATIONAL POLITICS OF INTELLIGENCE SHARING 5–6 (2010).

90. See Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the Use of the Schengen Information System for the Return of Illegally Staying Third-Country Nationals, 2018 O.J. (L 312) 1; Regulation

obtain information about potentially dangerous individuals for the purposes of national security, border control, and law enforcement.⁹¹ On November 28, 2018, the European Commission approved a legislative act which was to be made fully operational in EU Member States by December 28, 2021.⁹² Pursuant to the act, SIS was to be enhanced through the processing of both biometric data⁹³ and terrorism-related activities to allow policing officials to better combat serious acts of terrorism.⁹⁴

In passing Directive 2016/681 in April 2016, the European Parliament and Council adopted a provision for a Passenger Name Records (“PNR”) Package for the “prevention, detection, investigation and prosecution of terrorist offences and serious crime.”⁹⁵ In defining the responsibilities of Member States, Directive 2016/681 instructed that “Member States shall establish or designate an authority competent for the prevention, detection, investigation or prosecution of terrorist offences and of serious crime or a branch of such an authority, to act as its passenger information unit (“PIU”).”⁹⁶ Notably, the directive also instructed states to “exchang[e] both PNR data and the result of processing those data with the PIUs of other Member States and with Europol”⁹⁷

Finally, Europol’s mandate was strengthened. Europol’s Executive Director Catherine De Bolle describes the organization as a mandated entity that:

[m]ak[es] Europe safer by supporting EU law enforcement in their fight against terrorism, cybercrime and other forms [of] serious and organised crime. As the EU agency for law enforcement cooperation, Europol collects information from ongoing investigations from EU Member States and non-EU

(EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the Establishment, Operation and Use of the Schengen Information System (SIS) in the Field of Border Checks, and Amending the Convention Implementing the Schengen Agreement, and Amending and Repealing Regulation (EC) No 1987/2006, 2018 O.J. (L 312) 14; Regulation 2018/1862, *supra* note 85.

91. *What is SIS and How Does It Work?*, EUR. COMM’N, https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-information-system/what-sis-and-how-does-it-work_en (last visited Oct. 7, 2022).

92. Regulation 2018/1862, *supra* note 85, at art. 79.

93. *Id.* at 58.

94. *Id.* at 62.

95. Directive 2016/681, *supra* note 85; *see also Passenger Name Record (PNR)*, EUR. COMM’N, https://ec.europa.eu/home-affairs/policies/law-enforcement-cooperation/passenger-name-record-pnr_en (last visited Oct. 7, 2022).

96. Directive 2016/681, *supra* note 85, at art 4.

97. *Id.*

countries, to make connections and find relevant links to provide actionable intelligence and leads in return. As a criminal information hub, it connects EU Member States with its operational partners like Canada, Colombia, and the US, which has liaison officers at Europol from 13 federal agencies including the FBI, US Secret Service and Customs and Border Protection.⁹⁸

Following the Paris Attacks, Regulation 2016/794 was passed by the European Parliament and Council and aimed to “amend and expand” Europol’s previous mandate.⁹⁹ Notably, the regulation called upon Member States to strengthen mutual cooperation to prevent and combat terrorism.¹⁰⁰ To do this, the mandate initiated several tasks for Member States including “collecting, storing, processing, analysing and exchanging information including criminal intelligence,”¹⁰¹ as well as “notifying EU countries, via Europol national units, without delay, of any information and connection between criminal offences concerning them.”¹⁰²

Additionally, Europol’s Secure Information Exchange Network Application (“SIENA”) is a data exchange platform used by Europol officers, Member States, and third parties with whom Europol has agreements.¹⁰³ It, too, continues to be enhanced, and in recent years, “[a] specific SIENA framework has been developed to allow handling of restricted content on counter-terrorism. In response, counter terrorism units connected to the platform, thus enhancing the exchange of information and intelligence in this key area.”¹⁰⁴

98. Catherine de Bolle, *The Role of Europol in International Interdisciplinary European Cooperation*, 19 EUR. POLICE SCI. & RES. BULL. 17, 18 (2020).

99. Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and Replacing and Repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, 2016 O.J. (L 135) 53, 54.

100. *Id.* para. 13.

