

Embedding fundamental rights in the security agenda

FRA FOCUS

Introduction – the post Paris response

The recent events in Paris have challenged our sense of safety. They come at a time when the European Union is in the course of discussing its priorities in the area of internal security for the next five years. After the adoption of the Council conclusions on the development of a renewed EU Internal Security Strategy in December 2014, the European Commission is now preparing the European Agenda for Security to deal with the security threats that Europe is facing, from the threat of terrorism – increased by the proximity of conflict-ridden regions in the Middle East and elsewhere – to organised crime or cybercrime in its numerous manifestations. The trans-national nature of the current security concerns, particularly in an area defined by freedom of movement, contributes to a renewed sense of urgency for a joint response at EU level.

This paper examines the ways in which a fundamental rights perspective can benefit the current debate, so that a fundamental rights-anchored approach can support the creation of legitimate, effective and sustainable law enforcement and counter-radicalisation measures.

In the immediate aftermath of the events in France and Belgium in January 2015, FRA collected the reactions and responses of the relevant communities, politicians, media and civil society. A summary of this material is available in a separate FRA paper¹. These reactions clearly demonstrate an increase in fear among both

Muslim and Jewish communities, but at the same time show the unity of community and religious leaders in their condemnation of the attacks and their barbarity.

The predominant policy response at the national level has tended toward the adoption of (or the acceleration of already planned) tighter security measures to counter terrorism and radicalisation. Of course, there is a clear need to be mindful of possible security threats and related public concerns. The EU Member States have a duty to protect their population and the EU is uniquely placed to assist them. At the same time, **it is precisely now that Member States and EU institutions need to work together to seek balanced and legitimate responses that foster trust and cohesion within our societies.**

Fundamental Rights from the outset

In the internal security debate that took place in autumn 2014,² the need was underlined to ensure the proportionality and legitimacy of internal security policies by embedding fundamental rights considerations into their design from the very outset. Benefits of this ‘fundamental rights by design’ approach are twofold. On the one hand, it would help **limit the potentially adverse effects of security measures on the rights of individuals and reduce the risk of alienating entire communities by measures that could be perceived as discriminatory.** According to the Council conclusions on the

development of a renewed EU Internal Security Strategy, “respecting fundamental rights in planning and implementing internal security policies and action has to be seen as a means of ensuring proportionality, and as a tool for gaining citizens’ trust and participation”.³

At the same time, this approach could lead to **more sustainable and thus more effective policies** capable of passing the necessity and proportionality tests⁴ undertaken by the Court of Justice of the European Union (CJEU) and national courts. This is of particular importance in the light of last year’s CJEU ruling on the Data Retention Directive, which confirmed the need for a careful assessment of measures that otherwise satisfy the “objective of general interest, namely the fight against serious crime and, ultimately, public security”.⁵ The argument for targeted rather than ‘blanket’ monitoring measures is given particular currency by the fact that a number of the perpetrators of terrorist attacks that have taken place in the EU in recent years were previously known to the authorities.

Even prior to the most recent attacks, law enforcement measures aimed at monitoring suspected terrorists and detecting or intercepting their cross-border movements have been increasingly discussed in response to the **‘foreign fighters’ phenomenon**. According to recent Europol estimates, 3,000-5,000 EU nationals are currently involved in armed conflicts beyond the EU’s borders, particularly in Syria.⁶

Introduction of the **EU Passenger Name Record (PNR)** scheme has been repeatedly presented by the Council as well as the EU Counter-Terrorism Coordinator as one of the key instruments for combating the threat posed by foreign fighters.⁷ The European Commission has made clear that it is ready to work together with the European Parliament and the Council to “formulate a legal instrument that is effective and respects fundamental rights”⁸, aiming to overcome the reservations linked to proportionality, profiling and data protection that aroused opposition in the European Parliament against the proposed directive.

As FRA has stated previously, there are a number of fundamental rights considerations inherent to any PNR system.⁹ Use of PNR data by law enforcement authorities to assess the risk posed by individual passengers amounts to profiling, and as such can always lead to discrimination and ‘false positive’ matches. In light of the Data Retention ruling, the issue of proportionality and

necessity is particularly relevant as both instruments pertain to the collection and retention of large amounts of personal data without prior suspicion towards a specific individual. Furthermore, although PNR is, in the current context, portrayed as a powerful anti-terrorism tool, examples of its added value have been primarily linked in the past to combating organised crime – such as drug trafficking or trafficking in human beings – rather than terrorism¹⁰, a consideration that could affect the threshold applied by the CJEU. In this regard, the opinion of the CJEU on the PNR agreement between the EU and Canada requested by the European Parliament in November 2014 could provide much-needed clarity.

