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MEASURES AND REGULATORY CHANGES WITHIN THE EUROPEAN UNION TO STRENGTHEN THE FIGHT AGAINST GLOBAL TERRORISM

Abstract

The EU is a key player in the fight against global terrorism, which, given the intensity of this unbounded violence, it identifies as one of the greatest threats to the internal and external security of the region. To provide a strong response to terrorism, over time the EU has launched a series of *Hard* and *Soft Responses* to extremism, in order to create a true internal security structure. Nevertheless, the phenomenon of terrorism is constantly changing, forcing the EU to strengthen its tools and strategies to combat it.

Keywords

EU, terrorism, hard responses, soft response, legislative changes.

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INTRODUCTION. MEASURES TO COUNTER GLOBAL TERRORISM

Europe has experienced different types of terrorism over the course of its history, which has meant that the EU has become a key actor in the fight against this scourge that threatens both its internal and external security. Terrorism in Europe is currently regarded as drawing its inspiration from a wider range of ideologies. These include nationalist and separatist ideologies, those inspired by Al-Qaeda and violent ideologies of the far left, anarchy and far right, meaning that Europe finds itself directly affected by the terrorist activity playing out at international level. Nonetheless, whilst other types of terrorism continue to present a serious threat to the citizens of the EU, the Union's response to radicalisation and recruitment focuses on Jihadist terrorism, as a form of global terrorism that acts with unbounded violence.

In this respect, given the most recent terrorist attacks carried out in the EU, Europol has warned against the high threat level arising as a result of a fanatical minority operating from the Middle East in collaboration with people who were born in the EU itself and radicalised in a short space of time, who have shown themselves to be willing to act as facilitators and active accomplices to terrorist activities³.

In order to provide a strong response to the major threats to the EU's internal security, i.e. terrorism, radicalisation, the recruitment and financing of terrorism, one must take into account the fact that internal and external security are increasingly intertwined, a circumstance that makes internal security dependent on peace beyond its borders⁴. Aware of this fact, over time the EU has set its counter-terrorism course, launching a series of *Hard Responses* and *Soft Responses* to create a real security structure both internally and externally.

1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Preventing Radicalisation to Terrorism and Violent Extremism: Strengthening the EU's Response. Brussels, 15.1.2014 COM(2013) 941 final, p.2.

2 The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism, Doc. 14781/1/05 REV1, p.2.

3 European Union Terrorism Situation and Trend Report 2016 (TE-SAT), p.5.

4 European Global Strategy, June 2016, p.7.

Hard Responses

Regulatory Framework

One of the EU's objectives is to afford its citizens a high level of security within the area of freedom, security and justice. Therefore, immediately after the terrorist attacks of 9/11, the EU established a common legal framework for its Member States with the intention of terrorist offences being considered to be intentional acts committed by people, groups and entities⁵ with the purpose of: 1) seriously intimidating a population; 2) unduly compelling a public authority or an international organisation to act or abstain from acting; 3) seriously destabilising or destroying fundamental political, constitutional, economic or social values of a country or international organisation⁶. However, it should be noted that on the basis of the EU decisions, it is the Member States themselves who are responsible for taking the necessary measures to define terrorist acts within their respective national legislation⁷.

5 "Persons, groups and entities involved in terrorist acts" shall mean: — persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts; —groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities. Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, (2001/931/PESC). Art.I. 2.

6 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. "Terrorist act" shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of: (i) seriously intimidating a population, or (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (i) threatening to commit any of the acts listed under (a) to (h); (j) directing a terrorist group; (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group. Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, (2001/931/PESC). Art.I. 3.

7 Art. 1, Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. OJEU, L 164, 22.6.2002.

Given these new trends, in 2008, the range of terrorist activities was extended to cover three additional forms of crimes: 1) public provocation to commit a terrorist offence; 2) the recruitment of terrorists; 3) training for terrorism⁸. However, taking into account the constant changes to terrorists' modus operandi, the current legal framework has remained incomplete since there is a series of activities of a terrorist nature that must be classified as offences, and in this respect we are referring to participation in an association or a group⁹ with a terrorist purpose; receiving training with a terrorist purpose; travel abroad with a terrorist purpose; the financing of travel abroad with a terrorist purpose; or organising or facilitating in any other way travel abroad for terrorist purposes, just as is set out in the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism¹⁰. Likewise, it is appropriate to mention the fact that the signature of the aforementioned Additional Protocol was authorised on behalf of the EU, with those matters falling to EU competence being applicable¹¹.

On the other hand, as part of its desire to present a categorical response to combatting terrorism, the EU is working on a future Directive for the fight against terrorism which *“strengthens and updates the existing Framework Decision 2002/475/JHA, in particular, as it criminalises: Travelling for terrorist purposes, to counter in particular the phenomenon of foreign terrorist fighters. The compromise reached between the institutions will ensure that for example to travel to conflict zones with the purpose of joining the activities of a terrorist group or to travel to an EU member state with the purpose of committing a terrorist attack will be made punishable. The organisation and facilitation of such travels, including through logistical and material support, for example the purchase of tickets or planning itineraries. Receiving training for terrorist purposes, e.g. in the making or use of explosives, firearms, noxious or hazardous substances mirroring the already existing provision of knowingly providing such training. Providing or collecting funds with the*

8 Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism.

9 “Terrorist group” shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. “Structured group” means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure. Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, (2001/931/PESC). Art.1. 3.

10 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No 196). According to Recital 2 of Council Decision (EU) 2015/1914 of 18 September 2015 on the signing, on behalf of the European Union, of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No 196) “The Additional Protocol aims at facilitating the implementation of United Nations Security Council Resolution 2178(2014) on foreign terrorist fighters and, in particular, at establishing criminal offences for certain acts identified in operative paragraph 6 of that Resolution”.

11 Art. 1 Council Decision (EU) 2015/1914 of 18 September 2015 on the signing, on behalf of the European Union, of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No 196).

intention or the knowledge that they are to be used to commit terrorist offences and offences related to terrorist groups of terrorist activities”¹².

The key role of the EU in the fight against terrorism is illustrated by its policies on combatting terrorism, preventing radicalisation and the recruitment of terrorists as set out in various legal instruments, notably its strategies and action plans to counter terrorism¹³. In this vein, in 2010 the first Internal Security Strategy of the EU (ISS) for the period 2010-2015 was initiated and updated with a new Strategy for the period 2015-2020 in accordance with the Council Conclusions of 16 June 2015¹⁴.

Among the legal instruments that exist, in addition to the Security Strategies, a series of programmes stand out, for example OISIN I (1997-2000)¹⁵ and OISIN II (2001-2002)¹⁶, which have been implemented with a view to promoting cooperation between the police and custom authorities of Member States. Moreover, we should not neglect to mention the well-known Stockholm Programme¹⁷, which has established the EU priorities for the Area of Freedom, Security and Justice over the period 2010-2014, building upon the achievements of the preceding programmes, those of Tampere¹⁸ and The Hague¹⁹.

