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Counter radicalisation through the Rule of the Law

TRAINING AID

THIS PROJECT IS CO-FUNDED BY THE EUROPEAN COMMISSION DIRECTORATE-GENERAL MIGRATION AND HOME AFFAIRS

MOBILE ASSISTANCE INTERAGENCY TEAMS TO DETECT AND PREVENT THE ESCALATION OF VIOLENT RADICALISM

CRITICAL ASPECTS OF RADICALISATION POLICIES AND PRACTICES IN EUROPE

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This short Position Paper addresses the needs for a closer harmonisation of judicial and police cooperation as part of a comprehensive strategy to effectively prevent and counter the escalation of radicalism in Europe, while respecting fundamental rights and the differentiated competences of all stakeholders involved.

CRITICAL ASPECTS OF RADICALISATION POLICIES AND PRACTICES IN EUROPE

WHY WE NEED TO RESHAPE OUR CVE STRATEGIES AND PRACTICES TO BETTER HARMONIZE POLICE AND JUDICIAL COOPERATION WITH FUNDAMENTEL RIGHTS

22/12/2017

POSITION PAPER

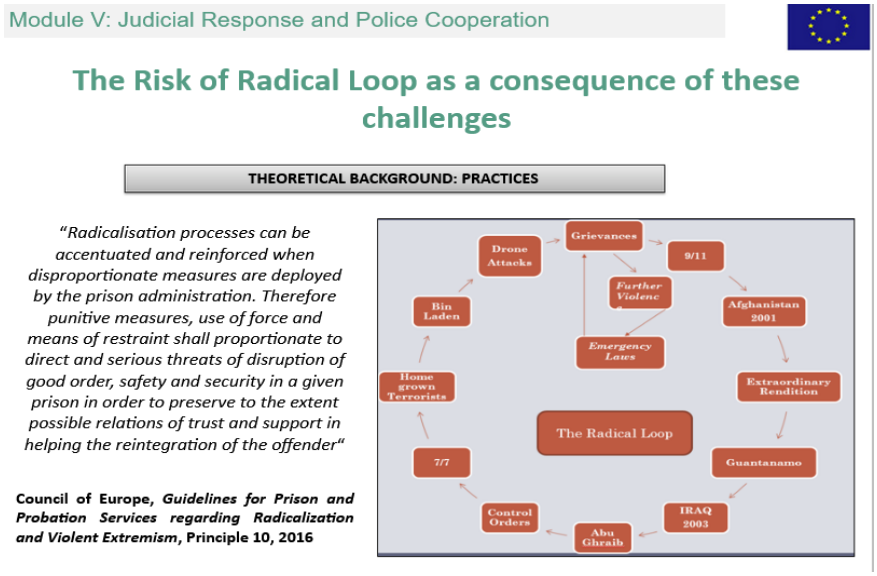
There is a clear need to properly evaluate results and impact of the numerous initiative in CVE at local, national, and European level. We call for a completion of the EU institutional architecture, to jurisdictionalize CVE practices and divide roles and responsibilities in prevention, to avoid abuses and preserve the social capital entrenched into the civil society

