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Foreign Terrorist Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response

Fourth Eurojust Report

November 2016

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List of acronyms

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| AIVD | General Intelligence and Security Service of the Netherlands |
| BND | Federal Intelligence Service of Germany |
| COSI | Standing Committee on Operational Cooperation |
| CPS CTD | Counter Terrorism Division of the Crown Prosecution Service of the United Kingdom |
| CT | Counter-terrorism |
| DAP | Analysis and Prevention Service of the Federal Office of Police of Switzerland |
| DHKP-C | <i>Devrimci Halk Kurtulus Partisi/Cephesi</i> , Revolutionary People's Liberation Party/Front |
| EAW | European Arrest Warrant |
| ECRIS | European Criminal Records Information System |
| ECTC | European Counter Terrorism Centre |
| ENCS | Eurojust National Coordination System |
| EU | European Union |
| EU CTC | European Union Counter-Terrorism Coordinator |
| EU INTCEN | EU Intelligence and Situation Centre |
| FATF | Financial Action Task Force |
| FIJAIT | <i>Fichier judiciaire des auteurs d'infractions terroristes</i> |
| FTF | Foreign terrorist fighter |
| ICC | International Criminal Court |
| ICT | Information and communications technology |
| IHL | International Humanitarian Law |
| IMSI | International mobile subscriber identity |
| IS | Islamic State |
| ISIS | Islamic State in Iraq and Syria |
| IT | Information technology |
| JHA | Justice and Home Affairs |
| JIT | Joint investigation team |
| MENA | Middle East and North Africa |
| MLA | Mutual legal assistance |
| NCTP | National Counter-Terrorism Prosecutor |
| NDB | Federal Intelligence Service of Switzerland |
| NGO | Non-governmental organisation |
| OP | Operational Paragraph |
| PKK | <i>Partiya Karkeren Kurdistan</i> , Kurdistan's Workers' Party |
| RAN | Radicalisation Awareness Network |
| SG | State Gazette |
| SIS | Schengen Information System |
| TCM | Terrorism Convictions Monitor |
| TFTP | Terrorist Finance Tracking Program |
| UNSCR | United Nations Security Council Resolution |
| USTD | United States Treasury Department |

The terms used throughout this report to refer to the terrorist organisation Islamic State (i.e. Islamic State, Islamic State in Iraq and Syria) may not be consistent, as they reflect the terminology used in the various sources for this report.

Executive Summary

Over the past year, Europe has experienced severe terrorist attacks claiming hundreds of lives. The attacks were committed by returning FTFs, ISIS sympathisers and followers, some of whom were previously convicted of terrorist or other offences. Several other attacks have been thwarted. As the threat of FTFs and ISIS followers has become more visible, the European Union and the Member States have adapted their policies, legislation and practices, seeking to address the evolving threat and its consequences in a proactive and efficient manner; measures to reinforce the criminal justice response to FTFs, their recruiters, facilitators and supporters have also been implemented. In addition to criminalising certain types of conduct, e.g. self-training to commit terrorist offences, preparatory acts of terrorists acting alone, financing of individual terrorists not linked to a specific terrorist act, unlawful participation in an armed conflict abroad, etc., Member States have also amended their procedural law provisions applied to terrorism proceedings to render them more efficient.

In view of the difficulty of maintaining working MLA relations with Syria and Iraq, information collected by intelligence services is deemed crucial to gaining insights on structures and members of terrorist organisations active in that region. The scale and widespread nature of terrorist threats require national authorities to bridge the existing gaps among intelligence, law enforcement and prosecution services. None of the latter should work in isolation and intelligence gathered in terrorism matters should eventually support investigations and prosecutions of terrorist suspects. Nonetheless, no uniformed approach exists across the Member States towards the evidentiary use of intelligence.

As jurisprudence experience in FTF cases across Europe is growing, courts must address more diverse and complex issues. In a number of cases, the scope and definition of terrorist offences and the classification of certain conduct as terrorist in nature was deliberated. While Member States have implemented a number of recent international instruments designed to align the definition of terrorism, differences still exist in the type of conduct that is considered terrorist in nature. The policies and practices adopted in the Member States concerning alternatives to prosecution and detention also vary. In some cases, custodial sentences as well as alternatives to imprisonment have been imposed in respect to FTFs, often accompanied by specific conditions for rehabilitation, disengagement and/or de-radicalisation.

Member States increasingly report links between terrorism and organised crime, especially regarding illicit trafficking in firearms and explosives, illegal immigrant smuggling and document counterfeiting. Acknowledging the close connection between terrorism and organised crime, and recognising the need to improve the ability to effectively counter those two criminal phenomena, a number of Member States have recently passed legislation to broaden the applicable investigative techniques and prosecutorial tools.

Member States continue to seek Eurojust's assistance to support their investigations and prosecutions. Eurojust's coordination tools, experience and expertise assist national authorities in coordinating in a more efficient manner, defining and pursuing common strategies and building synergies in addressing the terrorist threat, thus leading to concrete operational results. The crucial importance of information sharing between Member States, and also with relevant EU agencies, makes the use of existing platforms and services in a consistent and systematic manner essential. Ensuring that information shared can be used as evidence is of great importance in judicial cooperation, and Eurojust plays a major role in assisting the Member States in this respect. For Eurojust, judicial cooperation with key third States, particularly in the Western Balkans and the MENA region, also remains a priority and possibilities for posting Eurojust Liaison Magistrates to third States are currently being considered.

Eurojust's analysis of the evolving criminal justice response to the FTF phenomenon confirms the need to continue seeking more efficient ways to address the growing threat and tackle its changing nature in a proactive manner. Renewed legal frameworks, efficient cooperation, and timely and comprehensive exchange of information are key components of this approach and should remain a priority for the Member States and the European Union.

1. Introduction

The objective of the fourth Eurojust report, *Foreign Terrorist Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response* (this report), is to present Eurojust's findings on the evolution of the EU criminal justice response to FTFs. It highlights some remaining and newly identified challenges in FTF investigations and prosecutions across Europe. It refers to best practice in dealing with such challenges and presents lessons learned from relevant jurisprudence experience. This report contains two main chapters: national perspectives and the common approach to FTFs. Based on identified challenges and best practice, the report focuses on key topics that have emerged in ensuring an efficient criminal justice response to FTFs. This report also provides insight into the added value of Eurojust, and ends with conclusions and recommendations.

The findings in this report are based on Eurojust's analysis of information shared by national authorities in 2016. It builds on Eurojust's experience in coordinating and facilitating the cooperation between national authorities in FTF cases. It reflects national experience in dealing with FTF cases, as shared with Eurojust in response to the follow-up Eurojust questionnaire on the judicial responses to FTFs (the '2016 Eurojust questionnaire'). The questionnaire was sent to all national correspondents for Eurojust for terrorism matters and to the Eurojust Liaison Magistrates from Norway, Switzerland and the USA in April 2016. Its main objectives were to: i) further evaluate how national legislation evolves to address the changing terrorist threat, ii) continue identifying challenges and best practice in the investigation and prosecution of FTFs and in the implementation of de-radicalisation or disengagement programmes, and iii) identify the needs of judicial authorities for further action at national and EU levels. This report also elaborates on the discussions held during the fourth Eurojust tactical meeting on terrorism of 22-23 June 2016, *Building an effective judicial response to foreign terrorist fighters* (the '2016 tactical meeting on terrorism').¹

This report does not seek to offer a comprehensive analysis of all relevant issues. It provides an update, which develops further the findings and recommendations of the previous Eurojust reports on the topic. In its first report, *Foreign Fighters in Syria – A European Perspective: Eurojust's Insight into the Phenomenon and the Criminal Policy Response* (the 'Eurojust report of November 2013', Council document 16878/13 EU RESTRICTED), Eurojust identified the need for a coordinated and structured approach to the emerging FTF phenomenon, integrating judicial, administrative and other multi-disciplinary measures. The second report, *Foreign Terrorist Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response* (the 'Eurojust report of November 2014', Council document 16130/14 EU RESTRICTED), focused on challenges in securing strong evidence, particularly electronic evidence, and conducting financial investigations, and underlined the risk of creating prosecution gaps in the absence of common minimum standards for criminalisation of certain conduct. The third report, *Foreign Terrorist Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response* (the 'Eurojust report of November 2015', Council document 14907/15 EU RESTRICTED), presented Eurojust's analysis of jurisprudence experience and highlighted, among others, national experiences with countering radicalisation in a judicial context. This report builds on earlier findings and focuses on three essential issues: special and emergency powers applicable in case of terrorist attacks, admissibility of (foreign) intelligence as evidence for criminal proceedings and links between terrorism and organised crime. It identifies several conclusions and recommendations and outlines possible follow-up actions.

¹ The meeting was the fourth tactical meeting on terrorism since 2013, which focused on the criminal justice response to FTFs. It brought together the national correspondents for Eurojust for terrorism matters, representatives from the judicial and law enforcement authorities of the Member States and third States, as well as representatives from Europol and EU INTCEN. It was also attended by the EU Counter-Terrorism Coordinator.

2. Criminal Justice Response: National Perspectives

2.1. Legal framework

This section provides information on relevant national laws adopted or in the process of being adopted² in the Member States to counter the FTF phenomenon. In particular, the focus of this section is on *i*) national legislation dealing with special procedural law provisions applying in terrorism proceedings, and *ii*) an overview of special or emergency powers for the judiciary applicable in the event of a terrorist attack. The information included in this section was shared with Eurojust in response to the 2016 Eurojust questionnaire. If appropriate, references are also made to the adequacy and the impact of national legal frameworks on investigations and prosecutions of FTFs as discussed during the 2016 tactical meeting on terrorism. An overview of the legislative developments of relevance to the FTF phenomenon in general is presented in the Annex.

The extracts of relevant national laws and draft laws found in this section and in the Annex are unofficial English translations³.

2.1.1. Special procedural law provisions applying in terrorism proceedings

One of the issues addressed in the 2016 Eurojust questionnaire concerned planned or adopted legislation related to the special procedural law provisions applying in terrorism proceedings, in all or in certain procedural stages, such as extensions of time limits or time limitations for coercive measures (e.g. house searches, provisional detention, etc.) or special powers given to prosecutors to authorise coercive measures. Special and emergency powers applicable in situations involving terrorist attacks were also discussed by the participants of the 2016 tactical meeting on terrorism.

The replies to the 2016 Eurojust questionnaire show that, in a number of Member States, such special provisions have already been adopted, while in other Member States the discussions and review procedures are ongoing. The information available to Eurojust also shows, however, that some of the relevant provisions are not limited to cases of terrorism and can also be used in investigations regarding other serious crimes.

In the **Belgian** legislation procedural provisions⁴ were amended to extend the investigative capacities of competent authorities in terrorism cases. According to the amendments, searches can now be conducted around the clock, including during the night (between 21:00 and 05:00), if the investigation concerns terrorist offences. In addition, an around-the-clock search is possible if the investigation concerns a criminal conspiracy aiming to commit an attack on individuals or on property and if evidence indicates that illegal firearms, explosives or other dangerous and harmful substances are involved. Legal possibilities to enforce arrest warrants are extended to the night-time hours under the same prerequisites. Finally, telephone intercepts are now permitted for offences against the law on firearms or explosive substances and provisions on the physical protection of nuclear and other radioactive materials or the Cooperation Agreement on the Execution of the Chemical Weapons Convention. This measure can be ordered by investigating judges provided strong evidence of such offences is present (e.g. illegal possession of nuclear material or firearms, demanding illegal surrender of nuclear material by means of violence or threats, trespassing on facilities holding nuclear materials, handing out firearms to non-qualified persons, etc.).

In the **Czech Republic**, certain tools used for seizing property and assets from criminal activities were further specified⁵ to improve the fight against terrorism financing in general. Additional legislative

² Updates planned according to the replies to the 2016 Eurojust questionnaire.

³ With the exception of the laws and draft laws of the Member States that use English as official language.

⁴ Act of 27 April 2016 on complementary measures to fight terrorism, in effect since 19 May 2016.

⁵ Act No. 86/2015 Coll. on 'Seizing property and things in criminal proceedings', effective as of 1 June 2016.

amendments, suitable to also improve the fight against terrorism financing, to implement Directive 2014/42/EU of the European Parliament and of the Council, and, especially, 'enhanced confiscations', are currently being discussed.

In **France**, an automated database of perpetrators of terrorist offences, the FIJAIT was created⁶ to help prevent new terrorist offences and identify possible perpetrators via strong social monitoring, and inspired by a pre-existing judicial database for sexual or violent offenders. After sentencing or charging a perpetrator and upon the decision of an investigating judge or public prosecutor, individuals are listed for 20 years (underage individuals only for ten years). The listing creates a series of obligations for the individual, namely:

- Providing a proof of address every three months;
- Reporting changes of address within fifteen days;
- Reporting about planned journeys abroad at least fifteen days before departure; and
- In the event the individual lives abroad, journeys to France need to be reported at least fifteen days before departure.

Violation of any of the obligations set out above is punishable by up to two years' imprisonment and a fine of EUR 30 000. Apart from the FIJAIT, the French legislature extended the investigative techniques available to competent authorities in combating the financing of terrorism and organised crime⁷. The additional measures include night-time searches, room surveillance and technical measures (e.g. data collection by accessing data stored in a computer system and deployment of an IMSI catcher). In addition, the legal amendments reinforced gun and ammunition control and introduced new provisions with regard to witness protection.

2.1.2. Special and emergency powers applicable in the event of terrorist attacks

Special and emergency powers applicable in the event of terrorist attacks were one topic of discussion by the participants of the 2016 tactical meeting on terrorism. As a result of the discussions and according to other information available at Eurojust in this regard, in the majority of the countries in Europe, such provisions applying only in terrorist attacks do not exist. The participants also highlighted the need to make a distinction between 'emergency situations' and a 'state of emergency', the latter being subject to parliamentary oversight and under certain circumstances allowing a lower threshold for coercive measures (e.g. house searches and detention of suspects). In addition, the need to respect fundamental rights and appropriate means of legal redress were underlined. A number of Member States indicated that, also due to the November 2015 terrorist attacks in France, the possibility of implementing special powers in such cases was being assessed. In summary, however, the participants did not detect an evident impact by the differing legal frameworks in the Member States on MLA in terrorism cases or a pressing need to harmonise EU legislation in this field.