12 Council of the European Union, Press Release. Directive on combatting terrorism: Council confirms agreement with Parliament. 716/16 of 5.12.2016.

13 Out of this series of documents, we would like to mention the European Counter-terrorism Strategy, 30 November 2005, Doc. 14469/05 REV4; EU Action Plan on combating terrorism, 29 March 2007, Doc. 7233/1/07 REV1; Revised Strategy on Terrorist Financing, 17 July 2008, Doc. 11778/1/08 REV1; Internal Security Strategy for the European Union: “Towards a European Security Model” Doc. 7120/10; EU Action Plan on combating terrorism, 9 December 2011, Doc. 17594/1/11 REV1; Outline of the counter-terrorism strategy for Syria and Iraq, with particular focus on foreign fighters, 16 January 2015, Doc. 5369/15; Council conclusions on the EU Regional Strategy for Syria and Iraq as well as the ISIL/Da’esh threat, 16 March 2015, Doc. 7267/15; European Parliament resolution of 25 November 2015 on the prevention of radicalisation and recruitment of European citizens by terrorist organisations (2015/2063(INI)).

14 The European Agenda on Security for 2015-2020 was presented by the European Commission and approved by the European Council and Parliament as the renewed Strategy for EU Internal Security of 16 June 2015.

15 Joint Action of 20 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union providing a common programme for the exchange and training of, and cooperation between, law enforcement authorities (‘Oisin’) (97/12/JAI).

16 Council of Decision of 28 June 2001 establishing a second phase of the programme of incentives, exchanges, training and cooperation for law enforcement authorities (OISIN II). Oisin II programme — Annual work programme and call for applications for 2002 (2002/C 66/19).

17 The Stockholm Programme — An open and secure Europe serving and protecting citizens (2010/C 115/01). OJEU, C 115, 4.5.2010.

18 Tampere European Council (15 and 16 October 1999): Towards a Union of Freedom, Security and Justice: The Tampere Milestones.

19 Communication from the Commission to the European Council and the European Parliament, 10 May 2005: The Hague Programme: Ten priorities for the next five years. The Partnership for

Since the terrorist threat is constantly evolving, the priorities set out by the EU for the upcoming years in the field of internal security aim to tackle and prevent terrorism, radicalisation towards terrorism and also the recruitment of new fighters. As part of all this, it is of note that preventive action plays an essential role, which demands greater cooperation both at operational level and also with respect to the implementation of awareness-raising policies regarding radicalisation. Another EU priority is that of putting a stop to the financing of terrorism, which entails a series of measures to freeze financial assets as well as launching action plans on explosives and chemical, biological, radiological and nuclear substances and a policy for the extraction and analysis of financial messaging data within the EU. Nonetheless, given the modus operandi of the latest attacks, particular attention shall have to be paid to the so-called foreign fighters, to reinforcing security at borders via systematic and coordinated checks, as well as the security and protection of means of transport²⁰.

We thus observe that the array of legal instruments created in the EU is perhaps excessively wide, hence the obvious need for an EU Global Strategy for counter-terrorism measures.

Operational Framework: Exchange of information and operational cooperation

The security of the European Union is underpinned by a series of effective mechanisms for the exchange of information between national authorities and other European agents²¹ – an exchange which unfortunately is not yet free of obstacles that hinder the intensification of operational cooperation. This is evidenced by the four areas of immediate priority for the EU's combatting of terrorism, including the necessity to intensify the exchange of information and operational cooperation as well as the reinforced application of the Schengen framework, boosting notification capacity for internet content and the fight against the illicit trade of firearms²².

Just as has been previously mentioned, the European Union today faces a constant and ever-changing terrorist threat in terms of the last decade²³ and it is a trend that hits the core of Europe, and in particular its states, as it is the latter that bear the

European renewal in the field of Freedom, Security and Justice. COM (2005) 184 final. OJEU, C 236, 24.9.2005.

20 Draft Council Conclusions on the Renewed European Union Internal Security Strategy 2015-2020, Doc. 9798/15, p. 6 and The EU Internal Security Strategy in Action: Five steps towards a more secure Europe, COM 2010, 673 final of 22.11.2010, p. 7 et seq.

21 Communication from the European Commission of 10 June 2009, An area of freedom, security and justice serving the citizen (COM(2009)262), p. 16, para 4.1.2. *Controlling information*.

22 Justice and Home Affairs Council of 12 March 2015, Doc. 6891/15 and Council of the European Union: Draft Report to the European Parliament and national Parliaments on the proceedings of the Standing Committee on operational cooperation on internal security for the period July 2014 - December 2015. Doc. 5299/2/16 REV 2, p. 9

23 European Parliament resolution on anti-terrorism measures (2015/2530(RSP)), Recital B.

responsibility of fighting it²⁴. Therefore, on the one hand they must coordinate their counter-terrorism policies, and, on the other hand, they must pool information and experience gained as part of efforts to meet the challenges of radicalisation and terrorist recruitment undertaken both at national and European level²⁵. In this respect, it is essential to promote the exchange of information on people or groups subject to action due to their hate speech and incitement to terrorism, as well as effectively implementing those mechanisms for collecting and exchanging information relating to radical leaders who promote or incite terrorism²⁶.

It is indeed true that over the course of time the EU has launched a series of instruments that have led to huge advances in the field of cross-border police information exchange. Yet a series of deficiencies do still exist that hamper the full utilisation of the existing tools to combat terrorism, especially those focusing on operational cooperation between the national competent authorities.

By way of a brief overview of the aforementioned instruments, mention should be made of the fact that it was in The Hague Programme that the principle of availability was defined as a criterion for the exchange of information in the EU, stipulating that methods for the exchange of information must make full use of new technologies and adapt to all forms of information²⁷. Subsequently, the 'Swedish Initiative' set out a series of rules by virtue of which the security services in Member States are able to swiftly and effectively exchange the information and intelligence available in order to undertake criminal investigations and criminal intelligence operations²⁸.

Due to the changing and strengthened state of organised crime and international terrorism, the need for improvements to the exchange of information was more than blatant. Consequently, the Prüm Decision was adopted that, for its part, encompassed a series of provisions relating to access to automated DNA analysis files; automated fingerprint identification systems and national vehicle register data; the provision of

24 REVENGA SÁNCHEZ, M.: "Garantizando la libertad y la seguridad de los ciudadanos en Europa: sobre nobles sueños y pesadillas en la lucha contra el terrorismo", published in *Parlamento y Constitución*. Annual, Year 2006-2007 N. 10, p.62. In accordance with Article 4 Paragraph 2 of the TEU, national security is the exclusive competence of each Member State.

25 Annex, Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism, Council of the EU, Brussels, 19 May 2014, para 55.

26 Draft Council Conclusions on the use of a standardised, multidimensional semi-structured instrument for collecting data and information on the processes of radicalisation in the EU.

