

New perspectives in border security?

The US under Obama and the EU under the Stockholm Programme

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ABSTRACT

This report presents a synthesis of the main proceedings and discussions that took place at the Lunchtime Briefing on “New Perspectives in Border Security? The US under Obama and the EU under the Stockholm Programme” that was held in Brussels on the 28th April 2010. The aim of the meeting was to facilitate and encourage debate between INEX researchers and the EU and US policy-makers and stakeholders on the issue of border security and data protection.



- This event was the first in a series of five Lunchtime Briefings on the implications of the “Internal/External Security Continuum in Europe” organised by the Justice and Home Affairs Section at the Centre for European Policy Studies (CEPS), in cooperation with the research centre Law, Science, Technology and Society (LSTS) at the Vrije Universiteit Brussel (VUB) .

This series of events is organised within the framework of INEX - *Converging and conflicting ethical values in the internal/external security continuum in Europe*, a three-year project funded by the Security Programme of DG Enterprise of the European Commission’s Seventh Framework Research Programme. For more information about the project, please visit: www.inexproject.eu

PROGRAMME

12.00 – 13.00: LUNCH

13.00 – 15.00: PRESENTATIONS

Chair: Angela Liberatore (European Commission, DG Research)

Elsbeth Guild (Radboud University of Nijmegen and CEPS), *Border Security and Terrorism Financing: the EU-US Perspectives on the Lists*

Didier Bigo (Sciences Po, Paris), *Reconceptualising Border Security: the EU-US Debate*

Jacquelyn Bednarz (US Mission to the EU), *The US Perspective on EU-US Border Security Issues*

Peter Hobbing (CEPS), *The PNR Debate – Comparing the US/EU and Canada/EU agreements*

Jean-Louis De Brouwer (European Commission, DG JLS), *The Perspective of DG JLS on EU-US Border Security Issues*

PRESENTATIONS

ELSPETH GUILD, *Border Security and Terrorism Financing: EU-US Perspectives on the Lists*

In her presentation, Elspeth Guild explained the meaning of border security in the context of terrorism and political violence. Over the last ten years, there has been a substantial move on the part of the international community to seek to adjust the issue of how money gets into the hands of those who want to engage in international political violence.

The mechanism by which the international community and the EU address the financing of terrorism is based on lists of named individuals who are considered to be a threat to security, in particular to border security. Guild explained that the idea of freezing the funds of people suspected of financing terrorist activities has been controversial. There are doubts about the effectiveness of this measure, for instance, which in fact makes people whose funds have been frozen aware that they are on the list.

In 1999, the Security Council adopted Resolution 1267 to draw up a list of persons whose funds should be frozen. The way in which these lists have been devised has caused friction, particularly in the EU, explained Guild. Concerns arise that the list may include people who are not actually a risk to international security. Citing the example of a case that came up before the UK Supreme Court in which the UK authorities proposed the name of a person to the Security Council listing procedure, whose funds were consequently frozen in the UK, Guild pointed out that there is no mechanism through which a person can challenge a decision taken by the Security Council to include his/her name in the black list. In other words, the Security Council is used as a venue through which to process national executive decisions that would otherwise be subject to judicial control of their vulnerability in the interests of the individual.

Guild pointed out that with the aim of addressing these concerns, the EU institutions have adopted a regulation in relation to the freezing of funds, which is considered to be an obstacle to the free movement of capital (one of the four fundamental freedoms of the Union), asking courts to interpret this measure only to a very limited degree, in order not to go beyond the necessary scope of the objective.

The international and academic debate over the issue has increased since the ECJ *Kadi* judgement (C-402/05) and the challenge it presented to the law-making capacity of the UN Security Council by requiring that the individual be provided with a means of clearing his name from the lists and gaining access to his funds. In fact, the ECJ decision sparked criticism because of its 'anti-hierarchy' attitude, revealed by putting into question a formal high court resolution, which has broadened the discussion among institutional actors in the EU and the US on what has to be done in terms of the rule of law, particularly in relation to the protection of the individual and the safeguard of fundamental rights.

DIDIER BIGO, *Reconceptualising Border Security: the EU-US Debate*

The presentation by Didier Bigo focused on three main topics: border security; implications of the Stockholm Programme, and EU-US relations.

1 - Bigo offered a re-conceptualisation of the notion of border security. He highlighted the different implications of the notions of “security *at* the borders” and “security *of* the borders”. The meaning of the second definition is broader than that of the first because it goes beyond mere geographical borders. The fact of following the tracks of people on the move generates a division between those who are moving (who are more under surveillance) and those who are not.

