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Europe and Counterterrorism: Strengthening Police and Judicial Cooperation

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Summary

The September 11, 2001 terrorist attacks on the United States gave new momentum to European Union (EU) initiatives to combat terrorism and other cross-border crimes such as drug trafficking, human trafficking, and financial fraud. For many years, EU efforts to address such challenges were hampered by national sovereignty concerns, insufficient resources, and a lack of trust among law enforcement agencies. However, the terrorist attacks and the subsequent revelation of Al Qaeda cells in Europe changed this status quo as it became increasingly evident that the EU's open borders and different legal systems allowed terrorists and other criminals to move around easily and evade arrest and prosecution. Thus, EU officials renewed their efforts to harmonize national laws and bring down traditional barriers among member states' police, intelligence, and judicial authorities. As part of this initiative, the EU has also sought to enhance ongoing cooperation with U.S. law enforcement and judicial authorities so that information can be meaningfully shared and suspects apprehended expeditiously.

The March 11, 2004, terrorist bombings in Madrid, Spain, injected a greater sense of urgency into EU efforts to boost police and judicial cooperation within the EU and improve EU external border controls. Despite the EU's progress, however, the Union faces a number of political, legal, and cultural hurdles as it seeks to introduce more effective law enforcement tools. For example, some member states were slow to implement the EU-wide arrest warrant — which eliminates extradition proceedings among member states for 32 offenses, including terrorism — and other EU legislative instruments to counter terrorism. National police and intelligence services remain reluctant to share information. Contentious issues such as the use of the death penalty in the United States and different data protection regimes have also posed challenges at times to more robust U.S.-EU cooperation.

The 9/11 Commission recommended that the United States “should engage other nations in developing a comprehensive coalition strategy against Islamism terrorism;” the House and Senate have passed intelligence reform legislation (H.R. 10 and S. 2845) with elements that seek to enhance international cooperation against terrorism. The Bush Administration, backed by Members of Congress, supports EU efforts to strengthen its counterterrorism capabilities, and welcomes initiatives aimed at complementing and improving existing bilateral cooperation between U.S. and EU member states' intelligence and law enforcement agencies. The United States has concluded two information-sharing agreements with Europol, signed two treaties with the EU on extradition and mutual legal assistance, and has been working to improve cooperation with EU border control officials. Some critics question, however, whether U.S.-EU-wide cooperation will add much value to existing bilateral law enforcement relationships.

This report will be updated as events warrant. Also see CRS Report RL31612, *European Counterterrorist Efforts: Political Will and Diverse Responses in the First Year After September 11*, coordinated by Paul Gallis.

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Europe and Counterterrorism: Strengthening Police and Judicial Cooperation

Introduction

The Bush Administration supports the European Union (EU) initiative to improve cooperation in the police and judicial fields among its 25 member states and with the United States.¹ The Administration hopes that EU efforts will augment European counter-terrorist capabilities, promote better information-sharing among member states, and ultimately lead to rooting out terrorist cells in Europe that could be planning other attacks against U.S. interests. Washington is keen to keep the dialogue with the Union on such issues open, viewing it as serving U.S. interests to weigh in early and often given Europe's role as a key U.S. partner in international law enforcement efforts and the presence of terrorist cells in some EU countries. This is in line with the 9/11 Commission's recommendations that the United States should develop a "comprehensive coalition strategy" against Islamist terrorism, "exchange terrorist information with trusted allies," and improve border security through better international cooperation. Some provisions in U.S. intelligence reform legislation passed by the House and Senate (H.R. 10 and S. 2845) seek to enhance international collaboration against terrorism. At the same time, U.S. officials claim they have been proceeding cautiously in pursuing more robust cooperation with the EU in order to avoid actions that could damage currently good bilateral relations or impede ongoing criminal investigations.

EU member states have long sought to improve police and judicial cooperation among themselves as part of the Union's drive toward further political integration and its desire to create a European area of "freedom, security, and justice." European interior and justice ministries, law enforcement agencies, and security services began cooperating informally in the mid-1970s to combat terrorism and other crimes amid a significant increase in cross-border travel by European citizens and other nationals. The 1992 Maastricht Treaty on European Union formalized this intergovernmental cooperation into a "third pillar" of justice and home affairs (JHA) aimed at fostering common internal security measures and the free movement of people within EU borders.² Despite this institutionalization, progress in the police and judicial fields was hampered for years by member states' concerns about maintaining sovereignty

¹ The EU enlarged from 15 to 25 members on May 1, 2004. The 25 EU members are Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

² The first "pillar" of the European Union is the European Community, which encompasses economic, trade, and social policies; the second "pillar" aims to develop an EU common foreign and security policy.

over national law enforcement authorities, insufficient resources, and a lack of trust among police and intelligence agencies.

The September 11, 2001, terrorist attacks and the subsequent revelation of Al Qaeda cells in Europe, however, served as a wake-up call for EU governments. In the weeks after the attacks, police in many EU member states flushed out dozens of suspected terrorists linked to Osama bin Laden; Germany and Spain were identified as key logistical and planning bases for the attacks, and numerous arrests were also carried out in Belgium, France, Italy, and the United Kingdom. As the 9/11 Commission notes, Al Qaeda was able to exploit relatively lax security environments in Western Europe. This fact was readily appreciated by European leaders, who quickly recognized that the EU's open borders and different legal systems allowed terrorists and other criminals to move around easily and evade arrest and prosecution. Most EU member states, for example, lacked anti-terrorist legislation, or even a legal definition of terrorism.³ Without strong evidence that a suspect had committed a crime common to all countries, such as murder, terrorists or their supporters were often able to avoid apprehension in one EU country by fleeing to another with different laws and criminal codes. Moreover, although suspects could travel among EU countries quickly, extradition requests often took months or years to process.

Since the attacks on the United States, EU leaders have demonstrated a renewed political commitment to boosting police and judicial cooperation both among member states and with U.S. law enforcement counterparts. The March 11, 2004, terrorist bombings in Madrid, Spain, have further energized EU efforts to combat terrorism. Although many EU initiatives in the police and judicial fields are directed primarily against the terrorist threat, observers note that several of them — such as the EU-wide arrest warrant — will also improve EU abilities to investigate and prosecute other transnational crimes, and could be the first building blocks of an eventual EU judicial identity. Nevertheless, translating these EU political agreements into effective law enforcement tools has not been easy. A number of political, legal, and cultural challenges remain.

Progress to Date

EU leaders meeting in a special emergency session made key decisions on September 21, 2001 to boost police and judicial cooperation within the EU, close off sources of terrorist financing, and enhance U.S.-EU law enforcement coordination as part of a comprehensive plan to counter terrorism.⁴ They also endorsed a detailed work program of over 30 initiatives for closer police and judicial cooperation and stronger external border controls. Work on many of these proposals had been underway for much of the past decade.

³ Prior to the September 11 terrorist attacks, only six EU members had specific anti-terrorism legislation: France, Germany, Italy, Portugal, Spain, and the United Kingdom.

⁴ The EU's plan of action against terrorism also includes diplomatic, humanitarian, and economic assistance measures not addressed in this report.

In the wake of the March 2004 terrorist bombings in Spain, the EU renewed its commitment to implement existing legal instruments aimed at fighting terrorism and announced several additional measures in a new Declaration on Combating Terrorism.⁵ These new initiatives are aimed primarily at further enhancing coordination and intelligence-sharing among the various EU and member state agencies engaged in combating terrorism and improving border controls. The EU views all of the measures agreed since September 2001 as essential to building a common internal security area. (See Appendix A for additional background on the initiatives below and information on others.)

Boosting EU Police and Judicial Cooperation

The bulk of EU initiatives in the police and judicial fields set forth in September 2001 and March 2004 focus on establishing greater cross-border compatibility among EU member states' criminal laws and improving cooperation among national police, intelligence, and judicial authorities. Key measures include the following.

- **Establishing a common EU definition of terrorism and common penalties.** In December 2001, EU member states reached a political agreement that defines as terrorist offenses various types of crimes committed with the intent to intimidate a population or destabilize a country's political or economic system. It also standardizes penalties for participating in a terrorist group.
- **Defining a common EU list of terrorist organizations.** The EU maintains two lists of persons and entities with terrorist links. One list is directed against persons and entities associated with Osama bin Laden, Al Qaeda, and the Taliban; it essentially enacts into EU law U.N. Security Council sanctions against these individuals and groups. The other EU list currently names 91 additional terrorist individuals and organizations based both in Europe and worldwide. Examples include the Basque group ETA, the Turkish-based Kurdistan Worker's Party (PKK), the Revolutionary Armed Forces of Colombia (FARC), and Hamas. All EU members must freeze the assets of those named on both lists, and provide assistance to each other in related police investigations and legal proceedings.
- **Creating an EU-wide arrest warrant.** In December 2001, EU governments reached a political agreement to implement an EU-wide arrest warrant to eliminate the need for extradition proceedings among EU member states for a diverse set of 32 offenses, including terrorism as well as organized crime, trafficking in persons, corruption, and murder. EU officials claim the arrest warrant will expedite the apprehension of criminals given that the entire process, from arrest to surrender to the issuing authority, must be completed within a maximum of 90 days. The warrant is based on the principle

⁵ See European Council, "Declaration on Combating Terrorism," March 25-26, 2004 [<http://ue.eu.int/uedocs/cmsUpload/79635.pdf>].

of mutual recognition of other EU member states' judicial systems. The arrest warrant was supposed to have been implemented throughout the EU by January 2004, but some member states failed to meet this deadline.