Brussels, 16 April 2010 (19.04) (OR. en) 8570/10, ENFOPOL 99, p. 4 et seq.

27 Communication from the Commission to the European Parliament. The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice. Brussels, 10.5.2005, COM(2005) 184 final, p. 11.

28 Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (Known as the Swedish Initiative).

data relating to major events; the provision of information with the aim of thwarting terrorist acts; as well as other measures to reinforce cross-border police cooperation²⁹.

Given the wide range of information systems and instruments, which in parts were uncoordinated and inconsistent, a decision was taken to apply a European Union Information Management System with a view to redressing the erratic situation, a strategy that was revised in 2014³⁰. Later on, it was decided that the European Information Exchange Model (EIXM) would be implemented with the objective of setting out a series of recommendations to Member States about how to improve the implementation of existing instruments, restructure the communication channels used and guarantee a high level of quality, security and protection of the data in question³¹.

To take a more in-depth look, mention should be made of the principal police information systems currently used in the EU, i.e. the SIS (Schengen Information System); SIS II (Second Generation Schengen Information System); Europol Information System (EIS); PNR (Passenger Name Record); ECRIS (European Criminal Records System); VIS (Visa Information System); EURODAC (European fingerprint database); SLTD (Interpol's Stolen/Lost Travel Document database; and iARMS (Interpol's database on firearms). However, in addition to those systems regarded as the main systems, there also exists a series of additional information systems such as the Advance Passenger Information (API); the European Police Record Index System (EPRIS) and the Automated Fingerprint Identification System (AFIS), which it is hoped will be operative by mid-2017. Another possibility that is still in the evaluation phase is that of implementing an Entry and Exit System (EES)³² and a European Travel Information and Authorisation System (ETIAS)³³.

Taking this multitude of instruments into account, one of the challenges currently lies in, on the one hand, attaining interoperability, especially for the SIS II Information System and Interpol's SLTD and iARMS and, on the other hand, ensuring that

29 Council Decision 2008/615/JAI of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

30 Draft Council Conclusions on an Information Management Strategy (IMS) for EU internal security, Doc. 16637/09 and Draft Council Conclusions on an updated Information Management Strategy (IMS) for EU internal security, Doc. 15701/1/14 REV 1.

31 Communication from the Commission to the European Parliament and the Council, Strengthening law enforcement cooperation in the EU: the European Information Exchange Model (EIXM). COM/2012/0735 final.

32 Proposal for a regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third country nationals crossing the external borders of the Member States of the European Union. Brussels, 28.2.2013, COM(2013) 95 final.

33 Communication from the Commission to the European Parliament and the Council, Stronger and Smarter Information Systems for Borders and Security. Brussels, 6.4.2016, COM(2016) 205 final, p. 6.

Member States create single contact points as soon as possible in order to facilitate the exchange of information³⁴.

Political cooperation, reflected for the most part in the exchange of information, is key to pursuing terrorists in order to prevent their planning, impede their networks and activities, block their financing and detect *foreign fighters*³⁵, as well as creating better conditions for generating lists of radicalisers, recruiters or those conveying a radical message³⁶ since it is police cooperation and that of the intelligence services of each state that may contribute to the dismantling of cells that may be far apart from one another yet interrelated³⁷.

Fostering greater exchange of information and intelligence between Member States and EU Agencies is one of the key components in order to facilitate the alerts shared relating to violent extremism, terrorist networks, foreign fighters, as well as the surveillance of and taking down of terrorist propaganda content from the internet³⁸. For that matter, the EU security agencies such as Europol, Frontex and Eurojust play a decisive role in the fight against terrorism since they equip national competent authorities with the necessary tools to counter global terrorism. Nonetheless, it must be underscored that on the one hand operational cooperation between Member States and these agencies is imperative, yet this also goes for cooperation between the agencies themselves, as it provides particular added value, considering the complementarity of their mandates and competences, and thus this must be enhanced³⁹. Moreover, it is worth noting that one of the major shortcomings regarding the support that the Agencies could provide is the fact that these are not yet connected to all of the different systems for the exchange of information that the national competent authorities in Member States have access to and available to them. Therefore, the existence of a series

34 Conclusions of the Council of the EU and of the Member States meeting within the Council on Counter-Terrorism, 20 November 2015. Doc. 14406/15, p. 5.

35 The term *foreign fighters* is used to describe those individuals who travel to a country that is not that of their residence or nationality with the purpose of perpetrating or planning attacks or facilitating or receiving terrorist training. It is estimated that between 3500 and 5000 EU nationals have become foreign fighters since the outbreak of war and violence in Syria, Iraq and Libya, and there is major concern surrounding their rapid increase and subsequent potential return to EU territory, which presents risks to the internal security of the Union and to the lives of EU citizens. Proposal for Joint Resolution on anti-terrorism measures (2015/2530(RSP)), 10 February 2015, Recital G and para 4.

36 Draft Council Conclusions on the use of a standardised, multidimensional semi-structured instrument for collecting data and information on the processes of radicalisation in the EU. Brussels, 16 April 2010 (19.04) (OR. en) 8570/10, ENFOPOL 99, p. 6.

37 THIEUX, L: "La Unión Europea frente al terrorismo global", Rev. Papelets, N. 86, 2004, pp. 95-103, p. 99.

38 European Union Global Strategy, June 2016, p. 21.

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

of key tools in the fight against terrorism may not be deemed an effective response while all actors involved are not able to access these and to be interconnected.

A. EUROPOL

In close cooperation with the relevant EU and Member State bodies, Europol is mandated with the task of undertaking exhaustive analyses of the threats to security that must be addressed as regards the future EU strategy.⁴⁰ In this respect, given the significant threat to the internal security of the EU posed by terrorist groups and transnational criminal networks, it has been deemed necessary to reinforce Europol so that it can provide its essential support to Member States as regards the prevention, analysis and investigation of transnational organised crime and terrorism. Therefore, as of 1 May 2017, its new legal framework shall enter into force, which unlike the previous one, will take the form of a Regulation⁴¹.

However, reinforcing the Agency does not solely and exclusively depend on its new legal instrument, but also on a series of tools, particularly in the field of counter-terrorism, which is the issue at hand. In this vein, in January 2016, a European Counter Terrorism Centre was initiated within Europol, with the objective of turning it into the central axis for information as part of the fight against terrorism in the EU. Therefore, the ECTC includes: 1) Europol's Focal Point 'Travellers' dealing with foreign terrorist fighters and related terrorist networks; 2) the Terrorist Financing Tracking Program (TFTP) between the EU and the US; 3) FIU.NET, the decentralised information network that supports the Financial Information Units; 4) Arms smuggling; 5) IRU – online terrorist propaganda (EU Internet Referral Unit - IRU)⁴².