101. *European Union Agency for Law Enforcement Cooperation (Europol): Summary of Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol)*, EUR-LEX, <https://eur-lex.europa.eu/legal-content/En/LSU/?uri=CELEX%3A32016R0794> (last visited Sept. 26, 2022).

102. *Id.* (emphasis removed).

103. *Secure Information Exchange Network Application (SIENA): Ensuring the Secure Exchange of Sensitive and Restricted Information*, EUROPOL, <https://www.europol.europa.eu/operations-services-and-innovation/services-support/information-exchange/secure-information-exchange-network-application-siena> (June 10, 2022).

104. *Id.*

III. ANALYSIS

Despite the bolstering of intelligence sharing platforms and organizations, Member States are, nevertheless, hesitant to share intelligence across state boundaries. This section will argue that, despite certain hesitations and impediments, a coordinated regime is beneficial to individual Member States. Specifically, this section will look at two obstacles in particular: (1) a number of the counterterrorism measures passed by legislation are directives, and directives only mandate the end result achieved but give states discretion when implementing national policies;¹⁰⁵ and (2) though the EU saw the strengthening of resources and increased use of intelligence sharing platforms following several attacks in the mid-2010s, states may be reluctant to participate in shared intelligence networks due to a lack of trust in a shared system and conflicts with state sovereignty.¹⁰⁶

A. DUE TO ISSUES OF SOVEREIGNTY, HESITATIONS LIKELY REMAIN RESOLUTE AMONG EU MEMBER STATES WHEN SHARING INTELLIGENCE

1. Counterterrorism Measures Are Largely Passed Via Directives, and This Allows for Detrimental Maneuverability by Domestic Lawmakers

As stated above, directives, rather than regulations, are law-making tools that are binding as to the result achieved, yet they allow for individual discretion as to the method in which that goal is reached.¹⁰⁷ Because states are given broad discretion regarding the processes in which to apply counterterrorism measures, this can lead to significant differences among Member States when they enact and implement statewide laws.¹⁰⁸ As an example, recall that Directive

105. See *Country Profiles On Counter-Terrorism Capacity*, COUNCIL OF EUR., <https://www.coe.int/en/web/counter-terrorism/country-profiles> (last visited Oct. 11, 2022) (publishing country profiles containing information on the counterterrorism related legislation and policies of Member States).

106. Christine Yurechko, *Outsourced: The European Union's Reliance on External Actors in the Fight Against Jihadi Terrorism*, 24 COLUM. J. EUR. L. 737, 775–76 (2017).

107. TFEU, *supra* note 27, at art. 288.

108. EUR. PARLIAMENT, BRIEFING REQUESTED BY THE JURI COMMITTEE: CHALLENGES IN THE IMPLEMENTATION OF EU LAW AT NATIONAL LEVEL 3 (2018) (“Ensuring implementation of EU law that conforms to original intention of the drafters is fraught with difficulty: each actor beyond national legislators ultimately influence the way in which EU law is applied on the ground.”).

2017/541 was passed following the Paris Attacks.¹⁰⁹ Under Title II of the Directive, the European Commission established a list of offenses that constitute a terrorist act.¹¹⁰ Furthermore, the Directive instructed that “Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 8 September 2018.”¹¹¹

Some states acquiesced and enacted the requisite laws to bring their state legislations into harmony with the directive. Namely, “[t]he French legislation applicable at the time of the entry into force of the EU Directive 2017/541 was already fully in line with the directive.”¹¹² Conversely, other states wholly failed to meet the September 2018 deadline, and as of June 2021, “[t]he Commission . . . open[ed] infringement procedures . . . to Bulgaria, Germany, Poland and Portugal for failing to correctly transpose certain elements of the EU rules on combating terrorism (Directive (EU) 2017/541), namely on the definition of terrorist offences and the rights of victims of terrorism.”¹¹³ Thus, across Member States, there was a deviation when transposing the directive into state law.

Though directives “set[] out a goal that all EU countries must achieve . . . [.]” they, nonetheless, allow for discoordination during implementation and leave it “up to the individual countries to devise their own laws on how to reach these goals.”¹¹⁴ Such divergence is detrimental to combatting terrorism, for it makes a coordinated counterterrorism regime across the EU nearly impossible. For instance, given the above, France has strictly applied the definition of “terrorist” as established by the directive in its national counterterrorism schema. On the other hand, as noted above, Germany, Bulgaria, Poland, and Portugal failed to timely adopt the definition of “terrorist” altogether. Therefore, the aforementioned states could conduct dissimilar counterterrorism investigations since they are in discord over the meaning of the word “terrorist.” Without

109. Directive 2017/541, *supra* note 57.

110. Such acts include, but are not limited to, the following: 1) attacks upon a person’s life which may cause death; 2) kidnapping or hostage-taking; and 3) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life. *Id.* at tit. II.