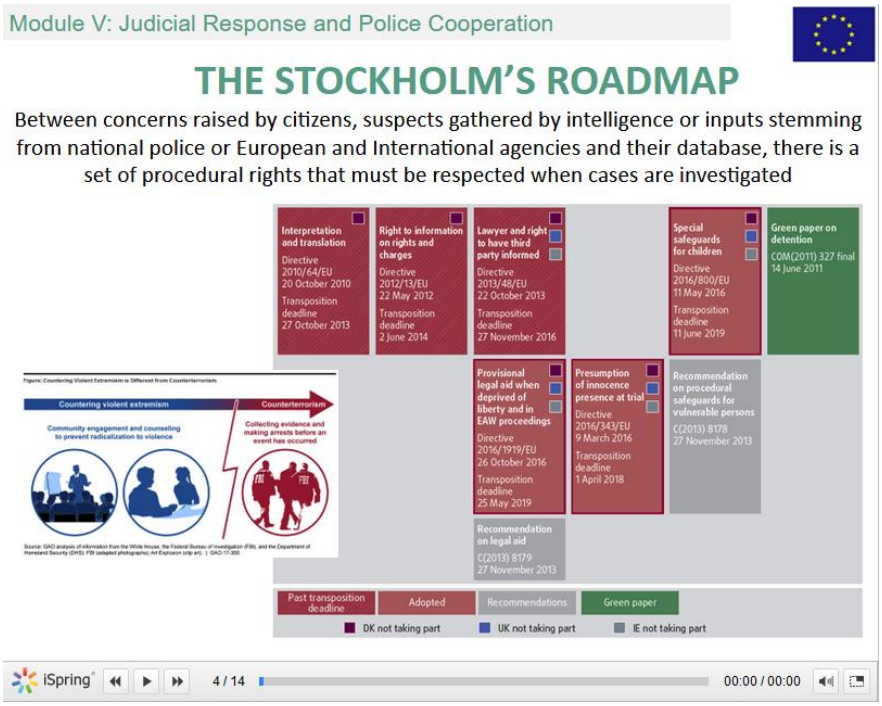
1- RELEVANT RISKS STEMMING FROM THE ONGOING CVE PRACTICES

The mainstreaming practices in CVE showed a tendency to de-jurisdictionalize counter-radicalisation policies and practices at MS level, in favour of administrative measures taken by police, intelligence or political bodies at Ministerial level.

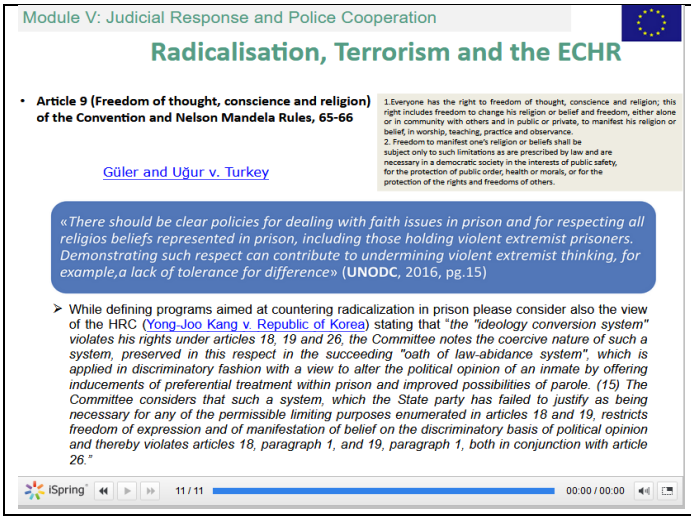
This is a very relevant aspect of the ongoing CVE approaches, because these measures, and practices:

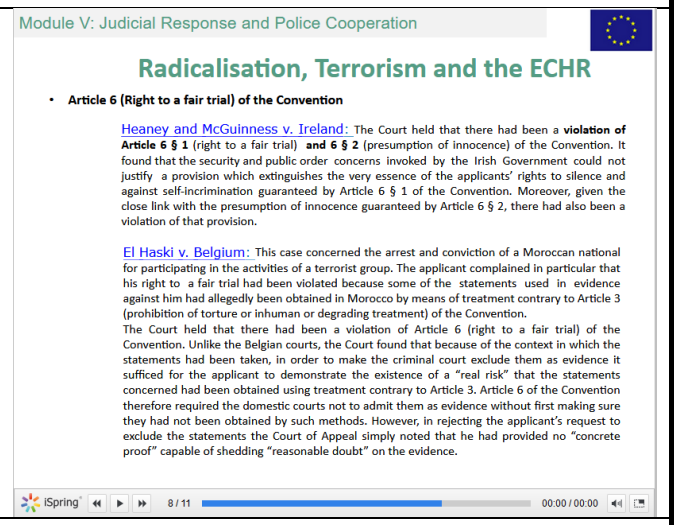
1. **risk** to undermine the efficacy of the actions, which may backlash (both in terms of efficacy, impact and unwanted polarisation effects, but also considered from the perspective of admissibility of evidences in court trials regarding radical individuals and groups);





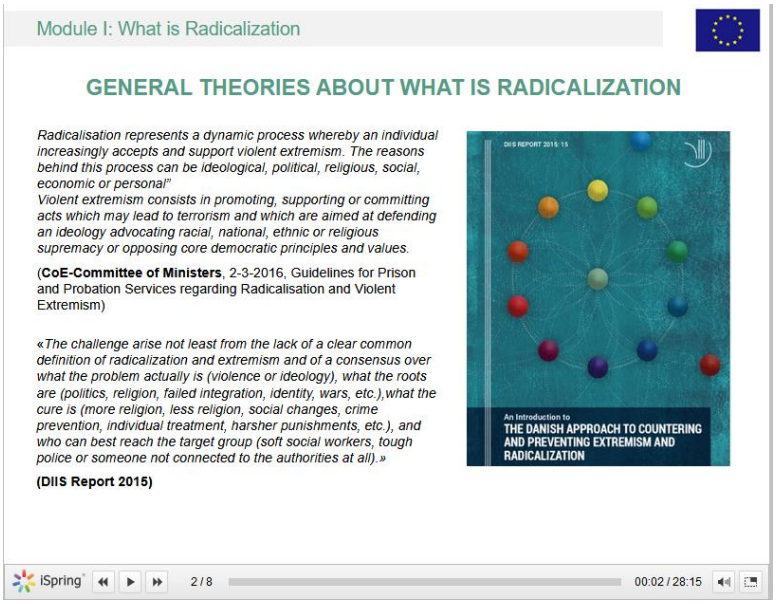
2. **risk** to unbalance the intrinsic coherence of the judiciary cooperation in relation to police cooperation, thus jeopardising key EU Framework Decisions and Directives, firstly, but, secondly, also the fundamental principles of rule of the law and fundamental rights, as set in the Treaties and interpreted by the CJEU and ECtHR;



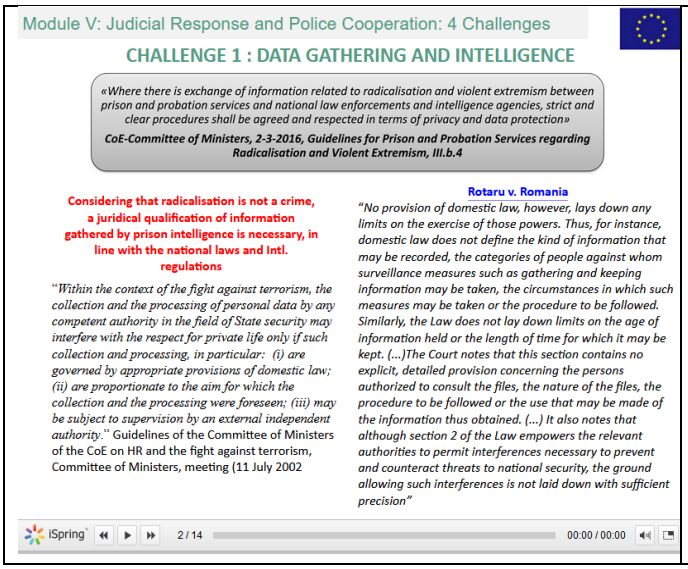


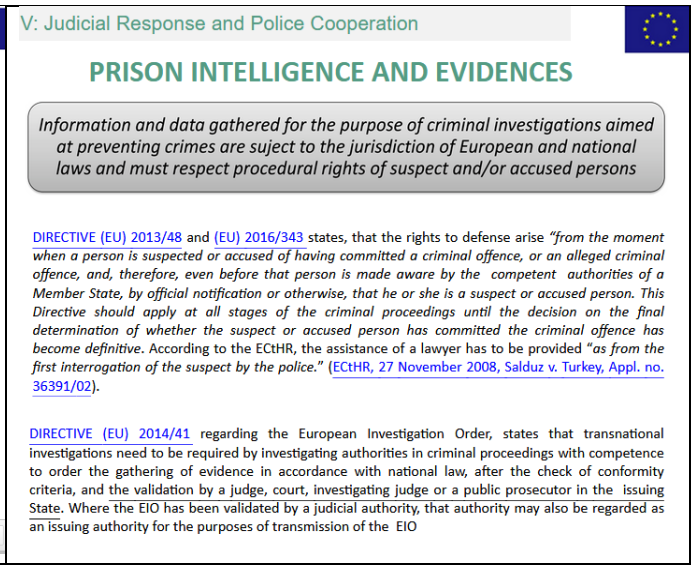
3. An excessive securitisation of socio-psychological phenomena connected to different forms of radicalisation, which are confused with terrorism, **risks**
   a) to expose LEAs and Intelligence in operative fields where their competences and powers are limited;
   b) to compress the participation of other social agencies, which have stronger and deeper experiences and competences in the treatment of vulnerable individuals;
4. The involvement of LEAs and Intelligence in social activities **risks** to undermining the necessary trust between probation officers, volunteers, educators, trainers, psychologists and individual suspected of radical behaviours, ideas or attitudes;
5. The supremacy of LEAs in critical events connected to a 'securitized model of radicalisation', **risks** to render ineffective the social powers and competences deeply rooted and entrenched into the civil society, communities, schools and educative institutions, local welfare, unions and syndicates, parties and cultural bodies, who don't want to be emptied or exploited by LEAs and Intelligence for purposes outside their natural and institutional scope.

These risks are very relevant in counter-radicalisation practices, because a clear definition of the phenomenon is lacking and therefore abuses, excesses and violations of fundamental rights are a matter of serious concern for numerous actors in the scene, as emerged from the debate around 'Prevent' in the UK, and the American experience with the NYPD, UCLA and as outlined by emerging case-law.



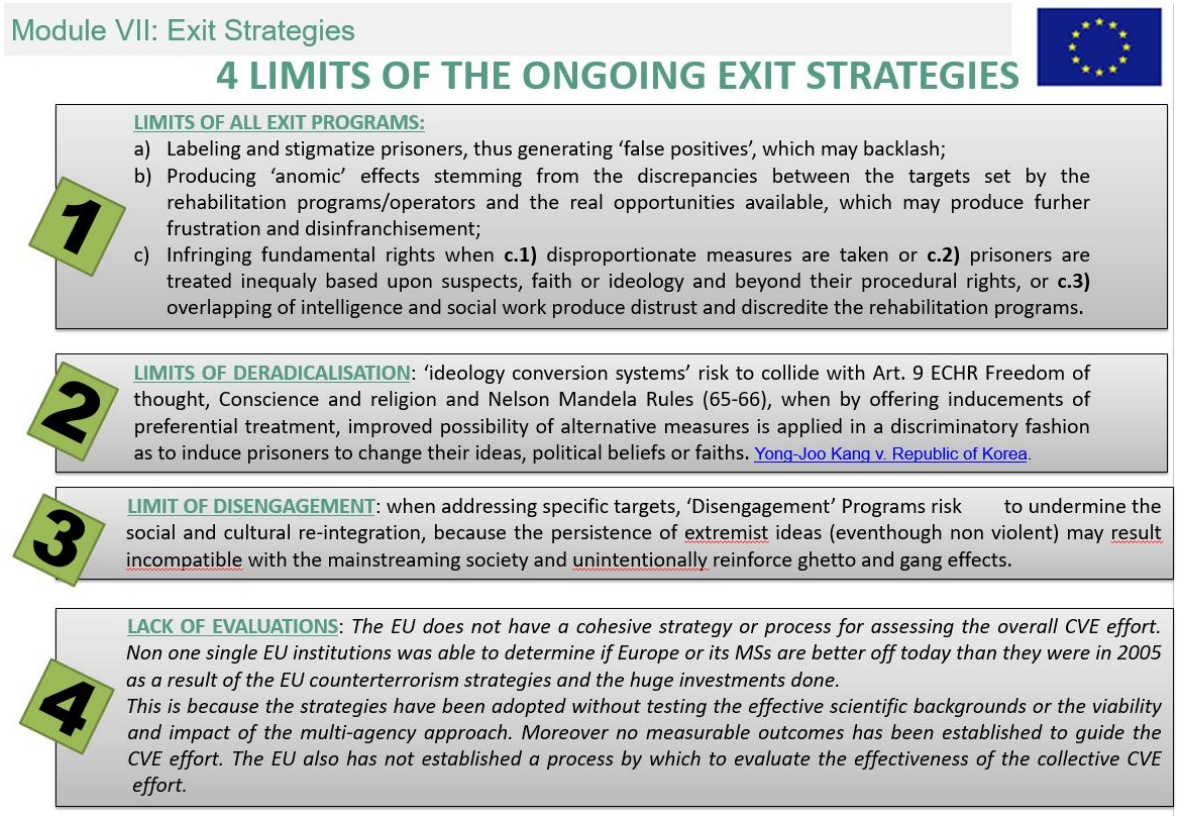
Furthermore, public-private cooperation and exchange of data among different agencies and public-private practitioners require a clear legal framework, which is available in some countries (UK, DK, NL, etc.) only, but not in others.





3- FUTURE CHALLENGES

Preliminary conclusions resulting from independent researches around these complex topics are relevant for policy makers, EU technostructures and EU Agencies and therefore we summarise four elements below:



More in details:

1. Radicalisation in itself is not a crime in many MSs (contrary to recruitment or other terror-related crimes that may lead to judicial investigations). Nevertheless, the majority of MSs have in place differentiated mechanisms to gather information (in prison and outside) concerning radical behaviours. We would like to clearly highlight that these are extrajudicial data, which may be very useful for rehabilitation programs of safeguard initiatives, if properly managed; however, when extrajudicial sensitive data are gathered, stored and transferred by police forces and within 'pre-crime' activities, clear procedural boundaries need to be defined in order to grant fundamental rights to the individual concerned and comply with several laws and procedures.

2.Unfortunately, the science behind behavioural models, defined as 'radicalisation', is contested at academic and political level and the tools and indicators used to profile individuals resulted as highly ineffective, with a very high rate of false positive and false negative, in some cases even Islamophobic. European activists harshly criticized covert connections between the UK Prevent (then adopted by the EU Counter-Terrorism Strategy in 2005) and psychological warfare campaign and counter-insurgency strategies used in war theatres. A substantial inability to properly address differentiated threats and socio-political conflicts remain at the core of the problem.

3. Moreover the evaluation scales and tools in use at MS level are not equivalent and interoperable. This aspect, combined with very different legislations at MS-level, generates serious contradictions concerning the treatment of prisoners under radical radars at transnational level. As an example, there are relevant legal constraints for the transfer of the related information at EU level, considering that in the majority of the cases we are dealing with sensitive and extra-judiciary data which may impact on fundamental rights. This lack of homogeneity in profiling and risk assessment may lead to differentiated prison and probation treatments, when inmates are transferred from one country to another.

> In this context, alleged radical behaviours or attitudes are often recorded, analysed, transferred and retrieved through non-verified and non-harmonized indicator-based risk assessment tools, which may lead to administrative decisions that have an impact on the fundamental rights of the inmates, their life and their future, including the application of specific administrative measures which impact on the rehabilitation programs, hinder the access to legal benefits and rights within and outside prisons, and endanger equality, far beyond the penalties prescribed by the sentences and their penal execution. In a few very extreme cases, alleged radicals are forced to follow mandatory 're-education' or 'rehabilitation' programs based upon suspects and in other cases can be classified in specific security regimes, deported or stripped of their identity documents in the absence of judiciary measures.

4. This type of extrajudicial information concerning radical ideas and/or behaviours is usually considered security data, therefore not accessible to the prisoners or their lawyers and can be transferred into different security databases, with lesser redress chances for the individual concerned. Unfortunately, this approach may have serious consequences for the

defendants, accused persons and/or convicted offenders.

DERAD Findings

Contrary to EU legal provisions, inmates suspected of radical attitudes, ideas, beliefs, or behaviours, in practice don't have access to the benefits of the Framework Decisions 909/829/947, which are important tools for the implementation of successful exit strategies. Furthermore, procedures to communicate to receiving MS information concerning non-forensic radical observations within the prisons of the issuing State, as part of the transfer certificates, are usually not in place. For these reasons no one single prisoner suspected of radical behaviours resulted as transferred, contrary to provisions and the ration of the 3 FDs. These procedures are in clear contrast with the European provisions and risk to undergo the scrutiny of the EU Court of Justice or the ECtHR.

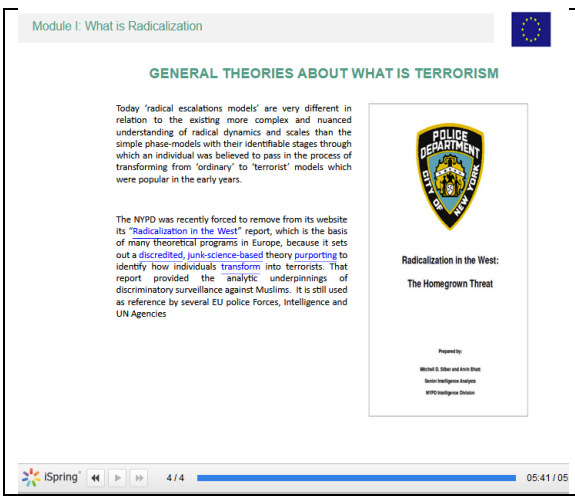
This example, among others, help to explain why judicial and police cooperation need to be re-balanced for effective counter-radicalisation measures.

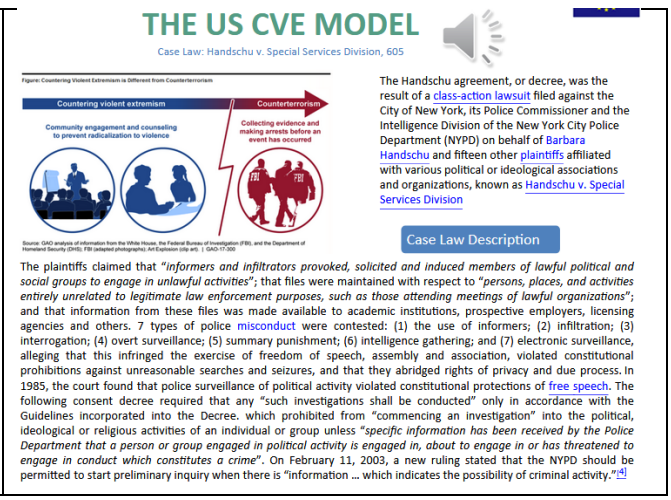
How to manage these data at transnational level remains an open issue, with serious juridical implications in relation to the wider EU juridical reform system after Lisbon (Stockholm's Roadmap, Data Protection Package, EIO, sentences of the EU Court of Justice and ECtHR), the constitutional architecture of several MSs, the institutional roles assigned by law to different preventive bodies (intelligence, LEAs, Judiciary and private sector) and the technological evolutions of the profiling and surveillance tools in relation to the rule of the law (New Europol security tools).

4- PREVENTION AND RISK PRIORITISATION

1- As a result of different researches, the urgency to better define PREVENTION at EU level emerged. Indeed, it is not clear how the concept of socio-psychological prevention is related to the 'PREVENT PILLAR' of the counterterrorism strategies adopted by the EC since 2005, which has a clear legal dimension, in the chain of investigations and responses. On the other hand, it is not clear how, and to which extent, 'private agencies' should be involved in typical LEAs or Intelligence activities (Ex.: personal and patrimonial 'preventive security measures', information gathering and exchange, etc.).

This flaw generated a serious conflict in the US which should be avoided in Europe, if possible.





GENERAL THEORIES ABOUT WHAT IS RADICALIZATION

Jurisprudence of interest

Raza v. City of New York (I)

In June 2013, The ACLU, the NYCLU, and the CLEAR project at CUNY Law School filed a lawsuit challenging the New York City Police Department's surveillance of New York Muslims. The NYPD mapped Muslim communities and their religious, educational, and social institutions and businesses in New York City (and beyond). It deployed NYPD officers and informants to infiltrate mosques and other institutions to monitor the conversations of Muslim New Yorkers, including religious leaders, based on their religion without any suspicion of wrongdoing. It conducted other forms of warrantless surveillance of Muslims, including the monitoring of websites, blogs, and other online forums. The results of these unlawful spying activities were entered into NYPD intelligence databases, which amassed information about thousands of law-abiding Americans. A police representative has admitted that the mapping activities did not generate a single lead or resulted in even one terrorism investigation.

The lawsuit charged that the NYPD, through its discriminatory surveillance program, violated constitutional rights to equal protection, as well as right to freely exercise their religious beliefs, because profoundly harmed their religious goals, missions, and practices. It forced religious leaders to censor what they said to their congregants, limit their religious counseling, and record their sermons, for fear that their statements could be taken out of context by police officers or informants. It also diminished attendance at mosques, prompted distrust of newcomers out of concern they are NYPD informants, and prevented the mosques from fulfilling their mission of serving as religious sanctuaries.

Module I: What is Radicalization

GENERAL THEORIES ABOUT WHAT IS RADICALIZATION

Jurisprudence of interest

Raza v. City of New York (I)

In March 2017 a settlement was approved by the court, establishing a number of reforms to protect Muslims and others from discriminatory and unjustified surveillance. It entailed modification of the Handschu Guidelines, which govern NYPD surveillance of political and religious activity. The reforms included:

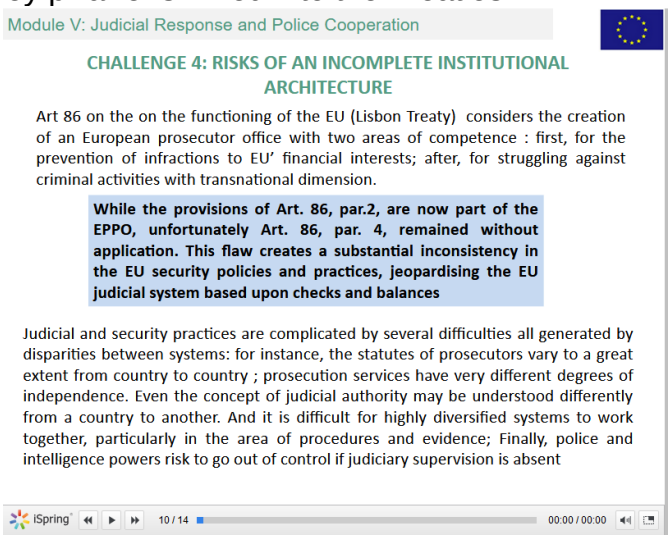
- Prohibiting investigations in which race, religion, or ethnicity is a substantial or motivating factor;
- Requiring articulable and factual information before the NYPD can launch a preliminary investigation into political or religious activity;
- Requiring the NYPD to account for the potential effect of investigative techniques on constitutionally protected activities such as religious worship and political meetings;
- Limiting the NYPD's use of undercovers and confidential informants to situations in which the information sought cannot reasonably be obtained in a timely and effective way by less intrusive means;
- Putting an end to open-ended investigations by imposing presumptive time limits and requiring reviews of ongoing investigations every six months;
- Installing a Civilian Representative within the NYPD, with the power and obligation to ensure all safeguards are followed and to serve as a check on investigations directed at political and religious activities;
- Empower the representative to report to the court at any time concerning violations of the Handschu Guidelines;
- Require the mayor to seek court approval before abolishing the position of civilian representative;

In this sense a clear intervention of the Council, the EC and the EP is considered necessary because there is a risk of numerous legal disputes in the near future, as anticipated by the 'Cage Report', which may expose police forces and intelligence, as already happened in the United States with the NYPD and the evolutions of the 'Handschu case', Hassan v. City of New York, Raza v. City of New York and Handschu v. Special Servs. Div.

2- Considering the vagueness of definitions and area of intervention, different partners highlighted the importance to defining clear structured policy models to PRIORITIZE RISKS beyond the 'Policy Cycle', considering also the differences perceived by security agencies and policy-makers at macro-regional level.

The prioritization of risks is a typical political duty, which cannot be delegated to executive agencies, in our opinion.

This aspect has an important juridical implication on the concept of proportionality of measures, which is a key pillar enshrined into the Treaties.



Indeed, at the end we are again at the key question: the harmonisation of judicial and police cooperation requires a complete European institutional architecture, based upon clear division of powers between the legislative, judicial and executive levels.

Therefore, the establishment of a proper European Prosecutor Office, in its full capacity to jurisdictionalize the operation of the EU Agencies, remains at the heart of the European reform, as well as the urgency to implement and complete the 'Stockholm's Roadmap' and to adopt the 'Equal Treatment Directive' proposed by FRA.