The vital importance of Europol's Focal Point 'Travellers' should be underscored and it requires further assistance from Member States to introduce and transfer sensitive information relating to foreign fighters. Similarly, it is considered absolutely essential that all entries made by Member States to SIS II relating to ETFs (European terrorist fighters) be also transferred to the EIS by default⁴³, since at the moment it

40 European Parliament resolution on renewing the EU Internal Security Strategy (2014/2918(RSP)).

41 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

42 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Security Agenda. Strasbourg, 28.4.2015, COM(2015) 185 final, p. 15 et seq.

43 State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16. According to the report "However, information sharing still does not reflect the threat: while there are now five

is recognised that Europol may cross-reference data included in the latter, but such a transfer is required until a systematic search function in the SIS II is enabled for the Agency⁴⁴.

The serious shortcomings currently faced by Europol boil down to the fact that it is impossible for the Agency to access all information exchange systems, or that it is only afforded limited access to mere consultations known as ‘discreet and specific checks’. In order for the Agency to properly and successfully fulfil its support function to Member States, synergies must be created between all the information systems and EIS. At the moment, it is being examined whether it is necessary for the Automated Fingerprint Identification System (AFIS), to be developed as part of the SIS, to complement Europol systems principally with a counter-terrorism purpose in mind.

It should be mentioned that Europol has had access to the VIS since September 2013 and to Eurodac⁴⁵ since July 2015, albeit only in consultation mode and without being able to extract or introduce data. This is totally insufficient and consequently Europol is drafting a proposal to establish direct access to these systems and to SIS II, which would need to incorporate a search function for fingerprints⁴⁶. It calls for the implementation of interconnectivity between all the different information systems – including the EIS, that is to say that the data registered in the system be able to be consulted automatically by another system centrally, which would lead to a reduction in the quantity of data circulating over communication networks and passing through the national information systems⁴⁷.

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times more person entities in Europol’s Focal Point Travellers database compared with last year, the analysis file still contains only 2,786 verified foreign terrorist fighters (FTF) entered by EU Member States. The European Information System (EIS) contains only 1,473 FTF entered by Member States. This despite well-founded estimates that around 5,000 EU citizens have travelled to Syria and Iraq to join DAESH and other extremist groups. It should also be noted that more than 90% of the contributions by Member States regarding verified FTFs in FP Travellers in 2015 originate from just 5 Member States. Not all FTFs are systematically entered into the SIS II and the EIS of Europol. Only 18 operational FTF cases were registered at Eurojust in 2015 and information on only 104 ongoing terrorism prosecutions has been shared with Eurojust. This despite the fact that, according to the relevant Council Decision, information about all prosecutions has to be shared by Member States with Eurojust.” p.5.

44 State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16, p. 7 et seq.

45 Communication of the Commission to the European Parliament and the Council, Stronger and Smarter Information Systems for Borders and Security. Brussels, 6.4.2016 COM(2016) 205 final, p.11.

46 State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16, p. 7 et seq.

47 Communication of the Commission to the European Parliament and the Council, Stronger and Smarter Information Systems for Borders and Security. Brussels, 6.4.2016, COM(2016) 205 final, p. 16 et seq.

B. FRONTEX

Just like Europol, Frontex is currently undergoing an improvement stage at a judicial level given the need to enhance to a considerable extent its capacity to respond effectively to current and future threats at external borders, whereby this must always be undertaken in coordination with Member State measures. Given this backdrop, it has been considered necessary on the one hand to change the name of the Agency to the European Border and Coast Guard and, additionally, to broaden its functions. In this regard, the Proposal for a Regulation made the case for the establishment of *“an operational and technical strategy for the implementation of an integrated border management at Union level, to oversee the effective functioning of border control at the external borders of Member States, [...] to provide increased operational and technical assistance to Member States through joint operations and rapid border interventions, and to ensure the practical execution of measures in case of a situation requiring urgent action at the external borders, as well as to organise, coordinate and conduct return operations and return interventions”*⁴⁸.

Having said that, with the aim of ensuring an effective application of European integrated border management, the European Border and Coast Guard has been established, which ultimately is what was formerly known as Frontex and, which despite the change to its name, will continue to operate under its previous denomination⁴⁹. In particular, its objective is to manage effectively the crossing of external borders, thereby meeting migration challenges and contributing to combatting serious types of crime with a cross-border dimension. Furthermore, its Regulation foresees that the Agency facilitate the implementation of current and future Union measures relating to the management of external borders⁵⁰.

That said, it should be noted that Frontex plays a key role in work to counter terrorism as it supports the coordinated application of common risk indicators, manages and coordinates operational coordination and assistance between Member States regarding border control with the aim of detecting foreign fighters' travel and

48 Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC. Strasbourg, 15.12.2015 COM(2015) 671 final 2015/0310 (COD).

49 Recitals 5 and 12, Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. OJEU L251, 16.9.2016.

50 Article 1 and Article 6.2, Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. OJEU L251, 16.9.2016.

illicit firearms smuggling⁵¹ and applies the rules of what is known as the Schengen Borders Code.⁵² Nevertheless, there exist a series of obstacles and deficiencies hampering the fulfilment of its functions, for the most part those relating to the access Frontex has to different information systems and, in this respect, despite the existence of an Operational Agreement between Europol and Frontex, the way in which information may be exchanged between the two agencies still remains to be established. Until the present day, Frontex has not been able to access SIS II, which is of vital importance if it is to undertake its risk analysis activities and detect suspicious terrorist movements, in addition to providing it with the possibility to introduce information specifically with relation to operational activities in critical spots and in the region of the Western Balkans⁵³.

Unfortunately, cooperation between Frontex and Europol falls short, on the one hand because, just as we have mentioned, the systematic exchange of information is not yet taking place. On the other hand, Member States do not adequately respond to shortages of Frontex staff who are needed to cross-check information at critical points and other entry points for migrants (with the objective of detecting those who enter using new passports that have been forged), which would enhance the work of Europol for second line checks –checks carried out by ‘Guest Officers’⁵⁴.

As part of endeavours to strengthen EU measures vis-à-vis border security, one initiative that stands out is that of ‘smart borders’, which is to improve the management and the control of passenger flows.⁵⁵ In this respect, it is believed that the access that Frontex will have to what will become the Smart Borders Database will boost its operational capacity. This database will comprise the Entry-Exit System (EES)⁵⁶ and a Registered Travellers Programme (RTP)⁵⁷. Moreover, the Agency must have access as

51 Draft Conclusions of the Council of the EU and of the Member States meeting within the Council on Counter-Terrorism, Brussels 19 November 2015. Doc. 14375/15.

52 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

53 State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16.

54 Conclusions of the Council of the EU and of the Member States meeting within the Council on Counter-Terrorism 22.II. 2015. Press Release, Doc. 848/15.

55 Communication from the Commission to the European Parliament and the Council: Smart Borders – Options and the way ahead. Brussels, 25.10.2011. COM(2011) 680 final.

56 Proposal for a regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third country nationals crossing the external borders of the Member States of the European Union. Brussels, 28.2.2013, COM(2013) 95 final.