111. *Id.* at art. 28(1).

112. COUNS. OF EUR. COMM. OF EXPERTS ON COUNTER-TERRORISM, PROFILES ON COUNTER-TERRORIST CAPACITY: FRANCE 10 (2021), <https://rm.coe.int/profile-france-2021-cdct-/1680a44e0c>.

113. European Commission Press Release, June Infringements Package: Key Decisions (June 9, 2021), https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743.

114. *Types of Legislation*, EUR. UNION, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en (last visited Oct. 12, 2022).

an agreed-upon definition, officials in one state will believe an act amounts to a terrorist-related activity whilst in another state, the same or equivalent action might not meet the bar of prosecution.

One reason for this disconnect is that each Member State maintains distinct national security goals, and states perceive national security threats differently. Officials must appeal to their own individual citizens and address the issues they are currently facing in order to keep the public's confidence in the efficacy of the current state government. When enacting directives at the national level, state actors are, therefore, compelled to endorse laws that are in accordance with their specific customs and norms, and they will shepherd in legislation that maximizes national support. Countries experiencing increased threats of terrorism might elect for more stringent laws while states that historically do not have high levels of terrorist activity might advocate for minimal counterterrorism-governing protocols. In systems that depend on the vote of constituents, state officials are nonetheless compelled to pass laws that are not divisive and can pass through the system with ease.

However, why might similarly situated states, for instance France and Germany, deviate so starkly? Both France and Germany share a border and both experienced deadly terrorist attacks,¹¹⁵ yet France adopted Directive 2017/541 while Germany missed the mandated deadline completely. It is not that German officials simply did not care about the issue of terrorism, but rather German legislation already addressed the issue at the national level prior to the enacted directive.¹¹⁶ Thus, an additional explanation for this disconnect could be that once state laws are already in effect and address the issue directives seek to regulate, it is hard to maneuver existing domestic legislation into compliance with mandates enacted at the EU-level.¹¹⁷

115. For instance, three Member States including Austria, France, and Germany suffered ten jihadist attacks in 2020. The completed attacks killed 12 people. 2021 EUROPOL REPORT, *supra* note 62, at 13. Additionally, France identified 1,451 French citizens or foreigners (aged 13 or over) who had travelled from France to the Iraq/Syria region since 2012 for terrorism-related travel; Germany followed close behind having identified 1,070 individuals. *Id.* at 62.

116. Directive 2017/541 was enacted in 2017. Directive 2017/541, *supra* note 57. At the time, Germany already had a "comprehensive counterterrorism legislation." U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2016 124 (July 2017). For instance, on July 29, 2016, Germany adopted an act to improve information exchange amongst authorities dealing with terrorism and the aim of the act was to strengthen German domestic intelligence agencies. *Id.*

117. Gerda Falkner et al., *Non-Compliance with EU Directives in the Member States: Opposition Through the Backdoor?*, 27 W. EUR. POL. 452, 466 (2007) ("In cases where in the very same issue area a national reform process has already been going on (as is often the case with working time regulation), it is plausible that

Though French legislation was already fully in line with the directive¹¹⁸ (i.e. French officials would not need to change the course of enacted legislation), it could be that other similarly situated states prioritize keeping domestic policies consistent rather than fully transposing mandated directives.¹¹⁹

2. Furthermore, States Remain Reluctant Because Intelligence Sharing Requires the Disclosure of Sensitive Material

Though bodies such as Europol exist and though intelligence sharing networks are in place to facilitate the safe transfer of information between Member States (i.e. SIS, SIENA and Europol, and PNR), state officials nonetheless remain reluctant to share such material transnationally.¹²⁰ For instance, in a communication published by the European Commission, policymakers noted that “Member States do not adequately share information with Europol (and thereby each other).”¹²¹ Furthermore, the Commission urged Member States to partake in a coordinated system because “the time ha[d] come within the EU for a more coherent approach, one giving the Europol channel a central role [T]he SIENA tool should become the default channel.”¹²² Evidently, states and national policing officials do not trust these shared intelligence systems and are hesitant to utilize the systems promulgated at the supranational level.¹²³

governments cannot easily set the implementation of EU law apart from the other reforms under consideration.”).

118. COUNS. OF EUR., *supra* note 112.

119. Falkner et al., *supra* note 117, at 463 (“Issue linkage can be pursued for some time until it becomes clear that transposition on the basis of this linkage is impossible, the transposition is unlinked and the discussion of critical points is transferred to a later reform.”).

120. Hartmut Aden, *Information Sharing, Secrecy and Trust Among Law Enforcement and Secret Service Institutions in the European Union*, 41 W. EUR. POL. 981, 987 (2018) (“Even if information sharing for security purposes has been more and more regulated and facilitated by EU law and procedural standards, the member states and their police agencies still have broad discretion in keeping information secret from Europol or from law enforcement agencies in other member states.”).

121. *Communication from the Commission to the European Parliament and the Council on Strengthening Law Enforcement Cooperation in the EU: The European Information Exchange Model (EIXM)*, at 9, COM (2012) 735 final (Dec. 7, 2012).

122. *Id.* at 10.

123. *E.g.*, WALSH, *supra* note 88, at 5 (2010) (“The most important barrier to intelligence sharing is the fear that other participants will defect, in the sense of violating their agreement to cooperate”); Richard J. Aldrich, *Intelligence and the European Union*, in THE OXFORD HANDBOOK OF THE EUROPEAN UNION 627, 627–642 (Erik Jones, Anand Menon & Stephen Weatherill eds., 2012) (“Europol’s counter-

One reason that such a phenomenon is likely taking place is because officials place more confidence in their own nation's security systems rather than relying on a shared system wherein, they cannot guarantee their neighbors will treat sensitive intelligence with the same level of care. The European Union is a 27-state multinational entity; however, each individual nation has a different history, different intelligence capabilities and officer training, different experience with terrorism, and most importantly, different political, economic, and geopolitical goals. As an example, France experienced 273 Jihadist-related arrests in 2018 while Denmark experienced only three arrests.¹²⁴

Because of their individual goals, states also tend to have their own privacy laws. For instance, though the European Commission broadly adopted the PNR directive in 2016,¹²⁵ states employ different protocols when granting access to citizens' private information.¹²⁶ Additionally, certain states fought against the implementation of PNR.¹²⁷ On one hand, French agencies maintain a high bar—they have a Passenger Information Unit (PIU) that uses PNR data to screen individuals.¹²⁸ However, such information is only accessible to French PIU staff per French privacy laws, and requests to access such information are approved on a case-by-case basis.¹²⁹ Denmark, on the other hand, is not bound to the broad sweeping PNR directive, and per the text of the directive, Denmark “is not taking part in the adoption of this Directive and is not bound by it or subject to its application.”¹³⁰ Thus, while France transposed the EU directive regarding PNR,¹³¹

terrorism intelligence effort is mostly symbolic . . . Practitioners have argued that trying to develop European ‘clearing houses’ that would pool all European intelligence centrally would be a mistake, since informal networks tend to be more efficient.”).

124. 2021 EUROPOL REPORT, *supra* note 62, at 17.

125. Directive 2016/681, *supra* note 85.

126. Compare COUNS. OF EUR., *supra* note 112, at 10, with Directive 2016/681, *supra* note 85, at 136 (“Denmark is not taking part in the adoption of this Directive . . .”).

127. For example, Spain was against the implementation of the PNR and was accused of infringing the Directive. European Commission Press Release, Security Union: Commission Decides to Refer Spain to the Court for Not Transposing EU Rules on Passenger Name Records (June 2, 2020), https://ec.europa.eu/commission/presscorner/detail/EN/IP_20_1246.

128. Bureau of Counterterrorism, *Country Reports on Terrorism 2019: France*, U.S. DEP’T OF STATE, <https://www.state.gov/reports/country-reports-on-terrorism-2019/france/> (July 29, 2020).