- **Strengthening EU police and judicial institutions.** The EU has been working to give Europol, its fledgling joint criminal intelligence body, a more assertive law enforcement role. Since 1999, Europol has functioned as an information clearinghouse for cross-border crimes such as terrorism and drug trafficking for member states' law enforcement agencies. Europol currently has a staff of 391, including 60 liaison officers from national police, customs, immigration, and intelligence agencies. In April 2002, EU leaders agreed to allow Europol to ask national police services to launch specific criminal investigations and to participate in eventual EU joint investigation teams. Europol agents will still be prohibited from detaining or arresting suspects, and can only participate in joint investigations into crimes that fall within their mandate. Since September 11, the EU has also increased Europol's budget by almost 50 percent to pay for more staff and growing counter-terrorist duties; for 2004, Europol's budget is roughly \$74 million.⁶ Eurojust, the EU's nascent unit of prosecutors and magistrates, was officially established in February 2002. It is charged with helping to coordinate the investigation and prosecution of serious cross-border crimes in EU member states. Some EU officials would also like to bolster the EU Chiefs of Police Task Force, which meets once every six months, to foster more systematic information exchanges.
- **Increasing cooperation among police and intelligence services.** Following September 11, the EU called on member states' police, security, and intelligence services to intensify information-sharing both among themselves and with Europol. EU leaders directed the heads of EU police counter-terrorist units to begin meeting, and called on national security and intelligence services to consult on a regular basis. However, many national services have remained reluctant to share information. The March 11, 2004, terrorist attacks in Madrid highlighted this problem as reports surfaced that several of the Madrid suspects were known to security services in Spain and other EU states but fell through communication cracks. Since then, the heads of the security services of the EU's 25 members have established a Counter-Terrorist Group, committed to meeting regularly in Brussels to exchange information and analysis on the terrorist threat. The EU is also considering two new proposals: one seeks to improve information-sharing about ongoing terrorist

⁶ In comparison to the FBI's almost 30,000 employees and \$3 billion annual budget, Europol remains small and minimally funded. "EU Boosts Spending on Europol to Fight Terrorism," *Associated Press*, February 28, 2002. Also see "Fact Sheet on Europol," January 2004 on the Europol website [<http://www.europol.eu.int>].

investigations among national authorities, Europol, and Eurojust; the other requires information on serious crimes to be shared among national law enforcement agencies within 12 hours. The European Police College also seeks to improve cooperation among national police services.⁷

- **Establishing an EU “counterterrorism czar” and intelligence capacity.** Following the March 2004 attacks in Spain, EU leaders created a new Counter-terrorist Coordinator to coordinate the efforts of the various EU bodies engaged in combating terrorism and to promote effective implementation of agreed measures. Gijs de Vries, a former Dutch interior ministry official and European Parliamentarian, was appointed to this post on March 26; he reports to the EU’s top foreign policy official, Javier Solana. In June 2004, EU leaders approved enhancing the EU’s counterterrorist intelligence capacity within the EU’s existing Joint Situation Centre (SITCEN) to better support EU counterterrorism policymaking. The SITCEN had been operating for several years but only had a handful of analysts charged with conducting external threat analyses; the new proposal would beef up the SITCEN by reinforcing it with more personnel and broadening its mandate to address internal threats to the EU.⁸

Suppressing Terrorist Funding

The EU has made progress on several initiatives since September 2001 aimed at helping close off sources of terrorist financing and improve financial investigative tools. Some have built on EU initiatives that date from before September 11 to clamp down on money-laundering. Major efforts in this area have focused on the following aspects.

- **Expanding the EU’s money-laundering directive.** In November 2001, EU finance ministers agreed to broaden the scope of its 1991 directive on preventing the use of the financial system for the purpose of money laundering, previously applicable only to drug-trafficking proceeds, to all serious crimes, intended to include terrorism. The directive also expands the types of professionals who must notify law enforcement of suspicious transactions. Whereas initially only those in the banking industry had such obligations, now lawyers, accountants, and others deemed vulnerable to misuse by money launderers, do as well. In June 2004, the European Commission proposed a new money-laundering directive that would consolidate the two previous directives and expand the definition of money-laundering to include legally acquired money used to finance

⁷ Ian Black, “On the Brink of War: EU to Pool Security Intelligence,” *The Guardian* (London), September 29, 2001; “European Council Keeps up Pressure to Deliver,” *European Report*, No. 2878, June 19, 2004.

⁸ “EU Urged to Upgrade Joint Intelligence Work,” *Agence France Presse*, June 8, 2004.

terrorism. The new directive would also further extend the range of professions subject to reporting requirements and enhance the “know-your-customer” rules. EU finance ministers will now consider whether to adopt this new proposal.

- **Establishing an EU-wide asset-freezing order.** In February 2002, EU justice and interior ministers reached political consensus on an agreement that will require national courts to enforce orders issued by other member states to freeze the assets of suspected terrorists and other criminals. Such orders could apply to investigations into any of the 32 offenses subject to the EU arrest warrant. The EU formally adopted this initiative in July 2003 after six countries cleared the measure with their respective legislatures.
- **Facilitating asset confiscation.** In August 2002, Denmark proposed two measures to ease the confiscation of criminal assets throughout the EU. In December 2002, member states reached political agreement on one of these proposals, which would relax the burden of proof, but it has not yet been formally adopted because two states must still gain approval from their national parliaments. The other proposal related to the mutual enforcement of confiscation orders was more controversial, but political agreement was reached in June 2004. Although these measures will apply to a wide range of crimes, it is hoped they will prove useful tools in the fight against terrorism also.

Strengthening External EU Border Controls

EU progress on new proposals to counter terrorism and other cross-border crimes has been slowest in the border control area. Border control was the least well-defined category of initiatives to emerge from the EU’s emergency sessions in September 2001. Developments in this area have also been hampered because many are linked to EU efforts to decrease illegal immigration, which continue to founder upon different national policy preferences and domestic political considerations. In the spring of 2002, however, EU leaders endorsed several measures aimed at preventing terrorists and common criminals from gaining footholds in the EU’s territory. These centered on improving cooperation among national customs and immigration officials, and combating visa and asylum fraud. By 2003, the EU also began focusing greater attention on travel document security, including the use of biometric information, and passenger data sharing; the Madrid attacks on March 11, 2004, have given additional impetus to efforts in these areas. Key initiatives to strengthen external EU border controls and document security include the following.

- **Improving cooperation in managing the EU’s external borders.** In June 2002, EU leaders approved a multi-faceted external borders management plan to help curb illegal immigration, especially at European air and sea ports. It sought to create networks of member states’ border control officials, establish common training programs and equipment standards, and centralize EU funding to share the financial burden of these measures. EU officials also called for joint

law enforcement operations at external borders to begin by the end of 2002; at least 15 ad hoc joint border control projects have been executed so far.⁹ In November 2003, the European Commission proposed establishing a new European Borders Agency, which would further build on the external borders management plan. It would provide border control, surveillance, and training assistance to member states, help manage specific crises, and coordinate EU-wide efforts to repatriate illegal immigrants. The Borders Agency would not have a law enforcement role, however. EU leaders gave political approval in December 2003; press reports indicate that EU officials will soon approve the technical arrangements for the new Agency, which the EU hopes will become operational in May 2005.

- **Reinforcing sea border controls.** In April 2002, EU officials agreed that strengthening maritime border controls was a priority given the growing number of immigrants attempting to enter the EU illegally by boat. In November 2003, the EU approved a plan to better combat illegal immigration across the EU's maritime borders, including improving cooperation among members and with third countries and the possible use of joint patrols to monitor especially problematic areas, such as those off the coasts of Spain, Italy, and Greece.
- **Increasing visa coordination.** EU officials view establishing a common visa policy among EU member states as crucial to stemming illegal immigration and keeping terrorists and other criminals out. In February 2002, EU justice and interior ministers approved establishing common consular offices in non-EU countries to end the practice of "visa shopping" in which non-EU nationals try their luck at different EU embassies. In April 2002, they approved creating a common EU visa format with digital photos to prevent fraud. In June 2002, EU leaders gave a green light to creating an EU visa database that would list all visas issued and turned down by member states to counter visa fraud and improve information-sharing among national law enforcement authorities.
- **Implementing Eurodac.** In February 2002, EU officials endorsed implementing Eurodac, an EU-wide fingerprint database of asylum seekers. Eurodac is intended to counter "asylum shopping," in which applicants lodge asylum requests in several member states, see where they are accepted, and which countries offer the most favorable reception conditions. The system was officially launched in January 2003. In its first year of operation, 7% of asylum seekers had made applications in more than one EU member state. The European Commission is reportedly considering future plans to make Eurodac and other EU databases, such as the proposed visa

⁹ "Justice and Home Affairs: Internal Report Says Border Control Projects Have Mixed Results," *European Report*, No. 2787, June 25, 2003.

database, interoperable, as called for in its March 2004 Declaration on Combating Terrorism.¹⁰

- **Improving travel document security.** At the June 2003 Thessaloniki Summit, EU leaders called for a coherent EU approach on including biometric identifiers in visas and residence permits issued to non-EU nationals, as well as in passports of EU citizens. In September 2003, the European Commission proposed two regulations providing a legal basis for the introduction of the facial image and two fingerprints in European visas and residence permits; EU officials approved these proposals in November 2003. In February 2004, the Commission proposed another regulation requiring all EU passports to contain machine-readable digital photos with facial recognition data, while keeping the inclusion of fingerprint data optional; EU leaders endorsed this proposal in June 2004. The EU hopes to begin introducing the new passports with biometric data in 2005, but it is unlikely that all member states will be able to meet this goal.
- **Establishing new rules for passenger data transfers.** In April 2004, EU officials approved new rules requiring airlines to communicate passenger data to member states before arriving in the EU. Data will be deleted after 24 hours, unless required for law enforcement purposes. Airlines that do not comply will face sanctions. In addition to combating terrorism, this measure is also aimed at countering illegal immigration in the EU. Member states must bring their national data regimes in line with this new EU directive by September 2006.

Enhancing U.S.-EU Cooperation

In addition to boosting cooperation among member states' law enforcement bodies, a key EU goal since September 11 has been to bolster coordination with the United States to better combat terrorism. The United States has welcomed the EU's heightened emphasis on better communication and cooperation; as the 9/11 Commission points out, collaboration with other governments is crucial to uncover terrorist sanctuaries, target terrorist travel and financing, and ensure the integrity of U.S. borders. Both H.R. 10 and S. 2845 contain provisions in line with these recommendations and with U.S.-EU counterterrorist efforts, especially those aimed at improving border controls and travel document security.

EU officials in Brussels have stepped up their diplomatic engagement on police, judicial, and border control policy matters with U.S. counterparts in the Departments of State, Justice, Homeland Security, and Treasury. The U.S. Attorney General, Secretary of State, and Secretary of Homeland Security meet at ministerial level with EU counterparts at least once a year, and a U.S.-EU working group of senior officials

¹⁰ "Justice and Home Affairs: Commission's New Plans to Boost Police Data Sharing," *European Report*, No. 2878, June 19, 2004.

meets once every six months to discuss police and judicial cooperation against terrorism. In April 2004, the United States and EU held its first high-level policy dialogue on border and transport security; this formation intends to meet at least twice a year to keep dialogue open on issues such as passenger data-sharing, cargo security, biometrics, visa policy, and sky marshals. In June 2004 at the U.S.-EU Summit in Ireland, the two sides issued a joint declaration on combating terrorism; among other measures that seek to reinforce ongoing police, judicial, and border security cooperation, the declaration also establishes a regular dialogue on terrorist financing.¹¹ EU officials are also seeking closer working relationships for Europol and Eurojust with the FBI, CIA, and other law enforcement agencies.¹² Major efforts include the following.