57 Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme. Brussels, 28.2.2013. COM(2013) 97 final.

soon as possible to SIS, SIS II, the Visa Information System (VIS)⁵⁸ and, in addition, to Interpol's Stolen/Lost Travel Document database (SLTD). The necessity to ensure this has been demonstrated by the latest attacks in Paris, since the terrorists who perpetrated the attacks had made return trips to Syria without being detected. As a result, in addition to providing Frontex with access to the aforementioned systems, the amount of data concerning foreign terrorist fighters (FTFs) included in SIS II would need to be increased and also the SIS II and Interpol databases relating to foreign borders should be systematically reviewed⁵⁹.

C. EUROJUST

In turn, Eurojust is a key actor in the coordination and cooperation between national authorities as part of measures to tackle serious cross-border crime that affects the European Union⁶⁰, yet also more particularly efforts to combat terrorism. In this context, in 2015 it created its first Coordination Centre of Foreign Terrorist Fighters and additionally provided assistance to Joint Investigation Teams (JITs) in terrorism cases⁶¹. In addition, the Agency investigates the trends and the evolution of the phenomenon of foreign fighters, principally on the basis of the Follow-up Report of the Terrorism Convictions Monitor and convictions in Member States relating to terrorism and violent radicalisation⁶². This Monitor includes information supplied exclusively to Eurojust by the national authorities of the various Member States (by virtue of Council Decision 2005/671/JHA) relating to criminal proceedings or convictions for terrorism offences, the specific circumstances of such offences, links with other related matters, requests for judicial assistance and the implementation of such requests⁶³.

In order to carry out its functions, the strategic cooperation that Eurojust currently undertakes with various other agencies, such as Europol, Frontex and OLAF, proves

58 Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

59 Council of the European Union. Report: State of play on implementation of the statement of the Members of the European Council of 12 February 2015 on counter-terrorism. 30 November 2015, Doc. 14734/15, p. 7 et seq.

60 Eurojust Annual Work Programme 2016, p. 4.

61 Council of the European Union. State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16, p. 6.

62 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. Press Release, 20 November 2015.

63 Internal Eurojust Report: Terrorism Convictions Monitor. Issue 18 February 2014, p. 3.

to be crucial⁶⁴. As regards strategic and operational cooperation with Europol, Eurojust contributes to the Annual EU Terrorism Situation and Trend Report (TE-SAT)⁶⁵ and in 2015 joined the Focal Point ‘Travellers’⁶⁶. Nonetheless, it is hoped that cooperation will increase and that Eurojust will fully participate in the activities of the European Anti-Terrorism Centre, which would translate into an enhancement of the coordination of investigations and legal proceedings⁶⁷.

The key role of Eurojust in the fight against terrorism comes to the fore not only with respect to Member States but also as regards operational and strategic cooperation with third countries in order to address the phenomenon of foreign fighters, above all by reinforcing the cooperation between the US and the Eurojust contact points in Turkey and the Western Balkans. In this respect, the Agency deems it necessary to have Eurojust liaison magistrates present in third countries with a view to better addressing the phenomenon of foreign terrorist fighters⁶⁸.

Soft Responses

Outreach policies to address radicalisation

What has become highly alarming is the rapid increase in the number of EU citizens travelling to conflict zones to join terrorist organisations and cells and subsequently to return to European soil, potentially with the intention of perpetrating terrorist attacks⁶⁹. As a result, the EU has considered a series of soft responses to counter the trend of foreign fighters, and, in this vein, address the radicalisation trend at a multidimensional level

64 Eurojust Annual Work Programme 2016, p.20.

65 Council of the European Union. State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16, p.6.

66 Council Conclusions on the Eurojust Annual Report 2015 - Council conclusions (9 June 2016). Doc. 10003/16, p.2, para 4.

67 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Security Agenda. Strasbourg, 28.4.2015, COM(2015) 185 final, p. 15.

68 Follow-up to the statement of the Members of the European Council of 12 February 2015 on counter-terrorism: Report on implementation of measures. Doc. 9422/1/15 REV1, p.7.

69 Communication from the Commission to the European Parliament, the European Council and the Council, Delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union, Brussels, 20.4.2016 COM(2016) 230 final: “Of the 4,000 foreign fighters thought to come from EU Member States, around 30% have returned to their home countries. Returned foreign fighters have been linked to the terrorist attacks of 2015 and 2016. Some foreign fighters will have been instructed to return to Europe to commit terrorist attacks, spread Daesh propaganda and radicalise and recruit others,” p. 4.

whereby the promotion of political and religious tolerance, the development of social cohesion and inclusion, as well as the design of policies to facilitate social reintegration, play a major role⁷⁰. With this in mind, it will focus on education, communication, culture, youth and sport in order to counteract violent extremism with the support and assistance of civil society, social agents, the private sector and the victims of terrorism⁷¹.

It considers, however, that employment and tackling the marginalisation of young people will boost the fight against radicalisation. As a consequence, it is deemed necessary to take a series of specific actions within the strategic framework for European cooperation in the field of education and training, in addition to launching a European Youth Strategy, as well as an EU Work Plan for Sport and a Work Plan for Culture⁷².

We should mention that in September 2011, the Radicalisation Awareness Network (RAN) was launched to equip local actors to tackle the problem of radicalisation and recruitment of young people⁷³. Consequently, it was in January 2014 that a series of proposals was adopted. These included measures to prevent radicalisation, but also to help those who had been radicalised to cut ties and to deradicalise⁷⁴.

Removal of extreme content from the Internet

As part of the fight against global terrorism that is constantly changing in terms of its *modus operandi*, it is vital to attempt to prevent a *new generation of terrorists* from emerging. As a result, the immediate priority lies in detecting radicalisation patterns, those who support the extreme ideology linked to terrorism, the *lone wolves* and the foreign fighters whose mobilisation is on the rise, whereby particular attention must be paid to online communication, especially on social media⁷⁵. Accordingly, recent terrorist attacks and attacks thwarted by international and national security authorities have shed light on the use of the internet by terrorists, showing it to be a key element used to spread their propaganda, recruit, radicalise, coordinate terrorist activities and glorify their atrocities⁷⁶.

70 European Parliament resolution on renewing the EU Internal Security Strategy (2014/2918(RSP)), para 5.

71 European Union Global Strategy, June 2016, p. 21.

72 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Security Agenda. Strasbourg, 28.4.2015, COM(2015) 185 final, p. 17 et seq.

73 Charter of Principles Governing the EU Radicalisation Awareness Network. http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/radicalisation_awareness_network/docs/ran_charter_en.pdf

74 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Preventing Radicalisation to Terrorism and Violent Extremism: Strengthening the EU's Response COM(2013) 941.

75 Annex, Revised EU Strategy for Combatting Radicalisation and Recruitment to Terrorism, Council of the EU, Brussels, 19 May 2014.