As indicated above, according to the information available to Eurojust, the current legislative landscape in this respect is as follows:

In **Germany**, most coercive measures generally must be ordered by a court. However, in cases of 'imminent danger', police officers and/or prosecutors can order the execution of some of the measures, which then must be subsequently validated by a judge. Nevertheless, these exceptional powers are not limited to cases of terrorism or terrorist attacks as such, but apply generally in criminal proceedings.

⁶ The database was enacted on 24 July 2015 by Law No. 2015-912 on intelligence.

⁷ Law No. 2016-731 of 3 June 2016.

In **Spain**, a special provision provides for the Minister of Interior or the State Secretary for Security to order certain coercive measures in cases involving investigations against 'armed bands' or 'terrorist elements' in the 'case of emergency'. Within certain deadlines, such measures must be reported to a competent magistrate to be either revoked or confirmed. Also, in cases relevant to national security (which may include terrorist attacks), the term of police detention may be extended to a maximum of five days instead of three. During this time, no communication to the judge in charge of the case or the defence lawyer representing the suspect is foreseen.

In **the Netherlands**, the indication that a terrorist offence is being or has been committed triggers the possibility for investigating law enforcement officers or public prosecutors to order and/or execute certain measures without a court order. Provisions also exist for extending the maximum time limit for warrants of arrest or detention for charges of terrorist offences in comparison with charges for other offences. In addition, under certain circumstances not necessarily linked to terrorist offences, provisions are in place that allow for a number of coercive measures without prior decision of a court.

In **the UK**, a terrorist attack can constitute an emergency enabling the government to enact emergency regulations that are limited in duration and can include extended powers for law enforcement, courts, and other components of the executive authorities (e.g. intelligence services).

In terrorism investigations, as in organised crime group cases, **Italy** provides the investigation tools available for investigating authorities (particularly 'preventive lawful interceptions' and new possibilities to retain information-technology data, including such data collected abroad).

As of 1 January 2016, the **Slovak Republic** introduced provisions allowing for courts to impose pre-trial detention for up to five years on suspects of terrorist offences without formally stipulating the reasons therefor. The time limit for detention by the police of a person suspected of terrorist offences has been extended from 48 hours to 96 hours, and, in the event of terrorist threats, police officers have been given more powers to erect roadblocks and to search vehicles. Additional witness protection measures (e.g. no confrontation in court proceedings, taping of testimony) in terrorism investigations/proceedings have been introduced, and, upon court order, website operators and domain providers are obliged to shut down or prevent access to online content promoting or encouraging people to engage in terrorist acts.

A measure introduced by **Norway** is court-ordered online surveillance of electronic devices used by suspects. The Norwegian legislature is also discussing the possibility of enabling police and security services to conduct online monitoring (referred to as 'data reading'), enabling them to bypass encryption technologies used by suspects. However, these measures are not limited to investigations regarding terrorist offences, but are allowed or foreseen in investigations of serious crimes.

2.2. Challenges and best practice in investigations and prosecutions

In its previous reports on the criminal justice response to FTFs, Eurojust analysed in detail the challenges Member States face in their investigations and prosecutions related to FTFs, as well as the national practices adopted to address those challenges. As the findings of these reports are still valid and could be consulted for reference, only one issue – the admissibility of (foreign) intelligence as evidence for criminal proceedings under the respective domestic legal frameworks – has been selected and analysed in detail below.

Admissibility of (foreign) intelligence as evidence for criminal proceedings under the respective domestic legal frameworks

Background

The use of information collected by (national and foreign) intelligence services is generally considered of great importance for building criminal investigations in terrorism cases, particularly against FTFs. Information gained by intelligence services is deemed crucial to gaining insights about the structures and members of terrorist organisations active in Syria and Iraq, due to the difficulty of maintaining working MLA relations in the region.

In addition, the scale and widespread nature of terrorist threats require national authorities to bridge the existing gaps among the intelligence, law enforcement and prosecution communities. A general consensus among the national authorities is that they should not be working in isolation, particularly when dealing with war-torn areas such as Syria and Iraq, and that intelligence gathered in terrorism matters should eventually support the investigations and prosecutions of terrorist suspects.

Nonetheless, Member States seem to be following different approaches with regard to handling information originating from intelligence services in the context of criminal proceedings, as well as on the role of the judicial authorities *vis-à-vis* the admissibility and use at trial of such information.

Evidentiary use of intelligence

While some legal systems do not permit the use of intelligence as evidence, several Member States (e.g. **Belgium, France, Germany and Spain**) use information from (national and foreign) intelligence services as the basis for opening criminal investigations or prosecutions of terrorism cases, as well as ordering coercive and surveillance measures (such as the interception of a suspect's telecommunications). Such information can be further used by the trier of fact for the adjudication of a defendant's criminal responsibility.

The analysis of the answers to the 2016 Eurojust questionnaire shows that in some of these Member States, the evidentiary use of intelligence is significantly narrowed, on account of the limited possibility to verify at trial the lawfulness of the information collected by the intelligence services, or to access its sources. The Member States may set out specific requirements for, or limitations to, the admissibility of intelligence as evidence in criminal proceedings. The requirements or limitations so imposed may require the prosecution: to obtain permission from the owner of the intelligence; to conduct a prior assessment of the legality and lawfulness of the intelligence (with particular regard to the means and methods deployed to gather it); to disclose to the defendant(s) the source(s) or provider(s) of the intelligence; and to call the provider(s) to testify as witnesses at trial.

Participants agreed during the 2016 tactical meeting on terrorism that admissible intelligence may often include classified intelligence – i.e. intelligence the sources of which are non-disclosable to the defendant. Classified intelligence can be used for the purpose of criminal investigations or proceedings in terrorism cases in a number of Member States. However, this use is mitigated by concurring (and conflicting) due process considerations, particularly in legal systems based on or inspired by adversary criminal procedure models, i.e. those legal systems in which the defendants enjoy the right to know, confront and cross-examine

the testimony of the sources of inculpatory evidence (e.g. the sources of incriminating intelligence). These legal systems provide checks and balances for the admissibility and use at trial of classified intelligence to ensure that the public interest to protect the anonymity (and safety) of the intelligence sources and the defendants' right to defence are equally respected.

Legality and credibility of the intelligence

Mostly, when permitted, the use of intelligence in criminal investigations and prosecutions is envisaged under the presumption of its compliance with the law, i.e. the legality and credibility of the intelligence services' operations and the information obtained by them. For example, in replying to the 2016 Eurojust questionnaire, the **Belgian** authorities highlighted that the Supreme Court of Belgium upheld the principle that information from intelligence services, which present a certain degree of reliability, may lead to the beginning of a criminal investigation as well as the application of coercive measure (e.g. searches and seizures).

In their answers to the 2016 Eurojust questionnaire, the **Dutch** authorities stated that the accuracy and reliability of the intelligence submitted for criminal investigations or prosecutions in the Netherlands is checked by two designated NCTPs. Acting as a connecting link between the intelligence services and the public prosecution offices, the NCTPs are charged with routing official reports (called *Ambtsberichten*) from the AIVD to the National Prosecution Office. Before routing intelligence reports, however, the NCTP is asked to scrutinise their contents, accuracy and reliability on the basis of supporting documents. However, the NCTP is not mandated to check the legality of the gathering and processing of the underlying information of the intelligence services.

Corroboration

In general, legal systems that provide for the admissibility of intelligence in criminal proceedings subject its evidentiary use to the requirement that such intelligence be corroborated by other evidence. Looking again at the jurisprudence of the Supreme Court of **Belgium**, the use of information coming from intelligence and security services cannot constitute the exclusive or predominant ground for a defendant's conviction. The Supreme Court reaffirmed the need for the intelligence to be supported by other corroborating pieces of evidence. In **the Netherlands**, the official reports (*Ambtsberichten*) prepared by the AIVD and transmitted through the NCTP may be regarded as the starting point for a new tactical investigation by the public prosecutor. However, for this tactical prosecution to develop into a proper criminal prosecution, the information contained in the *Ambtsberichten* needs to be coupled with additional incriminating information. The information in the *Ambtsberichten per se* can in itself constitute a reasonable suspicion and can be sufficient to start an investigation and serve as a basis for certain coercive measures.

Role of intelligence services and their relationship with judicial authorities

A number of Member States have adopted specific legislation to regulate the relationship between intelligence services and prosecution offices as well as the requirements under which the former may provide information to the latter in terrorism cases. Thus, in **Germany**, intelligence services generally make their information available to judicial authorities in the form of official affidavits (*Behördenzeugnisse*), particularly intelligence information concerning the structures of the terrorist organisations. In **the Netherlands**, as seen above, intelligence information that may be used for the purpose of criminal investigations and prosecutions comes in the form of the official reports (*Ambtsberichten*) routed from the AIVD to the National Prosecution's office, through the NCTP.

A review of the responses to the 2016 Eurojust questionnaire reveals that in some Member States, the legal framework goes as far as to permit intelligence services to play an active role in the investigation of terrorism-related offences. In Member States such as **Belgium**, such authority is accompanied by the obligation to inform the prosecution office as and when the intelligence services become aware of a crime

being committed. In other Member States, however (e.g. **the Netherlands**), the intelligence services have no obligation to officially report after discovery of an offence.

In **Germany**, the BND may be directly involved in criminal proceedings, i.e. by providing the specialised evaluation of specific factual situations. For example, in an investigation against a suspected member of the 'Jabhat al-Nusra' terrorist organisation, the BND was asked to evaluate video material that had been recorded in Syria by a witness. The information provided by the BND corroborated the witness' credibility and account of events. The BND was thus able to confirm the whereabouts of the defendant in Syria at the relevant time, as well as to provide information on hostilities in a certain region of Syria in which the defendant was alleged to have participated.

In **the UK**, the national authorities acknowledged the necessity for a close working relationship between the CPS CTD, police and intelligence services during counter-terrorism investigations and any subsequent prosecutions. The CPS CTD is routinely briefed about the intelligence case before any charging decision, as on occasion it may seek to use intelligence as evidence. However, to be able to use the intelligence as evidence in criminal proceedings, the CPS needs to obtain permission from the owners of the intelligence.

To that effect, the CPS would submit an advice setting out how the intelligence can assist the prosecution's case if used as evidence. The intelligence services' legal advisers would then consider whether the prosecution would benefit national security interests, whether the use of material would significantly assist the prosecution and whether the release of the material would carry a risk of damage to national security interests before seeking the relevant clearances and authority to release the material for use as evidence. Generally, UK intelligence services will not agree to release material for evidential use or agree to the attendance of witnesses if they assess that the overall benefit to the interests of national security or the prevention or detection of serious crime is insufficient to justify the cost (in terms of resources, including case preparation and attendance at court, and risk to sensitive information).

Case Nautilus (2016, Switzerland)

The **Swiss** judicial authorities have recently dealt with a case in which, for the first time, a criminal prosecution was triggered by and eventually based upon a report from the Swiss internal intelligence agency (DAP). The case touched upon a very sensitive and important issue: could a report from a national intelligence agency, based *inter alia* on information provided by foreign intelligence services, serve as a basis for opening a criminal investigation and subsequently ordering coercive and/or surveillance measures (such as the interception of the defendants' telecommunications)? Because of its significance, the case was presented by the Swiss national correspondent for terrorism at the 2016 tactical meeting on terrorism. The final judgement in this case, rendered by the Federal Court of Switzerland (*Bundesgericht*; the 'Federal Court') on 27 January 2016, was also provided to Eurojust and analysed in the Topic of Interest section of issue no. 25 of the *Terrorism Convictions Monitor*, released in June 2016.⁸

The DAP report in the instant case concerned suspicion of criminal activities by two Iraqi brothers of Kurdish ethnicity. Part of the information provided in the DAP report had been obtained with the help of foreign intelligence services. Upon receiving the DAP, the Office of the Attorney General of Switzerland opened an investigation against the suspects.

On 2 May 2014, the suspects were convicted by the Swiss Federal Criminal of first instance for participating in and supporting a criminal organisation and forgery of official foreign documents. They receive a prison sentence of three years and three months and a suspended sentence of two years, respectively. Both defendants appealed this decision before the Federal Court on the basis that the information used in the criminal investigation against them had been obtained illegally.

⁸ See section 3.2.2 for more information on the *Terrorism Convictions Monitor*.

Namely, the appellants claimed that the report of the DAP was based on unauthorised surveillance carried out by foreign intelligence agencies or other illegal methods of collecting evidence. They demanded the disclosure of and access to sources of the DAP report. They further argued that as it contained illegally obtained information, it should have not been used by the Office of the Attorney General as a basis for opening an investigation against them, and ordering the interception of their communications and further surveillance measures.

Firstly, the Federal Court dismissed the appellants' challenge against the legality of the collection of the information contained in the DAP report. The Federal Court noted that, as a matter of principle, an official national report is assumed to contain information that has been legally obtained. In the instant case, the Federal Court found no indications that the DAP had obtained any information illegally, or that the files received from foreign authorities via formal MLA channels had been compiled unlawfully.

The Federal Court stated that the DAP (and its successor, the NDB) was subject to parliamentary and administrative control, whereby the legality of their activities are monitored. The Federal Court took note of the absence, in the current case, of any concrete indications to the effect that such information was obtained unlawfully. The Federal Court therefore concluded that the information found in the DAP report was presumed to have been legally obtained.

Against this background, the Federal Court felt no need to compel the testimony of any of the sources used by the DAP (and later NDB) to prepare its report. The Federal Court acknowledged that the NDB has the right to protect its sources of intelligence information. In doing so, the NDB must balance the right to information of those affected and the interests of the source to be protected. In weighing the individual case, the identity of a foreign security agency must remain secret, unless it consents to the disclosure or the disclosure would not threaten the continuation of collaboration with it.

Secondly, the Federal Court rejected the argument that the Office of the Attorney General should not have used the DAP report as a basis for opening the investigation. The Federal Court noted that, in this case, the DAP report contained sufficient indications of criminal behaviour, which resulted in a legal obligation of the Attorney General to initiate criminal proceedings. In fact, the Federal Court acknowledged the criminal complaint character of the DAP report.

Thirdly, the Federal Court found that the DPA report: i) had provided sufficient information to establish the suspicion of criminal activity designed to lead to the commission of a listed offence; and ii) was based on lawfully acquired evidence. Based on the above, the Federal Court confirmed that the interception of telecommunications was rightly authorised and ruled that the information so gathered was admissible as evidence at trial.

On 27 January 2016, the Federal Court dismissed the appeal and confirmed the appellants' sentences to two years' imprisonment (suspended sentence) and three years and three months' imprisonment, respectively, imposed by the Court of First Instance.

2.3. Jurisprudence experience: lessons learned

As jurisprudence experience in FTF cases across Europe is growing, courts face more diverse and complex issues. The analysis below builds on lessons learned as highlighted in the previous Eurojust reports on the criminal justice response to FTFs. The analysis focuses on challenges and national practices identified in the relevant judgements shared with Eurojust in 2015 and 2016 and analysed by Eurojust in view of the possible added value they may have for building successful prosecution cases in other countries.

Definition and scope of terrorist offences: facilitation and support

While Member States have implemented a number of recent international instruments to align the definition of terrorism, differences still exist in the type of conduct that is considered of a terrorist nature. In addition to acts, such as participation in (the activities of) a terrorist group, receiving terrorist training and travel to a conflict zone with the purpose of joining a terrorist organisation, courts in the Member States have dealt with cases in which the classification of certain conduct as terrorist-related was deliberated.

As mentioned in previous Eurojust reports, participation in supporting activities, such as cooking or acting as a driver, while knowing that these activities are for the benefit of a terrorist group, are punishable in **Belgium**. Recent analysis of case law concerning the participation of women in the activities of terrorist groups, done by the Belgian authorities, concluded that the departure to a conflict zone to marry a terrorist fighter is not necessarily a material act of participation in the terrorist activities carried out by the group. However, providing support to a fighter in any form can be considered as participation in the activities of the terrorist group. In such cases, establishing that the woman shared the ideology of the terrorist group would suffice. In addition, when assessing each individual case, the court would take into consideration the level of radicalisation of the accused, her willingness to join a terrorist group, the fact that she acted in full knowledge, etc.

In **Germany**, the mere fact of travel to an operational area of a terrorist organisation for the purpose of marrying a terrorist fighter, for example, or with the intention of living there permanently, does not generally constitute a criminal act pursuant to German criminal law.

In **France**, the mere fact of departure to Syria or Iraq to marry a terrorist fighter is generally not subject to prosecution under the category of participation in criminal and terrorist activities; in general, women would be subject to legal proceedings as soon as a terrorist project or logistical support to terrorist groups can be proven. However, due to the evolution of the role given to women by ISIS, who are no longer confined to domestic tasks but on the contrary are particularly involved in consolidating ISIS by contributing to children's education and supporting ISIS's projects and activities, women who went to Syria or Iraq are likely, like men, to be prosecuted for their participation in terrorist activities.

In **Italy**, a court of first instance recently adjudicated a case involving an Italian/Albanian family suspected of supporting cells of ISIS operating on Italian territory. All the suspects were charged with the crime of international terrorism as provided under article 270bis of the Italian Criminal Code. Most of them were placed in pre-trial custody or under house arrest pursuant to a decision of the pre-trial judge in Milan. The court of first instance upheld that the conduct exhibited by the suspects was designed – in various forms and to different degrees – to support ISIS and to lead to the fulfilment of its terrorist goals.

The court found that some of the suspects travelled to Syria by car through a land route across central European Member States (e.g. Hungary) or by air (via Rome-Istanbul-Gaziantep) to receive military training and later actively participate in terrorist activities. A few other suspects were found to have supported those suspects who travelled to Syria by organising or financing their trips. Interestingly, two suspects were also

accused of having arranged a marriage of convenience to facilitate their travel to Syria, as well as that of their close relatives. The court further found that other suspects had been involved in the radicalisation and recruitment of new ISIS operatives in Syria and Italy, or via the internet. Based on these findings, the court convicted all suspects of the crime of international terrorism and imposed terms of imprisonment ranging from 30 months to five years and four months, based on each suspect's actual conduct and applicable mitigating factors.

Courts in **the Netherlands** have used as evidence a report about the life in a caliphate published by the Dutch Intelligence Service AIVD, as well as a report produced by researchers from two Dutch universities, which describe the living conditions of Dutch travellers to Syria. The second report states that even if persons fulfil roles other than fighters in a caliphate, their activities facilitate the functioning of terrorist organisations; therefore, this facilitation could be seen as participation in the armed conflict.

In **the UK**, several persons have been convicted of offences related to providing assistance to others to commit terrorist acts, engaging in preparatory acts or failure to disclose information about acts of terrorism. The provided assistance included, for example, arranging for various items to be used for terrorist purposes, driving others to train stations or airports from where they departed to Syria, disposing of their property after departure, providing advice on how to travel and which militia group to join, etc.

Financing of terrorism

The scope of the definition of financing of terrorism continues to be addressed by defence counsel in the cases in which money is transferred to the conflict zone for private use by fighters. In **the Netherlands**, for example, courts have ruled that by transferring money intended for private use by fighters in Syria or Iraq, the defendant added to the further destabilisation and lack of safety in the area. Courts have further ruled that by financially supporting fighters, those who send the money consciously accept the significant risk that this money would be used for terrorist purposes. The court did not make any distinction in the cases in which the money sent to FTFs was from their own savings.

In **the UK**, persons who provided their bank account details to enable transfers of money to be used for the purposes of jihad have also been convicted of terrorist offences.

Terrorist offences or war crimes

In **Sweden**, the Gothenburg District Court, and subsequently the Court of Appeal for Western Sweden, deliberated whether the involvement of two people accused of the execution of prisoners in Syria could be considered a war crime. The two appeared in a video showing a group of six men involved in the murder. The charge of murder as a war crime was brought by the prosecution as an alternative to the terrorism charges, recognising that terrorism laws would not be applicable to acts of armed groups during an armed conflict that fall under IHL.

Both the Gothenburg District Court and the Court of Appeal for Western Sweden found that the accused played an important role in the planning and execution of the murders and they should be regarded as co-perpetrators, regardless of the fact that the actual killing was done by others. The accused had a common intent with those who carried out the murders and supported them physically and mentally. The District Court found that, while both accused fought in the context of an armed conflict in Syria, the murders were committed by a group of people that came together only temporarily. This group bore very little resemblance to an armed group under IHL, and, thus, the court concluded that the offences could not qualify as war crimes. The court ruled that the murders were to be considered a terrorist offence as they were

intended to instil fear and intimidation. Furthermore, the Court of Appeal made a reference to Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, which is transposed into Swedish legislation. The court reflected on the requirement that a terrorist offence 'might seriously damage' a State. It ruled that the wording is not limited to threats that may have consequences on an entire country, but encompasses acts that might seriously damage a common interest of the citizens, such as defending an open and secure society. A decision as to which acts may fall under this provision must be made on a case-by-case basis.

Procedural and other issues

'FTF questionnaires'

The District Court of Glostrup in **Denmark** was the first court in Europe to refer to a form/questionnaire used by ISIS. The questionnaire was made available by the US authorities, which provided an explanation to the court as to how this and other similar forms had come into their possession. The questionnaire contained information on a Danish citizen charged with terrorist offences. According to his statements, a person working for the organisation had filled in information about him in a form. When confronted with the form, the accused confirmed that he had provided the data contained in it. Reference to the questionnaire was subsequently made when questioning him about his role as a fighter within the terrorist organisation. While he had stated that he was not interested in armed combat, the form showed that the accused had been registered as a fighter. He claimed that the form did not contain any other possible tasks; however, by a majority vote, the court held that the statement made by the accused about his tasks within the terrorist organisation, mainly cooking and serving food, was not reliable. Based on this and other evidence, the accused was found guilty, among others, of joining a terrorist organisation.

Use of intelligence information as evidence

As mentioned in section 2.2 of this report, Member States have different legal frameworks and practices regarding the use of intelligence information as evidence in criminal proceedings. This issue was addressed by the *Audiencia Nacional* in **Spain**, for example, in a case concerning a recruitment and facilitation network sending FTF to Syria and Iraq (so-called Operation Cesto). In its ruling, the court confirmed the validity of intelligence reports as circumstantial evidence, which, assessed together with direct evidence, led to the conclusion that the accused committed the acts as charged. The court held further that the authors of intelligence reports could assist the court as experts and their testimony before the court may provide additional circumstantial evidence.

Information provided by foreign authorities

As terrorist networks and activities often have strong international links, national authorities need to seek and rely on information provided by other countries. In the same **Spanish** case mentioned above, the court confirmed that the legitimacy of actions carried out by foreign investigative authorities could not be questioned unless serious indications of violations of the established rules were uncovered. The court further pointed out that in the cases in which information was provided by foreign authorities to the Spanish security services, the requirement to specify the source of the information was not considered an element of fair trial.

In **the UK**, key evidence against two prominent Islamist extremists was uncovered by a non-Member State conducting an investigation into another suspect. The evidence was found on a computer seized during a warranted search of the suspect's home. A mirror copy of the seized hard drive was provided to the UK investigators on a police-to-police basis. The originating State also provided statements regarding the continuity and the legality of the search. The evidence was served on the court and defendants and an

application was made at a pre-trial hearing by the defence counsel to exclude the evidence based on the lack of a letter of request. The application was rejected by the trial judge and the material was ruled admissible.

Interception of communications via virus

The Public Prosecution Office of Milan, **Italy**, is currently investigating several terrorist suspects who are Albanian, Italian and Moroccan nationals, believed to be associated with cells of ISIS operating on Italian territory. The investigations rely heavily upon the interception of communications via a virus that – like a so-called ‘Trojan’ – can be activated remotely to infect a smartphone or other portable device in the possession of a suspect. Under Italian law, the use of such special investigative technique is conditioned upon a favourable decision by the competent pre-trial judge, upon the request of the public prosecutor. In addition, the Italian Supreme Court (*Corte di Cassazione*) recently held that the evidence obtained via Trojan-like viruses can only be used in proceedings concerning organised crime and terrorism.

Continued interceptions

In a judgement of January 2016 concerning a terrorist cell in **France**, the *Tribunal de Grande Instance* of Paris expressly pointed out that interceptions of telecommunications continued even after the charges against the accused were formulated. Even though many statements were outside the scope of the proceedings, the court found that they must be considered as reflecting the ideology of the accused in general, and, therefore, were admissible in court.

Listing of terrorist organisations by the United Nations and other international bodies

The listing of terrorist organisations by the United Nations and other international bodies is often referred to by defence counsel. As seen in several jurisdictions, including **Belgium** and **Spain**, courts held that the formal inclusion of an organisation in the United Nations’ or any other international body’s list of terrorist organisations was not a prerequisite to considering it a terrorist organisation. In **Spain**, for example, the *Audiencia Nacional* ruled that regardless of the date of such listing, the organisations, which the recruits of the prosecuted network joined, were considered terrorist organisations, as the acts they committed were of a terrorist nature.

Sentences *in absentia*

Courts in **Belgium**, **France** and **the Netherlands** rendered sentences *in absentia* for persons who did not appear in court. In one of the cases dealt with by the Court of First Instance of Antwerp, for example, defence counsel claimed that the accused had passed away in Syria and the case should be dismissed. The claim was based on a message sent by the accused’s wife and a photograph of what was alleged to be his dead body sent to his parents via WhatsApp. The court held, however, that it could not dismiss the case, as there was no death certificate and the man had not been legally declared dead. The accused was sentenced *in absentia*. The absence of a death certificate was also pointed out by the Court of First Instance of Brussels as a reason to sentence *in absentia* one of the perpetrators of the March 2016 attacks. Together with 25 other accused, he was found guilty of participation in the activities of a terrorist group between 2013 and 2015.

Severity of penalties

The severity of penalties imposed for terrorist offences varies across jurisdictions. While the severity of the penalty depends on the offence and the circumstances of each case, prosecutors and the courts face challenges in determining the appropriate penalty. Eurojust has been consulted on several occasions by prosecutors regarding the penalties imposed for similar conduct by other jurisdictions.

In one case in **the UK**, for example, the court has asked the government’s position on the correct approach towards the terrorist organisation or cause in the name of which offences under the Terrorism Acts are committed. Specifically, the court has asked whether an offence committed in favour of one terrorist cause

or proscribed terrorist organisation should be regarded more seriously than an offence committed in favour of another, how that assessment would be made, and whether that assessment should be a relevant factor in sentencing. According to the submissions made to the court on behalf of the UK government, an offender should be sentenced on the facts before the court on the basis of the seriousness of the offence and the culpability of the offender. To assist courts in their decisions in cases of preparation of terrorist acts, for example, the Court of Appeal of England and Wales issued a judgement in May 2016 that provides direction intended to achieve consistency of approach until the Sentencing Council issues a guideline on terrorist offences.⁹

When determining penalties, the courts also take into consideration the possible existence of criminal records, the personal circumstances of the offenders, their physical and mental health, etc. In several cases so far, offenders were sent to mental health institutions for treatment and not to prison. In the **Swedish** case mentioned above, both accused were found guilty of terrorist crimes and sentenced to life imprisonment. Due to the seriousness of the offence, the court did not consider any lesser penalty for one of the accused, who was permanently disabled after being shot in the head. The court held that it had no indication that a long period of imprisonment would cause serious deterioration to his state of health, or that it would render the execution of his sentence particularly distressing.

Life imprisonment has also been ordered by the Court of Appeals in **the UK** to a person who plotted a street beheading. Having failed to travel to Syria to join ISIS, the man focused on attempting to perpetrate acts of terrorism domestically. The judges argued that only a life sentence had the requisite deterrent effect, since it was deemed unlikely that the person would refrain from attempting to act similarly after a limited prison sentence.

Furthermore, as pointed out in other Eurojust reports, the existence of a criminal record for terrorist or other offences of FTFs or their facilitators raises serious concerns and emphasizes the complexity of the problem. Such criminal records might also indicate that persistence is needed to ensure that the criminal justice response addresses repeat offenders in an efficient manner.

⁹ The Sentencing Council is an independent, non-departmental public body of the UK Ministry of Justice. Its primary role is to issue guidelines on sentencing, which the courts must follow, unless it is in the interests of justice not to do so. It is set up to promote greater transparency and consistency in sentencing, while maintaining the independence of the judiciary.

2.4. De-radicalisation, disengagement and rehabilitation measures in the judicial context

On 20 November 2015, the Council adopted *Conclusions on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism*¹⁰. Eurojust was then asked to contribute to the further development of criminal policy with regard to FTFs by continuing to monitor trends and developments of the applicable legal framework and relevant jurisprudence in the Member States, including the use of alternatives to prosecution and detention in terrorism cases.

Consequently, Eurojust has continued to gather information from the Member States on the criminal justice responses to radicalisation in all phases of criminal proceedings. It included this important topic in the 2016 Eurojust questionnaire and in the workshops of the 2016 tactical meeting on terrorism. Eurojust has continued to analyse terrorism-related convictions, also with a view to identifying whether alternatives to detention and specific conditions for FTFs to follow de-radicalisation/rehabilitation programmes are being imposed by courts in the Member States. This section summarises the findings of Eurojust in this area with the objective of facilitating the sharing of best practice and challenges encountered by the national authorities in tackling, at judicial level, the complex and dynamic phenomenon of radicalisation leading to terrorism.

Sentencing and diversion practices

Recent convictions in terrorism cases show that, with respect to FTFs, the courts in a number of Member States have imposed custodial sentences as well as alternatives to imprisonment. When applying non-custodial sentences, the courts have sometimes even attached specific conditions for the rehabilitation, disengagement and/or de-radicalisation of FTFs. Furthermore, in some Member States, individual pre-sentence risk assessments of FTFs are provided to courts, usually by probation services. A few examples of court decisions involving alternatives to imprisonment are presented below. When looking at these decisions, a growing tendency can be observed of the courts in a number of Member States mainly addressing (religious) beliefs and ideologies that lead to terrorism rather than behavioural factors. The courts appear to be correcting the misinterpretation of Islamic concepts by tackling the misunderstood aspects of Islam that are used to legitimise violence.

On 6 November 2015, a court in **Belgium** imposed a three-year prison sentence combined with five years' probation for a female FTF. In addition to the general conditions provided by law (i.e. the obligations to not commit any offences or infringements, to have a stable address, to comply with the decisions of the parole board, etc.), the court imposed personalised, tailor-made conditions, including an obligation for the FTF to follow 'psychological and/or religious guidance aiming at restraining the interest in radical Islam or in the jihad'. The court specified that this guidance is to be provided by a practitioner or a specialised centre selected in coordination with the probation officer for at least six months and for as long as the probation officer deems necessary.

Similarly, in **the Netherlands**, several community sentences passed by the courts in 2016 in relation to crimes committed by FTFs include general conditions, but also special ones, including: (i) the convicted person should have no contact with fighters in Syria and/or Iraq, or with persons placed on the terrorism sanctions list; (ii) the convicted person should stay away from all airports in the Netherlands and from the borders with Belgium and Germany; (iii) the convicted person should remain in the Netherlands and join a re-integration programme and cooperate, if necessary, with the Dutch Institute for Psychiatry and

¹⁰ Conclusions of the Council of the European Union and of the Member States meeting within the Council on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism (doc. 14419/15)

Psychology; and (iv) the convicted person should discuss Islam and his/her ideas about his/her future role in society with an expert¹¹ appointed by the probation office or a theologian¹². The probation office must ensure electronic oversight of the whereabouts of convicted persons. Moreover, in August 2016, the District Court of Rotterdam did not impose a penalty¹³ with respect to a defendant found guilty of attempting to participate in a terrorist organisation and training for terrorism. In this case, the defendant had prepared to join the jihad in Syria and tried to leave for the war zone in 2014. He was stopped at the airport by the border police. The court established his guilt based on his computer's browser history, which showed that he had actively sought information on the armed jihad and ISIS and had been in possession of images, video and audio files with jihadi content, as well as lectures by jihadi preachers. The court did not impose a penalty, as it considered the defendant's acts as a one-time misstep, and recognised the efforts he had made to re-integrate in Dutch society (e.g. renting a place to live, continuing his studies, finding a job, etc.).

Switzerland informed Eurojust that it has used alternatives to imprisonment and/or prosecution in FTF cases.

In **Austria**, at every stage of the proceedings (pre-trial, trial and enforcement phase), additional special measures can be imposed under certain circumstances laid down by law. According to Section 52 of the Austrian Criminal Code, supervision by the probation service can be imposed at the very beginning of an investigation (on a preliminary basis). Pursuant to Section 51 of the Austrian Criminal Code, instructions can be imposed. Such instructions are, for example, to avoid certain people, to attend further/special trainings, etc.

Conversely, **Denmark** mentioned that if a case concerns an FTF¹⁴, alternatives to prosecution and imprisonment are not used.

In **Sweden**, alternatives to prosecution are also not used with respect to FTFs.

In **the UK**, in February 2015, three schoolgirls travelled from London to Syria to join IS. The widespread media attention surrounding this case heightened the public's awareness of the risk of young and vulnerable people travelling for extremist purposes and how this behaviour can spread among peer groups. Since then, safeguarding of the young and vulnerable has been a counter-terrorism priority and is an evolving area of work for counter-terrorism policing. Local authorities, supported by counter-terrorism police, have sought to safeguard the interests of children who are subject to a counter-terrorism investigation or subject to Prevent¹⁵ Case Management by applying to the High Court Family Division under the Inherent Jurisdiction to make these children Wards of Court. The leading cases that have since come before the courts fall broadly into three categories: (i) the identified risk is that older children have become radicalised themselves, including the possibility of attempting to travel unaccompanied to Syria or Iraq; (ii) parents have allegedly attempted to travel to IS-held territories with their children, placing them at risk of physical as well as emotional harm; and (iii) concern that parents or older siblings hold extremist ideologies and may be indoctrinating children into those beliefs, placing them at risk of emotional and psychological harm. Since February 2015, in London alone, the Metropolitan Police Counter Terrorism Command and local authorities in London have formed a partnership to successfully apply for and secure 21 Wards of Court and two care orders.

¹¹ <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBR0T:2016:1266&keyword=syrie>.

¹² <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBLIM:2016:7141&keyword=syrie>.

¹³ Based on Article 9a of the Dutch Criminal Code.

¹⁴ In Denmark, an FTF is understood as a person who has taken part in the activities abroad of a terrorist group.

¹⁵ "Prevent" is the UK government strategy that aims to stop people at risk of being drawn into violent extremism.

De-radicalisation and support programmes in the community

France is planning to develop a care and specific monitoring programme for people under investigation for terrorist activities who are placed under court supervision.

The sensitive nature of the facts for which these individuals are investigated led to the signing of a specific protocol between the specialised Paris jurisdiction and the Ministry of Justice to strengthen the judicial supervision monitoring methods. To this effect, the insertion and probation service carries out an evaluation of people under judicial control, which leads to assessing their risks, needs and responsiveness, all of which are formalised in a report sent to the principal magistrate. By checking their information and supporting documents, the insertion and probation service also ensures that the obligations entailed by the measures are strictly respected. The service immediately warns the magistrate in the event of default or incident, including when there is suspicion that the individual placed under judicial control shows deficiency.

In **the Netherlands**, *within the criminal justice system*, recommending participation in rehabilitation programmes on a voluntary basis, during the pre-trial stage as well as during and/or after incarceration, is possible. The court decides on pre-trial detention and conditions and the sentence to impose, taking into account certain mitigating circumstances, such as: confession of guilt or repentance or providing information on the organisational structure and the connections of (terrorist) organisations. The probation services play an active role in the entire process. At the request of the Public Prosecution Service, they advise on the conditions for pre-trial detention, monitor suspended sentences and supervise the conditions for parole. When a returnee is convicted, the probation services provide guidance for reintegration and disengagement.

Outside the criminal justice system, an exit facility has been operational since fall 2015, although it is still under development. This facility supports local governments with counselling for ex-jihadis - i.e. persons who want to leave the jihadi movement. It is not an alternative to imprisonment and participation is voluntary. The Dutch authorities are considering whether participation could be a condition for probation. Additionally, the Family Support Unit provides families of radicalised individuals with knowledge, support and tools for dealing with these family members. Services provided include coaching in dealing with a radical family member, keeping in touch with the family member in Syria/Iraq, offering care and information in case of death of a family member, advice to parents and municipalities, and contact with other families with radical family members.

In **Denmark**, numerous initiatives are in place, including legislation, to prevent radicalisation and extremism, including measures related to prisons and the serving of sentences.

In **Austria**, since the beginning of February 2016, the association DERAD is in charge of conducting the measures for the prevention of extremism and de-radicalisation. The association is part of the Radicalisation Awareness Network of the European Commission.

In **Finland**, the Ministry of the Interior has appointed a working group to draw up a proposal on how the cooperation between authorities should be organised to reduce the risk of violence and radicalisation in connection with persons who return to Finland from combat areas. The goal is that the proposal should be ready before the end of November 2016.

In **the UK**, the Counter-Terrorism police launched a national campaign in April 2014 focusing on supporting women who are concerned about their relatives travelling abroad, and encouraging them to seek help from authorities. As part of this campaign¹⁶, the Senior National Counter Terrorism Coordinator hosts regular meetings with female community stakeholders from across the UK to discuss a range of issues relating to travel to areas of conflict and how these issues should be addressed by both police and the community.

¹⁶ <http://www.preventtragedies.co.uk>

Managing terrorist and extremist offenders in prisons

In **France**, within the framework of the Plan against terrorism of 21 January 2015, the prison administration established five units (in four prisons¹⁷) dedicated to prisoners in pre-trial detention/convicted of terrorist acts. These units are also open to people imprisoned for other crimes with respect to whom signs of violent radicalisation have been detected. The units became operational in the first quarter of 2016. The units provide a special monitoring of detainees who are radicalised or may radicalise others, while ensuring that order is maintained within the prison establishments in question. Two of the units are specialised in the evaluation/assessment of detainees by a multi-disciplinary team for at least 15 days and a maximum of eight weeks. The main objectives of such evaluation are to determine: (i) the existence of a risk that the detainee will act violently; (ii) the radicalisation factors and whether the person is radicalised and may influence others; (iii) the capacity of the detainee to adhere to a rehabilitation programme; and (iv) the recommended programme (individual or group programme). The conclusions of this evaluation will determine the regime of detention. The units aim to address the various radicalisation factors and commence a process of disengagement. The time spent in a unit can be no longer than six months. When the programme comes to an end, or when the detainee leaves it prematurely, a report containing the opinions of the multi-disciplinary team members will be sent to the concerned magistrate.

Austria has also focused on the de-radicalisation of FTFs in prisons and on avoiding the radicalisation of other prisoners. This focus includes: (i) special care/mentoring/supervision of prisoners by well-trained experts and imams; (ii) isolation of FTFs from other prisoners/isolation of abettors/distribution to different penal institutions in Austria (for example, 31 persons in pre-trial detention were suspected of being members of a terrorist association; all were dispersed to eight different penal institutions in Austria); and (iii) solitary confinement in exceptional cases. Special training for prison staff and awareness-raising from well-trained specialists (e.g. specialised police units, imams) is taking place to detect signs of radicalisation and present guidelines on how to respond. Best practice has been established and exchanged to establish a common approach to de-radicalisation of prisoners and a guide has been written. Prison management is immediately notified of any signs of radicalisation detected within a penal institution and followed by immediate restriction of the communication means of the respective detainee, by special support through imams, etc. Other types of training, such as education in other cultures and religions, tolerance and civic duties and anti-aggression training are also employed. The recruitment of multi-cultural and multilingual prison staff is also prioritised.

In **Germany**, an increasing number of de-radicalisation programmes in prisons are offered by civil society sponsors, who continue to provide support following release from prison. In addition, some prisons have imams to provide support to Muslim prisoners. One approach followed is that of 'prevention through information'. However, such programmes are a supplement to imprisonment and not a substitute for it.

Measures regarding returnees

In **Germany**, returnees can be subject to various measures, for example confiscation of personal identification cards or passports, prohibition of (further) travel abroad, registration requirements, and evaluation of measures to terminate legal residency. If the conditions for arrest or provisional custody are present¹⁸, detention on remand will be ordered and/or the accused person will be placed in provisional custody. Consistent and concerted criminal prosecution and risk avoidance are keys to success. A distinction is made between two sets of returnees. Priority must initially be given to security measures for dealing with *returnees who are assumed to have had combat experience* and represent a potential threat to security (e.g. IS is a terrorist organisation within the meaning of section 129a of the German Criminal Code). If a relevant

¹⁷ Fresnes, Fleury-Merogis, d'Osny and Lille-Annœullin.

¹⁸ Sections 112 et seq. and 127 et seq. of the Code of Criminal Procedure (*Strafprozessordnung*).



offence is suspected to have been committed, criminal investigation proceedings for that offence will be initiated against FTFs returning from Syria, and will proceed in cooperation with the competent *Land* or federal authorities. For the purpose of risk avoidance, responsibility for *returnees without discernible combat experience* rests with the *Länder*. Several of Germany's *Länder*, such as North Rhine-Westphalia, Hesse, Lower Saxony and Hamburg, have established opt-out programmes that focus, among other things, on the reintegration of returnees.

In **Sweden**, a special authority has been set up to prevent travel to conflict zones and to deal with returnees.

3. Criminal Justice Response: Common Approach

3.1. The EU legal framework

In the Eurojust report of November 2014, Eurojust recommended considering a revision of the EU legal framework for combating terrorism, and particularly highlighted: *i)* the possible need to expand the list of terrorist offences provided in the Framework Decision on terrorism (in the light of UNSCR 2178 (2014)); *ii)* addressing problems encountered by the judicial authorities in the Member States in relation to proving the existence of a terrorist group; and *iii)* assessing whether self-motivated FTFs travelling on their own to conflict zones and not part of a terrorist group are adequately covered by the Framework Decision on terrorism. In addition, in the Eurojust report of November 2015, Eurojust expressed its availability and interest in contributing to the revision of the EU legal framework for combating terrorism.

Following the revision of EU legislation in the field of counter-terrorism, the draft *Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism* (draft Directive on combating terrorism), as announced in the EU Agenda on Security (doc. COM (2015) 185 final), is one of the main developments since December 2015.¹⁹

The objectives of the draft Directive on combating terrorism are to create a comprehensive legal framework and replace Council Framework Decision 2002/475/JHA as amended by Council Framework Decision 2008/919/JHA, as well as to harmonise the implementation of operational paragraph 6 of UNSCR 2178 (2014) and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism within the EU. In addition, the draft Directive on combating terrorism intends to strengthen assistance and support to victims of terrorist attacks within the European Union.

In relation to travelling for terrorist offences, the Council general approach proposed to limit the provision in the draft Directive on combating terrorism on travelling to countries outside the European Union, while the initial proposal and the European Parliament include intra-EU travelling for terrorist purposes.

Some Member States (i.e. France, Italy and Spain) have criminalised self-study and/or self-training for terrorist purposes. Self-study and self-training had not been included in the initial proposal or in the Council general approach, but were introduced by the European Parliament. One of the main findings of the *Terrorist Financing FATF Report to G20 Leaders* of November 2015 is taken into account by the Council general approach and the European Parliament, lifting the requirement that financing of individual terrorists is criminalised even when not linked to a specific terrorist offence and differing only in relation to the referenced terrorist offences. Further elements added to the draft Directive on combating terrorism by the Council general approach and/or the European Parliament include provisions on *i)* investigative tools; *ii)* information exchange; and *iii)* victim support and assistance.

The objective of these provisions is to ensure that Member States enable the competent authorities investigating terrorism cases to employ investigative tools also available in cases of organised and serious crime. The draft provisions introduced by the European Parliament seek to incorporate obligations to proactively exchange information concerning terrorist offences between competent authorities of the Member States. The European Parliament also proposes to make use of the Schengen Information System to

¹⁹ In accordance with the EU Agenda on Security and the Council Conclusions on Counter-Terrorism adopted on 20 November (doc. 14375/15 LIMITE), the Commission on 2 December 2015 issued a first proposal for a draft Directive on combating terrorism (doc. 14926/15). The Council reached an agreement on a general approach with regard to the Commission's proposal on 11 March 2016, and the European Parliament's LIBE Committee held an orientation vote on the proposal on 4 July 2016. Since the Council's general approach, as well as the orientation vote of the European Parliament's LIBE Committee, brought a number of amendments to the initial proposal by the Commission, a trilogue commenced on 14 July 2016. Concerning the offences included in the draft Directive on combating terrorism, the main points for discussion during the trilogue will be *i)* the scope of criminalisation of travelling for terrorist purposes; *ii)* 'self-study' or 'self-training' for terrorist purposes; and *iii)* the scope of criminalisation of terrorist financing.

inform the competent authorities about individuals suspected and/or convicted for terrorist offences by issuing an alert in the system and ensuring the connection of border and coast guard officials to the Europol Information System. A further proposal is that, in relation to Passenger Name Records data, an obligation is created to transmit data to other passenger information units if a connection to terrorist offences is suspected. Finally, the European Parliament in a draft provision reiterates the obligation of Member States to provide Europol and Eurojust with relevant information according to Council Decision 2005/671/JHA and underlines the need to do so in an effective and timely manner.

In April 2016, the European Parliament invited Eurojust to attend an expert meeting on the subject, and, based on its experience in the field, present its views in relation to the draft Directive on combating terrorism. On this occasion, Eurojust proposed considering criminalising further types of conduct, such as: *i)* self-training to commit terrorist offences and preparatory acts conducted by terrorists acting alone; *ii)* financing of individual terrorists even if not linked to a specific terrorist act; *iii)* unlawful participation in an armed conflict outside national territory; and *iv)* seeking or allowing oneself to be recruited for terrorism.

Eurojust also suggested introducing a provision defining 'material support for terrorism' to clarify the criminal nature of various types of conduct (e.g. women travelling to conflict zones and supporting FTFs in various ways) and to address problems encountered by judicial authorities in relation to the proof of the existence of a terrorist group.

Finally, Eurojust suggested inserting provisions that refer not only to custodial sentences, but also to alternatives to imprisonment, risk assessments and de-radicalisation programmes.

Other legislative measures on EU level with an impact on counter-terrorism in general, and the FTF phenomenon in particular, are: *i)* the EU Passenger Name Record Directive of 21 April 2014; *ii)* the proposal for a directive on control of the acquisition and possession of weapons (amending Council Directive 91/477/EEC); *iii)* the proposal for a directive amending Council Framework Decision 2009/315/JHA regarding third country nationals and the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA; and *iv)* the planned amendment of the fourth anti-money laundering directive (Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015). The implementation of these measures as soon as they are in force will be expected to have a positive impact on the judicial response to FTFs and will also be subject to discussion during the upcoming tactical meetings on terrorism hosted by Eurojust, during which legal and practical challenges, best practice and other experience with new legislation, among others, are regularly exchanged.

3.2. Enhanced cooperation and information exchange

Member States have reported to Eurojust positive experiences with spontaneous exchange of information, execution of EAWs and surrenders in terrorism cases. Operational cooperation has been strengthened over the past months, enabling real-time contacts between national authorities from different countries and seeking an effective common approach towards terrorism. Also, JITs have been effectively used to reinforce national investigations of terrorism cases, including with third States.

3.2.1. Operational cooperation and coordination by Eurojust

Due to the complex nature of terrorism cases, as well as some specific requirements of national legal systems and judicial cooperation tools, national authorities may face challenges in solving legal and practical issues that may arise in their investigations and prosecutions. In such cases, Eurojust's coordination tools, as well as Eurojust's experience and expertise in terrorism cases, may assist national authorities in coordinating in a more efficient manner, defining and pursuing common strategies and building synergies in addressing the terrorist threat.²⁰

Increased operational support

Member States are increasingly seeking Eurojust's assistance in investigations and prosecutions of terrorism cases.²¹ The cases referred to Eurojust for assistance in 2015 and 2016 concerned investigations and prosecutions related to terrorist attacks in Europe and beyond, terrorist threats, alleged travel to conflict zones for the purpose of training and/or joining a terrorist group, recruitment for terrorism, financing of terrorism, etc. In some cases, alleged terrorist offences were investigated along with other types of criminal conduct, such as illicit trafficking in arms, ammunition and explosives, forgery of administrative documents, illegal immigrant smuggling, trafficking in human beings, kidnapping, murder, swindling and drug trafficking.

National authorities sought Eurojust's involvement in support of their investigations and prosecutions to facilitate the timely exchange of information and ensure efficient cooperation and coordination. In addition, the objectives of the cases referred to Eurojust included, among others, transferring proceedings from one Member State to another, setting up JITs, requesting special investigative measures, etc.

In the majority of the cases, Eurojust was asked to facilitate MLA requests; some other cases concerned improving the execution of (competing) EAWs and extradition, including of suspected FTFs. Eurojust facilitated, for example, the execution of MLA requests for the identification and hearing of individuals suspected of terrorist activities and/or witnesses. In one of those cases, the interview of a witness was requested via a videoconference during a court hearing.

In other cases, MLA requests sought to decrypt security systems of ICT devices to collect evidence on criminal activities, to transmit traffic and location data, and to obtain telephone subscriber and/or user data. In the latter case, information had already been exchanged at police level; however, Eurojust was requested to facilitate the swift feedback from the involved countries.

On other occasions, the requests concerned receiving bank account information or information on transactions via money and value transfer systems.

²⁰ For a complete overview of Eurojust's coordination tools and mechanisms, please see the Eurojust Report of November 2015 or Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

²¹ Fourteen terrorism cases were referred to Eurojust for assistance in 2014, 41 in 2015 and 54 in 2016 (until 31 October).

In several instances, national authorities sought the assistance of Eurojust to receive a copy of judgements previously issued by courts in other Member States against persons subject to ongoing counter-terrorism investigations. Assistance was also sought with the transfer of the execution of a judgement.

In addition, jurisprudence experience exchanged via Eurojust was used to identify similarities between concluded and ongoing cases across Europe to help prosecutors build successful cases and prepare solid indictments. Eurojust particularly provided assistance in detecting similarities in the facts of the cases and the alleged conduct and analysed the charged and convicted offences, as well the severity of the imposed penalties.

Enhanced coordination

Eurojust's major coordination tools –coordination meetings and coordination centres – are increasingly being used to facilitate and coordinate ongoing counter-terrorism investigations and prosecutions, leading to concrete operational results.²²

Coordination meetings: Eurojust's coordination meetings provide a unique platform for national law enforcement and judicial authorities to discuss ongoing investigations and prosecutions and agree on common strategies. Coordination meetings enable national authorities to exchange information on the scope and progress of their investigations, to facilitate and/or coordinate the execution of MLA requests, to coordinate ongoing investigations, coercive measures (e.g. search warrants and arrest warrants) and transfer of proceedings, to solve *ne bis in idem*-related issues, to facilitate the prevention of conflicts of jurisdiction and to identify and solve other legal and evidential problems.

In addition, several coordination meetings on terrorism cases held in 2015 and 2016 discussed, for example, jurisdictional issues, potential *ne bis in idem* issues, prosecution strategies in case of refusal of extradition, national legal requirements for transferring evidence, possibilities to enhance the real-time sharing of information and to carry out simultaneous and coordinated arrests, house searches, asset and evidence seizures during a common action day, etc.

In addition to exchanging information and agreeing on how to strengthen the cooperation and coordination among the national authorities involved in the case, common strategies towards third States were also discussed during coordination meetings at Eurojust. In one case, for example, as a result of the agreements reached at a coordination meeting, several countries included identical paragraphs in the MLA requests each of them sent to a third State. The text in those paragraphs was agreed among the concerned countries with the assistance of Eurojust and was intended to emphasize the gravity of the alleged acts and the importance of addressing them in an efficient manner. The MLA requests were also to be sent at approximately the same time. Eurojust received copies of the MLA requests for information and follow-up.

Coordination centres: In addition to coordination meetings, Eurojust organises coordination centres to provide increased operational support during common action days in Member States and third States. The setting up of a coordination centre ensures a secure, real-time connection between Eurojust and the prosecutors, judges and police officers carrying out the operation in the involved countries. Eurojust is able to follow all developments closely, facilitate the swift exchange of information, provide advice on possible solutions to issues that have emerged during the operation, and provide immediate assistance in drafting EAWs or other documents, as needed. In November 2015, Eurojust organised its first coordination centre on

²² Eurojust held four coordination meetings on terrorism cases in 2014, 15 in 2015 and 15 in 2016 (until 31 October).

a terrorism case. Eurojust successfully coordinated coercive measures executed in several countries across Europe, which resulted in the arrest of 13 suspected leaders and members of a terrorist organisation.²³

JITs: JITs constitute an essential judicial cooperation tool, which ensures swift exchange of information and evidence. Eurojust provides legal, operational and financial support in the setting up and functioning of JITs.

At present, Eurojust actively supports three JITs in terrorism cases. The JITs were set up to reinforce investigations and prosecutions related to recent terrorist attacks and activities in Europe; in one of the cases, possible links between terrorism and organised crime are also being investigated.

In some cases, coordination meetings held at Eurojust enabled the extension of a JIT agreement to another country and helped solve legal issues faced by the JIT parties. Those legal issues included, for example, obstacles related to limitations in the exchange of information and evidence resulting from applicable legal requirements in the countries involved in the JIT.

Cooperation with Europol: Eurojust was associated with Europol's Focal Point TRAVELLERS in April 2015 and with Focal Point HYDRA in August 2016.²⁴ This association allows Eurojust to provide judicial follow-up on the basis of Europol's analysis and creates further opportunities for both agencies to build synergies in supporting the competent national authorities. Eurojust can play a significant role in facilitating judicial cooperation, including in relation to evidence gathering, ensuring admissibility of the evidence, etc.; contributing to the identification of priority targets; involving Europol in cases referred to Eurojust that are suitable for cooperation at both police and judicial level; and supporting, together with Europol, action days by means of Eurojust's coordination centre and Europol's operational centre and mobile office, etc. Eurojust is committed to ensuring that it is fully involved in the activities of the ECTC at Europol, as envisaged by the European Agenda on Security. Eurojust and Europol have recently discussed the temporary posting at ECTC of a Eurojust representative specialised in terrorism to improve coordination of investigations and prosecutions. Practical steps in implementing this arrangement are to be taken in the near future.

Case example: EAW and extradition

In November 2015, the UK National Crime Agency requested that the UK National Desk at Eurojust open a case seeking the assistance of the Hungarian authorities. The case concerned two British nationals, who were detained in Hungary while trying to cross the border into Romania. Their intended destination was not known but there was reason to believe that they may have been heading to Turkey or Syria.

Both of the males detained had previous convictions for terrorist offences in the UK. One of them, an outspoken Muslim activist, was found guilty of financing and inciting terrorism overseas in 2008. The second male had also served a custodial sentence in the UK after being convicted of the financing of terrorism and possession of false identity documents. In July 2015, he was acquitted of planning to travel to Syria to join a terrorist group after having been found in the back of a truck at Dover, UK.

Due to the terrorist activities in which they had been involved, both men were subject to notification requirements detailed in the Counter-Terrorism Act 2008, a measure used to restrict individual liberties for the purpose of protecting the public from a risk of terrorism. They had breached the requirements imposed on them by virtue of having travelled internationally.

²³ For further details on the case and the assistance provided by Eurojust, please see the Eurojust Report of November 2015.

²⁴ Focal Point TRAVELLERS deals with FTFs, while Focal Point HYDRA concerns Islamist extremist terrorism.

The UK authorities intended to issue EAWs for the two men; however, urgent assistance was requested to ensure that the EAW fully met the requirements of Hungarian law. On the same day as Eurojust's assistance was requested, the UK and Hungarian National Desks at Eurojust started consultation. As a result of the efficient cooperation between the Eurojust National Desks, the UK National Desk was able to provide advice. EAWs were obtained the next day, and were transmitted to the competent Hungarian authorities via the two Eurojust National Desks and the SIRENE bureau.

Two days later, on 19 November 2015, the Hungarian court ruled in favour of returning both detainees to the UK. A week later, they arrived in the UK, and on 27 November 2015, they appeared in court in the UK for a first hearing. Their case was adjourned for sentencing, and on 8 January 2016 the case was concluded, with both men sentenced to two years' custody.

The case demonstrated the added value of the prompt and efficient assistance provided by both National Desks at Eurojust.

Despite the increase in the number of terrorism cases referred to Eurojust for assistance, the opportunities Eurojust offers to enhance cooperation and coordination among national authorities could be used in a more optimal manner. Due to its mandate and powers, as well as its experience and expertise, Eurojust is uniquely positioned to support national authorities in advancing their investigations and building successful prosecution cases. Eurojust's coordination role has been crucial in a number of terrorism cases of a cross-border nature. For example, in the case of the terrorist attacks in Paris in November 2015, Eurojust organised three coordination meetings in 2016 with judicial and law enforcement authorities in Salzburg, Paris and The Hague. In addition, within hours after the terrorist attacks in Paris in November 2015 and the terrorist attacks in Brussels in March 2016, Eurojust established contacts with the national correspondents for Eurojust for terrorism matters across Europe and ensured their availability to provide assistance to the French and Belgian authorities, as needed.

The facilitation of judicial cooperation, as well as the added value in identifying links between cases that seem disconnected, which only the unique position of Eurojust allows, are the two major advantages of referring a case to Eurojust, according to a recently published report of the French Parliament.²⁵ The report refers also to a complex case concerning French journalists held hostage by ISIS, which has demonstrated the added value of Eurojust's support.

The intense cooperation with Eurojust in the framework of the Brussels terrorist attacks of March 2016, for example, has been mentioned by the Belgian authorities, pointing out the added value of involving the National Member for Belgium at Eurojust in internal coordination meetings of the national authorities in Belgium, as well as highlighting the role of Eurojust in forwarding MLA requests and acting as a real-time intermediary in ongoing counter-terrorism actions.

Eurojust's coordination meetings and coordination centres have proven to be very efficient tools to achieve better operational results. Due to its legal and judicial expertise, Eurojust can play a significant role in addressing limitations and obstacles, which are not possible to solve with direct contacts between the competent national authorities. Involving Eurojust in ongoing counter-terrorism investigations and prosecutions may be particularly beneficial in cases in which the affected countries need to agree on a common and coordinated approach to ensure an efficient criminal justice response.

²⁵ *Rapport d'enquête relative aux moyens mis en œuvre par l'Etat pour lutter contre le terrorisme depuis le 7 janvier 2015 n° 3922 déposé le 5 juillet 2016 (mis en ligne le 15 juillet 2016 à 18 heures 45), in French, available at http://www.assemblee-nationale.fr/14/dossiers/enquete_moyens_lutte_terrorisme.asp.*

3.2.2. Sharing information, experience and best practice

Eurojust has emphasized, on multiple occasions, the crucial importance of information sharing between Member States and with the relevant EU agencies. Translating the political will to exchange information into standard operating procedure for all national authorities concerned is essential. The existing platforms and services need to be used in a consistent and systematic manner to ensure a continuous and swift sharing of relevant data. As already pointed out by Eurojust, ensuring that information shared can be used as evidence to secure convictions is of great importance in international judicial cooperation.²⁶

Information provided to and by Eurojust

Member States are increasingly sharing with Eurojust information on prosecutions and convictions of terrorist offences, as provided for by Council Decision 2005/671/JHA on the exchange of information and cooperation concerning terrorist offences.²⁷ However, considerable differences exist in the amount, type and scope of the information shared with Eurojust by each Member State. In addition, the information transmitted to Eurojust concerning prosecutions is relatively scarce compared to what may be available at national level. Due to the specifics of reporting adopted by some Member States, relevant information may be provided to Eurojust only once per year, rather than in real time or in a regular manner. Unless information is shared in the context of an operational case supported by Eurojust, Eurojust receives very little information concerning links with other relevant cases, requests for judicial assistance, including letters rogatory addressed to or by another Member State and the relevant responses, as required by Article 2(2) and (5) of Council Decision 2005/671/JHA.

Therefore, Eurojust continues to call for better compliance with the obligations stemming from Council Decision 2005/671/JHA and transmission of information to Eurojust in a timely and systematic manner. This compliance will enable Eurojust to provide more solid operational support by, among others, identifying links between ongoing investigations and prosecutions. It will also allow Eurojust to gain a more comprehensive insight and analyse challenges and best practice related to counter-terrorism prosecutions and convictions. As mentioned in section 3.2.1, Eurojust has already been able to successfully support national authorities in providing copies of judgements issued by courts in other Member States against persons who are the subject of ongoing counter-terrorism investigations, identify similarities between concluded and ongoing cases to help prosecutors build successful cases and prepare solid indictments, etc.

Eurojust will continue to use the TCM²⁸ to share its analysis of the criminal justice response to terrorism. Eurojust will ensure that analysis of judgements included in the TCM focuses particularly on returning FTFs, terrorist networks and repeat offenders. As in the past, the analysis will also identify and elaborate on specific legal, evidentiary and procedural issues that may help practitioners from other countries when dealing with similar issues in their own investigations and prosecutions. In addition to the TCM, Eurojust will continue to produce specific analysis of judgements rendered in FTF cases across Europe. The objective

²⁶ Following the proposal made by the Latvian Presidency and endorsed by the JHA Ministers, in March 2015 Eurojust submitted to the Standing Committee on Operational Cooperation on Internal Security (COSI) proposals on the better use of existing platforms and services for information exchange (Council document 7445/15 LIMITE).

²⁷ The information shared with Eurojust in 2014, 2015 and 2016 (until 31 October) is as follows:

| Type of information | 2014 | 2015 | 2016 (31 October) |
|----------------------------------------------------|------|------|-------------------|
| Prosecutions for terrorist offences | 33 | 100 | 121 |
| Concluded court proceedings for terrorist offences | 180 | 218 | 77 |

²⁸ The TCM is a Eurojust LIMITED report, which provides a regular overview of terrorism-related convictions and acquittals throughout the European Union, as well as analysis of jurisprudence experience. It is based on data provided by the national authorities in the implementation of Council Decision 2005/671/JHA, as well as open source information, and has been published since 2008.

of this analysis is to provide a more targeted insight into national experiences in dealing with FTF cases and is intended to be shared with practitioners only.

Further to Council Decision 2005/671/JHA, Article 13 of the Eurojust Decision²⁹ provides for exchange of information with Eurojust concerning cases of serious and organised crime of a cross-border nature, setting up of JITs, conflicts of jurisdiction, controlled deliveries, repeated difficulties or refusals regarding the execution of requests for, and decisions on, judicial cooperation. Better compliance with the obligations stemming from Article 13 of the Eurojust Decision will contribute to achieving better operational results. Together with information available in the framework of operational cases and information submitted to Eurojust under Council Decision 2005/671/JHA, it will enable Eurojust to detect possible links between terrorism cases and cases of organised crime. This aspect has become particularly important in the past few years, when links between terrorism and organised crime have become more evident.³⁰

Optimal use of existing networks and fora

The unique position Eurojust holds in the area of freedom, security and justice allows Eurojust to monitor and analyse developments in the national and international legal frameworks and their possible impact on prosecution strategies. It allows Eurojust to identify effective solutions to challenges faced by judicial authorities, as well as to promote and facilitate the sharing of best practice across Europe.

In support of counter-terrorism investigations and prosecutions, Eurojust will continue to reinforce the synergies built within the network of national correspondents for Eurojust for terrorism matters. The national correspondents for Eurojust for terrorism matters form part of the ENCS, which provides a platform for the exchange of information and ensures coordination. For more than a decade, Eurojust has been hosting the annual meetings of the national correspondents from the 28 Member States, Norway and Switzerland. The meetings enable the national correspondents to share experience and discuss challenges and best practice in investigations and prosecutions of terrorist offences. As mentioned in section 3.2.1, further to its unique role in sharing experience, the network of the national correspondents has demonstrated its operational added value in the immediate aftermath of the Paris and Brussels attacks, when all national correspondents were contacted and expressed their commitment to assist the French and the Belgian authorities, as necessary.

Eurojust will make further use of its annual tactical meetings on terrorism, which have been focusing on the criminal justice response to the FTF phenomenon since 2013. Eurojust will ensure that the tactical meetings bring together practitioners dealing with relevant cases to enable the sharing of experience and best practice, help identify common challenges and seek effective solutions to the issues at stake.

Eurojust will continue to share its views and the findings of its analysis with the European Parliament, the Council and the Commission, the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union, as well as other international fora. Among others, over the past year, Eurojust was invited to contribute to policy and expert discussions on the criminal justice response to the FTF phenomenon, the Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, and various documents prepared by the EU CTC and the Council. Eurojust will continue to use these opportunities to emphasize the importance of a solid criminal justice response to the FTF phenomenon and contribute to the common efforts in finding robust solutions to address the changing terrorist threat in an efficient and effective manner.

²⁹ Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

³⁰ See section 3.3 for further information on Eurojust's experience in this area.

3.3. Links between terrorism and organised crime

Background

Overall, Member States increasingly report links between terrorism and serious and organised crime, with particular regard to illicit trafficking of firearms and explosives, illegal immigrant smuggling and document counterfeiting. Notably, the investigations into the November 2015 attacks in Paris revealed that some of the perpetrators used forged Syrian passports to enter and travel across European soil. Similarly, all six terrorists were found to be involved in the Brussels attacks in 2016 and six of the ten perpetrators of the Paris attacks in November 2015 had a background in organised or other serious crime, including drug trafficking and robbery.

A recent joint analysis by Europol and EU INTCEN of the changes in the *modus operandi* of IS supports the Member States' findings. The joint analysis reveals that a large number of individuals (more than 800) were reported to Europol between January and July 2016 both for terrorism-related offences and for involvement in serious and/or organised crime, including illegal immigrant smuggling, drug and firearms trafficking, financial crime and organised property crime. In addition, 67 per cent of the terrorist suspects with links to organised crime identified between January and July 2016 were reported as FTFs.

Acknowledging the close connection between terrorism and organised crime, and recognising the need to improve their ability to effectively counter those two – at times interlinked – criminal phenomena, a number of Member States have recently passed legislation to broaden the applicable investigative techniques and prosecutorial tools. For example, with the adoption in April 2015 of Law n. 43/2015, Italy has – *inter alia* – extended several tools already used against organised crime-related offences to investigations of terrorism crimes, such as preventive interceptions (which may apply even absent or before any criminal proceeding, but still require judicial authorisation) and expanded the range of cases in which the investigative authorities may access, collect and store IT data, even if collected abroad.

Links to illegal trafficking of firearms and explosives

The analysis of the answers to the 2016 Eurojust questionnaire shows that a distinct and increasing connection exists between terrorism and firearms trafficking. The recent experience of several Member States (including Belgium, France, Germany, Italy, Spain and the UK) further confirms that dismantling illegal weapons smuggling groups is an important component of the fight against terrorism in that it weakens the logistic capacity of terrorist groups likely to carry out deadly attacks in Europe.

The Spanish authorities, for example, have made reference to Operation Cesto, mentioned also in section 2.3 of this report, in which information was provided by the Swedish intelligence services to the effect that a Swedish national of Moroccan descent was providing material support and training to persons in Spain for terrorist purposes. After subsequent investigations, the Spanish authorities were able to confirm the links between these activities and firearms trafficking.

The French authorities have reported an increasing number of links between terrorist activities and firearms trafficking. More specifically, the weapons and ammunition used in the January and November 2015 terrorist attacks on Paris were discovered to have not been directly imported from warzones, but were bought in Europe through 'ordinary' illegal trade networks. To fight efficiently against firearms trafficking, France adopted a new law in June 2016 that creates new criminal offences, increases penalties and allows the use of special investigation techniques.

Germany informed Eurojust that more than 430 investigations are pending with the prosecutors' offices of Germany's Länder, mainly concerning individuals who have travelled to Syria, in particular with the aim of undergoing training in firearms and explosives in preparation for serious acts of violence. The German authorities further reported isolated occurrences of terrorist suspects travelling to Syria for the purpose of illegal arms trading.

The **UK** has also detected links between terrorist activities and firearms trafficking. One case reported to Eurojust within the framework of the 2016 Eurojust questionnaire concerned the prosecution of four individuals involved in a plot to conduct targeted assassinations in the UK with a firearm equipped with a silencer, the most likely targets being police officers or military personnel. The main plotters were connected to individuals in West London who had links with both Islamist extremism and organised crime groups. The weapon to be used in the terrorist attacks was sourced and ultimately provided through these connections. Other weapons that had been available to the plotters but were not selected for use were recovered by police during the investigation. The individual responsible for storing these weapons was eventually convicted of firearms offences but acquitted of terrorism offences. Two of the defendants pleaded guilty to a number of offences of possessing or supplying the firearm and ammunition that was to be used in the plot and received sentences ranging from six and one-half years' imprisonment to 11 years' imprisonment. A third defendant pleaded guilty to conspiracy to murder and preparation of terrorist acts and was sentenced to life imprisonment, to serve a minimum sentence of 21 years. The last defendant was found guilty after trial of conspiracy to murder and preparation of terrorist acts. He was sentenced to life imprisonment, to serve a minimum sentence of 20 years.

Links to document counterfeiting

The information provided to Eurojust within the framework of the questionnaire further indicates a close - and instrumental - relationship between the production of counterfeit documents by organised crime groups and their use by terrorists to enter and travel across Europe. Many Member States have reported cases of terrorist suspects who managed to pass through and move freely within the European borders - to reach in some cases the location where they would perpetrate terrorist attacks - thanks to forged documents.

In this regard, the **French** authorities informed Eurojust that at least six terrorists related to the terrorist cell responsible for the November 2015 Paris attacks entered Europe with counterfeit Syrian passports, posing as Syrian refugees and passing through the Greek island of Leros. They further referred to the case of a French national who was thought to have been a member in Syria of the terrorist group responsible for the November 2015 attacks in Paris. He was arrested in Turkey and then deported and placed under formal investigation in France in June 2015 while attempting to secretly return to Europe via Prague using a fake Swedish passport. Another French national - who acknowledged that he was sent to Europe by IS to perpetrate terrorist attacks - was arrested in France in August 2015, and was found to have travelled from Syria to France on counterfeit documents.

The **Czech** authorities informed Eurojust that in May 2015 a Bosnian citizen, born in and a permanent resident of Austria, was arrested at the departure terminal of Prague's airport. He tried to travel from Prague to Istanbul on a counterfeit Romanian passport. He was known to the authorities as a jihad sympathiser, and was being prosecuted in Austria since November 2014. In July 2015, he was convicted of forgery and counterfeiting of public documents by a district court in Prague, expelled and prohibited from entering the territory of the Czech Republic for five years. On the basis of an EAW issued by Austria, he was surrendered to the Austrian authorities in August 2015 to face criminal proceedings in which he was accused of participation in an organised criminal group, terrorism and forgery. Similarly, in July 2015, a Turkish citizen

with a residence permit in Germany was arrested in Prague's airport. He tried to reach Istanbul with a counterfeit French passport. He was expelled from the Czech Republic by administrative decision for a period of four years.