- **Increasing working-level cooperation between U.S. and EU police and judicial counterparts.** In the immediate aftermath of the September 11 attacks, the EU established a task force of counterterrorism specialists, housed in Europol and composed of police and intelligence representatives from each member state, both to increase communication among these services and to work on liaison with U.S. counterparts. EU leaders directed that this task force be reactivated in the wake of the March 2004 terrorist bombings in Madrid. The FBI will station a U.S. liaison officer in The Hague to coordinate with the task force, and the U.S. Secret Service will appoint a liaison to Europol to work on counterfeiting issues. Two Europol liaison officers have been operating in Washington since June 2002. In addition, EU and U.S. judicial officials are collaborating in Eurojust, and U.S. representatives have reportedly been invited to attend meetings of EU heads of counterterrorist units.
- **Establishing U.S.-Europol information exchanges.** In December 2001, the United States and the EU agreed to allow U.S. law enforcement authorities and Europol to share “strategic” or “technical” information, including threat tips, crime patterns, risk assessments, and investigative procedures. In December 2002, negotiations were completed on a second Europol agreement to permit U.S. and European investigators to share “personal” information, such as names, addresses, phone numbers, and criminal records, about suspects in all crimes covered by Europol’s mandate.
- **Establishing U.S.-EU cooperation agreements on extradition and judicial assistance.** In April 2002, EU leaders approved opening

¹¹ See “U.S.-EU Declaration on Combating Terrorism,” U.S.-EU Summit, June 26, 2004 [<http://www.whitehouse.gov/news/releases/2004/06/20040626-5.html>].

¹² On the U.S. side, the State Department has the lead in managing the interagency policymaking process toward enhancing U.S.-EU police, judicial, and border control cooperation, while the Justice and Homeland Security Departments provide the bulk of the technical legal expertise. The Treasury Department has the lead on efforts to suppress terrorist financing.

negotiations with the United States on agreements aimed especially at promoting cooperation in extraditing terrorist suspects and providing legal assistance in such cases. At the May 2002 U.S.-EU summit in Washington, the Bush Administration agreed to explore developing such instruments with the Union. Two treaties, one on extradition and the other on mutual legal assistance, were concluded in February 2003, and signed in June 2003. Washington and Brussels hope they will help harmonize the bilateral accords that already exist between the United States and individual EU members, simplify the extradition process, promote better information-sharing, and be useful tools in combating fraud and organized crime as well as terrorism. The provisions of the treaties must now be transposed into national law by EU members, and ratified by the U.S. Senate.¹³

- **Improving border control and transport security cooperation.** The United States and the EU have been placing increasing emphasis on collaboration in these areas, as seen by the creation in April 2004 of the U.S.-EU high-level policy dialogue on border and transport security. A number of initiatives have also been concluded or are under discussion. In April 2004, the United States and EU signed a customs cooperation accord; among other measures, it calls for extending the U.S. Container Security Initiative (CSI) throughout the EU. The CSI stations U.S. customs officers in foreign ports to help ensure that U.S.-bound cargo containers do not contain weapons of mass destruction or other dangerous substances. In May 2004, the United States and the EU approved an agreement permitting airlines operating flights to or from the United States to provide U.S. authorities with passenger name record (PNR) data in their reservation and departure control systems. This accord formalizes a practice in place since March 2003, but it has been controversial in the EU. European Parliamentarians and civil liberty advocates continue to challenge the agreement, claiming it violates privacy rights. The United States and the EU have also pledged to enhance international information exchanges on lost and stolen passports and to promote travel document security through the use of interoperable biometric identifiers. Such efforts are in line with provisions in H.R. 10 that call for curtailing terrorist travel by working with other countries to improve travel document security and with measures in both H.R. 10 and S. 2845 related to biometric entry/exit controls and passport requirements. U.S.-EU cooperation

¹³ Interviews of EU and U.S. officials, 2003 and 2004. The United States and EU member states have been working on concluding protocols that will reconcile the terms of their respective bilateral treaties with the new EU-wide treaties. U.S. and EU officials hope that the protocols with the EU's original 15 members will be concluded by December 2004; a second round will then begin with the EU's newest 10 members. U.S. officials may send the initial 15 protocols to the Senate for ratification as early as the beginning of 2005. For the texts of the U.S.-EU extradition and mutual legal assistance agreements, see the Council Decision of June 6, 2003 (2003/516/EC) in the *Official Journal of the European Communities* [http://europa.eu.int/eur-lex/en/search/search_oj.html].

on biometric identifiers is aimed in part at helping to minimize conflicts over new U.S. rules for its Visa Waiver Program (VWP) and to facilitate legitimate transatlantic travel.¹⁴

Challenges Ahead

Despite the EU's strides since September 11, 2001 to foster closer police and judicial cooperation, the Union still faces significant political, legal, and cultural hurdles as it seeks to translate its initiatives into effective EU-wide law enforcement tools. Although the political commitment of EU leaders is strong at present, the "devil is in the details." Implementing many of the agreed measures will take time and some have bogged down in the legislative processes of individual member states. Different interpretations of agreed measures, long-standing reluctance of police and intelligence services to share information, weak EU enforcement capabilities, ongoing national sovereignty concerns, domestic preoccupations, and civil liberty considerations of various member states have also hindered EU progress. Following the March 11, 2004, terrorist attacks in Madrid, the EU acknowledged these delays and renewed its commitment to fully and quickly implement all existing legal instruments aimed at fighting terrorism. This was a key rationale for establishing a new EU counter-terrorist coordinator tasked with overseeing and promoting member state compliance. EU leaders called for all member states to transpose many of the already agreed EU initiatives, such as the arrest warrant, into national law by the end of June 2004. Several member states, however, have still not fully met this goal.

In addition to sorting out these issues among 25 member states, the EU is confronting challenges in improving coordination with U.S. law enforcement authorities and putting judicial relations with the United States on an EU-wide footing. Although some U.S.-EU problems are similar to obstacles facing the EU internally, such as law enforcement communication issues or differences in terrorist definitions, others have their origins in different legal traditions and societal attitudes toward personal privacy, and crime and punishment.

Internal EU Obstacles

Implementation Delays. Most observers view the EU as having made rapid progress since September 11, 2001, on forging political agreements on many initiatives in the police and judicial fields that had been languishing for years.

¹⁴ Fifteen of the EU's 25 member states participate in the VWP, which allows travel to the United States without a visa. New U.S. regulations require citizens of VWP countries to have machine-readable passports by October 26, 2004, but Congress extended the deadline for biometrics requirements for VWP passports to October 26, 2005, to allow more time to resolve technical and operational issues. EU officials, however, admit that not all EU member states will be able to meet the new deadline and are pressing for another extension to October 2006. To mitigate security concerns, VWP entrants as of September 30, 2004, will be processed through the U.S. VISIT program, in which U.S. visitors are fingerprinted and photographed upon arrival. For more information, see CRS Report RL32221, *Visa Waiver Program*, by Alison Siskin.

Indeed, the pace has been speedy for the EU, a traditionally slow-moving body because of its intergovernmental nature and largely consensus-based decision-making processes. Nevertheless, it is an inescapable fact of EU life that considerable lag times often exist between when an agreement is reached by EU leaders in Brussels and when it is implemented or enforced at the national level. Often, member states must alter their laws to bring them into line with EU decisions or directives. Following the March 2004 attacks in Madrid, the European Commission released a summary of EU legislative instruments to fight terrorism, which indicated that various EU member states had not yet implemented many of the already agreed measures, including the EU arrest warrant.¹⁵

In laying out the plans for the warrant, EU leaders set January 1, 2004, as the date for it to take effect in all member states to allow time for them to enact the necessary constitutional amendments or updated criminal codes. Despite this long lead time, the arrest warrant's implementation lagged. At the time of the deadline, only eight of the EU's then 15 members had transposed the warrant into national law. Civil liberty concerns slowed the passage of legislation in some countries, such as Germany, where it finally entered into force in late August 2004. Ongoing concerns over the extradition of their own nationals has delayed the warrant in other countries such as Italy and the Czech Republic, among others. Italy is now the only member of the enlarged EU of 25 that has still not passed the required legislation; the arrest warrant is expected to enter into force in the Czech Republic in November 2004.¹⁶

Some observers suggest that some EU member states may not implement all parts of the EU arrest warrant immediately. They note that it may take Germany, Austria, Denmark, and Greece five years or more to enact new constitutional provisions permitting their nationals to stand trial in other EU member states. Despite such possible delays, all members will likely claim they are in compliance by 2004 because they will be able to execute the warrant against citizens of other states within their territory. For example, Danish judicial officials could still execute the arrest warrant on a French national wanted in Germany.¹⁷

Other critics question how effective the EU counterterrorism coordinator will be in promoting the implementation of already agreed EU legislation against terrorism. They point out that although the coordinator is meant to provide oversight and a measure of peer pressure on laggard member states, the position lacks enforcement or sanction capabilities. Some also suggest that because the coordinator

¹⁵ See Press Release, "Existing Legislative Instruments Relevant to the Fight Against Terrorism, and Draft Measures Already on the Council Table," European Commission, March 18, 2004.

¹⁶ See "Javier Solana to Take Stock of Cooperation Against Terrorism," *Agence Europe*, October 9, 2004. Italy was the most reluctant of all EU members to agree to the arrest warrant in 2001; it claimed that the 32 offenses were too many and varied. Italy initially wanted the warrant's 32 offenses reduced to six, including terrorism but excluding financial crimes. Press reports speculated that this was due to allegations of corruption and tax evasion pending against Prime Minister Berlusconi in Italy and elsewhere in Europe. James Blitz, "Italy Falls into Line on Arrest Warrants," *Financial Times*, December 12, 2001.

¹⁷ Interview of U.S. official, May 2002.

position reports to the EU's top foreign policy official, the post lacks sufficient clout and visibility and merely represents another ineffectual bureaucratic layer.¹⁸

Differing Interpretations. Despite EU efforts to harmonize national laws and criminal codes related to terrorism, EU definitions and common penalties will still be open to interpretation by individual member states. The European Commission originally recommended specific standardized sanctions for terrorist activities ranging from maximum penalties in each member state of at least two to twenty years depending on the offense. Member states, however, could not agree on such exact penalties and found the proposed system too complicated. As a result, specific penalties were spelled out for only two offenses: leading a terrorist group and participating in or financing the activities of a terrorist organization. Sanctions for other offenses, such as murder, kidnaping, or hijacking, are largely left to the discretion of each member state, although the EU decision allows for the imposition of a heavier sentence if the acts were committed with a terrorist intent. Observers note that even for those sentences specified in the decision, the maximum/minimum construction leaves states free to set penalties as high as they want, but also allows lesser sentences to be imposed. A June 2004 report by the European Commission on the implementation of a common EU definition of terrorism and common penalties found that considerable divergences still exist in the interpretation and transposition of these measures among the member states.¹⁹

Cultural Barriers. The EU views increasing communication and information-sharing among members' national police, judicial, and intelligence services as crucial to improving its ability to counter and apprehend terrorists and other cross-border criminals. This issue has received renewed focus in the aftermath of the Madrid bombings. News reports indicate that several individuals suspected in the Madrid attacks were known to security services in Spain and other EU states, but this information was not shared. As in the United States, long-standing law enforcement traditions against information-sharing as well as rivalries between and among the various local, regional, and national services must be overcome in order to improve cooperation and close security loopholes. Thus, such cooperation is a tall order because it will require changing well-entrenched police cultures and mentalities.