76 Europol Unclassified – Basic Protection Level: EU Internet Referral Unit. Year one report highlights, p.3.

One of the EU's *soft responses* as part of the fight against terrorism is combatting online radicalisation, accounting for the threat that also emanates from those people who remain on European territory and who receive inspiration or instructions from terrorist groups located abroad.⁷⁷ Therefore, the EU Internet Referral Unit (IRU) for online content, which has been operational within Europol since 1 July 2015, is a key tool as part of the European Counter-Terrorism Centre. Its main function consists in pre-empting terrorist abuse online, acting as a central service for Member States and third partners in order to reduce levels of terrorist propaganda content on the internet. Given this context, we reiterate the need for Member States and partners to cooperate actively with Europol to increase the volume of notifications of terrorist propaganda on the internet and remove extremist content from the internet⁷⁸.

Currently, in concert with Member States, the IRU focuses on the propaganda and terrorist content disseminated by Al-Qaeda or Daesh.⁷⁹ Therefore, given the high threat level as well as the technological capacity used by these terrorist groups, firstly the IRU's ability to decipher and decrypt communication among Jihadist networks on social media is being reinforced and, secondly, cooperation alliances have been forged with the private sector to allow the IRU to actively contribute to the EU Internet Forum and a Europol platform for experts will be developed with the aim of facilitating contact with academia and research centres.⁸⁰

The most significant elements of the regulatory changes introduced or pending in the eu to intensify the fight against global terrorism

The evolution of the global terrorism threat presents an unprecedented challenge to the internal security of the EU, which is why it is necessary to adapt the legislation in force in order to address urgently the persistent gaps, fragmentation and existing limitations, thereby guaranteeing up-to-date, robust European legislation that will create an environment of trust among national authorities so that they can address common challenges⁸¹. In this vein, a series of legislative measures have been initiated in

77 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. Doc. 2015/0281(COD).

78 Council of the European Union. State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16, p. 35 et seq.

79 Europol Unclassified – Basic Protection Level: EU Internet Referral Unit. Year one report highlights, p.4.

80 Council of the European Union. State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16, p. 35 et seq.

81 Communication from the Commission to the European Parliament, the European Council and the Council: Delivering on the European Agenda on Security to fight against terrorism and pave the

order to strengthen the existing legal instruments, some of the most significant here are the review of the Framework Decision on Terrorism⁸², the Proposal for a Directive on Firearms⁸³, the Proposal for a Directive on the European Criminal Records System⁸⁴, the Action Plan to Strengthen the Fight Against Terrorist Financing⁸⁵, the Directive on Passenger Name Record Data⁸⁶ and the Europol Regulation⁸⁷.

Proposal for a Directive on Combatting Terrorism

It is considered that the terrorist threat that the EU currently faces has undergone decisive changes, which has highlighted the need to adapt the existing judicial standards to make them more consistent, exhaustive and harmonised across the whole of the EU in order to respond adequately to the biggest practical and legal threats seen at cross-border level⁸⁸ – principally related to the travel of European citizens to third countries to participate in terrorist activities⁸⁹.

way towards an effective and genuine Security Union. Brussels, 20.4.2016, COM(2016) 230 final, p. 3 et seq.

82 European Parliament, Report on 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 (COM(2015)0625 – C8-0386/2015 – 2015/0281(COD)). A8-0228/2016.

83 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons. Brussels, 18.11.2015 COM(2015) 750 final 2015/0269 (COD).

84 Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA. Brussels, 19.1.2016 COM(2016) 7 final 2016/0002 (COD).

85 Communication from the Commission to the European Parliament and the Council: Action Plan for strengthening the fight against terrorist financing, Strasbourg, 2.2.2016 COM(2016) 50 final.

86 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. OJEU L 119 of 4.5.2016.

87 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA. OJEU L 135 of 24. 5.2016.

88 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. Brussels, 2.12.2015 COM(2015) 625 final.

89 Communication from the Commission to the European Parliament, the European Council and the Council: Delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union. Brussels, 20.4.2016 COM(2016) 230 final.

The deficiencies observed in the current counter-terrorism legal framework⁹⁰ mean that travel to third countries by European citizens with a terrorist purpose, as well as the training that they receive with a terrorist purpose, do not fall under the classification of a crime. With respect to the financing of terrorism, the current legal framework is restricted merely to that which is provided to a terrorist group, without including funding provided to recruit or to train or the financing of trips abroad with a terrorism purpose. Given the limitations that have been mentioned already, Member States face a series of difficulties when they prosecute foreign fighters due to the obstacles that exist with regard to proving the existence of a terrorist group. Similarly they encounter the specific situation of foreign fighters who travel to Syria or Iraq by their own means in order to participate in terrorist activities without becoming a member of a terrorist group⁹¹. As a consequence, it has been the Member States themselves who have insisted on the need to revise the legal framework in the light of the requirements implemented by Resolution 2178(2014) of the UN Security Council⁹² which establishes a series of measures to tackle the phenomenon of foreign fighter terrorists.

In this respect, the Resolution lays down that all States must ensure that their national legislation establishes as serious criminal offences and as sufficient to prosecute and punish: 1. The attempt to travel to or travel to a third country for the purpose of contributing to the perpetration of terrorist acts or the providing or receiving of terrorist training to participate in terrorist acts; 2. The financing of such travel and 3. The organisation or facilitation of such travel.⁹³ Consequently, a common understanding of crimes relating to foreign terrorist fighters, including training for terrorist purposes, is viewed as an element that would increase the effectiveness of the criminal justice and cooperation instruments at international and European Union level.⁹⁴ Therefore, by means of the European Council's Additional Protocol on the Prevention of Terrorism signed by the EU, new acts of a terrorist nature are classified as crimes: 1. The participation in an association or group for the purpose of terrorism; 2. Receiving training for terrorism; 3. Travelling for terrorist purposes; 4. Financing travel for terrorist purposes; 5. Organising and facilitating in some way travel abroad for terrorist purposes⁹⁵.

90 Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism.

91 Foreign Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response, p. 5.

92 Follow-up to the statement of the Members of the European Council of 12 February 2015 on counter-terrorism: Report on implementation of measures. Doc. 9422/1/15 REV 1.

93 UN Security Council (UNSC) resolution 2178 (2014) of 24 September 2014 on threats to international peace and security caused by terrorist acts.

94 Council Decision (EU) 2015/1914 of 18 September 2015 on the signing, on behalf of the European Union, of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No 196).

95 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196).

Mention must be made of the approval in March 2016 of the proposal for a Directive on Combating Terrorism with the key aim of aligning the definition of terrorist offences, as well as offences related with a terrorist group, including activities of a terrorist nature associated mainly with foreign terrorist fighters and terrorist financing, which are also punishable offences if committed on the internet and social networks⁹⁶. Nonetheless, it is underscored that irrespective of the principal target being foreign terrorist fighters, the threat posed by terrorists who act single-handedly, the *lone wolves*, and by *foiled* terrorist travellers whose passports were confiscated at national borders, should not be underestimated⁹⁷.