Operations GALA I and GALA II and follow-up Eurojust case

The following **Spanish** case, currently in progress in Spain and at Eurojust, is illustrative of the complexity of the links that may exist between terrorist and other criminal groups, as well as the seriousness of the threat represented by this unfortunate criminal synergy. Generally, these links may derive from a business relationship among the different groups, whereby the criminal group provides logistic support (typically in the form of weapons or forged travel documents) to the terrorist group, or personal connections among their members.

In 2014, the Spanish authorities conducted an investigation (Operations GALA I and GALA II) concerning terrorism-related offences committed by a group of perpetrators calling themselves the 'Al-Andalus Brigade', - Al-Andalus being the term used by jihadi terrorists to refer to Spain.

The Al-Andalus Brigade was active in the radicalisation of potential terrorists and their recruitment for terrorist cells affiliated to Al-Qaeda, as well as the facilitation and financing of their travel to war zones to join jihadi combatants. The Spanish authorities concluded the investigation in June 2014, and issued several EAWs against the leaders of the terrorist group, which included the brother of one of the perpetrators of the Madrid bombing of 2011.

The investigation against the Al-Andalus Brigade revealed links between this terrorist cell and a criminal group involved in forgery of administrative/official documents and facilitation of illegal immigration, mainly from Turkey, Morocco and Greece through and to other Member States, including Belgium, Hungary and Sweden. The terrorist cell was believed to have used the criminal group to support its activities by obtaining counterfeit documents and providing other logistical support to facilitate travel of the terrorist suspects from or to European countries.

The Spanish investigations further uncovered that the leader of the criminal group was a radicalised Islamist who had regular contacts with at least two important associates of the Al-Andalus Brigade, including an individual believed to be connected with the terrorist cell in Hamburg involved in the 9/11 terrorist attack, and who was arrested in July 2003 in the UK for his alleged involvement in an attempted terrorist attack against the London Metro using ricin.

Against this background, the Spanish authorities launched a separate investigation into the criminal group in relation to the allegations of forgery of documents and facilitation of illegal immigration, and to ascertain whether and to what extent the criminal group facilitated the travelling of potential FTFs to conflict zones in Iraq and Syria and their return to the European Union, without being detected by the relevant security services, to subsequently engage in terrorist operations.

Because of its wide international character, the seriousness of the offences investigated and volume and complexity of matters of judicial cooperation involved, the Spanish authorities sought and obtained the support of Eurojust. The case is ongoing.

3.4. Cooperation with third States

In the period since the publication of the Eurojust report of November 2015, Eurojust has liaised on several occasions with relevant judicial authorities from third States in relation to the FTF phenomenon. In addition, the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union underlined the key role to be played by Eurojust in facilitating judicial cooperation between the Member States and third States in cases of serious and organised crime, including terrorism and illegal immigrant smuggling³¹.

Eurojust has continued reinforcing its operational and strategic cooperation with the USA, Turkey and the Western Balkans in relation to the FTF phenomenon. On 22 and 23 June 2016, Eurojust invited, for the fourth consecutive year, the EU national correspondents for Eurojust for terrorism matters to exchange views on the FTF phenomenon during the 2016 Eurojust tactical meeting on terrorism, *Building an effective judicial response to the phenomenon of foreign terrorist fighters*. The meeting was attended by the national correspondents for Eurojust for terrorism matters from Switzerland and Norway and by specialised counter-terrorism prosecutors from the USA, Turkey, Montenegro, Albania, Serbia and Bosnia and Herzegovina.

In addition to their participation in this event, other initiatives to step up judicial cooperation on terrorism with these and other third States have taken place during the last months.

Eurojust strengthened its partnership in the field of international judicial cooperation in criminal matters with the Western Balkans. From 4 to 8 July 2016, eight Eurojust contact points from the Ministries of Justice and prosecution offices of Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro and Serbia followed a one week training hosted by Eurojust. The training was facilitated by the EU-funded regional IPA2014 project, *International Cooperation in Criminal Justice: Prosecutors' Network of the Western Balkans*. Eurojust and the Western Balkans experts exchanged views on potential ways to enhance information exchange on terrorism and to promote a swifter coordination of transnational FTF cases.

Eurojust participated in the Turkey - EU Counter-Terrorism Dialogue held in Brussels on 8 June 2016, during which the commitment to urgently step up efforts to tackle the threat posed by FTFs was reiterated, and Turkey's determination to work closely with Eurojust and other relevant EU agencies to counter this phenomenon was affirmed. One of the actions discussed at this meeting referred to the work of Eurojust in analysing terrorism-related court decisions in the Member States that are published in the TCM. In this context - under the condition that the necessary resources are allocated to Eurojust - Eurojust could collect, analyse in more detail and publish in the TCM relevant PKK and DHKP-C related court decisions in the European Union. Such analyses could particularly consider legal and practical obstacles to judicial cooperation, as well as arguments of the courts used for the conviction or acquittal of PKK and DHKP-C suspects tried in the European Union on terror-related charges. The results of the analyses could be shared with the Turkish authorities to better determine how judicial cooperation in these cases could be improved.

Eurojust participated in the 4th Joint Review of the EU-US *Agreement on the Processing and the Transfer of Financial Message Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program* (TFTP Agreement³²) held in March 2016. Article 10 of the TFTP Agreement enables any law enforcement, public security, or counter-terrorism authority of a Member State, Europol or Eurojust to request from the USTD a search for relevant information obtained through the TFTP, provided that 'there is

³¹ Report of the 11th meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union, hosted by Eurojust on 3 June 2016 (Council Document 12393/16).

³² Council Decision of 13 July 2010 on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (2010/412/EU).

reason to believe that a person or entity has a nexus to terrorism or its financing'. Eurojust believes that the TFTP Agreement is an important instrument to provide timely, accurate and reliable information about activities associated with suspected acts of terrorist planning and financing. Therefore, Eurojust calls for a wider use of the possibility provided by Article 10 of the TFTP Agreement and is ready to assist the Member States' counter-terrorism judicial authorities in their requests to the USTD.

The Swiss coordinator for international counter-terrorism visited Eurojust on 13 April 2016, at which time he was given insight into the counter-terrorism work of Eurojust. Views were exchanged on the further development of Swiss counter-terrorism foreign policy and on the possibilities to further coordinate efforts to foster counter-terrorism cooperation among national authorities, international organisations and the private sector.

Eurojust signed a cooperation agreement with Montenegro on 3 May 2016, and with Ukraine on 27 June 2016, to facilitate the exchange of operational data and cases. The cooperation agreements also provide for the designation of contact points in Montenegro and Ukraine as national correspondents for Eurojust for terrorism matters. The agreement on cooperation between Eurojust and the Republic of Moldova, signed in The Hague on 10 July 2014, entered into force on 21 October 2016.

Eurojust actively works towards enlarging its network of contact points in third States, particularly in the regions in which terrorism raises a serious threat to the internal security of the European Union. With respect to the MENA region, since July 2015, contact points for Eurojust have been nominated in the Palestinian Authority, Lebanon, Jordan, Algeria, Saudi Arabia and Iraq, in addition to those already appointed in Egypt, Israel and Tunisia. The Tunisian judicial authorities are currently in the process of nominating a contact point to deal exclusively with counter-terrorism matters. A Tunisian delegation recently accepted an invitation to visit Eurojust to explore further ways to enhance relations and improve cooperation. Possible dates for this study visit are currently being considered. On 24 October 2016, Eurojust was informally advised by the Libyan judicial authorities of the appointment of a Libyan prosecutor as Eurojust contact point to stimulate and improve the coordination of investigations and prosecutions on transnational serious crimes, including counter-terrorism.

In addition, for the purpose of facilitating judicial cooperation with third States in cases in which Eurojust is providing assistance, Article 27a of the Eurojust Decision provides for the posting of Eurojust Liaison Magistrates to third States under certain conditions. The College of Eurojust is currently discussing the draft Implementing Arrangements for Eurojust Liaison Magistrates posted to third States. In accordance with Article 27a(4) of the Eurojust Decision, the College shall adopt the necessary implementing arrangements in consultation with the European Commission. At a later stage, Eurojust will draft an Action Plan for the posting of Eurojust Liaison Magistrates to third States, which will develop the role of these Liaison Magistrates and the criteria for selecting countries. The need to address the phenomena related to the travel of FTFs will be carefully considered.

In the framework of its cooperation with international organisations dealing with counter-terrorism, Eurojust organised a counter-terrorism meeting, gathering officials of the ICC, the national correspondents for Eurojust for terrorism matters and terrorism experts from Norway, Switzerland and the USA. The event took place on 23 June 2016, in the margins of the 2016 Eurojust tactical meeting on terrorism. The ICC representatives pointed out existing links between core crimes and terrorism in Libya. Libya is the pilot project State in which the ICC would like to implement a strategy to further exploit counter-terrorism cooperation possibilities, such as enhancing the use of the ICC formal and informal networks for judicial cooperation. Eurojust believes that a coordinated investigative and prosecutorial strategy on counter-terrorism matters among the ICC, Eurojust and national judicial authorities would have multiple advantages for all the actors and deserves to be explored.

4. Conclusions and Recommendations

Based on the findings of this report and Eurojust's experience in coordinating operational terrorism cases, Eurojust has identified several conclusions and recommendations, which are of relevance to its mandate and powers. They build on conclusions drawn in the previous Eurojust reports on the criminal justice response to FTFs and recommend some follow-up actions:

1. The Member States and the European Union should continue to seek more efficient ways to address the growing terrorist threat and tackle its changing nature in a proactive manner. A common, comprehensive and cooperative approach is needed to secure a robust and consistent criminal justice response. Renewed legal frameworks, efficient cooperation and timely and comprehensive exchange of information are key components of this approach and should remain a priority for the Member States and the European Union.
2. Member States are encouraged to seek Eurojust's assistance to reinforce their counter-terrorism investigations and prosecutions. Member States should make systematic and efficient use of Eurojust's unique expertise, coordination tools and operational capabilities to enhance their cooperation in cases of a cross-border nature. Member States should submit to Eurojust information on prosecutions and convictions for terrorist offences in a timely, consistent and comprehensive manner. Eurojust will continue to provide operational support to ongoing counter-terrorism investigations and prosecutions, analyse national legal frameworks and jurisprudence on terrorism and promote the exchange of best practice and lessons learned among judicial authorities to help build successful prosecution cases.
3. Absent a uniform approach across the Member States towards the evidentiary use of intelligence, the increased involvement of judicial authorities should be encouraged, particularly when the intelligence sought to be used in terrorism proceedings was (in full or in part) gathered by or through the intervention of a foreign intelligence service. This involvement would safeguard a more consistent and uniformed application of due process requirements. For example, as suggested by the participants of the 2016 tactical meeting on terrorism, Member States should be encouraged to resort to MLA requests, and avail themselves of Eurojust's support, when seeking intelligence to be used in criminal proceedings from foreign jurisdictions.
4. Due to the increasingly close connections between terrorism and serious and organised crime, such as illegal trafficking of arms and document counterfeiting, Member States should apply in the fight against terrorism the same legislative and operational tools that have proven successful in bringing down ordinary criminal groups, such as drug cartels and mafia-type conspiracies.
5. Eurojust continues to prioritise the strengthening of cooperation with third States in counter-terrorism to support national authorities in their efforts to counter the FTF threat. Eurojust actively works towards enlarging its network of contact points in third States, explores effective interaction possibilities with international organisations monitoring the FTF phenomenon and regularly gathers at its premises counter-terrorism experts from the Member States and from third States to exchange views on the specificities of the FTF phenomenon.
6. Eurojust recommends that the Member States increase information sharing on the FTF phenomenon with third States by making use of existing EU services and platforms, ratifying relevant international legal instruments, exploring new interaction possibilities with international organisations working in the field of counter-terrorism and concluding bilateral or multilateral agreements between Member States and third States.
7. Eurojust will continue to monitor the convictions and to facilitate the exchange of views, legislation and practice among prosecutors to see 'what works' in tackling radicalisation. In this way, Eurojust will be able to contribute to the evaluation of the impact of different measures taken.

Annex: Legislation on combating terrorism and tackling radicalisation

Legislation criminalising terrorism-related offences

The previous Eurojust reports on the criminal justice response to FTFs established that many Member States had implemented or were in the process of implementing legislation to align their national legal framework in counter-terrorism to the requirements established by international law, particularly OP 6 of UNSCR 2178 (2014) and Council Framework Decision 2008/919/JHA on combating terrorism. In addition, many countries had updated their legislation relating to other types of conduct linked to terrorism and terrorism financing, as well as the applicable procedural provisions in investigations and prosecutions with a terrorist dimension.

The 2016 Eurojust questionnaire invited respondents to elaborate, among others, on further developments in national legislation criminalising terrorism-related offences. The responses show that eleven countries³³ adopted or are in the process of adopting such legislation.

In **Belgium**, the Law of 20 July 2015 introduced a new Article 140sexies³⁴ into the Criminal Code, criminalising travel from and into Belgium if done so for terrorist purposes.

Bulgaria also made relevant amendments regarding terrorist offences to Articles 108a and 110 of the Criminal Code on 26 September 2015³⁵. These amendments concern the extension of terrorist offences

³³ BE, BG, CZ, DK, FR, LT, HU, NL, SK, SE and NO.

³⁴ Article 140sexies:

Notwithstanding the application of Article 140, will be sentenced to imprisonment for five to ten years and to a fine of 100 to 5,000 euros:

1° any person leaving the national territory in order to commit, in Belgium or in another country, any offences referred to in articles 137, 140 to 140quinquies and 141, with the exception of the offence referred to in Article 137, §3, 6°;

2° any person entering the national territory in order to commit, in Belgium or in another country, any offences referred to in Articles 137, 140 to 140quinquies and 141, with the exception of the offence referred to in Article 137, §3, 6°.

³⁵ Article 108a

(1) (Amended, SG No.33/2011, effective 27.05.2011, supplemented, SG No.74/2015) Anyone who commits a crime under Articles 115, 128, 142, 143, 143a, 216(1) and (5), 319b-319d, 326, 330, 333, 334, 337, 339, 340, 341a, 341b, 344, 347(1), 348, 349, 350, 352(1), (2) and (3), 354, 356f or 356h for the purpose of causing disturbance/fear among the population or threatening/forcing a competent authority, a member of the public or a representative of a foreign state or international organisation to perform or omit part of his/her duties, shall be punishable for terrorism by imprisonment from five to 15 years; and where death has been caused, the punishment shall be imprisonment from 15 to 30 years, life imprisonment or life imprisonment without a chance of commuting.

(2) (Amended, SG No. 33/2011, effective 27.05.2011, SG No. 74/2015) Anyone who, regardless of the mode of operation, directly or indirectly collects or provides financial or other means, while knowing or assuming that they will be used entirely or partially:

1. for committing a crime under Paragraph 1;

2. by an organisation or group which pursues the goal of committing a crime under Paragraph 1 or 3;

3. by a person who has committed a crime under Paragraph 1,

shall be punished by imprisonment from three to 12 years.

(3) (New, SG No. 33/2011, effective 27.05.2011) Anyone who recruits or trains individuals or groups of people for the purpose of committing a crime under Paragraph 1 shall be punishable by imprisonment from two to ten years.

(4) (New, SG No. 74/2015) Anyone who is being trained for the purpose of committing a crime under Paragraph 1 shall be punished by imprisonment for up to eight years.

(5) (New, SG No. 74/2015) The persons under Paragraph 4 shall not be punished if they voluntarily turn themselves in to the authorities, before committing the crime under Paragraph 1.

(6) (New, SG No. 74/2015) A Bulgarian national who leaves Bulgaria across its border for the purpose of getting involved in a crime under Paragraphs 1-4, including any crime against another country, shall be punished by imprisonment for up to ten years.

(7) (New, SG No. 74/2015) The punishment under Paragraph 6 shall also be imposed on any foreign national who - for the purpose of getting involved in a crime under Paragraphs 1-4, including any crime against another country - enters Bulgaria across its border or illegally resides in it.

(8) (Renumbered from Paragraph 3, SG No. 33/2011, effective 27.05.2011, renumbered from Paragraph 4, SG No. 74/2015) The object of the crime under Paragraph 2 above shall be confiscated to the benefit of the State, and where this object may not be found or has been expropriated, payment of its equivalent sum in cash shall be ruled. *(footnote 31 continued on following page)*

(footnote 31 continued from preceding page)

according to Article 108a(1) to computer crimes of particular gravity. Article 108(4) criminalises receiving training for terrorist purposes, and Article 108(6) and (7) criminalises travel for terrorist purposes, limiting the provisions to the requirement that the territory of Bulgaria must be affected as a necessary link (*i.e.* leaving the territory of Bulgaria or illegally entering/staying in it). Article 110(2) criminalises 'making preparatory arrangements' for committing terrorist offences abroad for foreigners on Bulgarian territory as a preparatory offence.

In the **Czech Republic** as of 1 July 2015, according to an amendment to Article 311 of the Criminal Code, financial, material or other support not only of a terrorist and a member of a terrorist group, but also of a terrorist group itself is criminalised.³⁶ Further amendments are currently under discussion and could entail dividing the state of facts for a terrorist offence from currently one offence ('terrorist attack crime' according to Article 311 of the Criminal Code) to several offences, namely:

- Terrorist attack (Article 311 of the Criminal Code);
- Participation in a terrorist group (Article 312a of the Criminal Code);
- Funding of terrorism (Article 311 of the Criminal Code);
- Support and promotion of terrorism (Article 312d of the Criminal Code); and
- Threatening with an act of terrorism (Article 213 of the Criminal Code).

With regard to the criminalisation of joining a terrorist group (like ISIS) abroad, the assessment in the Czech response to the 2016 Eurojust questionnaire is that such conduct would be covered by the draft Article 312a of the Criminal Code.

In **Denmark**, participation in an armed conflict in which Denmark takes part has been made a criminal offence, which would cover such actions by individuals in Syria and Iraq, as Denmark is part of the coalition against ISIS. In addition, an amendment to the Criminal Code is being discussed, criminalising travelling to a region in which a terrorist group is part of an armed conflict.

In **Finland**, new legislation is pending regarding terrorist offences. The new legislation, which is meant to enter into force as soon as possible, would criminalise travel to a State than the State of residence or nationality of the traveller, if the purpose of the travel is to commit, to plan or to prepare a terrorist act or to give or to receive terrorist training. The new legislation would also criminalise funding of travel for the aforementioned purposes. The new legislation is based on United Nations Security Council Resolution 2178 (2014) on 14 September 2014.

In **France**, the Criminal Code was amended and supplemented³⁷ by criminalising trafficking of cultural goods coming from areas in which terrorist groups are operating and regularly consulting online content with messages, pictures or other material that can lead to or provoke someone to commit a terrorist act or that promotes or glorifies those acts.

Article 110 (Amended, SG No. 99/1989, SG No. 92/2002)

(1) (Previous text of Article 110, SG No. 74/2015) For preparation of a crime under Articles 95, 96, 99, 106, 107, and 108a, s. 1, the punishment shall be imprisonment for up to six years.

(2) (New, SG No. 74/2015) Any foreign national who is making preparatory arrangements, in the territory of Bulgaria, to commit a crime under Article 108a(1) abroad, shall be punished by imprisonment for up to six years, but for no longer than the punishment stipulated in Article 108a(1).

³⁶ Czech law defines 'a terrorist group' as an association of at least three criminal liable persons, which is of a more permanent nature, exhibits division of tasks among its members, whose action is defined by planning and coordination and is aimed at committing acts of terrorism.

³⁷ By Law No. 2016-731 of 3 June 2016.

In **Italy**, the following Conventions in the field of counter-terrorism have been ratified³⁸:

- The Council of Europe Convention on the Prevention of Terrorism (CETS No. 196);
- The International Convention for the Suppression of Acts of Nuclear Terrorism (of 13 April 2005);
- The Protocol amending the European Convention on the Suppression of Terrorism (ETS No. 190);
- The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on the Financing of Terrorism (CETS No. 198); and
- The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217).

Furthermore, a new provision has been inserted in the Italian Criminal Code (Art. 270quinquies), which criminalises any conduct consisting of gathering funds or goods with the objective of committing terrorist offences, even without a link to a criminal association or a conspiracy to commit terrorist offences. Therefore, any conduct for the purpose of procuring means to finance terrorist activities is criminalised as such.

The **Lithuanian** legislator is considering supplementing the Criminal Code with a provision to criminalise travel abroad for terrorism³⁹, as well as also extending criminal liability to legal persons. In addition, plans to supplement the Criminal Code with a provision criminalising the active gathering or obtaining of special knowledge or skills from another person necessary for committing or for participating in a terrorist crime when done so for terrorist purposes are being considered.

In **Hungary**, the crime of 'breaching information systems or data' was added to the list of terrorist offences in Article 424 of the Criminal Code⁴⁰, which entered into force on 1 July 2015. This addition was regarded as necessary to more effectively combat terrorist financing by enabling the authorities and courts to 'temporarily' or 'irreversibly render electronic data inaccessible'. Currently, further draft legislation is being discussed in Hungary to criminalise travelling from or to Hungary to join a terrorist group, categorising 'organising a terrorist group' as a substantial offence instead of only a preparatory act, and extending the criminal liability for minors to the age of 12 if they commit terrorist acts.

The criminal provisions in **the Netherlands**⁴¹ enable prosecution of a wide range of conduct related to terrorism, including the types of conduct addressed by OP 6 of UNSCR 2178(2014), particularly 'travel' according to OP 6(a) of UNSCR 2178(2014), which is covered by Articles 46, 134a and 140a of the Criminal Code. Article 421 of the Criminal Code also criminalises the financing of offences for the preparation of terrorist offences according to OP 6(b) of UNSCR 2178(2014). The organisation or facilitation and recruitment according to OP 6(c) of UNSCR 2178(2014) is also covered by Articles 46, 134a, 140a and 421 of the Criminal Code, and additionally by Articles 140 and 205 of the Criminal Code. On 1 April 2016, the legal

³⁸ By Law No. 153 of 28 July 2016, published in the Official Journal of the Italian Republic on 9 August 2016.

³⁹ The draft Article reads as follows:

Article 250^b (Journey to another state for terrorism purposes)

Any person who went to another state which is not the state of his citizenship or permanent residence state seeking to commit a terrorist crime, or to participate in commission of a terrorist crime, or to participate in activities of a group purpose whereof is to commit terrorist crimes, or to train terrorists or to engage in studies for terrorism-related purposes, shall be punished by imprisonment for the period of up to seven years.

⁴⁰ By Act LXXVI of 2015. The new Article 424 of the Criminal Code provides criminal liability for any person, who 'a) gains unauthorized entry to an information system by compromising or defrauding the integrity of the technical means designed to protect the information system, or overrides or infringes his user privileges; b) disrupts the use of the information system unlawfully or by way of breaching his user privileges; or c) alters or deletes, or renders inaccessible without permission, or by way of breaching his user privileges, data in the information system'.

⁴¹ In particular the following Articles of the Criminal Code: Article 46 (Preparation of serious offences); Article 134a (Training for terrorism and other means of preparation for terrorism); Article 140 (Participation in a criminal organisation); Article 140a (Participation in a terrorist organisation); Article 205 (Recruitment); and Article 421 (Terrorist financing).

possibility to strip a person of Dutch citizenship in case of dual citizenship and final conviction for terrorist offences was extended to preparatory offences (including training for terrorism). Further amendments to the legal framework that are being discussed in the Dutch Parliament include expiration of national passports and ID cards when travel bans are imposed, stripping of Dutch nationality if the person lives abroad and poses a threat to national security, as well as further regulating sale or use of explosives precursors and improving procedures for removal of illegal online content. In addition, laws related to urban issues with regard to selective housing allocation and the possibility to screen tenants regarding radical, extremist or terrorist behaviour in the context of a housing permit are to be reviewed. Finally, additional administrative measures in case of threats to national security, without the need of indication of criminal offences, are being discussed. They would have (renewable) time limitations, focus on preventive action and include exclusion or restraining orders, monitoring and reporting duties, travel bans and enforcement of these measures by electronic monitoring (ankle bracelets), as well as sanctions in the event of deliberate breaches. Temporary custody as part of these measures is also being discussed. Judicial recourse against the administrative measures through administrative courts is foreseen.

In **Slovakia**, a new provision of the Criminal Code came into force in January 2016, criminalising 'participation in combat operations within organised armed groups abroad'.

In **Sweden**, further amendments to the Criminal Code were made to counter the phenomenon of FTFs. On 1 April 2016, new provisions came into force criminalising travelling to a country other than the country of which the suspect is a citizen, with the purpose of committing or preparing serious crimes, particularly terrorist crimes, gathering, supplying or receiving money or other property with the purpose of supporting such travel and also passive training for terrorism.

Finally, in **Norway**, the legislator is discussing criminalising 'participation in insurgency groups in an armed conflict', which would relieve the authorities from having to establish the terrorist nature of an insurgent group.

Legislation and action plans tackling radicalisation

In **Spain**, according to the Criminal Code, punishment can be mitigated when the defendant not only admits the charges, but also cooperates with the police.

In **Lithuania**, progress was made in the implementation of the Counter-Terrorism Programme 2008-2016 in terms of improving legal acts governing combat against terrorism, implementing long-term terrorism prevention measures, increasing capacities and skills of state authorities involved in anti-terrorist activities and cross-border cooperation of Lithuania, input into the joint efforts of the international community to combat terrorism, and strengthening the protection of potential targets of terrorism (sectors of transport, energy, information and communication technologies, as well as other important infrastructure objects, state institutions, establishments and protected objects). Lithuania has also approved the Public Security Development Programme for 2015-2025, with a special focus on combating terrorism, and on reducing and eliminating risk factors increasing the possibility of terrorist acts. To this end, Lithuania intends: (i) to reinforce the efficiency of monitoring of processes related to the radicalisation of the views of the residents of the country, their prevention and the de-radicalisation system by way of including communities operating in residential areas, municipalities and NGOs to achieve these purposes; (ii) to prepare and implement the measures for preventing facilitation of the promotion of radicalism and extremism as well as recruitment of people for terrorist activities; and (ii) to cooperate with the RAN as well as with other Member States by way of exchanging best practice.

In **Hungary**, the new Code of Executing Penalties and Measures, which entered into force on 1 January 2015, is predominantly built on various re-integrative actions and possibilities, as well as on differentiated execution, and emphasizes educational issues. From 1 April 2015, the new provisions of 're-integrative custody' have been introduced and added to the Code (Section 113 of Act LXXII of 2014). Its main objective is to promote and facilitate the social re-integration of convicts by releasing them from incarceration, while at the same time obliging them to stay in a designated apartment, where they are under the control of the authorities for up to six months. The goal to be achieved is progressive re-socialisation.

In the **Czech Republic**, the phenomenon of FTFs is yet to be encountered; therefore, no legislation has been passed to expressly address the radicalisation or disengagement of FTFs, but the authorities analyse the situation carefully. In FTF cases, employing the general provisions of the Criminal Code (Sec.12 Par.2) and Code of Criminal Procedure on subsidiarity of criminal repression, as distinct from administrative forms of sanctions, provisions regarding diversion in criminal proceedings, or provisions on alternatives to custodial sentence of imprisonment would be possible.

In **the UK**, a Counter Extremism Strategy was adopted in October 2015. The UK government is also considering new legislation to counter extremism. This legislation is expected to include: (i) introducing Banning Orders for extremist organisations that seek to undermine democracy or use hate speech in public places, but fall short of proscription; (ii) new Extremism Disruption Orders to restrict people who seek to radicalise young people; (iii) powers to close premises in which extremists seek to influence others; (iv) strengthening the powers of the Charity Commission to root out charities that misappropriate funds and redirect them towards extremism and terrorism; (v) further immigration restrictions on extremists; and (vi) a strengthened role for Ofcom⁴² to take action against channels that broadcast extremist content.

⁴² Ofcom is the regulator and competition authority for the UK communications industry. It regulates the TV and radio sectors, fixed-line telecoms, mobile networks, postal services, plus the airwaves over which wireless devices operate.