Perhaps nowhere are such tensions more evident than in Europol, which is dependent on receiving information from member states' law enforcement services. Jürgen Storbeck, Europol's director and a former German police official, summed the problem up this way: "For a policeman, information about his own case is like property. He is even reluctant to give it to his chief or to another department, let alone giving it to the regional or national services. For an international body like Europol, it is very difficult."²⁰ According to some EU watchers, national police and intelligence services harbor a deep mistrust of Europol. Qualms about sharing

¹⁸ "EU Anti-terror Tsar Faces Pitfalls," Reuters, March 25, 2004; "EU's Anti-terrorism Tsar: Mission Impossible?," *Agence France Presse*, March 28, 2004.

¹⁹ "Commission's Damning Indictment of Member States," *European Report*, No. 2875, June 9, 2004.

²⁰ Quoted in Judy Dempsey, "Europol's Bid for Success," *Financial Times*, February 27, 2002.

sensitive intelligence information, and possibly compromising sources and methods, also torpedoed calls from Austria and Belgium in the wake of March 11 for creating a centralized EU-wide intelligence agency.

The lack of a common language in the EU can also pose problems for closer cooperation among police services, especially at local or regional levels. Along the French-Belgian border, for example, Belgian police officers are not required to speak French, and most French police officers do not speak Flemish. And in some states such as Germany, where the history of its Nazi past still weighs heavily, legal prohibitions restricted information-sharing between police and intelligence services.

Despite these difficulties, EU officials counter that the changing nature of crime and the growth in cross-border terrorist and criminal organizations will increasingly force police agencies to cooperate at the national and international level. They recognize that building trust and fostering greater communication among these law enforcement authorities will take time, but note that this is a key reason for the EU's backing of the European Police College and other common training programs. They also point out that the problems facing the EU in this regard are not that different from those currently confronting the United States as it seeks to improve the flow of information among the FBI, state and local police forces, and customs officials to prevent suspected terrorists and other criminals from falling through the cracks.²¹

Lack of Enforcement Capabilities. Strengthening EU police and judicial institutions, especially Europol, has emerged as a central piece of EU efforts to bolster cooperation. Nevertheless, critics point out that Europol and Eurojust are still largely talk shops, remain minimally funded, and have few enforcement capabilities. Even though EU leaders have agreed that Europol should have a more operational role in cross-border investigations and the right to ask national authorities to initiate criminal investigations, these new powers will not take effect until all national parliaments ratify the required changes to Europol's 1995 Convention. Eurojust can recommend that national authorities initiate an investigation, but cannot launch one itself. Data privacy issues have also slowed some efforts to enhance Europol and Eurojust's capabilities. For example, EU leaders agreed in principle in December 2002 to grant Europol and Eurojust partial access to the Schengen Information System (SIS) to help improve information-sharing, but this has not yet been formally adopted because of ongoing data protection concerns. The SIS is an EU database, used primarily by customs and immigration officials, containing information on convicted or suspected criminals, forged passports, and stolen vehicles.

EU officials, however, believe these criticisms that Europol and Eurojust lack sufficient authority — and the underlying assumption that these bodies provide little value — are unfair. They note that Europol and Eurojust are still in the early stages of development. A key current objective of these bodies is to foster closer coordination, routine communication, and greater trust among police, intelligence, and judicial officials from the member states. Other proponents point out that Europol has had some analytical successes, helping identify narcotics and human

²¹ Judy Dempsey, "Europol's Bid for Success," *Financial Times*, February 27, 2002; Interview of EU official, March 2002.

trafficking networks that have led to coordinated law enforcement operations in both EU member states and other European countries.²² And since the March 2004 terrorist attacks in Spain, EU officials have focused renewed attention on measures to bolster both Europol and Eurojust. In 2005, Europol will receive an extra \$2.1 million for counterterrorism activities. And in June 2004, Europol and Eurojust signed a cooperation agreement that allows the two organizations to share information.

National Sovereignty and Domestic Considerations. Traditionally, law enforcement and criminal justice have been jealously guarded national prerogatives. Progress in building an EU police and judicial sphere has thus been brought about through mutual recognition of member states' legal systems rather than wholesale harmonization. Despite the EU's achievements since September 2001 in pushing forward its common judicial agenda, some EU-watchers maintain that member states' will proceed cautiously. Leaders will resist measures that smack of EU judicial federalism, thereby exposing themselves politically to domestic opposition and public outcries that they are ceding national sovereignty to Brussels. Many European politicians note the rise of extreme right parties like those in France and the Netherlands that have made electoral gains partly on anti-EU platforms, and a number of anti-EU parties, especially in the UK, did very well in recent European Parliament elections. Skeptics suggest these concerns will inhibit Europol's development into the equivalent of the FBI or Eurojust's maturation into a European public prosecutors office, able to initiate and direct criminal investigations as well as prosecute cases in national courts, for the foreseeable future. They point out that the proposal in the EU's recently-agreed "constitution" to develop a public prosecutors office limited to handling crimes against EU financial interests provoked fierce British opposition initially; the UK eventually relented, however, in order to secure other negotiating priorities.

Furthermore, skeptics suggest that enhancing external EU border controls has been difficult because some member states have been reluctant to relinquish any control of national borders or police activity within them to Brussels. At the Seville Summit in June 2002, EU leaders stopped short of calling for a common EU border guard corps for precisely this reason. And, although agreement has been reached to soon establish the European Borders Agency, critics contend it will have limited powers and resources and no law enforcement role.²³

Some analysts also point out that the effectiveness of EU efforts to strengthen external border controls will partly depend on the EU's success in combating illegal immigration and standardizing immigration and asylum rules throughout the EU. For years, EU attempts to do so were impeded by vastly different national preferences and sensitivities toward immigrants and asylum seekers. Although EU member

²² For example, in May 2002, with help from Europol, police in a dozen EU countries searched 30,000 containers at ports and railways, found 200 illegal immigrants, and arrested ten suspected human traffickers. "European Police Forces Target Illegal Immigration Networks," *Agence France Presse*, May 29, 2002.

²³ Raphael Minder, "Modest EU Border Agency Plans Point to Unease," *Financial Times*, November 11, 2003.

states have reached political agreement on a package of measures to harmonize asylum rules, managing other aspects of immigration and asylum policy remains complicated.²⁴ Several common measures proposed over the last few years have been deemed excessively draconian by some member states and have been rejected. For example, in June 2002, Britain and Spain proposed suspending EU financial assistance to developing countries that failed to crack down on illegal immigration or refused to readmit their nationals. France and Sweden led the charge against this initiative; they argued that imposing sanctions on development aid would only add to the poverty that forces people to emigrate. Commentators noted that France, whose bulk of both legal and illegal immigrants come from Africa, also feared that sanctions would upset its bilateral relations with those countries and produce domestic unrest at home. Similarly, France and Sweden continue to oppose on human rights grounds proposals to establish asylum centers outside the EU to process refugee claims.

Other analysts argue that national sovereignty issues are becoming less important to many EU member states. They claim that the EU continues to knit itself closer together on a number of fronts, and less integrationist-minded states such as the UK, Ireland, and Denmark are in the minority. For example, many members, including France, Germany, and Italy, back the formation of an EU border police force. These optimists also point out that some member states' attitudes toward cross-border policing and arrest capabilities may be changing. Within the Schengen area, some "hot pursuit" bilateral agreements already exist between member states to allow each other's police officers to pursue but not arrest suspects that cross into another member's territory. France, however, has found receptivity in Germany, Belgium, and Spain to proposals that would give their police forces the right of arrest on each other's soil.²⁵ Some view these bilateral arrangements as potentially paving the way for a similar EU-wide accord in the future.

Civil Liberty Concerns. Distrust among some members of other countries' legal regimes and wariness about the degree of protection they offer for individual civil rights may also pose obstacles to closer police and judicial cooperation. As noted earlier, civil liberty concerns have slowed the passage of implementing legislation for the EU arrest warrant in Germany. Conservative opposition parties in Sweden and the UK also objected, albeit unsuccessfully, to the arrest warrant on grounds that it would compromise domestic legal protections. They feared that their fellow citizens would be exposed to the whims of other judicial systems that they considered less than trustworthy. British commentators pointed to the 2002 conviction of 12 British tourists in Greece on allegedly trumped-up charges of spying

²⁴ The EU views establishing common asylum definitions, standards, and timetables for processing requests as crucial to ending "asylum shopping" and preventing the exploitation of differences in members states' asylum procedures. In 2002, EU members concluded agreements setting out minimum reception standards for asylum seekers and rules determining which member state should process asylum claims. In the spring of 2004, although well behind the original deadlines, EU members finally reached agreement on a common definition of a refugee and common asylum procedures.

²⁵ "French, German Deal on Police Arrests," *Agence France Presse*, May 27, 2002; "Paris and Madrid in Cross-border Police Deal," *The Guardian*, November 7, 2003.

on Greek military aircraft. Supporters counter that the warrant contains an appeals process that allows for redress at the national level. Similarly, a newly proposed EU initiative to make the retention of internet, e-mail, and telephone data compulsory for 12 months for crime-busting purposes will likely face opposition from civil rights groups concerned about privacy protections; the telecommunications industry is also worried about the potential costs of such a data retention scheme.²⁶ In addition, some European Parliamentarians and civil liberty organizations have voiced data privacy and reliability worries about EU plans to include biometric identifiers in EU passports and other travel documents.