Bigo highlighted the fact that research has proved that it is not possible to anticipate the behaviour of human beings by technology. He showed that given the fact that we are referring to the population and not to individuals, it is not possible to have certainty in matters of human behaviour. Moreover, taking the ‘risk’ as a category of analysis is wrong because the notion of ‘risk’ implies opportunity and danger, but in security studies only dangers are considered. So, the consequence of using a category of risk (meaning danger) is that people who are possibly dangerous but not (yet) culpable could be detained. This confusion between danger and culpability can have deep and far-reaching implications.

Bigo also looked at the implications of the Stockholm Programme on border security. According to him, the Stockholm Programme is critical about the Hague Programme and goes back to Tampere. Issues such as data protection, freedom of movement and asylum, which have been left aside during the implementation of The Hague Programme, are now given great importance in the Declaration of the Stockholm Programme.

Bigo argued that the Stockholm Programme has to deal with the contradictory desires of the EU: to be both more autonomous and more interconnected with third countries. Bearing in mind that The Hague Programme, with EURODAC, was too technology-oriented, Bigo highlighted the fact that the Stockholm Programme tries to solve the issue by striking a balance between law enforcement and the rights of the individuals. He emphasised that the focus should be put on freedom, security and justice, not only on delivering security.

Security is not about technology but about politics and politics in a liberal democracy, stressed Bigo. Technical aspects are *de facto* political. He cited as an example the practice of collecting all available information in order to have the capacity of data mining, which is central to profiling through technology to anticipate dangerous profiles of unknown individuals. This is an intelligence logic that is far-removed from the systems of law enforcement and criminal justice, and for which it is possible to access data concerning only those people who represent a serious risk.

Regarding EU-US relations, Bigo pointed out that having reciprocal relations implies that also the US would need to adapt their national legislation to comply with EU legislation. According to Bigo, in order to have information-sharing, the US must accept reciprocity and solidarity in US-EU relations, which is a precondition for data protection and intelligence services to work together. If intelligence tries to maintain secrecy on data in the name of national security, the two transatlantic communities will increasingly have problems on both sides.

PETER HOBGING, *The PNR Debate – Comparing the US/EU and Canada/EU agreements*

In his presentation, Hobbing faced the issue of the respect of data protection standards in transatlantic agreements of recent years (2004, 2005 and 2007), also stressing the sensitiveness of such a policy area.

Hobbing recalled that the EU Parliament has recently stated it would not overestimate the *status quo* on the data protection issue, which has been negotiated by the Commission and the Council, but that the situation must change quickly to prevent the non-respect of data protection requirements in years to come. This position has also been backed by the Justice Commissioner. What does 'confronted' mean in this context? Viviane Reding, who has stated that great attention must be paid to civil liberties and to security, reiterating that the issue of data protection is of great concern to citizens and that everybody should pay attention to it.

After recalling the importance of complying with Art. 8 of the Fundamental Rights Charter, Hobbing introduced an overview of a Commission DG Relex study on the EU/Canada agreements and contrasted this study with a similar analysis conducted by the US and the EU. As a result, the presentation showed how, particularly following the letter sent in 2007 by the US Homeland Security Secretary to the Portuguese UE Presidency, but in general since 2005, several concerns could be raised. Changes in the handling of data have mainly occurred as a result of that letter, in which the US authorities had meant to let it be known that modifications in the US data protection regulations would be established without previous negotiations with the other political (EU/Canada) counterparts.

In this sense, a lack of compliance with data protection requirements in agreements of recent years is evident. New purposes have been introduced, such as “public health”, “judicial purposes” or “otherwise required by the law” clauses, and new facilities have been created that disregard the filter systems in terms of data quality (excessive elements on the lists); data retention periods (which have nearly doubled between 2004 and 2007) and concerning the restrictions on the onward transfer of data (exemptions have increased).

On the other hand, there has been an improvement in the rights of access and rectification, but it is still not clear whether judicial review or redress is really available for non-US citizens. These concerns have sparked ongoing debate. Hobbing therefore recommended that different political actors review the situation according to a fixed calendar, instead of leaving the review process to discretionary decisions.

Hobbing foresaw that EU data protection authorities will criticise certain issues when it comes to negotiating the new agreement with the US (probably after the summer) but on the other hand the EU Parliament is obviously interested in not interrupting the flow of passenger traffic between the EU and the US and will try to find a compromise solution in order to reconcile the two interests.

JACQUELYN BEDNARZ, *The US Perspective on EU-US Border Security Issues*

Bednarz began her presentation by referring to the common values and common threats – such as US terrorism, transnational crime, cyber attacks – that the EU and the US share. She stressed the need to combine efforts in a shared way, in order to make a more resilient network capable of facing those threats.

Bednarz highlighted the fact that for US Homeland Security, border security means something more than the geophysical line dividing the US from Canada or from Mexico, but a network approach with foreign governments on issues such as improving identity documents. She explained that on the borders of the US they are using a combination of tools, including watch-lists and technology, and measures for the safety of all travellers. Technology in the form of behaviour detection and explosive trace detection is used in US airports. Furthermore, they have also decided to use imaging technology in the US after very careful looks at health and data privacy; 450 of these units will be used in domestic airports before the end of the year.

Bednarz underlined the fact that, for the first time, the Homeland Security Department has set a multi-annual programme for the next four years, setting five priorities and mission areas: deterring and preventing terrorist attacks and enhancing the security of the US; securing and managing US borders (including not only the flow of travellers and people but also the flow of goods to and from the US); enforcing immigration laws, not only looking at undocumented migration but also delivering an efficient and effective legal immigration system; safeguarding and securing cyber-space; and finally, ensuring that residents would not be so adversely affected by natural or man-made disasters.

She also highlighted the fact that the Stockholm Programme and the US four-year review have common elements and mentioned a few documents that the US and the EU have developed together in the last year that try to set the vision of a common approach to border security and other JHA areas: the US-EU joint statement on enhancing transatlantic cooperation in the area of Justice Freedom and Security (reached during the US-EU JHA Ministerial in Washington at the time of the Swedish Presidency of the EU); the US Homeland Security-FRONTEX agreement for a cooperative work arrangement; the US-EU joint Declaration on aviation security, which followed Secretary Napolitano's participation in the informal Justice and Interior Ministers meeting in Toledo, Spain.

Finally, Bednarz referred to the need to: develop programmes that facilitate travel, such as “trusted traveller” programmes; to open negotiations on an agreement on international data protection principles and legally binding forms that are valid internationally; and to enhance a migration dialogue.

JEAN-LOUIS DE BROUWER, *The Perspective of DG JLS on EU-US Border Security Issues*

De Brouwer began his presentation by elaborating on the notion of ‘border’, which is, according to him, “a political and cultural limit with a geographical dimension” and which also represents “the limits of the sovereignty of a political entity”. He highlighted that in the EU context, the external border is a political limit with no cultural reference.

De Brouwer remarked that European borders are crossed by flows of individuals, goods and capital and that there is a common recognition that by controlling fluxes at the border the 'political entity' enhances levels of internal security. Rejecting the notion of achieving a balance between liberty and security, De Brouwer emphasised that fundamental rights are 'fundamental' and derogations must be well-justified, well-grounded and interpreted in a limited way. This is central to the issue of borders and ethical values.

De Brouwer then gave an historical analysis of the last ten years in the EU, focusing on three milestones: Tampere, The Hague and Stockholm. He highlighted that border control was not a central issue in the Tampere Programme (because at the time Schengen had just been integrated into the EU). It became central with The Hague programme, when a huge modernisation programme was decided upon. This led to the adoption of the EU border code, to the development of a second generation of the Schengen Information System, to the setting of a border control agency (FRONTEX) and provided member states with financial support from the EC budget.

Considering the Stockholm programme, De Brouwer stated that nothing new had been introduced into the border policy dimension. However, he underlined the fact that two major linguistic and structural changes had taken place: first, borders and visas had become part of a new approach aiming at the integrated control of access to territory – now seen as two sides of the same coin. Second, there is an effort to disconnect borders and visas from the classical policy area in which they were located (migration management) to bring it closer to that of internal security. Are border controls and visa policy part of the migration management policy or part of a new (still to be developed) internal security strategy? According to De Brouwer, they are neither one (anymore) nor the other (yet).

Concerning the Lisbon Treaty, De Brouwer highlighted its impact on both the developments of the EU institutions and on their relations with US administrations. He remarked on the enhanced role of the EU Parliament and the possible increased influence of the Permanent Chair of the EU Council in the development of the JLS agenda. Furthermore, he pointed out that there is for the time being a direct contact between the Commissioners of Justice and Fundamental Rights and of Home Affairs on the one side and their counterparts in the US administration on the other. However, as for the US, from now on, also the EU will have its own State Department, although its role in the external dimension of JLS policies still has to be defined.

Regarding the launch of a dialogue on migration, De Brouwer agreed fully with Jacquelyn Bednarz and remarked on the impressive progress made in EU-US cooperation since 2009. Finally, he called for further steps in the negotiations on Passenger Name Records (PNR) and the agreements on data protection.