129. *Id.*

130. Directive 2016/681, *supra* note 85, at 136.

131. Press Release, Passengers Information Unit France, Transposition by France of the EU Directive 2016/681 Related to the Use of PNR Data for Fight Against

Danish officials were left to implement their own national laws that may or may not be in harmony with the PNR directive. Furthermore, several states objected to the PNR system and took longer to implement the directive.¹³² Thus, because of differences between countries, not only are Member States implementing different methods regarding this EU directive, but states also implemented the directive at different points in time leading to a discombobulation of the system.

At a high level, states are overwhelmingly hesitant to rely on shared systems, and these wary sentiments likely percolate down to individual officers and their decision-making processes. Such sentiments also help explain why a centralized system is not currently effective. Presently, police officials face significant issues when communicating across borders with the European Commission observing that, “[t]he current rules on information exchange and police cooperation in the EU have proven not to be sufficiently clear, leading to uncertainty, diverging practices across Member States and practical obstacles to cooperation.”¹³³ This was published in response to Council Framework Decision 2006/960/JHA¹³⁴ which aimed to simplify the exchange of information and intelligence between law enforcement authorities of the Member States¹³⁵ but has since had issues in being effective.¹³⁶

One reason individual officers are wary to share information directly ties to the issue of sovereignty—if intelligence is considered a valuable commodity or costly asset, then officers may believe that, “[k]nowing something is an advantage that can be used to get

Terrorism and Serious Crime (June 9, 2018), <https://pnr.gouv.fr/eng/News/Transposition-by-France-of-the-EU-Directive-2016-681-related-to-the-use-of-PNR-data-for-fight-against-terrorism-and-serious-crime>.

132. For instance, the Commission decided to refer Spain to the Court of Justice of the EU for delay in transposing EU rules on the use of passenger name record data per Directive 2016/681. The Directive was adopted in April 2016 and Member States agreed to transpose it into national law by May 25, 2018. European Commission Press Release, Security Union: Commission Decides to Refer Spain to the Court for Not Transposing EU Rules on Passenger Name Records (June 2, 2020), https://ec.europa.eu/commission/presscorner/detail/EN/IP_20_1246.

133. European Commission Press Release, Police Cooperation Code: Questions and Answers (Dec. 8, 2021), https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_6646.

134. Council Framework Decision 2006/960/JHA of 18 December 2006 on Simplifying the Exchange of Information and Intelligence Between Law Enforcement Authorities of the Member States of the European Union, 2006 O.J. (L 386) 89.

135. *Id.*

136. European Commission Press Release, *supra* note 133 (“The Decision has however proven difficult to implement and enforce, meaning rules and practices differ at national level, impeding the efficient flow of information.”).

information from another agency in return.”¹³⁷ Acquiring more assets places one in a more advantageous position should a conflict ever arise.¹³⁸ Moreover, state governments spend a significant amount of time, money, and resources when gathering and analyzing intelligence and, ultimately, would like to be credited for their work.¹³⁹ Giving out intelligence freely on shared platforms can be deemed unfair by those who spend increased amounts on their intelligence and security efforts.¹⁴⁰ Finally, the sharing of information could be regarded as a weakness, and such weakness is not conducive in a world that is constantly in conflict.¹⁴¹

Additionally, officers may be reluctant to share intelligence (and rather hoard it) because successful apprehension of suspected terrorists relies on discretion, and officials would rather keep knowledge within the scope of a limited party.¹⁴² Communicating potential security threats across borders may allow important knowledge to be inadvertently disclosed thus harming efforts to defend against national security threats. Even if the EU intelligence-sharing online systems are fortified and guarantee security, officers can nonetheless share material they acquire by word of mouth.¹⁴³ Because of this, it might be difficult to pinpoint who, precisely, let slip the classified intelligence given that officers do not work in close proximity to one another and are, rather, sharing intelligence across state boundaries with their fellow Member States. In one fell swoop, confidence in a shared intelligence system can be broken if information is inadvertently disclosed to an undeserving party. Thus,

137. Aden, *supra* note 120, at 985.

138. See JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 53–54 (2001) (“[T]he structure of the international system, not the particular characteristics of individual great powers, causes them to think and act offensively and to seek hegemony . . . the principal motive behind great-power behavior is survival.”).

139. WALSH, *supra* note 88, at 6.

140. *Id.*

141. See THOMAS HOBBS, *LEVIATHAN* 98 (Oxford Univ. Press 1909) (1651) (“[I]n all times, Kings, and Persons of Sovereigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators ; having their weapons pointing, and their eyes fixed on one another ; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes ; and continuall Spyes upon their neighbours ; which is a posture of War.”).

142. See Aden, *supra* note 120, at 984 (“When security agencies keep information secret, they often aim to avoid disclosing their tactics and strategies. Letting criminals know early that they are under surveillance would warn them and endanger further efforts to collect evidence.”).

143. See WALSH, *supra* note 88, at 10 (explaining that states sometimes renege on their agreements to keep shared intelligence secret because it might be in their best interest and also because officials inadvertently share the information they acquire).

this will likely lead officers to share only information with those that they can “trust,”¹⁴⁴ rather than blindly rely on online sharing systems like SIENA where they cannot hold accountable third parties and officials in other Member States.¹⁴⁵

Finally, though the need to maintain state sovereignty and the fear of letting important information accidentally slip might be the primary motivating factors against a successful transnational counterterrorism system, the sheer number of systems currently employed by the EU and Europol likely contribute to officials' hesitations. As stated above, there are multiple systems and tools in place.¹⁴⁶ However, it is not always clear which system to use and how the systems interact with each other. Though the platforms in place have great potential to become a comprehensive intelligence sharing hub, they must first be streamlined and navigable.¹⁴⁷ If EU officials continue to create more platforms rather than strengthen those in existence, then such platform proliferation may harm the goal of a collective and coordinated counterterrorism network since the volume of intelligence is too expansive for investigators to scour through. The number of suspected terrorists is already high; if officials have the added burden of cross-checking their targets against numerous data systems, then that may have the effect of frustrating the investigation process and further delegitimizing the system.¹⁴⁸

144. *Id.* at 13 (“[T]he expectation by one state that the other state will not exploit its cooperation to secure immediate gains.”).

145. *See Aden, supra* note 120, at 988. (“Not all police practitioners trust Europol and therefore sometimes prefer the use of other formal or informal ‘channels’ outside the official EU framework for the exchange of sensitive information, for example the informal Police Working Group on Terrorism.”).

146. *See supra* II.C.2 (describing PNR, SIS, Europol, and SIENA).

147. EUR. DATA PROT. SUPERVISOR, OPINION OF THE EUROPEAN DATA PROTECTION SUPERVISOR ON THE COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL ENTITLED ‘STRENGTHENING LAW ENFORCEMENT COOPERATION IN THE EU: THE EUROPEAN INFORMATION EXCHANGE MODEL (EIXM) 3 (Apr. 29, 2013) (“The [EIXM] Communication states at the outset that information exchange generally works well, adding that neither new EU-level law enforcement databases nor new EU information exchange instruments are needed, but existing instruments should be better implemented.”).

148. *See* David A. Graham, *How Belgium Tried and Failed to Stop Jihadist Attacks*, THE ATLANTIC (Mar. 22, 2016), <https://www.theatlantic.com/international/archive/2016/03/belgium-attacks-isis/474945/> (“Belgian security services appeared—despite the quality of many individual officials, overwhelmed. It was revealed that a few hundred agents were supposed to watch over thousands of potential militants.”).

B. DESPITE HESITATIONS, A CENTRALIZED COUNTERTERRORISM REGIME
IS PARAMOUNT TO ENSURE SAFETY WITHIN THE EUROPEAN UNION

The tragedies of recent terrorist attacks underscored the discoordination between Member States, specifically regarding intelligence sharing. This discoordination suggests that counterterrorism should not be addressed by individually-acting nations since “[t]he necessity to cooperate, on [the] EU level and internationally, became glaring and ‘working alone [was] no longer an option’ – intelligence could not risk having undetected terrorist activity again.”¹⁴⁹

However, EU Member States cannot continue to disregard the established shared intelligence systems, despite their hesitations toward a unified schema. Despite the strengthening of certain mandates like SIS and PNR, the EU would benefit from continued coordination between Member States in regard to their intelligence sharing abilities, and EU officials should persist in moving towards a centralized counterterrorism regime despite the above apprehensions.

In an era where perpetrators of terrorist-related activity are both transnational and national actors, it is hardly sufficient for members to act irrespectively of their neighbors. As indicated by the 2021 Europol Report, terrorists are may be homegrown wherein EU-born citizens are recruited through online methods.¹⁵⁰ They also have the ability to abuse the Schengen System that facilitates efficient (and sometimes undetected) travel between Members States.¹⁵¹ As attackers are increasingly originating from within and have the opportunity to nation hop with feeble detection mechanisms in place, Member States will need to respond with increased force and coordination. Secrecy and reluctance to share between Members are harmful to their respective countries and to the well-being of their citizens.

149. Andreeva, *supra* note 81, at 762.

150. See 2021 EUROPOL REPORT, *supra* note 62, at 50 (“Recruitment for jihadist terrorism takes place within online and offline networks, often without direct links to terrorist organisations.”).

151. See Tiekstra, *supra* note 69.

1. Coordinated Counterintelligence Efforts Are Specifically Mandated Via the Defining Treaties of the European Union and Subsequent Caselaw

A union-wide system seemed to be the original intention of the founders of the European Union. As a reminder, the Treaty of the European Union specifically mandates:

For the purposes of achieving the objectives of the Union . . . , Member States shall regard the following as matters of common interest . . . police cooperation for the purposes of preventing and *combatting terrorism*, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).¹⁵²

Thus, it would seem apparent that the founders of the European Union specifically intended for a system of centrality when creating the EU, especially when police cooperation across borders is needed to circumvent terrorist-related crimes. Deviating from such a mandate and continually objecting to a coordinated intelligence sharing system could be seen as contrary to the original intentions of the Treaty and in opposition to the decisions rendered in *Van Gend en Loos v. Nederlandse Administratie der Belastingen*¹⁵³ and *Flaminio Costa v. Ente Nazionale per l'Energia Elettrica*.¹⁵⁴ Furthermore, should the EU continue to move toward an increasingly centralized system, such coordinated measures would be deemed legitimate and as having support from the formal texts upon which the Union relies.

2. More Regulations, Rather than Directives, Must Be Enacted

The maneuverability of directives leads to dissimilar structures across Member States, and such divergence must be addressed. If the

152. Treaty on European Union, art. K, Feb. 7, 1992, 1992 O.J. (C 191) 1, 61 (emphasis added).

153. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1. (holding that mandates made at the supranational level will have "direct effect" at the national level.)

154. Case 6/64, *Flaminio Costa v. Ente Nazionale Energia Elettrica*, 1964 E.C.R. 585 (holding that States were bound to the treaties forming the European community.)

EU does not naturally transition to a more coordinated intelligence sharing regime, it is evident that policymakers will need to increase the number of *regulations*, rather than *directives*, put into place to ensure a uniform, broad-sweeping counterterrorism strategy. Though this may be seen as an intrusion into state sovereignty, Member States have specifically elected to be part of the Union, and regulations are the most effective means to ensure cohesion across this multi-state entity.

The use of directives allows for too much discretion when forging a counterterrorism strategy, and such flexibility leads to national measures that are in discord with protocols promoted by fellow Member States. Like pollution dispersing easily from one nation to neighboring states, so too does terrorism easily spread vis-à-vis the Schengen System and, undeniably, through online radicalization. Simply, terrorist activities are not bound by internal borders of Member States, but rather such activities permeate across the region. Thus, successful counterterrorism legislation requires consistency across borders, and such consistency is disrupted by the flexibility of directives.

3. EU Officials Must Learn to Trust Intelligence Sharing Platforms

EU officials largely do not trust intelligence sharing platforms for a myriad of reasons, including concerns regarding accountability and abundance of information.¹⁵⁵ However, it is imperative that confidence in a centralized intelligence system continues to be strengthened since “mistrust could have negative repercussions for the legitimacy of security policies and ultimately for the value-added of ‘more EU’ in countering terrorism.”¹⁵⁶

The passage of regulations would compel various counterterrorism actors to use Europol’s systems and would effectively tie the hands of Member States and make cooperation mandatory with regard to intelligence sharing. Furthermore, a system of checks (and possibly certain disciplinary measures) could be implemented to ensure that the Member States contribute to the cause of fighting counterterrorism and fulfill their promises to ensure a cohesive security strategy and to ensure that intelligence remains secure and only in the hands of approved individuals. Without such a system, states could too easily skirt their obligations and refuse to

155. See *supra* III.A.2.

156. Sergio Carrera et al., *Reflections on the Terrorist Attacks in Barcelona: Constructing a Principled and Trust-Based EU Approach to Countering Terrorism*, 32 CEPS POL’Y INSIGHTS 1, 2 (2017).

share information with intelligence officials across national borders. As stated above, one reason officials refuse to share information with others is because of the inherent lack of trust between agencies.¹⁵⁷ Thus, the EU must implement a system that: (1) compels Members to share information; and (2) alleviates fears that shared information will be divulged to undeserving third parties.

In addition to negative aspects of centralization, there are other competing considerations policymakers must address when enacting legislation. For instance, the more broadly sweeping an intelligence system is, the more likely it is that someone can undetectably abuse it given that there are more actors to monitor.¹⁵⁸ Additionally, EU officials must strike a balance between centralized access to intelligence and the data privacy of EU citizens (and related data privacy laws).¹⁵⁹ Consequently, given these concerns, EU officials should continually monitor the efficacy of enacted legislation to ensure policies are achieving their desired goals, and counterterrorism developments “should pay careful attention to the relationship between existing EU legal and policy instruments and agencies[,] and EU and national rule of law principles, as well as their impacts on society and fundamental rights.”¹⁶⁰

On paper, Member States can agree to a common goal of safeguarding their citizens through the successful employment of a counterterrorism strategy, but if they continue to employ incohesive processes, then progress will not be made. A ‘tragedy of the commons’ problem could occur without such checks since, for intelligence sharing to manifest, Member States must be sufficiently motivated. EU officials need to pressure national agencies into compliance because Member States often lack the incentive to perform independently and will act according to their independent objectives.

Following the Paris Attacks, Belgian Prime Minister Charles

157. See *supra* III.A.2.

158. EUR. PARLIAMENT, BRIEFING REQUESTED BY THE JURI COMMITTEE: CHALLENGES IN THE IMPLEMENTATION OF EU LAW AT NAT'L LEVEL 3 (2018) (“EU law is thus implemented and applied by a multitude of state and non-state actors that make a variety of decisions and policy choices, within the legislative framework, that may achieve or frustrate the aims of the policy drafted at the EU level . . . [E]ach actor beyond national legislators ultimately influence the way in which EU law is applied on the ground.”).

159. Though this note does not provide a comprehensive dive into data privacy, it remains a relevant concern. For instance, on May 25, 2018, the General Data Protection Regulation (“GDPR”) was enacted and “it imposes obligations onto organizations anywhere, so long as they target or collect data related to people in the EU.” *What is GDPR, the EU's New Data Protection Law?*, EUR. COMM'N, <https://gdpr.eu/what-is-gdpr/> (last visited Mar. 7, 2022).

160. Carrera, *supra* note 156, at 10.

Michel suggested the following:

A European CIA (Central Intelligence Agency), these are my words. It is a necessity, I believe. And I think that because of this Schengen zone, there are two important correlations: better external borders to the European Union, this is not the case today and it is a real issue. And second, *to better share, to share more data on the people circulating within the (Schengen) zone.*¹⁶¹

Given the issues above, a strengthened and coordinated intelligence sharing system, in spite of certain hesitations, might solve the burgeoning terrorist issues within the European Union.

IV. CONCLUSION

The European Union departs from traditional notions of state sovereignty. Through treaties and caselaw, it has been determined that the EU, as a supranational entity, exercises jurisdictional power over individual Member States and their domestic policies. This has been notably observed in the strengthening of counterterrorism measures involving intelligence sharing. Following the development of recent terrorist offenses and terrorist-related activity, the European Union responded with a variety of binding obligations. However, the success of such measures has been hindered. First, a number of these binding obligations were passed via directives, which are binding as to the overreaching goal to be achieved, but allow states to decide how to implement that goal and transpose it domestically. Second, states are reluctant to use intelligence sharing platforms because it requires the sharing of sensitive information, and states continue to mistrust a collective intelligence system.

Despite these hesitations, it is crucial that the EU increasingly moves toward a centralized intelligence sharing model. Perpetrators of terrorism cross borders easily, thus thwarting state officials hoping to apprehend them. Because of this, Member States can no longer operate in silos and must consider the overarching benefits of a shared intelligence system.

161. *Belgium's PM Michel Calls for a European CIA*, EURONEWS (Nov. 30, 2015), <https://www.euronews.com/2015/11/30/belgium-s-pm-michel-calls-for-a-european-cia> (emphasis added).