Any future attempt to create an EU PNR system would therefore, as a minimum requirement, benefit from an **enhanced set of fundamental rights safeguards**, such as those FRA presented in March 2014 as guidance for Member States that are considering setting up a domestic PNR system.¹¹ These **introduce clear and strict limitations on purpose, personal data safeguards or increased transparency of the system towards passengers**. While not removing all potential fundamental rights risks, these additions would offset some of the system’s weaknesses without compromising its primary security function. In this regard, it should be emphasised that the extension of the scheme’s scope to intra-EU flights, as advocated by some Member States, would further undermine the proportionality of the tool and could be challenged with regard to its compatibility with the Schengen *acquis*.

The right to free movement should also be highlighted in the context of other measures currently under discussion concerning the movement of potential foreign fighters, including those falling within Member States’ competence such as the **confiscation of travel documents**. A denial of the right to leave one’s country is in principle possible under the International Covenant on Civil and Political Rights and Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as long as the restriction is provided by law and necessary to protect national security. According to Article 12 (3) of the Covenant, however, any such restriction must be consistent with other guaranteed rights such as that to non-discrimination. It cannot therefore target people based on criteria such as religion or ethnicity. In addition, jurisprudence of



the CJEU and the European Court of Human Rights (ECtHR) requires that such preventive measures must be proportionate and subject to strict limitations and judicial review.

Finally, there have been repeated calls from some Member States to introduce **systematic checks of EU nationals at the external borders of the Schengen area** in order to intercept potential foreign fighters travelling to the Middle East. The current wording of Article 7(2) of the Schengen Borders Code clearly does not allow for this practice in relation to people enjoying the right to free movement. The joint statement adopted following the informal meeting of Justice and Home Affairs Ministers in Riga on 29-30 January 2015 therefore calls for “a targeted proposal to amend the Schengen Borders Code [...] by making it possible to proceed to systematic checks on individuals enjoying the right of free movement against databases relevant for the fight against terrorism”.¹²

Such an initiative **would need to be assessed against the principle of proportionality**. This is particularly the case with regard to checks on exit, as these would be carried out on all passengers, whether they were under suspicion of committing a crime or not. On the other hand, a more targeted use of selective checks that is already permitted by the Schengen Borders Code, preferred by the European Commission,¹³ needs to be based on a **predefined and regularly reviewed set of common risk indicators** drafted from a clear fundamental rights perspective. This would ensure the selection was based on evidence and did not constitute discriminatory profiling.

The issue of profiling is also highly relevant in the context of current calls for increased monitoring of people who might have undergone violent radicalisation, including returnee foreign fighters and other potential ‘jihadists’. Monitoring people suspected of criminal activity constitutes a legitimate preventive instrument. However, **surveillance of a specific group or profiling of potential suspects based solely or mainly on ethnicity or religion creates the risk of unacceptable discriminatory treatment**, both under the ECHR and the EU Charter of Fundamental Rights. In 2010, FRA published a guide to identifying legitimate and illegitimate uses of profiling, which was accompanied by a comparison of the experiences of profiling among ethnic minority and immigrant respondents alongside their majority population

‘neighbours’ in 10 EU Member States. The guide aims to assist law enforcement authorities in carrying out their tasks in a fundamental rights compliant manner.¹⁴

It can therefore be seen that a number of the measures proposed at EU level, or which are already in operation in some Member States as a response to the increased level of perceived threat, may have an adverse effect on the rights of individuals, giving rise to a sense of discrimination and potentially contributing to the alienation of some groups, thus undermining their trust in the authorities. This testifies to the need for fundamental rights considerations to be integrated into the design of new policies, as well as **mandatory review clauses** to ensure that fundamental rights compliance is regularly evaluated and that measures are discontinued if this compliance cannot be guaranteed.

Prevention of radicalisation

A comprehensive approach to combating terrorist threats needs to look beyond law enforcement measures to the prevention of radicalisation by measures that support social inclusion and participation. This was summed up by the Justice and Home Affairs ministers in their joint statement from Riga, in which they emphasised the importance of promoting a culture of social inclusion and tolerance as a means of addressing the underlying factors of radicalisation.

FRA research shows that **a sense of social marginalisation is indeed closely linked to the experience of discrimination, including discriminatory responses of authorities towards minorities**.¹⁵ Its EU Minorities and Discrimination Survey (EU MIDIS), the only survey of its kind in the EU, showed that 40% of Muslim respondents who had been previously stopped by the police believed that this was specifically due to their minority or immigrant status. The same research showed that the overwhelming majority of Muslims who had been victims of what they considered to be a racially motivated crime over the previous 12 months did not report it, often citing their lack of confidence in the police’s ability or willingness to do anything about the incident.¹⁶

Findings by monitoring bodies such as the United Nations’ Office of the High Commissioner for Human Rights and the Council of Europe’s

European Commission against Racism and Intolerance show that a number of minorities in the EU may be disproportionately affected by law enforcement measures such as discriminatory ethnic profiling or discriminatory misconduct by law enforcement officials. The Council of Europe therefore called on its Member States to “clearly define racial profiling, ensure its prohibition and provide specific training on identity checks to all police officers.”¹⁷

Lack of trust and a sense of insufficient protection have potentially far-reaching implications both as a factor in radicalisation and as a further obstacle to effective communication between the authorities and particular communities. **Poorly designed security policies that are perceived as targeting an entire community rather than individual suspects can further exacerbate the problem**, as heavy-handed tactics may serve to enhance recruitment to terrorist organisations if the people concerned are or feel they are treated in a discriminatory or negative way. There are therefore a number of lessons to be learnt from EU Member States’ previous experiences of counter-terrorism, where a ‘fundamental rights anchor’ to any given policy could have alleviated negative consequences in a number of cases.¹⁸

In 2013, FRA published a fundamental rights-based police training manual to provide guidance on how law enforcement can carry out its duties in a fundamental rights-consistent manner. This guide shows that relatively minor steps can have a major effect on the perception of law enforcement policies and increase their acceptance at individual and community level. It covers a wide range of areas and includes a compilation of fundamental rights-compliant practices, ranging from anti-terrorism to intercultural communication and hate crime.¹⁹

Policing with dignity is one important factor in a strategy aimed at reducing tensions and building trust. The above-mentioned FRA guide on discriminatory ethnic profiling emphasises that the negative impact of being repeatedly stopped by the police is significantly diminished if officers’ conduct is professional and respectful. The guide offers examples of national regulations whose goal is to tackle the issue of appropriate language and treatment, and highlights the fact that only some Member States have recognised the need to combat discriminatory profiling as an integral part of ‘quality’ policing practices that are ultimately a means of fostering confidence.²⁰

The considerations outlined above highlight the need for the EU to base its policy responses on an improved understanding of the situation of the communities that are currently of concern in the context of both inclusion and radicalisation. The design and operation of successful counter-radicalisation policies will have to be based upon **data collected systematically over a long period of time**, so as to provide an insight into perceptions and actual experiences of different communities in the fields of discrimination, social marginalisation and hate crime. In this respect, data from the second round of FRA’s EU MIDIS survey, which will be available in 2016, will offer a valuable comparison over time.

Both at the EU and Member State level, considerable attention is being given to the **sharing of best practices on combating radicalisation and the development of counter-narratives**, particularly on social media. The Radicalisation Awareness Network (RAN) provides a useful platform in this context, particularly with regard to its work in the area of radicalisation in prisons and during probation. It can thus play a pivotal role in supporting the development and dissemination of suitable ‘exit strategies’. Counter-narratives aimed at preventing radicalisation within specific communities need to be appropriately targeted and accompanied by an offer of alternative means of civic engagement, as advocated by the EU Counter-Terrorism Coordinator.²¹

At the same time, there is a clear need for a **wider communication framework that reaches out to all groups and communities and promotes tolerance and non-discrimination**. It is of utmost importance that people of Muslim faith are not portrayed as a monolithic group or linked with the conduct of radicalised individuals, particularly by leading political figures and the media. At the same time, dialogue with Muslim communities must ensure representation across different religious sub-groups, and furthermore needs to engage men and women as well as the old and young. It also needs to be reiterated that **radicalisation in Europe is not limited to specific ethnic or religious groups**, as demonstrated by the National Socialist Underground (NSU) attacks in Germany or, outside the EU, the murders committed by Anders Breivik in Norway, all of which were motivated by xenophobia and anti-multiculturalism. The EU and its Member States need to be aware of these realities and be sensitive when developing security measures, to avoid legitimising xenophobic reactions and hate



crime towards specific groups within European society. FRA stands ready to contribute to the much-needed mutual awareness raising effort, for example by assisting in the development of an EU fundamental rights communication strategy that has been repeatedly advocated in order to promote the respect of fundamental rights and values.²²

Finally, the **role of the internet and social media in radicalisation** continues to play a central role in the policy debate. The anonymous nature, accessibility and outreach of the internet makes it a prime platform for hate speech and incitement to terrorism. For example, 10% of respondents to FRA's survey on discrimination and hate crimes against Jews had experienced offensive or threatening antisemitic comments made about them on the internet, and nearly three quarters (73%) believed that online antisemitism had increased over the past five years.²³

Public incitement to violence or hatred on the basis of race, colour, religion, descent or national or ethnic origin is criminalised under the EU's Framework Decision on combating racism and xenophobia,²⁴ which to this end places limits on freedom of expression. Under the terms of this Framework Decision and its application at national level, the EU and its Member States must tackle incitement to violence and hatred, regardless of its source. Here, however, an integrated approach between different actors at EU level – for example, building on the work of the RAN – is needed to better understand the linkages between hate, victimisation and radicalisation on the one hand, and inclusion, anti-racism and fundamental rights on the other. In this regard, the positive role that social media has played in the massive public response to the latest terrorist attacks, mobilising solidarity and rejecting extremism, can be seen as confirmation of the **positive role internet can play as a platform for awareness raising and dissemination of counter-narratives**.

Conclusion – making fundamental rights part of the security agenda

The events of January 2015 have reinforced the need to formulate an effective but fundamental rights-compliant and sustainable response to the

security threats the EU is facing. The European Agenda for Security will have to respond to the call for additional law enforcement and counter-radicalisation measures in a manner that neither jeopardises social cohesion nor undermines mutual trust among communities or their trust towards the authorities.

A number of security measures currently under discussion or already in operation at the EU or Member State level could have an adverse effect on individual rights, and also a negative impact on community cohesion. Besides the possibility of being annulled by the courts as the Data Retention Directive was, they risk contributing to the alienation of some groups in European society and, ultimately, to an environment conducive to radicalisation. Introducing fundamental rights into the design and operation of security policies would facilitate a timely identification of these risks and the provision of viable alternatives, allowing the EU to achieve its goals in line with fundamental rights.

FRA research shows that a lack of trust in the authorities is already reality among certain minorities. Countering radicalisation therefore has to begin by ensuring that authorities do not apply their powers in a discriminatory manner but on the contrary in a way that engenders trust. Moreover, counter-radicalisation policies must be based on a broader policy of social inclusion and non-discrimination that draws on systematic data collection to monitor new developments, while encouraging the exchange of best practices and communication to promote tolerance. In this respect, the unity and solidarity demonstrated across the EU in the face of the attacks that took place in January 2015 provide an opportunity for policymakers to support initiatives that not only combat radicalisation, but also build strong bonds between different communities. The development of an EU fundamental rights communication strategy would be an important step in this direction.

Finally, it should not be forgotten that the introduction of enhanced security measures seeking to counter violent radicalisation may also have negative consequences for the entire population. In the EU's efforts to provide safety for its citizens, stringent law enforcement – without thorough fundamental rights safeguards – could mean that the freedoms the EU currently enjoys are encroached upon to the long-term detriment of all.

FRA's research has and will continue to provide a 'fundamental rights reading' of developments in the field of internal security. The Agency's work on PNR, its forthcoming publication on national surveillance and fundamental rights safeguards, and its large-scale surveys that capture the opinions and experiences of thousands of

respondents from minority communities are all examples of where FRA provides additional evidence that can support the work of those seeking to address the internal security threats to the Union.

- ¹ FRA (2014), Reactions to the Paris attacks in the EU: fundamental rights considerations (online), <http://fra.europa.eu/en/publication/2015/reactions-paris-attacks-eu-fundamental-rights-considerations>.
- ² FRA (2014), 'Safeguarding internal security in compliance with fundamental rights law', Contribution to the High-level Conference on A renewed EU Internal Security Strategy, Brussels, 29 September 2014, and FRA (2014), *Contribution to the preparation of the Communication of the European Commission on a renewed Internal Security Strategy for the period 2015-2020*, <http://fra.europa.eu/en/news/2014/fra-helps-shape-new-eu-internal-security-strategy>.
- ³ Council of the European Union (2014), Council conclusions on development of a renewed European Union Internal Security Strategy, Brussels, 4 December 2014, p. 7.
- ⁴ According to Article 52 of the Charter of Fundamental Rights of the EU, "limitations on the exercise of the rights and freedoms recognised by the Charter may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."
- ⁵ CJEU, Joined cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others, 8 April 2014.
- ⁶ EuObserver (2015): *Up to 5,000 Europeans joined jihad, Europol chief says*, 14 January 2015, available at: <https://euobserver.com/news/127202>.
- ⁷ Furthermore, the United Nations (UN) Security Council, in its Resolution 2178 (2014) dealing with measures to prevent the movement and recruitment of foreign fighters, encouraged states to "employ evidence-based traveller risk assessment and screening procedures including collection and analysis of travel data". See UN, Security Council (2014), Resolution 2178 (2014), S/RES/2178 (2014), 24 September 2014.
- ⁸ Avramopoulos, D. (2015), Speech at a press conference at the informal JHA Ministerial meeting, Riga, 29 January 2015, http://europa.eu/rapid/press-release_SPEECH-14-2351_en.htm.
- ⁹ See FRA (2011), Opinion on the proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, FRA Opinion 01/2011, Vienna, <https://fra.europa.eu/en/opinion/2011/fra-opinion-proposal-passenger-name-record-pnr-directive>.
- ¹⁰ See European Commission (2011), *Proposal for a Directive of the European Parliament and the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*, COM(2011) 32 final, Brussels, 2 February 2011, p. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2011:0032:FIN>. FRA is aware that while further evidence proving the necessity of a PNR system might exist, it may nevertheless be necessary to demonstrate the overall necessity and proportionality of the system.
- ¹¹ FRA (2014), Twelve operational fundamental rights considerations for law enforcement when processing Passenger Name Record (PNR) data, <http://fra.europa.eu/en/news/2014/fra-provides-guidance-member-states-setting-national-pnr-systems>.
- ¹² Joint Statement following the informal meeting of Justice and Home Affairs Ministers in Riga on 29-30 January, https://eu2015.lv/images/Kalendars/IeM/2015_01_29_jointstatement_JHA.pdf.
- ¹³ See European Commission (2015), Fighting terrorism at EU level, an overview of Commission's actions, measures and initiatives, European Commission Factsheet, Brussels, 11 January 2015, http://europa.eu/rapid/press-release_MEMO-15-3140_en.htm.
- ¹⁴ FRA (2010), Towards more effective policing, understanding and preventing discriminatory ethnic profiling: A guide, <http://fra.europa.eu/en/publication/2012/towards-more-effective-policing-understanding-and-preventing-discriminatory-ethnic>.
- ¹⁵ See FRA (2010), Experience of discrimination, social marginalisation and violence: A comparative study of Muslim and non-Muslim youth in three EU Member States, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2012/experience-discrimination-social-marginalisation-and-violence-comparative-study>.
- ¹⁶ FRA (2009), EU-MIDIS Data in Focus Report 2: Muslims, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-2-muslims>.
- ¹⁷ Council of Europe, Parliamentary Assembly (2014), Report Doc. 13384 Tackling Racism in the Police, 10 January 2014, <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=20325&lang=EN>.

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- ¹⁸ The study of counterterrorism operations in Northern Ireland under the Prevention of Terrorism Act serves as an example. According to research conducted by P. Hillyard, personal experiences of people targeted by police stops and searches, preventive imprisonment and other similar measures contributed to “hundreds of young men [...] joining the IRA and creating one of the most efficient insurgency forces in the world”. See Hillyard, P. (2005), *The “War on Terror”; lessons from Northern Ireland*, European Civil Liberties Network, Essays for Civil Liberties and Democracy in Europe, London, ECLN, 2005, <http://www.ecln.org/essays/essay-1.pdf>. Similar insights are described, for example, in German, M. (2007), *Thinking like a terrorist: Insights of an FBI undercover agent*, Washington D.C., Potomac Books.
- ¹⁹ FRA (2013), *Fundamental rights-based police training – A manual for police trainers*, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2013/fundamental-rights-based-police-training-manual-police-trainers>.
- ²⁰ See the advice by the United Kingdom National Policing Improvement Agency that underlines that “A person’s appearance or ethnic background will sometimes be a factor, but an officer’s decision to search them [...] should be made only if it is a result of evaluated intelligence. Profiling people from certain ethnicities or religious backgrounds may also lose the confidence of communities.” See National Police Improvement Agency (2008), *Advice on Stop and Search in Relation to Terrorism*, p. 14, http://www.npia.police.uk/en/docs/Stop_and_Search_in_Relation_to_Terrorism_-_2008.pdf.
- ²¹ See Council of the European Union (2014), *Foreign fighters and returnees from a counterterrorism perspective, in particular with regard to Syria: state of play and proposals for future work*, 9280/14, Brussels.
- ²² See Council of the European Union (2014), *Council conclusions on development of a renewed European Union Internal Security Strategy*, Brussels, 4 December 2014, p. 7.
- ²³ FRA (2014), *Fundamental rights: Challenges and achievements in 2013*, Annual report, Luxembourg, Publications Office, p. 93, <http://fra.europa.eu/en/publication/2014/fundamental-rights-challenges-and-achievements-2013-annual-report-2013>.
- ²⁴ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, p. 55–58.

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