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# TOWARDS EU-NATO COOPERATION IN THE PROTECTION OF EUROPEAN CRITICAL INFRASTRUCTURE

## *Absztrakt/Abstract*

*A terrortevékenységek gyors terjedésével szembesülő kormányok az Atlanti-óceán mindkét partján újfajta küzdelem mellett kötelezték el magukat. A terrorfenyegetés kiszűrése és a támadások megelőzése végett elkerülhetetlenné vált a múltból megörökölt katonai eszközök polgári eszközökkel való kiegészítése. Európában az Európai Unió fejlett polgári, rendészeti, rendőri és igazságügyi együttműködési mechanizmusait hatékonyan lehetne ötvözni a NATO katonai tapasztalataival és kapacitásaival, ám a két szervezet közötti együttműködés elé számos gátat állít az Unió bonyolult döntéshozatali rendszere és alapvető hatáskörhiánya a védelem és a biztonság területén. A két szervezet párhuzamos tevékenységei némi szinergiát mutatnak ugyan például a kritikus infrastruktúrák védelmének területén, de a NATO határozott együttműködési szándékával szemben az Európai Unió még csak most kezdi egy olyan jogszabálynak a vitáját, amely néhány éven belül a legjobb esetben is csak az európai kritikus infrastruktúrák azonosítására teremt jogalapot. A szerző szerint a két szervezet megközelítései között mutatkozó erős aszimmetria semmiképp nem fogja megkönnyíteni az együttműködés kibontakozását.*

*Faced with the rapid spread of international terrorist activity over the past years, governments on both sides of the Atlantic engaged into a fight of a new nature. The integration of the military expertise and capacities inherited from the past decades with the development of tools required to tackle the civil aspect of terrorist threats has become inevitable. In Europe, the EU with its fairly developed tools of civil, police and judiciary cooperation, and NATO with its military expertise have a lot to gain on developing tighter bonds. However, their cooperation is heavily obstructed by political and administrative obstacles pertaining to the EU's complicated decision making procedures and meagre competence in the field of defence and security. Synergies exist notably as both organisations are simultaneously focussing on the protection critical infrastructures, but while NATO is willing to see this cooperation unfold as soon as possible, the European Union has only started a laborious legislative procedure which, in a few years' time, will merely allow member states to identify European critical infrastructures. The author believes that this strong asymmetry between the EU's and NATO's approaches will not facilitate the cooperation.*

**Kulcsszavak/Keywords:** *Kritikus infrastruktúrák védelme Európában, EU-NATO polgári-katonai együttműködés, nemzetközi és európai jogi feltételek ~ Protection of critical infrastructures in Europe, EU-NATO civil-military cooperation, international and European legal conditions*

## INTRODUCTORY REMARKS

The last decade of the history of international peace and homeland security has been deeply marked by a radical change of nature: Whereas threats and defence mechanisms used to be quite well structured in an interstate military dimension stretching between two major poles of power whose primary intent was each other's dissuasion and where actual collisions were limited to the peripheries, threats have now dissolved from the restricted military level to a broad civilian one, more diffuse and more hard to identify, but not any less international or intercontinental than before. The first major outburst of these new threats hit the very territory of the United States of America caught off guard on 11 September 2001, immediately triggering a swift and panic-like reaction in which regular military forces were first asked to tackle this new type of menace.

With further attacks following shortly in Madrid and London, along with the identification of rising terrorist threats throughout the whole of the European Union, it quickly became obvious that the tools and methods of traditional military warfare were no longer suitable to face the new challenges posed by international terrorism, and that a whole new security strategy was needed to integrate the dominantly civil aspect of the new threats. As part of the new needs, the debate on the protection of critical infrastructures came into the spotlight on both sides of the Atlantic, as the United States [1], NATO [2] and the European Union [3] all committed themselves to the fight against terrorism, and to improving the protection of civilian populations against all kinds of natural and manmade disasters by developing appropriate tools and capacities for both prevention and response.

This new approach requires an unprecedented level of integration of civil and military capacities, and thus calls for the effective and operative cooperation between the two different levels, both on national and international levels. In Europe, where a majority of states are members both of the EU and of NATO, it would seem obvious that the EU with its almost exclusively civil institutions, authorities and tools, and NATO with its broad experience and expertise in the field of international military cooperation should play complementary roles in living up to the new challenges of Europe's homeland security and fight against terrorism. However, the legal and practical aspects of such a complementary action are far from being obvious.

On 31 January 2007, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs held a joint seminar together with representatives from NATO's Parliamentary Assembly to discuss the possibility of an enhanced cooperation between the EU and NATO in the field of critical infrastructure protection in Europe. Whereas all stakeholders agreed on the crucial practical need for Europe to be able to rely on NATO's expertise and capacities, opinions diverged as to how the cooperation is legally feasible in a way that reconciles the complex structure of the EU's decision making process with the requirements of quick operational field action.

The cooperation, however much called for by the European Parliament both in the fields of foreign policy [4] and of the fight against terrorism [5], currently suffers from an institutional imbalance: NATO authorities would be looking forward to some form of action which however has not been provided with a legal basis or definition

so far, and is thus almost inexistent in the legal order of the European Union. The difference between the two approaches is striking if we run through the opinions expressed on the two sides of the table.

## THE EU'S LEGALISTIC APPROACH

Representatives from the EU's decision makers extensively commented on the EU's draft directive on the identification and protection of European critical infrastructure [6], but their exposés eventually triggered little enthusiasm as they depicted a very partial and embryonic initiative the administrative and bureaucratic aspects of which apparently heavily outweigh its practical improvements.

**European Commission** official Nina Commeau-Yannoussis, who played a central role in drafting the proposal as head of the energy infrastructure and critical infrastructure unit in Directorate General for energy and transport, explained: The external constraints of the European Commission's legal mandate and the internal boundaries of its several administrative subdivisions made it very difficult to get a horizontal hold of the topic of critical infrastructures, which naturally ranges from energy and transport through health and food down to telecommunication and information technologies. To implement the cross-sector and all-hazard approach which is required here, an inter-service working group - with sheer coordination responsibility - was created in 2004 under the leadership of senior Commission administrator Magnus Ovilus. Mrs Commeau-Yannoussis detailed the series of questions which guided the Commission's work, and many of which still have to earn a satisfactory answer.

*What is critical?* - Although the horizontal and sector-specific criteria of criticality will only be defined by a committee of national experts mandated to this end by the directive, the Commission has already made it clear that the key aspect to consider in establishing criticality should be the consequences of a disruption of the infrastructure, and not the potential causes of it.

*What is European?* - As a matter of law, European action can only be taken in case European interests are engaged. According to the subsidiarity principle, this mainly covers cases which, unless already within the Union's reserved field, reach beyond the competence of one single member state. In the case of critical infrastructures, it means facilities or systems the failure or disruption of which would affect more than one member state or a member state other than the one where the infrastructure is based. Referring to the specific case of a critical infrastructure located outside the Union but impacting directly on it, Nina Commeau-Yannoussis added that this one posed a totally open question, both political and legal, the answer to which definitely lies in the hands of the Council and of the member states, at least to the extent that it might necessitate the conclusion of bilateral agreements and the implementation of sound cooperation with strategic partners such as Ukraine and Russia.

*Is the infrastructure vulnerable?* - Once an infrastructure has been identified as such, the next logical step is to assess its objective vulnerability, both intrinsic and external. This covers the evaluation of all the elements and factors which create or induce weaknesses in the infrastructure.

*Is the infrastructure exposed to risks?* - Based on the vulnerability as evaluated above, the second task is to analyse whether the objectively weak points of the infrastructure may expose it to specific risks, such as a terrorist attack for instance.

*If there are risks, are they adequately controlled?* - Both the notion and the measurement of adequate control are as hard to define as it is to determine what an acceptable level of safety is. Protection measures implemented on the levels of each and every member state, or even on that of each individual infrastructure are most different and disparate: They might as well be 24/7 physical surveillance by security services in certain cases as mere penal legal protection under administrative and police scrutiny in others. For instance, the protection of several highly infrastructures in France is provided for under a simple stipulation of French administrative law [7], whereas the permanent representative of Russia to the EU, who attended the meeting as a diplomatic guest, pointed out that there is a whole special body within the Russian armed forces whose only job is to ensure the physical protection of energy infrastructures around the clock. In the case of our future European directive, the assessment of the various existing measures and the evaluation of their respective merits and shortcomings can only be delivered on a case by case basis, and the outcome is not the least predictable, let alone material for European harmonisation.

*If there are inadequately controlled risks, what measures should be taken to enhance the protection of the critical infrastructure?* - The operational part of the Commission proposal is limited. As administrator in charge Magnus Ovilius explained, the primary target is not to impose legally binding protection measures on critical infrastructure operators and owners, but to stimulate the implementation of such measures on a voluntary basis, in the framework of a broad pan-European public-private dialogue and partnership where best practices could be exchanged between experts and players as confidentially as possible. This is why the Commission's intent is solely to impose on every owner and operator of a European critical infrastructure the obligation to designate a security liaison officer and to define, implement and continuously update an operative security plan which contains the locally adopted and most appropriate measure of permanent surveillance and response to specific emergencies. Where such measures already exist and are deemed sufficient, no change will be required.

Speaking on behalf of the **Council's** Presidency, German federal minister for home affairs Jürgen Merz pointed out that neither the notion of infrastructure, nor the concept of criticality should be considered solely in connection with major natural or human (e.g. terrorist) threats, but should be thought through down to the most banal occurrences which might impact on civilians, such as for instance a blackout or a railway collision. This necessary circumspection considerably broadens the field for investigation and thus makes the required 27-member-state consensus and unanimity much harder to find than it would be if the circle of scenarios to consider were narrowed down to major natural disasters and terrorist attacks. Reporting on the progress made in the framework of the Council's working party on civil protection (PROCIV), Minister Merz insisted that member states had expressed their strongest will to reach results on short notice and had promised to give detailed response to the Commission's initiative by March this year. An unusual sign of good will in the Council, reported the German minister, is that national governments committed themselves to only consider objecting to and rejecting the provisions proposed by the

Commission if they are able to substitute them with suitable alternative solutions. In other words, the Commission's proposal, even if far from perfect, is still deemed to be the best so far. However, the representative of the German presidency warned: The majority of member states currently appear most reluctant to adopt the complex, two-plus-one step comitology voting procedure put forward by the Commission to first define the criteria for identification, then actually identify critical infrastructure, and eventually designate European critical infrastructure. Indeed, implementing this procedure would mean that even if the directive enters into force in the best case scenario's early 2008, the first European critical infrastructure won't be designated any earlier than in three years' time.

By the end of February 2007<sup>1</sup>, as Commission official Magnus Ovilius later reported, actually only four member states (France, the United Kingdom, Italy and Spain) had given firm positive replies to the two questions of the German Presidency: 1- Do you agree with the need to adopt a European directive? 2- Do you agree with the approach proposed by the Commission? Rapporteur for the **European Parliament** Jeanine Hennis Plasschaert added however that most of the reservations formulated by the other member states in Council, though fair and understandable, were already covered by the Commission's proposal. Therefore, she estimated, the eventual positive outcome of the Council negotiations ahead is not jeopardised, which in the current situation is the *de minimis* requirement if the EU is to live up to the opportunity for cooperation that NATO is eager to offer.

## NATO'S PRAGMATIC APPROACH

On behalf of the North Atlantic Organisation, Chairman of the **NATO Parliamentary Assembly's Committee on the civil dimension of security** Michael Clapham recalled that the scope of action of his committee covers all aspects of security impacting on civilians, including democratic governance, fundamental freedoms, civil rights, or counter-terrorist action. After having spent the past two years focussing on Mid-Eastern Asia and the Caucasus, he called it more than a lucky coincidence that 2007's key topic for the NATO Parliamentary Assembly would be the protection of critical infrastructure. Beyond the good prospects for synergy with the European Union's decision makers' work on the themes of EU-NATO dialogue and on public-private coordination, the Parliamentary Assembly would also investigate and evaluate the needs and possibilities for coordination between the civil and the military, thereby providing a definite value added to the work of the European institutions. Moreover, Michael Clapham also pointed out that just as the EU, NATO was also most interested in developing its partnerships with third countries, in which respect NATO could possibly benefit from the diplomatic endeavours and negotiations the EU might engage with its Eastern neighbours in the framework of its own critical infrastructure protection policy.

Nonetheless, the NATO P.A. representative deplored that as far as he could see, the EU's efforts for international cooperation had remained very limited in the field of civil protection, and called for a possible extension of the 2003-initiated Berlin Plus agreement to these aspects, along with the strengthening of transatlantic cooperation. The European Commission however had to decline the call, Directorate General for

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<sup>1</sup> These further precisions were given at the occasion of a working breakfast of the European Internet Foundation in the European Parliament in Brussels on 28 February 2007. See [www.eifonline.org](http://www.eifonline.org).

Transport and Energy recalling that the whole extent of the EU-US cooperation was here limited to the political level of the G8, and Directorate General for Environment adding that the Berlin Plus agreement could neither apply nor be extended here in any case, as it was concluded under the European Security and Defence Policy (II<sup>nd</sup> pillar), as opposed to the Justice and Home Affairs policy (III<sup>rd</sup> pillar) where critical infrastructure and civil protection belong.

Lord Jopling, senior representative of the NATO P.A. and an expert on CBRN threat detection [7], called this attitude of the Commission's "lamentable", and urged the EU to overcome its own internal, mostly bureaucratic obstacles before seeking cooperation with other international organisations such as NATO. The expert recalled that when faced with the need to tackle civil emergencies<sup>2</sup>, the originally political-military alliance had gradually developed a flexible *ad hoc* approach that has only grown more efficient over the years - exactly the kind of approach the EU is obviously lacking. It is all the more a pity that NATO, who is definitely engaged in the process of reorienting its activity towards military-civil cooperation in the field of civil emergencies, would naturally tend to consider that the pillars on which it can build its new strategy are its efficient partnerships with other key international players such as the United Nations and the European Union. As it stands today, NATO's conversion is a success: Not only has it succeeded in maintaining the military *acquis* inherited from the Cold War period, but it has also broadened its scope of action in the field of civil emergencies from the initial focus on assistance to allied nations in responding to natural and manmade disasters to an all-inclusive engagement into all stages of emergency planning, from early warning and prevention through preparedness down to response and recovery.

The following paragraph from Lord Jopling's special report on NATO and civil protection brilliantly summarises the situation:

"Some of the EU's instruments, in particular police and justice co-operation in the fight against terrorism, provide it with unique tools, which have no equivalent within NATO. However, many other current or planned mechanisms duplicate the Alliance's own tools. The MIC<sup>3</sup> (...) can be seen as an equivalent of the EADRCC<sup>4</sup>. In the event of a disaster, countries that are members of both mechanisms thus have to choose which one to use for their requests and offers of assistance. Both organisations have their own early warning systems, their inventories of national capabilities and their own mechanisms for sharing information and communicating during crisis. Finally, both NATO and the EU are considering a role in the future for the protection of critical infrastructures. *Yet, there is for now no structured division of labour and framework for co-operation between NATO and the EU either in the field of natural disasters or in the field of terrorism. Some contacts exist at the inter-governmental level, but institutional rivalry remains strong. Moreover, there is literally no institutional dialogue between NATO and the European Commission and other EU institutions are very reluctant to allow any such contacts in the near future. The*

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<sup>2</sup> The starting point of NATO's transformation to adapt to the new demands is 11/09, but its major steps have since then broadened the scope of needs and actions: Madrid and London bombings, Hurricane Katrina, Pakistan earthquake, etc.

<sup>3</sup> Monitoring and Information Centre of the EU's Community Mechanism for Civil Protection put in place in 2001

<sup>4</sup> NATO's Euro-Atlantic Disaster Response and Coordination Centre

*current situation, in which both institutions develop their own mechanisms independently from each other and with only minimum co-ordination, is clearly not satisfactory. Overlaps will only increase as the Union develops its military capabilities."* [8]

## CONCLUSION

The EU-NATO cooperation in the field of critical infrastructure protection is very much of chimera: Both parties are willing to develop it, and NATO is showing explicit signs of good will, but the EU, either out of political reluctance, or simply because of its overcomplicated and intricate political and legal system at odds with practicality, is simply unable to live up to the challenge. Given the lack of strong political leadership which the EU has been suffering from for over a decade, the situation is not likely to change before long, unless the EU is hit by a major disaster which blasts away its heavy procedures, and where urgency replaces at once all that blur of pillars, institutions, comitology, green and white papers, draft directives, working parties, negotiations, reports, readings, impact assessments and other bureaucratic hyper-structure.

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