As regards what has been mentioned above and relating to the difficulties faced by Member States when they try to prosecute those who do not necessarily belong to a terrorist group, the proposal for a Directive responds here by classifying as an offence the act of belonging to a structured terrorist organisation, whereby this is “not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure”⁹⁸.

Likewise, one aspect that is viewed as particularly relevant is the incorporation of a series of connected measures such as the identification, interrogation and police supervision of returned foreign fighters, as well as the systematic exchange of information about them that should be shared with the Europol’s European Anti-Terrorism Centre and with other Member States via the Schengen Information System⁹⁹.

Combatting the funding of terrorism

The fight against the funding of terrorism forms a decisive aspect in the combatting of global terrorism¹⁰⁰ and consequently the European Agenda on Security sets out a

96 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 [first reading]. Brussels, 3 March 2016 (OR. en) 6655/16.

97 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. Brussels, 2.12.2015, COM(2015) 625 final, p. 3.

98 Art.2. letter d), 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. Brussels, 2.12.2015 COM(2015) 625 final.

99 Communication from the Commission to the European Parliament, the European Council and the Council: Delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union. Brussels, 20.4.2016, COM(2016) 230 final, p. 6.

100 Regulation (EC) No 2580/2001 of the Council of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJEU L334, de 28.12. 2001), Recital 2.

road map based on the launching of an Action Plan to Strengthen the Fight against Terrorist Financing, which focuses on two major objectives: 1. Tracing terrorists through financial movements and preventing them from moving funds or other assets; 2. Disrupting the sources of revenue used by terrorist organisations, by targeting their capacity to raise funds.¹⁰¹ For this process to be effective, it is vital to strengthen the participation of relevant specialists both at national and transnational level, who play a fundamental role in the Financial Action Task Force on Money Laundering and Terrorist Financing, and the representatives of the Financial Intelligence Units within Member States, as well as other bodies at EU level¹⁰².

As regards the first objective that focuses on dismantling sources of income and identifying the financing of terrorist organisations, the EU has considered it necessary to make transparency rules more stringent with a view to combatting terrorism financing, tax avoidance and money laundering, mindful of the fact that the global interconnectedness of the financial system facilitates the concealment and transfer of funds across the world making tracing money more difficult and playing to the benefit of money launderers, tax evaders, terrorists and fraudsters who manage to cover their tracks¹⁰³. Moreover, it intends to remedy the difficulties related to access to information about who really holds financial accounts, as well as setting out common guidelines regarding money laundering, tax evasion and illicit financing to better detect money laundering, corruption, the financing of terrorism and other criminal activities¹⁰⁴.

If we consider the Proposal for a Directive on Counter-Terrorism, terrorist financing activities are understood to be the provision or collection of funds¹⁰⁵, by any means, directly or indirectly, with the intention that they should be used or in the knowledge

101 European Commission, Press release: Commission presents Action Plan to strengthen the fight against terrorist financing, Strasbourg, 2 February 2016. IP/16/202.

102 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJEU L 141, of 5.6.2015), Recital 24.

103 Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC. Strasbourg, 5.7.2016 COM(2016) 450 final.

104 Proposal for a Council Directive amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities. Strasbourg, 5.7.2016 COM(2016) 452 final.

105 For the purpose of this proposed Directive on combatting terrorism, according to Art.2, letter a), “funds” is understood to be: “assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers’ cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit”.

that they are to be used, in full or in part, in order to carry out terrorism offences¹⁰⁶ or offences relating to a terrorist group, provocation to commit a terrorist offence, terrorist recruitment, the training of terrorists, receiving training with a terrorist purpose, travelling abroad for the purpose of terrorism, the organisation or facilitation of travel abroad with a terrorist purpose, aggravated theft with a view to committing a terrorism offence, blackmail with the purpose of committing a terrorist offence, the deliverance of false administrative documents with the purpose of committing terrorism, aiding or abetting, inciting and attempting¹⁰⁷.

The second objective of the Action Plan lies in dismantling and detecting sources of income for terrorist organisations, taking account of the fact that terrorists generally resort to criminal activities to obtain financing. In this respect, the need to detect 'high risk third countries' has been brought into the spotlight, countries in which there exists a series of strategic and judicial shortcomings that make it difficult to tackle the financing of terrorist activities that pose a significant threat to the financial system of the European Union¹⁰⁸. As a response to terrorist financing, the proposal for a Directive encompasses a series of harmonised and strengthened due diligence measures, as well as countermeasures concerning high-risk third countries. Here, various salient measures include virtual currency exchange platforms and prepayment instruments, with emphasis on access by the Financial Intelligence Units (FIUs) and other competent authorities to centralised banking registers and payment accounts, or to electronic systems for data retrieval and enhanced access to information and enhanced exchange of this information by the FIUs¹⁰⁹, which have additionally been integrated into Europol as of 1 January 2016.

There currently exists a Terrorist Finance Tracking Programme (TFTP), which plays an important role in anti-terrorism investigations by boosting the capacity to detect terrorist networks by tracing the financing chain. However, the TFTP is not free of flaws if one considers that it does not provide for an instrument to track terrorist financing

106 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJEU L 141, of 5.6.2015), Art. 1, para 5.

107 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. Brussels, 2.12.2015 COM(2015) 625 final. Art. 3-10, 12-14 and 16.

108 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC. Art. 9. 1.

109 Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC. Strasbourg, 5.7.2016 COM(2016) 450 final.

activities within SEPA countries (those that exclude financial transaction data relating to the Single Euro Payments Area), or between these countries in the case of SEPA transactions. Consequently, it has proven impossible to detect and obtain information relating to terrorist foreign fighters and their associates within SEPA countries, and despite the incorporation of the network of Financial Intelligence Units (FIUs) into Europol, this lacuna has not been rectified since the TFTP does not form part of the working methods of the FIUs¹¹⁰. Given the aforementioned challenge, it is being examined whether a European Terrorist Finance Tracking Programme, used as an *EU Equivalent System*, might play a key role in strengthening the capacity of the EU and its Member States to access relevant data and boosting their analytical capacity for tracing and identifying terrorists on the basis of their financial transactions¹¹¹, thus including the SEPA zone.

Firearms, precursors and explosives

Illegal firearms represent another serious threat to the internal security of the EU¹¹² and the fight against the illicit trade in firearms is considered itself to be one of the counter-terrorism measures where further progress is needed¹¹³ since despite the efforts already undertaken, it is still seen as incredibly easy to gain access to weapons, explosives and explosives precursors within the EU¹¹⁴. In this respect, the differences that exist between national legislations are an obstacle to effective checks and police cooperation across the whole of the EU¹¹⁵ as part of efforts to tackle the illicit trade of arms and explosive material. As a result, it has been deemed necessary to establish a series of common rules to fill the gaps, thereby facilitating judicial action and police investigations. Nonetheless, in addition to the shortcomings relating to the legislative framework of Member States, the challenges also lie in a series of practical issues, such

110 Council of the European Union. State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16, p.31 et seq.

111 In this respect “an equivalent EU system would be an independent European system for tracking terrorist finance through access to, searches on and analysis of the data of Designated Provider(s)”, Communication from the Commission to the European Parliament and the Council on A European terrorist finance tracking system (EU TFTS). Brussels, 27.11.2013 COM(2013) 842 final, p.3.

112 Internal Security Strategy 2015-2020, Doc. 9798/15, p.10.

113 Council of the European Union, Report to the European Parliament and national Parliaments on the proceedings of the Standing Committee on operational cooperation on internal security for the period July 2014 - December 2015, Brussels, 11 March 2016, 7033/16. p. 11.

114 Communication from the Commission to the European Parliament and the Council, Application of the European Agenda on Security: Commission takes action to combat terrorism and illegal trafficking of firearms and explosives Brussels, 2.12.2015, COM(2015) 624 final, para 2.

115 European Agenda on Security, COM(2015) 185 final of 28.4.2015, p.20.

as a lack of resources, contradictory political priorities or a lack of means to enforce existing laws, and these significantly hamper the cross-border progress being made in combatting the illicit trade and use of firearms and explosives¹¹⁶.

Despite the fact that various instruments exist in the field, the EU has launched an Action Plan with the aim of laying down a series of measures to restrict access to firearms and illicit explosives and, among these measures, highlights the need to create national contact points for firearms; map the global routes for trafficking towards the EU; reinforce cooperation between Member States, Europol and Interpol and similarly between Europol and the private sector¹¹⁷.

With respect to police cooperation, advances are considered to have been made concerning access to information systems, whereby an essential role is played by the creation of a single entry and a search interface between the Firearms Section of SIS II and Interpol's iARMS database¹¹⁸. Similarly, we should mention that Europol's support has proved vital in Member State operations and investigations by means of a series of operative analyses and cooperation on the basis of the European Bomb Data System platform (EBDS), as well the Joint Cybercrime Action Taskforce (J-Cat)¹¹⁹ that the Agency makes available to Member States.

In order to reinforce the EU offensive in this particular field, it is considered necessary to develop innovative detection instruments to counter the threats posed by explosives, and similarly to limit terrorists' access to explosives precursors and detonators¹²⁰. In this vein, concerns have been raised about a series of gaps in the implementation by Member States of the Regulation on Explosive Precursors¹²¹ and the need to review the regulatory framework is being examined in order to strengthen the security of explosive stocks, both

116 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons. Brussels, 18.11.2015 COM(2015) 750 final, p.5.

117 Communication from the Commission to the European Parliament and the Council, Application of the European Agenda on Security: Commission takes action to combat terrorism and illegal trafficking of firearms and explosives Brussels, 2.12.2015, COM(2015) 624 final, para 2.

118 Council of the European Union: State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16, p.8.

119 Communication from the Commission to the European Parliament and the Council, Application of the European Agenda on Security: Commission takes action to combat terrorism and illegal trafficking of firearms and explosives Brussels, 2.12.2015, COM(2015) 624 final, para 4.

120 Council of the European Union: State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16, p. 28.

121 Regulation (EU) No 98/2013 of the European Parliament and of the Council of 15 January 2013 on the marketing and use of explosives precursors.

for civilian and military use. Of particular concern is the loophole that would permit the reactivation of firearms and thus legislative measures have been taken to ensure that for firearms that have been deactivated this is done so irreversibly¹²².

Another series of loopholes in the current legal framework will be closed with the proposal for a firearms directive, which aims to enhance the dissemination of information, strengthen tracing, standardise the market and establish common rules for the deactivation of firearms¹²³, as well as to prohibit the sale of firearms and their components online, given the increased use of this sales channel for firearms and the difficulties encountered online as regards checking the legality of permits for the possession of firearms¹²⁴.

Passenger Name Record (PNR)

Recent terrorist attacks in the EU have once again highlighted the high threat level that we face. Consequently, it has been deemed necessary to implement a series of measures to guarantee a high level of security for all citizens. Measures, however, that cannot be carried out without a certain degree of intrusion into the right to privacy¹²⁵. Accordingly, it has been seen as vital that competent authorities be able to evaluate and identify passengers who before this evaluation were not flagged up as terrorism offence suspects yet for whom, once the analysis has been undertaken, PNR data indicate that they may have been involved in such activities and hence should be subject to an additional investigation¹²⁶.

On the basis of the new Directive, airlines are obliged to provide the competent authorities of Member States with the PNR data¹²⁷ of flights entering or exiting the EU,

122 Commission Implementing Regulation (EU) 2015/2403 of 15 December 2015 establishing common guidelines on deactivation standards and techniques for ensuring that deactivated firearms are rendered irreversibly inoperable.

123 Draft Council conclusions on strengthening the use of means of fighting trafficking of firearms, Press Release 713/15, 8.10.2015.

124 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons. Brussels, 18.11.2015 COM(2015) 750 final, p.10.

125 Meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union and Workshop on Data Retention in the Fight Against Serious Crime: The Way Forward Eurojust, The Hague, 10-11 December 2015. Doc. 5930/16, I.13.

126 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. OJEU L119, 4.5.2016. Recital 7.

127 Passenger name record data as far as collected by air carriers: 1. PNR record locator; 2. Date of reservation/issue of ticket; 3. Date(s) of intended travel; 4. Name(s); 5. Address and contact information (telephone number, e-mail address); 6. All forms of payment information, including

data which is to be evaluated by the Passenger Information Unit (PIU) of each state¹²⁸ and which, in turn, will be exchanged mutually in order to ensure interoperability¹²⁹. Given this extreme need, it is considered appropriate that Member States speed up the transposition of the Directive without waiting for the two-year deadline to be up and that they create the national PIUs as soon as possible¹³⁰.

Moreover, the combined use of API (Advanced Passenger Information System) and PNR data is particularly important, since this would increase the effectiveness of both of these systems as part of efforts to tackle terrorism and serious crime¹³¹ as well as generating added value within police investigations by reducing to a minimum the risk of carrying out checks and investigations on innocent people¹³².

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billing address; 7. Complete travel itinerary for specific PNR; 8. Frequent flyer information; 9. Travel agency/travel agent; 10. Travel status of passenger, including confirmations, check-in status, no-show or go-show information; 11. Split/divided PNR information; 12. General remarks (including all available information on unaccompanied minors under 18 years, such as name and gender of the minor, age, language(s) spoken, name and contact details of guardian on departure and relationship to the minor, name and contact details of guardian on arrival and relationship to the minor, departure and arrival agent); 13. Ticketing field information, including ticket number, date of ticket issuance and one-way tickets, automated ticket fare quote fields; 14. Seat number and other seat information; 15. