

# Future of Policing: Policing the future? Lessons from the past to understand the present

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## Introduction (1)

Contrary to what European experts expected concerning an area of freedom, security and justice, this field has seen some of the most active creation of standardised rules within the EU. After 11 September 2001, as no one dared to ignore the question of security any more, it gained in importance and became a central issue in the debates between Member States and institutions concerning the boundaries of their respective powers. The EU's zealous activity in the issue contradicted predictions for a sector that, according to advocates of national sovereignty, should never be managed on the European scale because it was too closely linked to a state's sovereign activities and that, according to integrationists, could not work due to the overly complex problems that would make it impossible to meet security needs for all of Europe.

This excessive activity was not evenly distributed however, and while countless European measures in favour of security, border control and surveillance within and beyond its borders were adopted, along with numerous measures in favour of cooperative legal investigations, the same can hardly be said for individuals' right to defence in judicial matters, or for extending the same rights and freedoms to citizens and foreigners residing in EU territory. It has reinforced

a trend which may create difficulties in the future, but which is part of a pattern characterising at least the last 50 years of European policing and that is difficult to change. Nevertheless it is possible to create the conditions of possibility of a more legitimate form of policing at the European and transatlantic levels if serious adjustments concerning the presumption of innocence and privacy are made immediately and if the trend towards prevention, control of mobility and technologisation is reversed in favour of a more criminal justice and rule-of-law-bound orientation.

This article is based on the results of research on the contemporary field of the EU internal security agencies and on its genesis (Bigo, Guild and Walker, 2010) (2). It will sum up some of the findings concerning the history of European policing in order to discuss what its future might be (Bigo et al., 2007).

For many people (professionals of security, professionals of politics, journalists, the larger public), and still today, security (meaning internal security, including monitoring and controlling foreigners when they cross borders), justice (simplifying and speeding up procedures in criminal matters) and freedom (free movement of people and freedom from fear of severe threats) are bound together under the heading of what some continue to call Justice and Home Affairs,

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(2) Project financed by the 6PCRD. More on [www.libertysecurity.org](http://www.libertysecurity.org). CD and DVD are available for training course purposes. Ask [didier.bigo.conflits@gmail.com](mailto:didier.bigo.conflits@gmail.com) For a more complete description see Bigo, Didier et al. (2007), *The Field of the EU Internal Security Agencies*. Paris: Centre d'études sur les conflits/L'Harmattan.

the label chosen by the Maastricht Treaty of 1993 to designate the content of the third pillar of the EU. For them, these activities have to be principally the responsibility of the Ministries of Interior of the Member States, and not the responsibility of the Ministries of Justice or of Fundamental rights and citizenship Ministries, departments or agencies in these same Member States. They often dismiss European policing and consider it superfluous. Even if they know about it and are supportive, they think it is a new phenomenon, in its infancy. This is wrong.

European policing has been constituted as a rope woven by four strings (see graph), which have each reinforced its strength. These strings can be analysed as a series of events which all make sense on their own, but which have to be interlinked by a mapping process in order to understand their logic.

The first one and the most well-known is to understand European policing as a product of community development and as a tension between the pooling of national sovereignties, harmonisation, mutual recognition, mutual 'trust' and a core of common standards. It has been profoundly marked by the EU enlargements and their access to freedom of movement of persons internally, with key landmarks such as the single European act of 1986, the Maastricht and Amsterdam Treaties and the creation of European internal security agencies as well as the summits of Tampere, The Hague or Stockholm. It is an important trend and a changing one, which frames the boundaries and the legitimacy of European policing. As the adoption of the Lisbon Treaty demonstrates, it may completely reshape the relationships between the actors who believed that the third pillar would exist forever, but it is not at all a complete picture.

Long before the development of the European Communities, European policing was shaped by informal and intergovernmental police and intelligence services' cooperation at the European and transatlantic levels. This second string can be traced back to the 1880s and the inter-war period. It was strengthened during the cold war, especially for intelligence services, and gained notoriety in the mid-seventies when the European governments had to prove that they were active against the internal terrorism of that time, quickly labelled 'Euroterrorism' in the mid-eighties. It has

continued in parallel with Community development, even if sometimes the two strings were interwoven but in contradiction, and after September 11 2001, it has been pushed through, with the Prüm agreement and mainly in favour of a line of thought favouring the United States intelligence services and their methods. The United States intelligence and police services have for long been active in the EU and they have constituted their own system with the department of homeland security, but they have also learned a lot from the EU databases and information networks, which were older than many of the United States ones in matters of policing and were already applying the principle of interoperability.

This technologisation of policing through the extension of information networks available to police and intelligence services has been one of the central elements of the present. It may be considered as a third specific string. It has developed a different form of policing; a form of so-called preventive or pre-crime policing through data mining and the pretence to know the future behaviour of unknown individuals. The multiplication of projects involving interconnected databases and the dream of total information awareness has induced a will to create a 'police industry complex' using the surveillance tools already developed in other locations (banking, taxes, social security, local communities, schools) and a profitable market for some companies. In addition to SIS and Eurodac, the years after 2004 have seen the development of multiple projects not yet finalised as SIS2, VIS, Eurosur, EU-PNR and so on. It has increased exponentially the transatlantic links with ESTA, Swift and may have played a role in the European complicity in extraordinary renditions by creating the sense of common interests, going as far as to consider that Europe was also at war against terror, and not only in a policing mission against terrorism.

Last but not least, it has also re-activated the de-differentiation of internal and external dimensions of European policing and security and has created the bureaucratic label of the external dimension of AFSJ to say that we have an external dimension of internal security, without discussing what that means. The internal security strategy document is particularly interesting in this respect and shows that this label or acronym has blocked any serious discussion about the limits of this area in terms of collaboration, exchange of

information or/and integration through technological platforms, as we will see in the conclusion.

## 1. Origins of European police collaboration: a necessity for understanding current developments

Newspapers and analysts of public policies tend to believe that to account for the past is to go back several years in time. In this regard 2001 now appears as a landmark for speaking of European policing, as if everything changed at that moment, and as if nothing existed before. It is a dangerous illusion and an easy way to de-responsibilise part of the European networks of policing, and to charge the Bush administration for tendencies largely shared by some European networks. Even to make things start with the Maastricht and Amsterdam Treaties is quite a limited view. It is certainly important for the juridicisation of European policing and for the formalisation of police agreements, respectful of the rule of law and allowing judges to look more carefully into what is going on. It is however also only one small part of the picture, even if it is the most official one.

As we said, law and constitutions draw official boundaries that are central for the legitimacy of policing, and especially of transnational policing, which cannot be considered as foreign affairs or diplomatic matters only, or as an add-on to a military logic. But a legal view is also misleading. That is why it is central to look first at all the informal agreements or at the complex networks of bilateral and multilateral agreements that have existed from the Second World War onwards and even before. It allows understanding that some of these agreements still shape our present and maybe our future in terms of policing. Our research shows that the origins of this cooperation seem to have come full circle in the relationships between America and Europe, and that the transatlantic relationships in terms of policing that we re-discover now — to applause or criticism — were obscured in the eighties and nineties, but can be traced back largely before this period and have never been completely severed. The future of European policing then may be dependent on its relationship with the United States, and especially in regard to the competition of EU and United States for an industry of surveillance technologies.

### From nation-state to European policing? A juridical perception and its ambiguities

The three treaties that instituted the European Community did not deal with these fields of policing and justice, or even freedom; they merely evoked free movement of workers and services, with no answer to the question of non-workers and family members of a worker, leaving them to be determined by the Court of Justice at a later stage (Guild and Lesieur, 1998; Stone Sweet and Caporaso, 1998). They also made it seem preferable for Europeans to encourage free movement in Europe to the detriment of free movement worldwide. Economic reasoning focused on creating a specific economic zone with a single tariff policy laid at the heart of the project; questions concerning public freedoms and policing were only marginal concerns.

Does that imply then that questions of justice and security were the last to be raised at the European level; that they were merely a last-minute spill-over because they fell under sovereign prerogatives? If we consult only the legal acts that tie their creation to the Convention applying the Schengen Agreement in 1990 and the Maastricht Treaty in 1992, this does seem to be the case: these questions only appear in European law via a sort of shortcut in the form of international agreements between certain Member States, which were then partially or completely Europeanised. But this belief of lawyers, that they can identify the origins of European policing through the process of legislating, is quite illusionary, and the argument of a struggle between communitarisation versus national sovereignty as the key element to understand policing is useless. Policing was transnational before it was Europeanised. It has nothing to do with a 'spill over'.

So, if we use a wider sociological reading of this issue, far from showing that European policy on security and justice lags behind economic and social developments, it shows that cooperation in legal and police matters began in Europe well before Maastricht and even before the Rome Treaty.

### The strength of informal networks and their transatlantic characteristics

Unlike judicial cooperation, police cooperation has always taken place behind the scenes through informal

networks recognised by the authorities only officially many years after their establishment. The first actual cooperation dates back to the 1880s with the exchange of information about the anarchist threat and efforts to institute cooperation among police to combat crime by creating individual records. This shows that contrary to popular belief, police cooperation does in fact date back to the time when national police forces were established (Fijnaut, 1987). However, we can consider the modern police and intelligence networks to be essentially products of the post-war era, intended in particular to establish rules for the protection of personal data.

The 1950s also saw the creation of informal, transnational intelligence networks that were often secret and of which the founders of Europe were only partially aware. Most of them were transatlantic in origin or created around the colonial organisation in effect then. Exchanges between police intelligence services were often also transatlantic, operating between Western Europeans, North Americans, Australians, New Zealanders and Israelis. Cooperation was based on 'friendly relations' between departments and gave rise to distinct networks — cooperation between police counter-espionage departments, between military departments within NATO and between English-speaking countries more or less independently from the other, more-European networks. Cooperation between intelligence departments was quickly separated from police cooperation, including the anti-terrorist Trevi Group, and they used separate information channels. They often favoured informal, top-level and operational meetings, refusing the more strictly organised and legal approach taken by law enforcement within their networks.

Conversely, formalising cooperation via ICPO-Interpol and bilateral exchanges between polices led to more regulation and surveillance of police cooperation by legal courts. Many within the police felt that the information channels had become too long and complicated. The success of Interpol in the 1960s was part of this trend, but by moving rapidly to a global scale, it became a source of tension between Americans and Europeans, both of whom were vying for leadership of the institution. It also led to a desire within Europe for an institution of their own that they could trust to be more confidential, a 'Europol'. Cooperation among

Europeans was therefore actually born out of Interpol, but was developed elsewhere, in informal clubs and networks created in the 1950s, some of which would become formal institutions in the 1980s. Among many other groups (see graph) the Trevi group, informally founded in 1976 and only officially recognised in 1986 in order to show that the governments could respond to terrorism in the Middle East, played a major role in constructing the strong ideological tie between free movement and lack of security. It also played a very important role in trying to limit the influence of the United States in European policing and it was among the first to insist that the United States was a 'third party' that cannot assist in the meetings: the United States had to wait for a common European position to emerge. And so, even if they used and over-used the technologies of policing promoted by United States' liaison police officers, they wanted their autonomy as a centre of decision-making independent from Washington. At that time the lack of interest of the United States for any form of internal terrorism was a key element of differentiation, and some of the former Trevi members, not yet retired, have insisted on their cleverness in comparison to the under-reaction of the eighties of the United States and their over-reaction after September 11. Trevi has also been central for the creation of a specific European identity in policing matters by constructing a strong insecurity continuum specific to the EU and built on the fear of the removal of internal borders with the implementation of the Single Act on 31 December 1992, and by insisting later on, on the creation of Europol, which, in their view, was not to share any information with the United States. In addition to the Trevi group dealing with terrorism, drug trafficking and hooliganism, a fourth group (known as Trevi 1992) was created, dedicated to making up for the security loss that resulted from the end of border controls. It has promoted new technologies, including the possibilities of biometric identification and the interoperability between databases that we know now. The blueprint not only of the SIS, but also of Eurodac, of VIS, of FADO can be found during this period.

This earlier history of cooperation is important to highlight in order to understand that informal networks prospered and were not all abolished or absorbed with the creation of formal institutions, in opposition to the wishes of those who initiated the institutionalisation of European police cooperation, who were working

both to free themselves from American oversight and to submit international cooperation to the rule of law. They have been central to the transatlantic 'community' of policing and they have marked a complete generation of policemen sharing more with their United States counterparts in terms of behaviour, ideology, vision of their role, than with their national colleagues, belonging to a rival police force as it happens in many Mediterranean countries, which have both civil police and civil police with military status, like the gendarmeries.

## 2. The fight against global insecurity: the structural element for an area of freedom, justice and security?

### An (in)security continuum

The Maastricht Treaty has been considered the landmark of European policing and many texts refer to it almost 'religiously'. But the Treaty is more a de facto rationalisation of the development of the fear of a global insecurity. The various elements — free movement of people; crossing of borders; citizenship, the relationship to illegality, fraud, migration; the increase of cross-border crime encouraged by globalisation; the relationship to labour exploitation, particularly of women and children; the creation of delocalised mafia networks; the increase in the drug trade and laundered money trafficking; the continued terrorism and the appearance of new forms of terrorism; the need for a quick, inflexible justice system — have been put together as 'proofs' of this global insecurity, but each element should only be linked to another with great caution, and with sustained statistics in a long period of time. These connections have for the moment been made without such a research, and more on the basis of media reports and their propagation. They have been more the objects of the symbolic politics of some professional of politics in security matters than the object of in-depth research about the connections. Each time one thread has been analysed, it has been proven weak. The connection between terrorism and illegal migration is absolutely not proven, and the label 'clandestinity' in both cases is not sufficient to amalgamate the two phenomena. The common belief in an increase of global insecurity has also always been the subject of competition between the various services of the ministries of interior and justice that

are competent in the matters. Indeed, each service has wanted to prioritise the specific threat it claims to counter the others. No one has accepted once and for all a hierarchy of threats and the results of the various arbitrations in terms of budget, missions have always been contested, questioning the boundaries of the area of internal affairs, and even the pertinence of its definition as an 'area'. If the future of European policing remains dependant on this path in favour of the struggle against transnational threats, and in particular terrorism, with its implications regarding prevention, mobility control and technologisation of policing, it is because it is still dependant on a *doxa* (an erroneous common sense) which largely predates September 11, and which is shared by the informal and the formal networks of policing as well as by a major part of the American and European intelligence services. We can call it a belief in the inevitable increase in global insecurity at the world level against which only a strong integration of all the police, intelligence and even military instruments and organisations can be efficient.

### The impact of September 11

The 11 September 2001 attacks on the United States, or more exactly the answer on the part of the United States administration on the 14 September, amplified an already-existing trend, which was to consider issues of movement, tourism, migration and asylum as being linked to police and intelligence, or even to military issues. From this point of view, internal security agencies, which may at times work outside the borders of a country to prevent threats, must cooperate with neighbouring countries. Moreover, the police, and more importantly certain intelligence agencies, have tried to carry out a discretionary policy, independent from judges, thereby refusing to bend to the will of the Commission's legal experts and various authorities on data protection for oversight and transparency.

While the events of 11 September 2001 clearly had an impact on European institutions, it was after the attacks in Madrid on 11 March 2004 and in London on 7 July 2005 that counter-terrorism truly became an omnipresent issue and security came to be seen as a part of every problem facing the EU (crime, illegal immigration, unauthorised border crossings, falsified documents), requiring dangers to be listed and specific techniques to be employed (in particular the use of

databases, profiling and lists of persons banned from entering a country).

As early as 21 September 2001, the Freedom, Justice and Security (FJS) Council stated that 'the gravity of the recent events has incited the Union to work faster in setting up the area of freedom, justice and security and increase and strengthen cooperation with our partners, particularly the United States', and it presented an action plan against terrorism in November 2001 (Bossong, 2008). The Laeken summit which followed thereafter presented a series of security measures taken as a direct result of 11 September, with European solidarity with the United States and a general consideration by the Union of 'European citizens' expectations in terms of justice and security, combating international crime, controlling migrations and accepting asylum seekers and refugees from distant zones of conflict' (excerpt from the Council of Laeken, 2002). The Commission touted the EU's swift reaction in drafting a definition of terrorism, extending Europol's powers, creating a European arrest warrant, officially instituting Eurojust which had until then only existed as a project team, and the signing of an agreement with the American government concerning passenger name records (PNR). However, work on all these actions was already under way and many of them were near completion. The definition of terrorism as set by Europe owed as much to the problems that accompanied the G7 summit in Geneva as to 11 September; the European Arrest Warrant and Eurojust had been planned long before <sup>(3)</sup>; the new item among all of these was undoubtedly the acceptance of an American prosecutor in Eurojust without an opposite equivalent. As for the PNR procedure, although it was accepted under pressure from the American Homeland Security department, it was in keeping with an older, internal movement to step up passenger controls.

Beginning in 2003, European police and intelligence services, along with the services in charge of external borders and visas, made considerable efforts to Europeanise themselves, provided that this move would increase their discretionary power and not result in greater judiciary control. These services

were seeking an intelligence agency and a European equivalent of the American Homeland Security department via a system of border controls with biometric identification and travel authorisations granted before travelling, or an inter-operable database that would allow them to gather, store and compare data for investigations; this led to the Treaty of Prüm and renewed agreements between the EU and the FBI. For some, while these efforts were necessary to avoid risks, they were also a way to avoid American hegemony in this field. These developments were not made simply to follow the American position; there was a real push to create a European industry for databases and security technology that could compete with the United States and at the same time guarantee the control of information concerning European citizens and foreigners living in EU territory. Unlike criminal investigation police, the intelligence departments insisted on the danger posed by Al Qaeda within Europe where there were large communities of Muslim origin, particularly in France, Germany and the United Kingdom, which could serve as a groundwork structure. Despite a difference of opinion on participation in the war in Iraq, the different anti-terrorist services of the different Member States made a joint evaluation of the threat and were mostly in agreement. Within Europe, anti-terrorist services shared more or less the same opinions on the possible threats, although they proposed different responses to the problem, and they had for some time stressed the idea of the infiltrated enemies within our own borders (Bonelli, 2005). European leaders did take the threat of Al Qaeda seriously, but many considered anti-terrorist activities to be the concern of the police and judicial fields, aided by intelligence services, rather than the business of the army or agencies such as the United States' National Security Agency (NSA) and the United States' Central Intelligence Agency (CIA), the spearheads of American policy. So, the more European policing collaborated with the United States, the more they were driven towards a trend obliging them to be subordinate to their own intelligence services and even to their own militaries. The idea of integration of information, even balanced by the EU Commission in terms of availability of information, was never in favour of criminal justice, but in favour of prevention, hence fostering a certain kind of suspicion, freeing the agencies from the judges' supervisions and giving the upper hand on the network to intelligence services.

<sup>(3)</sup> Eurojust was included in the EU Treaty of Nice in Article 31. A provisional department had existed since 14 December 2000. The Council's decision to create the institution was signed on 28 February 2002.

It is nearly impossible to draw up a complete summary of the cooperative activities led since 2001 among European countries or between them and third countries for the area of freedom, justice and security. By March of 2007, 51 texts had been adopted, 33 were in the process of being adopted and 22 communiqués and 21 reports had been published, making the area of freedom and security one of the most dynamic fields of legislative activity. The ‘de-pillarisation’ or ‘cross-pillarisation’ of certain initiatives that involved various groups from the Commission and the Council, and even some private players within specific partnerships, was by far one of the most important effects of this increase in activities (Monar, 2006; Balzacq and Carrera, 2006; Baldaccini, Guild and Toner, 2007). Some people perceived this combination of internal and external security concerns as the third pillar spilling over into the first pillar, others as a sort of ‘Americanisation’ of European policies (Bigo, 2006; Kanter and Liberatore, 2006). Information exchange, cooperation between institutions and a feeling of belonging to a common professional field specialised in internal security threats grew out of the network of police officers, magistrates, customs officials, border guards and even intelligence departments. This cross-border cooperation tended to make this field less dependent on political officials at the national as well as at the European levels. The new field has ‘de-nationalised’ and ‘de-governmentalised’ European policy and strengthened the common vision shared by the Ministries of Interior with their specific interests in migration policy, border crossing and acceptance of American anti-terrorism standards; and their common distaste of legislative activities and procedural discussions as well as of constraints on speed due to privacy requirements. These points were hotly debated, but the fact that they were dealt with by this group of Ministers for the Interior was quite naturally accepted as legitimate, even when they were speaking of human rights, travels, mobility and freedom. In addition, the ‘European’ field of professional security underwent a change of focus due to the United States’ involvement in European affairs and the role attributed to intelligence departments and border controls, to the detriment of judicial police and magistrates because of a supposed link between terrorism and the presence of foreign citizens in the EU (Geoffrey and Meyer, 2008; Bigo et al., 2008). But, the activity of intelligence services transnationally was however offset by the signing of the Treaty of Lisbon,

the implementing of joint decision-making processes and the transparency and legal value granted to the EU Charter of Fundamental Rights with a sudden U-turn or break that many professionals of security have not understood because they were not paying attention to legislation. And it is with this specific situation that we live in the present.

### **The revenge of the legislation? Stockholm programme and Lisbon Treaty**

The Lisbon Treaty, by reframing the structure of the European Union and the idea of three pillars created thirty years ago, has re-opened questions which were the key questions of the seventies and the eighties. In addition our ideas about what is considered relevant for freedom, security and justice vary a lot. It is therefore important to have a larger view than the ‘sectorial’ view created by the three-pillars mindset. What the European Union has done to increase freedoms has been due first and foremost to its enlargement, its ability to manage administrative issues and the prerogatives of sovereignty and its structural reforms through various treaties, and not much to the third pillar dealing in theory of freedom. Many observers now feel that combining all three dimensions of security, justice and freedom, which have clearly contradictory interests, under the authority of a single commissioner was an error that has lasted more than twenty years. It has just been corrected, and if the idea of three commissioners (one for security, one for justice, one for freedom) has not been taken into account, we have nevertheless seen the sharing of responsibility of DG JLS (Directorate-General for Justice, Freedom and Security) by both Viviane Reding, Vice-President, responsible for Justice, Fundamental Rights and Citizenship, and Cecilia Malmström for ‘Internal Affairs’ (Lieber and Guild, 2008).

Many observers hope that this transformation will stop the old habit of considering police and security as the ultimate goal, and freedom and justice as only ‘minor gods’, possible adjuncts or limitations to security, but never of equal or superior value (Bigo, 2008). The treaty signed in Lisbon in 2007 is therefore central, as it laid down three distinct pillars to hold up the roof of the single, common European house set up by the Maastricht Treaty (1992), and the Stockholm programme makes sense only in relation to the enforcement of the

Lisbon Treaty, now that all the countries have agreed to it.

The tone and style of the Stockholm programme also demonstrate this view that legitimacy of policing is much more important than a so-called short-term efficiency, as the last one creates *de facto* more problems than it can solve. And the dream of complete control of the movement of citizens and foreigners by technology in order to prevent their actions is destroying the basis of what is said to be protected: democracy, habeas corpus, privacy, protection rights and freedom. The Swedish proposal was therefore different from the Hague programme and declared that the core values of the EU needed to be respected and that any theory of permanent derogations or exceptions was not accepted. Rule of law, privacy, protection of asylum seekers and right of defence were placed at the core of the text. But they did not address the reasons of the breaches of these principles, and at the same time the programme contains a series of elements, which led to these breaches of rule of law. The technological trend was not halted, but on the contrary accelerated, even if evaluation is at least asked before new projects begin. The role of the exchange of information is valued in principle, and if privacy is incorporated into the picture, it is more as a warning against excess than a serious discussion about the limits and the boundaries of these exchanges.

So what can we say concerning the future of policing from this contrasting view of the present?

### 3. Implications of the Stockholm programme for future policing

#### The relation between The Hague and the Stockholm Programmes: a break, an achievement, a parenthesis?

The Stockholm Programme has been presented by some as a third phase after The Hague Programme and the Tampere Programme. The first was about principles, the second about organisation and the third about implementation, it is said. But how far can we believe this linearity and this 'progress'? Is it not once again a rhetorical device, an illusionary belief that history has only one direction? To the contrary, others have presented the Stockholm Programme

as a major break, as a U-turn in relation to the Hague Programme and they have insisted on the involvement of non-governmental organisation (NGOs) and private actors into its framing. From what we have analysed a different perspective emerges. The Hague Programme was a parenthesis particularly influenced by the United States administration, and now the Stockholm Programme is returning to the trend of Tampere, which was already torn between on the one hand a bigger concern for privacy, data protection and freedom, and on the other a strong impetus for the technologisation of security, the reinforcement of the exchange of personal data through different database systems and the first ideas of a systematisation of biometric elements for national documents (visa, passports and ID cards). For some, this idea of a non-linear evolution of European policing is certainly strange, and they will insist on the different 'steps' to valorise or de-valorise these incremental steps. But for us, Stockholm is more or less the reproduction of Tampere and bares the same ambiguities.

Remember Tampere. Tampere, after the Amsterdam Treaty, was seen by some as the moment of juridicisation of policing and the moment when the distance between European policing and transatlantic policing was quite important, resulting in an increased respect on the part of both sides for their mutual differences in appreciation. But it can also be seen as one of the key moments of US-EU collaboration. Tampere in 1999 was still informed by the end of bipolarity, by the reunification in Germany and by the possibility of a larger Europe reincorporating all its Eastern part. The preoccupations of the United States were then not much in tune with the European Union. And in retrospect, Tampere appears to many observers as the highest wave of a movement in favour of personal freedoms that was thrown into question by the events of 11 September 2001, creating some nostalgia for this period. However, this summit also firmly supported a tie between mobility, insecurity and strengthened discretionary powers for the police by claiming that we can only enjoy liberty in an area that has already ensured justice and security, the latter being the *sine qua non* for establishing positive conditions of justice and freedom. The summit also abandoned the idea of harmonisation or anything approaching it in favour of mutual recognition. In other words, Member States



were not required to modify their own laws provided that they accept the laws of other Member States within their own territory when these laws have the same aim. Judicial cooperation and the Eurojust project suffered the consequences of this principle, which assumes a mutual trust that has been all too rare. The most ambitious projects (Corpus Juris and the European Public Prosecutor) were also abandoned (Guild, 2006; Megie, 2006; Peers, 2004; Valsamis, 2006). So, the moment of juridicisation of Amsterdam in 1997 and its legacy was very short. The third pillar has been reframed, some important matters went into the first pillar under title four, and created a differentiation limiting the possibility of the insecurity continuum to construct asylum and border crossings as forms of insecurity linked with terrorism and trafficking. Nevertheless the third pillar was not only reaffirmed as such, but also extended with the Schengen integration. Tampere, following Amsterdam, was already a turning point in favour of more links with third countries and it resulted in the official acceptance of a transnational exchange of information, like the telecommunications surveillance system shared between the EU and the FBI, despite the Echelon scandal, the Commission's officials in charge of data protection taking a stand for the opposing opinion and the European Parliament's criticism. In other words, the Hague Programme accelerated this Tampere trend and destabilised the willingness for autonomy of European policing regarding the United States. The Stockholm Programme is once again adjusting the contradictory desires of the EU to be more autonomous and more interconnected with third countries. It is more or less the same tension between privacy and preventive policing which has been at the heart of the discussion, and the strategy has been, this time, to try to accommodate both objectives and not to give absolute priority to security. Soft critiques have been heard concerning the previous programme. We can read on the Swedish website: 'By comparison, the Stockholm Programme has a better balance between law enforcement and the rights of the individual'. And as explained by the Minister for Justice of Sweden, Ms Ask, 'With the Stockholm Programme, the EU is focusing on the rights and needs of the individual. We are taking vigorous measures against crime. At the same time, we are safeguarding the rights of the individual across a broad spectrum, from migrants'

rights and a legally secure and predictable asylum process to the protection of privacy and support to victims of crime.' Mr Billström, Minister for Migration and Asylum Policy has added: 'We have confirmed the goal of having a common asylum system in place by 2012. The days of the asylum lottery are numbered. Visa exemption for the Western Balkans will mean a great deal for hundreds of thousands of people. From 19 December 2009, citizens from Serbia, Montenegro and the Former Yugoslav Republic of Macedonia will be able to travel without visas to the Schengen area. I think we should all be proud of this achievement.' Without saying the Swedish presidency has sidelined the technological belief in Eurodac and the Dublin Convention, it has at least tried to come back to 'compassionate policing': understanding the difference between the perpetrators of crime, the victims and the suspects which have rights as long as they are not effectively convicted. Doing so, they have shown that they were disagreeing with the teleology of the unknown unknowns of Donald Rumsfeld, the Total Information Awareness of ex-admiral Poindexter and the computerisation and data mining that they imply. Exchange of data cannot be a way to construct profiles of potential suspects unknown by the police, but can be used for criminal justice purposes. This has been highlighted by the technical discussion between the push or pull system in the PNR and Swift cases. Data mining needs to have access to a maximum of data in order to construct profiles and it is a permanent justification to have a pull system with raw data and construction of correlations. To the contrary a push system is sufficient for criminal justice, and the technical controversy is in fact a very strong political controversy engaging the presumption of innocence. The European Parliament has been clear on this subject which opposes not the United States to the EU, but the intelligence services of both sides to the privacy organisations on both sides.

#### **The future of policing: policing the future by technology or compassionate policing?**

It is too soon to say what the effective results of the Stockholm Programme will be beyond its declared intentions. However, one of the key elements for the future is linked to the emphasis put by the Stockholm Programme on achieving security through technology infrastructures and databases, with the participation of private companies in this framing of a 'global' policing

(and not only in the realisation of equipment for the police). It seems that this tendency is contradictory to the human dimension of 'compassionate policing' and the criminal police logic and has a tendency to favour de facto preventive policing, software detection and data mining.

The reliance on technology seems to be clearly demonstrated by the development of 'an EU information management strategy' which reproduces locally in Europe what has been done previously in Australia and in the United States, and which tries through an entry-and-exit system to register the complete population of those who travel abroad (including the EU citizens de facto).

This EU information management strategy will exacerbate the question of exchange of personal data between the services of different institutions (law enforcement policing, but also administrative bodies as 'prefectures', and some intelligence services plus border guards and customs) whose trajectories and functions vary from country to country and may end up with a development of mistrust in the other countries' police institutions if a better knowledge of their structures and missions is not acquired. It is a central task to develop this knowledge. Learning about the other Member States' police organisations, justice and administration, as well as external affairs (in embassies and consulates, the hierarchy between the liaison officers abroad, the ambassadors and the ministries), and understanding the relationships of power and duties of each of them, (for example the complicated and different relationships in many countries between police, prosecution and judges), as well as their autonomy towards the ministry and the government, will certainly help in this regard. Without such a mapping, and a thorough understanding of the tensions between a 'preventive', 'intelligence-led approach' loaded with technology and software and the presumption of innocence, the respect for fundamental rights, their international protection, the rights of EU citizens abroad, the level of uncertainty and the ambiguities implied by such a 'management' will deter the use of the system and will maintain multiple and more informal channels of communication, overlapping with the official one.

It would be important in this regard to abandon a certain level of secrecy not adapted to the present situation,

and which has nothing to do with national security, and to deliver an exhaustive and public list of all the services in Europe contributing to each database and the list of databases they are connected to. It will help citizens and policemen themselves to understand where and to whom the data circulates. The fact that personal data is introduced into a system of systems, which is now constructed to create interconnections with future databases still not in service and still without legal base, is not reassuring for everyone, except for the promoters of the companies who have the contracts to build these technologies and the persons working symbiotically with them at the Commission or in different Member States ministries.

The question is important inside the EU, through the Prüm Treaty, but is exacerbated when data exchange goes beyond the EU Member States and includes third countries. Certainly the Stockholm Programme states: 'The Union must secure a comprehensive strategy to protect citizens' data within the EU and in its relations to third countries' (Ibid: 7), but the level of doubt about the accuracy of this strategy and the defence of the rights of EU citizens regarding the cooperation with allies in counterterrorism rose exponentially, with good reason, after the enquiries concerning the United States and UK exchange of data during the Bush period, and their lack of respect of basic principles of rule of law and human rights, as well as the Swift affair and the acceptance by EU negotiators, in the name of good relationships with their United States counterparts, of the possibility for the United States to have access to the complete database through a pull system.

The recent discovery that the so-called technical constraints that Swift was giving in order to avoid the cost of creating filters that were previously required by the EU and the United States congress, and then to allow the United States administration to have access to all the data instead, has infuriated some members of the European Parliament. Indeed, it seems to them that a strong lobby has been created at the transatlantic level by a small group of persons sharing the same interests on both sides. These MEPs consider that this group has not acted in good faith, and has not seriously represented the interests and values of their respective institutions, but has instead 'colluded'.

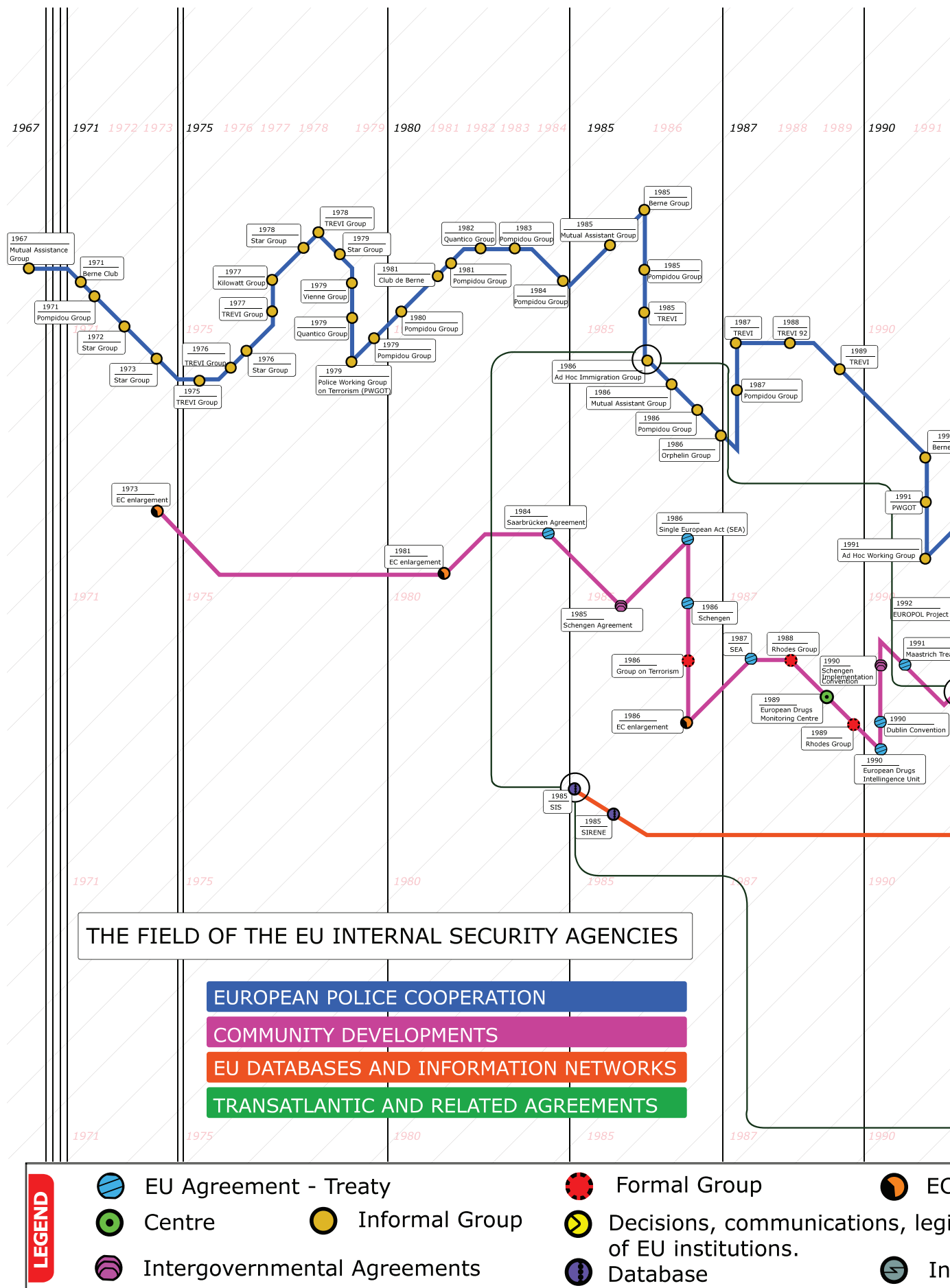
This 'solidarity' between the civil servants on both sides of the Atlantic is not a surprise for the researcher. Some have used the terminology of a European police elite, other have used the notion of transnational guilds to express the structuration of transversal solidarities. It can be explained by many reasons: ideological certainly, but also and more profoundly, similarities of trajectories and carriers, misunderstandings regarding the importance of privacy, and so on. It will take time to reconcile what is more and more perceived as two opposed communities (one of intelligence backed by some law enforcement policemen, and one of data protection and privacy) which have different weights in the United States and in Europe, but which are more and more interconnected at the transatlantic level. The 'privacy' community felt that their arguments had been marginalised during the Bush period and the 'Frattini' period in the EU. They sometimes demonstrate a sense of revenge and hope that their United States counterparts will be strengthened with the Obama administration and its Congress, but they are still isolated in front of a transnational community integrating military, police and intelligence service networks. Consequently, they are not ready for conciliations. If, Swift is finally passed, but under strong pressure of the defence, foreign affairs and interior ministries, it will upset them even more, which will have repercussions in the future. The vision of some of them of a 'plot' is certainly exaggerated as the different networks of police, military and intelligence are in a process of 'linking-up' at the transatlantic level, as we have seen, but they are also in competition, and are not 'integrated', even if the 'fusion' discourse in the name of efficiency is still strong in the department of Homeland Security in the United States, and has supporters inside the EU as well. But, in the future, only if a change of attitude by the intelligence services concerning secrecy and practices contrary to human rights happens, will it be possible to have a security driven by rule of law and not opposed to it.

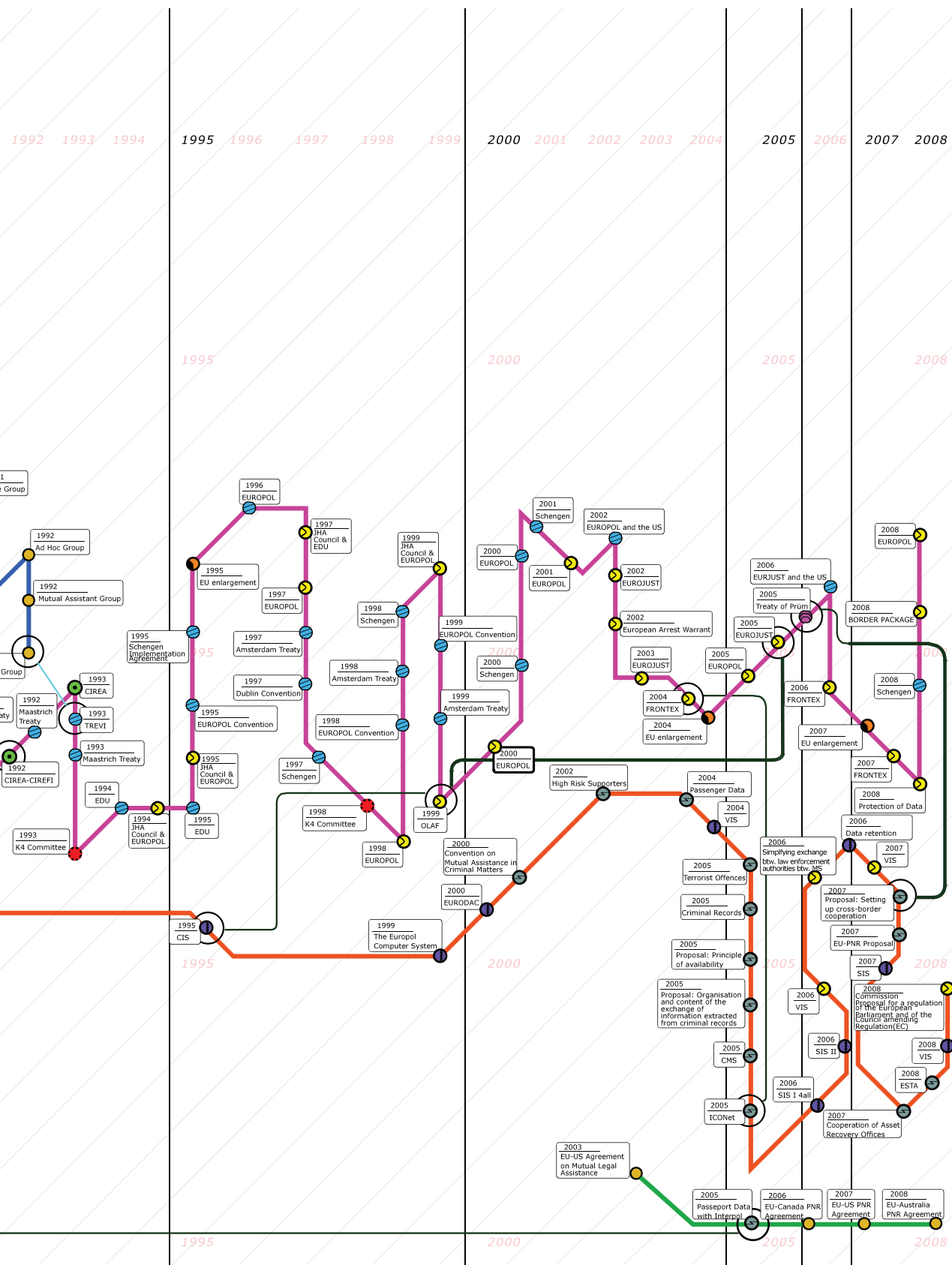
It is one of the elements to build on for the future of policing, in agreement with the United States administration, which required a reflexive stance on both side, and the necessity for the United States to accept that they have also to change their national legislation to comply with the EU requirements, a difficult element to achieve as it required a change of mind-set concerning the relation between United States national sovereignty and international agreements, between hegemony and

reciprocity. The future of European policing is perhaps also dependent on a change of attitude on the part of the United States, change which itself will depend on the strengthening of the privacy community and the limitations imposed on the intelligence service community in their activities abroad.

### **The boundaries of information exchange: cooperation between states or between democracies?**

If the transatlantic community is difficult to build, what should we think about the exchange of personal data with other third countries? The Stockholm Programme identifies as a priority '*information exchange* that flows securely, efficiently and with adequate data-protection standards between the EU and third countries'. Exchanges of information are particularly emphasised with regard to terrorism, where the document highlights: 'Framework agreements should be entered into with the United States and the Russian Federation on the exchange of information while ensuring that adequate data-protection safeguards exist.' But, we have to wonder about the Russian Federation and the other third countries considered as 'strategic partners'. The legal and diplomatic language may be prevented from discriminating between third countries, but is it not an open door for mismanagement of personal data if they flow towards these other third countries which are not all democracies and which have themselves their own networks of exchange? Where are the boundaries of responsibility? Is any state willing to contribute to the war on terror a candidate for receiving the personal data of EU citizens or of residents and non-residents travelling to the EU? Not answering the question, developing a form of fuzziness about the political limits of collaboration and extending this collaboration beyond democracies to any allied state, is endangering the whole scheme of collaboration, and may result in a serious breach of our international obligations concerning persons in need of protection. A key element is then to have a clearer definition of the boundaries of collaboration, and a shared list of countries to which the data have to be refused, whatever the alleged purpose. This clarification will help to build a legitimate form of transnational policing in the future.





C-EU enlargement  
 legislation and proposals  
 information network

**Connections:** ○ — ○  
 institutional transfers, formal and informal relations  
 between agencies and services, database links.



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