Obstacles to Closer U.S.-EU Cooperation

Liaison Difficulties. Although U.S. officials praise the help provided by European law enforcement officials after September 11, some doubt the utility of liaison exchanges with EU-wide bodies. In early 2002, a U.S. liaison officer was stationed in The Hague to work with the Europol-based counterterrorism task force, but was withdrawn in August 2002. Some observers suggest that EU task force officers were less than welcoming to the U.S. representative and not cooperative; at the same time, they point out that given the information-sharing problems among EU police and intelligence services, this should not have been a surprise. Other analysts question how effective Europol officers in Washington can be given that they are housed in the European Commission's Washington delegation office, and not with U.S. law enforcement agencies. EU officials counter that this practice is neither unusual nor disadvantageous; they point out that U.S. legal attaches abroad (for example, FBI officials) are customarily located in U.S. embassies rather than in the headquarters of their foreign counterparts. Critics also argue that direct liaison with Europol is unnecessary given the good bilateral relationships between U.S. law enforcement agencies and counterparts in EU member states, and in light of Europol's capability deficiencies. Supporters contend that Europol may still evolve into a more capable and coherent EU law enforcement agency, and therefore, it behooves U.S. interests to establish close ties now. The United States has announced that it will appoint an FBI liaison officer to coordinate with the counterterrorism task force being reestablished at Europol.²⁷

Definitional Differences. The United States and the EU have been working to bring their respective lists of individuals and groups that engage in terrorist activities closer together. The United States views this as important not only for its symbolic value, but also because of the asset-freezing requirements that the EU attaches to those on its list. Some EU member states were hesitant initially to name certain groups that are based in nations with dubious human rights records to the list, such as the Turkish-based Kurdistan Worker's party (PKK), the Revolutionary Armed Forces of Colombia (FARC), and Palestinian-related organizations. A

²⁶ The initiative to retain telecommunications data for law enforcement purposes was proposed in April 2004 by France, Ireland, Sweden, and the UK. The EU hopes to reach agreement on this initiative by June 2005. "European Data Retention Proposal Criticized," *Communications Daily*, May 10, 2004.

²⁷ Interviews of U.S. and EU officials, August 2004. Also see, "US to Send FBI Liaison Officer to Europol," *Agence France Presse*, September 30, 2004.

number of commentators also suggest that the EU has been slower to add such groups on its list because some member states view them as more revolutionary than terrorist in nature. In other cases, the EU drew distinctions between the political and military branches of the same organization, such as Hamas. Although the EU terrorist list included Hamas's military wing since its first iteration in December 2001, the EU did not agree to add the political wing until early September 2003. Some member states argued that Hamas's political wing provided crucial social services in the West Bank and Gaza, and worried that listing it would only further inflame the Israeli-Palestinian conflict. The EU's decision to include Hamas's political wing came amid an escalation in suicide bombings and a growing sense that Hamas is a single organization. The EU was unable to reach agreement, however, on adding related charities or individuals suspected of raising money for Hamas.

The United States and other countries such as Turkey, Colombia, and Israel have successfully lobbied the EU to include the PKK, FARC, Hamas, and other organizations on its terrorist blacklist. The United States has also taken some cues from the EU, adding to its terrorist asset-freezing list a number of Basque separatists, several Northern Ireland paramilitary organizations, and two Sikh separatist groups, among others. The United States and Israel continue to press the EU to add the Lebanon-based Hezbollah to its terrorist list. As with Hamas previously, however, some member states remain concerned that including Hezbollah, which also provides needed social services, would be counterproductive.²⁸

Data Protection Worries. In order to forge closer police and judicial cooperation with the EU, the United States had to overcome worries that it did not meet EU data protection standards. The EU considers the privacy of personal data a basic right; EU data privacy regulations set out common rules for public and private entities in the EU that hold or transmit personal data, and prohibit the transfer of such data to countries where legal protections are not deemed "adequate." According to the EU, the United States falls short. European officials insist, however, that this view stems more from fundamentally different data privacy regimes than from EU beliefs of nefarious U.S. practices. They note that the European approach has been structured to keep personal data out of the hands of authorities as much as possible; in the United States, this is not as much of a concern because there is greater confidence that the judicial system will correct law enforcement mistakes. U.S. officials believe the underlying problem is different perceptions of law enforcement. While Americans see the police as providing a societal benefit, Europeans regard law enforcement as a necessary evil that must be constrained lest it run amok. Europe's past experience with totalitarian regimes clearly informs this view, and contributes to the demand of European politicians and publics for strict data privacy rules.

Bridging the gap between U.S. and EU data protection regimes has been and will likely remain a challenge. Negotiations to allow U.S. law enforcement officers and Europol representatives to share "personal" information on suspected terrorists

²⁸ David E. Kalish, "European Slow to Block Terror Assets," *Associated Press*, March 8, 2002; Paul Geitner, "EU Says Won't Step in to Help Palestinians Replace Any Frozen Hamas Funds," *Associated Press*, September 8, 2003; Interviews of EU officials, Spring-Summer 2003.

and other criminals were arduous and took over a year to complete. The EU also contested new U.S. regulations requiring airlines operating flights to or from the United States to provide U.S. authorities with passenger data (PNR information) from their reservation and departure control systems. In May 2004, the United States and EU signed an agreement that sought to calm European concerns about the length and type of data stored and how it could be used by U.S. law enforcement. The European Parliament and European civil liberty groups, however, continue to challenge the deal. The European Parliament has lodged a case against the PNR agreement in the EU Court of Justice, which could nullify the deal if the Court finds it violates EU privacy rules. The Court is not expected to issue its ruling for at least 18 months; the EU will abide by the terms of the May 2004 accord until then.

Washington would like to establish an umbrella agreement in which the EU would largely accept U.S. data privacy standards as adequate and permit the routine transfer of personal data between EU bodies and U.S. law enforcement agencies. The EU resists this idea, claiming that only tailored agreements will guarantee an “added level of protection” for EU citizens against possible U.S. infringements of their privacy rights. They point out that it would be burdensome for EU citizens to gain redress for any wrongs committed through the U.S. judicial system.²⁹ Regardless, some U.S. analysts assert that the conclusion of the Europol and PNR agreements establish U.S. data protection “adequacy” in practice and predict that similar U.S.-EU efforts in the future to improve information-sharing for law enforcement purposes will face fewer challenges. They also note that the EU has begun to reconsider its data privacy rules and their relation to law enforcement, in part in response to the need to improve communication among EU police and intelligence agencies to better counter the terrorist threat.³⁰

Crime, Punishment, and Diverging Views. The EU was keen to establish cooperation agreements with the United States on extradition and mutual legal assistance to aid the fight against terrorism and other transnational crimes, help harmonize member states’ policies vis-à-vis the United States, and expedite the judicial process. Concluding these U.S.-EU-wide accords proved challenging, however, because U.S. and EU negotiators had to grapple with a number of contentious issues rooted in different U.S. and European societal attitudes toward crime and punishment. Many Europeans are increasingly wary of what they view as a widening divide between the two sides of the Atlantic over concepts of justice and U.S. tendencies toward retribution rather than rehabilitation. They struggle to understand how a country with which they share such fundamental values regarding the protection of individual human rights can take such a different perspective on capital punishment. For many in the EU, the U.S. handling of Al Qaeda prisoners at Guantánamo Bay and the Bush Administration’s decision to “unsign” the U.N. treaty creating the International Criminal Court are further proof of underlying philosophical differences.

²⁹ Interviews of U.S. and EU officials, 2002 and 2003.

³⁰ In June 2004, the European Commission issued a paper aimed at launching a debate on EU privacy rules for law enforcement authorities and enhancing their access to personal and passenger information.

Topping the list of EU concerns in the extradition treaty negotiations was the use of the death penalty in the United States. EU law bans capital punishment among member states and prohibits the extradition of suspects to countries where they could face the death penalty. The EU laid down a clear redline that it would not conclude an accord in which a suspect extradited from an EU member state could be subject to capital punishment. With little room for compromise by the EU side, Washington effectively agreed to EU demands that suspects extradited from the EU to the United States would not face the death penalty. EU officials say this merely formalizes past ad hoc practices in which EU member states have extradited suspects wanted for capital crimes on a case-by-case basis on the condition that the death penalty would not be imposed or carried out. EU member states may refuse extradition to the United States if these conditions are not guaranteed.

Some EU leaders and European human rights activists oppose the U.S.-EU extradition treaty and could slow its transposition into national law in certain member states. These critics contend that the guarantees against the imposition of the death penalty in the current text are not strong enough. Moreover, they point out that the guarantee to a fair trial is ambiguous, and worry that the treaty does not explicitly prohibit trial by military tribunal. Many Europeans oppose the proposed use of military tribunals for suspected terrorists in the United States on grounds that they lack transparency and curtail civil rights protections.³¹

Impact on Bilateral Cooperation. Many working-level U.S. police and judicial officials were initially hesitant to pursue U.S.-EU-wide cooperation on extradition and mutual legal assistance (MLA) because they were doubtful it would add much value to existing bilateral arrangements. In particular, they worried that an EU-wide accord on mutual legal assistance could weaken currently strong and effective MLA treaties with individual member states. They pointed out that the difficulty of reaching consensus among the 25 EU member states often results in common positions founded upon the lowest common denominator, such as conditions acceptable to all but that may not be optimal. U.S. officials feared that certain issues, such as German views on data protection, could hold U.S.-EU negotiations hostage. They noted that Berlin's redline that even basic legal assistance provided by German authorities must not lead to the pursuit of a capital case in the United States had precluded the conclusion of a U.S.-German bilateral MLA treaty for over ten years. U.S. officials asserted that they were not interested in signing onto an EU-wide accord that might have to subscribe to this principle in order to get German agreement and that could call into question U.S. bilateral MLA treaties with other individual EU members that were less restrictive. U.S. officials were somewhat more enthusiastic about the potential benefits of a U.S.-EU-wide extradition accord. They had hoped to secure a provision permitting any EU national to be handed over to U.S. judicial authorities. Under current bilateral arrangements, only some EU countries permit the extradition of their nationals to the United States.

Ultimately, the resulting U.S.-EU agreements on extradition and mutual legal assistance reflect several compromises. U.S. concerns that these Union-wide accords

³¹ "EU Agrees to Extradition Deal with United States," *Reuters*, June 6, 2003; Interviews of U.S. and EU officials, 2002 and 2003.

not weaken existing bilateral arrangements were eased by a provision calling for each EU member state to conclude a protocol with the United States reconciling the terms of its bilateral treaties with the new EU-wide agreements. These protocols will spell out which parts of the bilateral treaties will be retained, and which parts will be added to or replaced by provisions in the wider U.S.-EU treaties. Both U.S. and EU officials claim that this procedure should protect those parts of the bilateral treaties that are stronger or more effective than those in the U.S.-EU accords. Although Washington failed to obtain the extradition of all EU nationals to the United States, U.S. policymakers point out that the EU-wide extradition treaty will update and modernize existing bilateral accords. In the end, U.S. negotiators were pleased with the MLA treaty, which will provide U.S. authorities access to European bank account information on potential terrorists and other criminal suspects, establishes expedited procedures for processing MLA requests, and permits setting up joint investigative teams. They note that accepting the banking information provision was difficult for many EU member states because of their concerns about protecting privacy rights. EU and U.S. officials also point out that the MLA agreement captures all current and future EU member states in one agreement; Washington has active bilateral MLA treaties with only 18 of the EU's current 25 member states.³²

European Perspectives

The March 11, 2004, terrorist attacks in Madrid, Spain, refocused EU attention on the threat of terrorism in Europe and have injected a greater sense of urgency into EU efforts to boost police and judicial cooperation within the EU and with the United States. As noted, the EU has reasserted its commitment to fully implement existing legal instruments aimed at fighting terrorism. Some observers worry, however, that as memories of the terrorist attacks fade, so will the EU's renewed political will. These skeptics believe the EU's commitment to pushing its common police and judicial agenda forward will wane as competing priorities emerge, and as further progress in this area starts to encroach even more on national sovereignty. Some suggest that the new EU arrest warrant may represent the current outer limits of EU judicial cooperation. Critics also doubt that the EU will devote the resources necessary to build more effective EU-wide police and judicial institutions.

Other European commentators stress that sufficient momentum exists to sustain the EU's effort to boost police and judicial cooperation, especially in the aftermath of the Madrid attacks. They argue that European publics feel a heightened sense of vulnerability and EU leaders know that the costs of failure are high. Although the EU as an entity and many individual member states are struggling with establishing a proper balance between law enforcement, individual privacy, and civil rights in the post-September 11 world, the changes in some domestic laws demonstrate that European governments recognize that law enforcement officials need new tools to tackle emerging challenges. Observers note that even in Germany, which has among the strictest data protection laws of any EU country, legislators passed a series of

³² The United States has signed mutual legal assistance treaties with EU members Sweden and Germany, but these have not yet been ratified. No U.S. MLA agreements exist with Finland, Malta, Portugal, Slovakia, or Slovenia.

measures designed to improve the ability of law enforcement authorities to track terrorist suspects and enable police and judicial officials to better communicate with each other. As for EU willingness to pay for new common internal security measures as well as initiatives to strengthen the EU's external borders, EU-watchers point out that the sums involved are relatively small — unlike the anticipated large defense equipment expenditures necessary to make the EU's rapid reaction force effective. Moreover, they claim that EU publics are more amenable to spending scarce budgetary resources on measures aimed at enhancing “homeland security” than on new peacekeeping capabilities for use outside of Europe.

Supporters also assert that the EU's recent enlargement to the east gives further impetus to EU initiatives aimed at clamping down on cross-border criminals and closing security loopholes. Enlargement pushes the EU's borders east to Russia and further into the Balkans, areas that are havens and conduits for organized crime and other criminals. By joining the EU, new members will have to beef up their own border controls, introduce tough visa requirements, and subscribe to the provisions of new EU law enforcement tools, such as the arrest warrant. Furthermore, EU officials point out that while September 11 provided the initial spark to accelerate cooperation in the police and judicial field, the rapid progress since then was only possible because work on many of the initiatives had been underway for several years. EU leaders have always viewed greater cooperation in the law enforcement and judicial fields as a crucial step on the road to further European integration.

The EU recognizes that increased cooperation with U.S. law enforcement and intelligence authorities (particularly with the FBI, CIA, and agencies under the U.S. Department of Homeland Security) is essential to improving its internal security, preventing future terrorist attacks in Europe, and ensuring the safety of EU citizens. In addition, observers point out that the desire of many EU leaders to build an eventual judicial identity, complete with common EU institutions such as a public prosecutors office, is also driving EU efforts to increase cooperation with the United States both at the investigative level and with policy counterparts at the U.S. State, Justice, and Homeland Security Departments. The EU views establishing external relationships with the United States and other countries in the police and judicial field as an essential part of developing a common judicial identity. EU officials recognize this will take many years to accomplish, especially as EU efforts to formulate common policies, definitions, and sanctions for crimes beyond terrorism, such as drug-trafficking or child exploitation, lag behind. Analysts estimate that a common EU judicial identity is at least a decade away given the ongoing national sovereignty concerns of some member states.

Some analysts suggest that transatlantic tensions could negatively affect future U.S.-EU cooperation against terrorism. Differences in U.S. and European approaches to counterterrorism have become more evident as Washington has broadened the war against terrorism beyond Al Qaeda and Afghanistan. Most EU members continue to view terrorism primarily as an issue for law enforcement rather than a problem to be solved by military means. Europeans are increasingly worried that the United States is losing the battle for Muslim “hearts and minds,” not only because of the war with Iraq and Washington's traditional support for Israel, but also because of U.S. decisions that some charge violate human rights, such as keeping suspected Al Qaeda terrorists at Guantánamo Bay. The 9/11 Commission recognizes

that allegations of U.S. prisoner abuse “make it harder to build the diplomatic, political, and military alliances” that the United States needs in order to combat terrorism worldwide. Provisions in both H.R. 10 and S. 2845 echo the Commission’s call for the United States to develop a common coalition approach toward the detention and human treatment of captured terrorists. Despite ongoing U.S.-EU frictions, others argue that Europe remains vulnerable to terrorist attacks, and law enforcement cooperation will continue because it serves both EU and U.S. interests.³³

U.S. Policy and Perspectives

The 9/11 Commission recommends that the United States “should engage other nations in developing a comprehensive coalition strategy against Islamist terrorism,” including through multilateral institutions. The Bush Administration, backed by many Members of Congress, supports EU efforts to enhance its counterterrorism capabilities, and hopes they will ultimately lead to rooting out terrorist cells in Europe that could be planning other attacks against U.S. interests. The Administration also welcomes EU initiatives designed to increase cooperation with the United States and enhance ongoing bilateral law enforcement and border control relationships. This is in line with entreaties in the 9/11 Commission Report to “do more to exchange terrorist information with trusted allies” and improve U.S. and global border security standards “through extensive international cooperation;” some measures in H.R. 10 and S. 2845 also mirror these sentiments. The U.S. Departments of State, Justice, Homeland Security, the FBI, and CIA, are actively engaged in efforts to step up coordination with EU police, judicial, and intelligence counterparts.

Some working-level police and judicial officials continue to caution that U.S.-EU-wide cooperation must add value and not detract from good, existing bilateral law enforcement relationships or impede ongoing cross-border investigations. Although mindful of these concerns, the Bush Administration appears to have determined that the political benefits of engaging the EU as an entity on police and judicial matters outweigh potential negatives. U.S. officials stress they are proceeding cautiously in engaging the EU to avoid damaging good bilateral relations, but they also believe that the Union’s renewed efforts on the police and judicial front may be the first steps on a long road toward a common EU judicial identity. Thus, they claim it is in U.S. interests to weigh in early and often in this EU process given Europe’s role as a key U.S. partner in international law enforcement efforts and the fight against terrorism.

Administration officials assert that this strategy has already garnered some successes. For example, U.S.-EU coordination in naming terrorist suspects and freezing their assets is improving, and the EU has taken U.S. concerns into account in formulating its common arrest warrant. Original language in the EU arrest warrant agreement gave priority to member states in the event that multiple extradition requests for a particular suspect existed from countries both within and outside the EU. The United States successfully lobbied the EU to change this provision to

³³ Interviews of European officials, 2002 and 2003.

permit consideration of the seriousness of the offense and the place where the offense was committed. For example, if an alleged criminal located in Italy is wanted in Germany for car theft, but in the United States for a terrorist act, Italian judicial authorities could decide to extradite the suspect to the United States rather than to its EU partner.

The Administration also believes that room exists for closer cooperation between the United States and the EU in the border control area and has been seeking more systematic exchanges of customs and immigration information. U.S. officials hope this will help both American and EU authorities keep better track of suspected terrorists and prevent them from entering the United States or finding sanctuary in Europe. As the 9/11 Commission Report notes, the United States can only guarantee the security of its own borders through close collaboration with other governments. The new U.S.-EU high-level dialogue on border and transport security not only seeks to boost collaboration and communication among border control officials but also aims to provide a forum in which each side can provide the other with “early warning” of and input on emerging legislative proposals on issues such as travel documents, cargo security, passenger data transfers, biometrics, and sky marshals.

Congress is keenly interested in the measures being developed by the EU to improve the ability of its member states to combat global terrorism. A salient issue for Congress in relation to EU efforts to strengthen police and judicial cooperation will be whether the U.S.-EU agreements on extradition and mutual legal assistance add value to existing, strong bilateral arrangements or threaten to reduce them to the level of the lowest EU common denominator. U.S. negotiators stress that the U.S.-EU treaties on extradition and mutual legal assistance protect all U.S. bilateral agreements with member states and merely add to, update, or strengthen the existing accords.³⁴ Congressional decisions related to improving U.S. travel document security and border controls may also affect how U.S.-EU cooperation in these areas evolves.

³⁴ Interviews of U.S. officials, 2002 and 2003.

Appendix A: Key EU Initiatives to Improve Police and Judicial Cooperation and Combat Terrorism

This Appendix provides additional information on the EU's main initiatives to enhance cooperation in the police and judicial fields and combat terrorism. It should be read in conjunction with the information on pages 3-8 of this Report.

Common EU Definition of Terrorism and Common Penalties. The common definition applies to groups or individuals committing or threatening certain acts, including murder, kidnaping and hijacking, with the intent to intimidate a population or destabilize a country's political system or economic structures. Each member state must set a maximum sentence of at least 15 years incarceration for leading a terrorist group and at least eight years for participating in or financing the activities of a terrorist organization. EU members were required to bring their national laws into line with these common provisions by December 31, 2002.³⁵

Common EU Lists of Terrorist Organizations. In October 2001, the EU expanded its previously existing sanctions against the Taliban, Osama bin Laden, and Al Qaeda to include a total of 27 individuals or groups. Following subsequent U.N. Security Council decisions, this list has grown to include over 300 persons and entities with links to Al Qaeda, including Abu Sayyaf, Algeria's GIA, Harakat al-Mujahideen, and Jemaah Islamiyah.³⁶ The EU issued the first iteration of its own common list of 42 additional terrorist individuals and organizations in December 2001; most of the groups on this initial list were European-based, such as the Basque group ETA, but Hamas's military wing was also included. In May 2002, the EU added 7 other individuals associated with ETA and 10 additional entities, such as the Turkish-based Kurdistan Worker's Party (PKK) and Peru's Shining Path. In June 2002, EU leaders added 4 more Basques (but removed 5 others) and 8 other groups — including the Revolutionary Armed Forces of Colombia (FARC) and two Palestinian entities with ties to Palestinian Authority president Yasser Arafat (the Al Aqsa Martyr's Brigade and the Popular Front for the Liberation of Palestine). In September 2003, EU member states agreed to include the political wing of Hamas on this list, but continues to resist adding the Lebanese-based Hezbollah. As of May 2004, this EU list contains 45 individuals and 46 groups; it is updated at least every six months.³⁷ EU police authorities also maintain a separate, classified list of suspected terrorists that are the subjects of ongoing investigations.

³⁵ See the "Council Framework Decision on Combating Terrorism" (2002/475/JHA), June 13, 2002. Text may be found in the *Official Journal of the European Communities* [http://europa.eu.int/eur-lex/en/search/search_oj.html].

³⁶ Text of the relevant Council Regulation (EC) No. 881/2002 of May 27, 2002 and accompanying amendments may be found in the *Official Journal of the European Communities* [http://europa.eu.int/eur-lex/en/lif/reg/en_register_18.html].

³⁷ Text of the most recent relevant Council Common Position (2004/500/CFSP) of May 17, 2004 and Council Decision (2004/306/EC) of April 2, 2004 may be found in the *Official Journal of the European Communities* [http://europa.eu.int/eur-lex/en/search/search_oj.html].

EU-wide Arrest Warrant. The EU arrest warrant will effectively end the practice of non-extradition of EU nationals within the Union and abolish dual criminality — the principle that a crime must be defined and verified as a crime in both the issuing and enforcing state — for the 32 agreed upon offenses. Hence, it will transform the formal diplomatic process of extradition into an administrative procedure and permit suspects to be handed directly from one judicial authority to another. For example, an Italian judge could issue an arrest warrant for a French citizen who committed a crime in Rome and give it to the Dutch police to enforce if the suspect had fled to Amsterdam; Dutch police would then arrest the suspect and transfer the individual back to Rome to face trial. The maximum 90-day time frame for this process includes an appeals procedure. The 32 offenses must be punishable by at least three years incarceration in the requesting state for the warrant to apply.³⁸

Europol (European Police Office). Europol was established by the 1992 Maastricht Treaty. Agreement and ratification of the Europol Convention, which set out the agency's mandate, responsibilities, and competencies, was delayed for many years because of a dispute between member states over the role of the EU Court of Justice. Based in The Hague, Europol began limited operations in 1994 in the form of the Europol Drugs Unit. The Europol Convention was finally signed in 1995 and ratified in 1998, thereby allowing Europol to become fully operational in 1999. Europol's original mandate covered terrorism, money-laundering, Euro counterfeiting, drug trafficking, human trafficking, and child pornography. In December 2001, EU leaders extended this mandate to include extortion, corruption, kidnaping, and racist, cyber, and environmental crimes. As a result of the March 2004 attacks in Madrid, Europol plans to enlarge its small counterterrorism unit, which provides strategic and operational analyses of the terrorist threat in Europe. Europol is also seeking to boost cooperation with other transnational police organizations such as Interpol, and with other countries to facilitate information-sharing. To date, Europol has signed cooperation agreements with the United States, Bulgaria, Colombia, Iceland, Romania, Russia, Switzerland, and Turkey. Europol relations with the 10 new members of the EU will be governed by bilateral cooperation agreements until each state ratifies the Europol Convention.

Joint Investigation Teams. In October 1999, EU leaders gave the green light to establish joint investigation teams, composed of law enforcement officers of two or more member states, to conduct a specific cross-border investigation of limited duration. The creation of such teams was codified in Article 13 of the EU Convention on Mutual Assistance in Criminal Matters of May 2000, which has not yet entered into force. In October 2001, Belgium, France, Spain, and the United Kingdom submitted a proposal to allow Article 13 to take effect immediately to help in the fight against terrorism. This proposal was formally adopted by the EU in June 2002, but its implementation has lagged in several member states.³⁹ This decision

³⁸ See the “Council Framework Decision on the European Arrest Warrant” (2002/584/JHA), June 13, 2002. Text may be found in the *Official Journal of the European Communities* [http://europa.eu.int/eur-lex/en/search/search_oj.html].

³⁹ See the “Council Framework Decision on Joint Investigation Teams” (2002/465/JHA), June 13, 2002. Text may be found in the *Official Journal of the European Communities* (continued...)

will cease to have effect once the May 2000 Convention has been ratified and enters into force in all member states.

EU Convention on Mutual Assistance in Criminal Matters of May 2000. This Convention seeks to update previous mutual legal assistance agreements among EU members; it does not require dual criminality as a condition for assistance and outlines provisions for rendering assistance on restitution, temporary transfer of persons, hearings by video or telephone conference, and cross-border investigation methods. Following the 2001 terrorist attacks, the EU called for all members to ratify the Convention as soon as possible. It has not yet entered into force.

Eurojust. Based in The Hague, Eurojust is a centralized unit of senior lawyers, prosecutors, judges, and other legal experts charged with helping to coordinate the investigation and prosecution of serious cross-border crimes involving at least two member states or one member and the European Commission. It is composed of 25 representatives, one from each EU member state, who reportedly have extensive knowledge of the legal systems of their own countries, and access to national authorities. These representatives are charged with providing legal advice and assistance in cross-border cases to investigators, prosecutors, and judges in the member states, thereby improving cooperation and communication between the national courts and making the prosecution of cross-border cases better and more efficient. Eurojust can recommend that national authorities initiate an investigation, but cannot launch or carry out one itself. In March 2001, a provisional judicial cooperation unit (Pro-Eurojust) began work and dealt with 180 cases during its eleven months of operation. Eurojust has since handled over 500 cases. Eurojust works alongside the EU's decentralized European Judicial Network, which began operations in 1998 and is composed of contact points in all member states who provide advice and assistance to lawyers and judges working on cross-border cases.

EU Chiefs of Police Task Force. EU leaders called for the establishment of this Task Force in 1997; it came into being in 2000 as a forum for EU police chiefs to engage in dialogue with each other and with Europol on best practices and trends in cross-border crime. It is also charged with providing strategic guidance for Europol operations and for preventing and combating crime throughout the EU. In April 2002, the Task Force established a supervisory committee composed of representatives from the outgoing, incoming, and current EU presidency countries, Europol, and the Commission. The committee's goal is to ensure greater continuity in the Task Force's efforts and enhance cooperation with Europol. In the wake of the Madrid bombings in March 2004, European leaders have called for new arrangements reinforcing the Task Force's operational capacity to be adopted by December 2004.

Cooperation among EU Police and Intelligence Services. In 2002, EU leaders approved three additional measures in this area. One calls for establishing multinational, ad hoc teams of counter-terrorist experts from agencies under the control of member states' Interior Ministries to investigate the working

³⁹ (...continued)

[http://europa.eu.int/eur-lex/en/search/search_oj.html].

methods of terrorist groups such as the use of joint training camps and sources of financing. Europol will provide analytical and logistical support, but the member states in which the operations are carried out will have authority over the teams. The second initiative requires each member state to designate a police and judicial contact point for collecting and exchanging information on terrorist investigations. The third measure allows for the common use of member states' police liaison officers posted to non-EU countries; such liaison officers are now able to share information with any member state and with Europol. Critics charge that these proposals duplicate existing instruments and could compromise EU data protection rules.

EU Counter-Terrorist Group (CTG). Following the March 11, 2004, terrorist attacks in Spain, the directors of the security services of the EU's now 25 members agreed to meet regularly in Brussels in the Counter-Terrorist Group format to promote intelligence-sharing and build trust. Discussions are expected to focus on exchanging information and analysis on the threats posed by fundamentalist Islamic terrorist cells in Europe.

European Police College (CEPOL). EU leaders set up the European Police College in December 2000 as a network of training institutes for senior police officers. It seeks to boost knowledge of national police systems and foster a European police culture, but it has been slow to get off the ground. In February 2002, EU officials decided Denmark would temporarily host the College, thereby allowing a director to be appointed and its operating funds to be released. Courses organized by the College address anti-terrorism, border controls, community policing, and riot control, among other subjects. In December 2003, EU leaders decided on the UK as CEPOL's permanent host.

EU Counterterrorist Coordinator. The new EU Counter-terrorist Coordinator is charged with coordinating the policy efforts of the various EU bodies engaged in combating terrorism to improve cooperation and communication. The Coordinator is also supposed to promote and oversee the effective implementation of agreed measures and help manage EU relations with other countries in the fight against terrorism. The Coordinator reports to the EU's High Representative for Common Foreign and Security Policy (CFSP).

EU Counterterrorist Intelligence Capacity. In March 2004, EU leaders backed the idea of reinforcing the EU's capacity to analyze intelligence in the field of terrorism and tasked the High Representative for CFSP to make proposals for doing so by the June 2004 EU summit. At this summit, EU leaders approved measures to enhance the EU's ability to provide EU policymakers with intelligence analyses that integrate information on both external and internal terrorist threats to the EU's territory. The EU's embryonic Joint Situation Centre (SITCEN) will be beefed up with additional personnel to carry out such integrated analyses, which will also be made available to member states. Analyses will reportedly be for policy planning, rather than operational, purposes.⁴⁰

⁴⁰ Alexander Ratz, "EU Seeks Greater Sharing of Intelligence to Assess Terrorist Threats to Europe," *Associated Press*, June 8, 2004.

June 2001 Framework Decision on Money-Laundering. In June 2001, EU leaders reached an agreement directing member states to introduce tougher money-laundering laws related to the identification, tracing, freezing, and seizing of criminal assets by December 31, 2002. It also called for harmonizing penalties for money-laundering offenses. Several EU states, including most of the new members, have not yet, or only partially, implemented these measures.⁴¹

Expanded EU Money-Laundering Directive. This second directive builds on the EU's 1991 money-laundering directive. The terms of this directive were initially proposed in 1999, but final approval was delayed because of the European Parliament's concern that it would seriously damage lawyer-client confidentiality rules. In a compromise reached in November 2001, lawyers will be exempt from reporting information received from clients during the course of criminal proceedings and in certain cases, are permitted to warn clients before tipping off law enforcement agencies. In addition to lawyers and accountants, the new requirement to report suspicious transactions also applies to auditors, real estate agents, notaries, casino owners, dealers in high value goods such as precious gems or works of art, and fund transporting companies. All EU member states were required to bring their national laws into line with the expanded directive by June 15, 2003, but not all member states have done so yet.⁴²

New EU Money-Laundering Directive. On June 30, 2004, the European Commission proposed a new money-laundering directive that would consolidate the two previous directives and expand the definition of money-laundering to include legally acquired money used to finance terrorism. The expanded directive agreed in November 2001 only referred to proceeds resulting from "serious crimes." Among other measures, the new directive would also extend the range of professions subject to reporting requirements, enhance the "know-your-customer" rules by explicitly stating that banks may not keep anonymous accounts, and further align EU rules with the 2003 recommendations of the international Financial Action Task Force on Money Laundering (FATF).⁴³

EU-Wide Asset Freezing Order. This initiative was originally proposed by France, Sweden, and Belgium in February 2001. Following September 11, its scope was extended to terrorist-related crimes and linked to the EU-wide arrest warrant. It will be applicable to specific cross-border investigations, and is distinct from the

⁴¹ "Money-laundering: Member States' Bad Record for Applying Legislation Exposed," *European Report*, No. 2859, April 9, 2004.

⁴² See Directive 2001/97/EC of the European Parliament and of the Council amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, December 4, 2001. Text may be found in the *Official Journal of the European Communities* [http://europa.eu.int/eur-lex/en/search/search_oj.html].

⁴³ "Money-laundering: New Directive Tabled to Tackle Terrorist Financing," *European Report*, No. 2882, July 3, 2004.

asset-freezing requirement that accompanies the EU's common terrorist list. It must be implemented in all EU member states by August 2005.⁴⁴

Confiscating Assets in the EU. In August 2002, Denmark proposed two measures to facilitate the confiscation of criminal assets in the EU. One measure, approved in December 2002, relaxes the burden of proof necessary for confiscation of crime-related proceeds. It has not yet been formally adopted, however, because two states must still clear the measure with their respective legislatures. The other proposal calls for the swift mutual recognition and enforcement of orders to confiscate criminal assets wherever they may be located in the EU. After resolving disagreements on the scope of this initiative and the division of confiscated assets, political agreement was reached in June 2004, but it must still be formally adopted.⁴⁵

Ratifying EU and U.N. Mechanisms Against Financing Terrorism. In October 2001, EU leaders signed the Protocol to the EU Convention on Mutual Assistance in Criminal Matters. The Protocol seeks to facilitate the exchange of information among member states on banking records, accounts, and transactions of criminal suspects under investigation. This Protocol, however, like the Convention itself, has not yet been ratified. In addition, the EU has called upon member countries to ratify the 1999 U.N. Convention for the Suppression of the Financing of Terrorism; all have signed it, but five EU members have not yet ratified it (Belgium, the Czech Republic, Germany, Ireland, and Slovenia).

Increasing Cooperation among National Financial Intelligence Units and the International Financial Action Task Force on Money Laundering (FATF). In September 2001, EU leaders directed member states to improve data exchange among their national financial intelligence units concerning all sources of terrorist funding and to take action against countries and territories identified by the FATF as non-cooperative in the fight against money laundering. In October 2001, EU justice and finance ministers, meeting in a special joint session, reportedly approved a ban on EU-based banks opening branches in states blacklisted by the FATF as non-cooperative and called for those with already existing branches to disclose any large financial transactions.⁴⁶

External Borders Management Plan. The terms of this plan were largely based on recommendations put forward by the European Commission in early May 2002. In June 2002, EU leaders at the Seville Summit approved the bulk of this plan

⁴⁴ See the "Council Framework Decision on the Execution in the European Union of Orders Freezing Property or Evidence" (2003/577/JHA), July 22, 2003. Text may be found in the *Official Journal of the European Communities* [http://europa.eu.int/eur-lex/en/search/search_oj.html].

⁴⁵ "Justice and Home Affairs: Irish Presidency Closes up Impressive Scorecard," *European Report*, No. 2882, July 3, 2004.

⁴⁶ The intergovernmental FATF was founded in 1989 by the Group of Seven (G7) most industrialized countries; it is composed of 31 member states, plus the European Commission and the Gulf Cooperation Council. It currently lists 6 countries and territories as non-cooperative. Allen Nacheman, "EU Finance Ministers Back Tough New Money Laundering Measures," *Agence France Presse*, October 16, 2001.

and called for establishing a Common Unit of External Border Practitioners, composed of member states' heads of border control, to coordinate the plan's numerous initiatives. EU leaders at Seville also set near-term deadlines for several of the plan's provisions. They directed a network of immigration liaison officers to be set up by the end of 2002, and by June 2003, they called for undertaking a common risk analysis, establishing a common core curriculum for border guard training, and a Commission burden-sharing study on the costs of managing the EU's external borders. Although these various studies were completed by 2003, the regulation formally setting up the network of member states' immigration officers posted to non-EU countries was not officially adopted until February 2004.

European Borders Agency. In November 2003, the European Commission proposed establishing a "European Agency for the Management of operational cooperation at the common borders." It sought to build on the external borders management plan and its Common Unit of External Border Practitioners. The Commission believed that the Common Unit was encountering structural difficulties in managing the operational cooperation among member states but could still play a useful role as a forum for consultation and strategic coordination. The new Agency would have a small staff of 30 people and a budget of about \$7 million for 2005, to conduct research and risk assessments, facilitate the sharing of surveillance techniques and equipment, help member states' train border guards, provide assistance in immigration crises, and play a coordinating role in chartering flights to repatriate illegal immigrants throughout the EU. The formal adoption of the regulation establishing the new Agency was held up for several months because of a dispute between Spain and the United Kingdom related to the contested island of Gibraltar. In September 2004, the UK and Spain agreed that the regulation would not apply to Gibraltar. EU officials hope to decide by the end of 2004 on a locale for the Agency's headquarters and for it to become operational by May 2005.⁴⁷

Reinforcing Sea Border Controls. In April 2002, EU justice and interior ministers directed the European Commission to conduct a viability study on measures to improve controls at maritime borders, identify risk zones, and enhance existing information and early warning systems. This study was presented in September 2003. In November 2003, the EU responded to the study's findings with a "Plan for the Management of Maritime Borders," aimed at improving efforts to combat illegal immigration across the EU's sea borders. Several of the ad hoc joint border control projects that have been undertaken as part of the external borders management plan have also focused on improving sea border controls.

Increasing Visa Coordination. All measures under consideration are designed to enable member states to share information on visa seekers and end the ability of some visa applicants to exploit differences in national policies and requirements. Progress on the EU visa database, or Visa Information System (VIS), has been slow as member states have struggled to work out data protection concerns.

⁴⁷ Press Release, "Establishing a European Agency for the Management of the Operational Cooperation at the External Borders," European Commission, November 11, 2003; "Border Agency Moves Closer to Fruition as Gibraltar Problem Solved," *European Report*, No. 2873, September 18, 2004.

However, in February 2004, EU officials adopted political guidelines on the content and structure of, and access to, the VIS; in June 2004, the EU formally established the VIS and freed funding for its development. The European Commission is now working to flesh out the February 2004 guidelines in greater detail. The VIS is expected to contain information on the applicant's identity, type of visa issued, or reason for visa refusal. The VIS is also expected to be accessible to a wide range of immigration and other law enforcement authorities. It is also likely to be implemented in two phases, with personal details and digital photos stored by 2006, and biometric data, such as fingerprints, added by 2007.

Eurodac. This system allows immigration officials to check the fingerprints of asylum seekers against records held by other EU countries. If an applicant has already claimed asylum in another EU member state, he or she would be returned to that country where the original application was made for processing. The use of fingerprints is also intended to prevent asylum seekers from making asylum claims in different member states under a pseudonym. Eurodac was originally approved in principle in December 2000. It became operational in January 2003. Its effectiveness will depend on member states collecting the necessary fingerprints and sending them for storage to the central unit in Brussels, as they are legally required.

Schengen Information System (SIS). The SIS is an EU database, used primarily by customs and border control officials, of information on convicted or suspected criminals, lost or forged passports, missing persons, and stolen vehicles and firearms. It was established to facilitate implementation of the Schengen Convention, which allows for freedom of movement among 13 EU member states plus Iceland and Norway.⁴⁸ Each Schengen member decides the amount and type of information to enter into the system. Following the September 2001 terrorist attacks, EU leaders called for participating states to ensure that data is fed more systematically into the SIS. In April 2004, the EU adopted a regulation expanding SIS access primarily to visa and immigration authorities and has been working on finalizing an agreement to give Europol and Eurojust access to the SIS. Finally, the EU has been working on upgrading the technical capabilities of the SIS (SIS II) to enable it to accommodate by early 2007 information from the 10 new EU members, as well as additional types of information, including biometric data.

Improving Travel Document Security. Although political agreement has been reached on the three EU regulations introducing biometric identifiers in EU visas, residence permits, and passports, these regulations have not yet been formally adopted. The Netherlands, the current holder of the rotating EU presidency, hopes to sign off on the three regulations soon to enable the inclusion of biometric data in EU travel documents to begin in 2005. EU officials admit, however, that some member states are unlikely to meet this goal as they seek to resolve technical issues and privacy concerns and say that 2006 is a more realistic compliance deadline.

⁴⁸ Although the UK and Ireland do not subscribe to the Schengen Convention's free movement provisions, they do participate in police and judicial aspects of the Convention, thus allowing them access to the SIS. The 10 new members of the EU continue to work toward improving their external border controls to enable them to participate fully in the Schengen system by 2007-2008.

Some EU members would also support the mandatory inclusion in the future of a second biometric identifier, such as fingerprints, in EU passports, but others are reportedly opposed because they fear the financial costs involved and worry it would further erode data privacy protections.⁴⁹

New EU Rules for Passenger Data Transfers. The new rules approved by the EU in 2004 were originally proposed by Spain in April 2003. EU justice and interior ministers reached political agreement on the new rules in March 2004 in the wake of the terrorist bombings in Madrid, but official approval was held up by delaying tactics in the European Parliament. As with the U.S.-EU agreement to transmit passenger data, members of Parliament opposed the new rules on data protection and privacy grounds. In April 2004, EU leaders in effect overrode Parliament's efforts to delay the initiative and formally adopted the new rules requiring the advance transfer of passenger data by airlines servicing the EU.⁵⁰

EU Counterterrorism Task Force. The task force established after September 11 was composed of police and intelligence representatives from each EU member state, as well as Europol officials. Task force representatives worked on liaison with U.S. counterparts and sought to collect and analyze all relevant information and intelligence about the September 11 attacks. Following the March 11, 2004 attacks in Madrid, EU leaders called for the task force to be reactivated; reports indicate it will have a broader mandate than the first task force and will work on a variety of terrorist-related investigations. A key aim of the task force is to promote communication and intelligence-sharing among EU member states. Europol headquarters will again provide the administrative and operational support for the task force.

⁴⁹ "EU/US: Homeland Security Deputy Says Fingerprints in Passports Preferable," *European Report*, No. 2880, June 26, 2004.

⁵⁰ "Air Transport: Adoption of Spanish Initiative for Data Transfers," *European Report*, No. 2865, May 1, 2004.

Appendix B: EU Decision-making Structures and Bodies with a Role in Countering Terrorism

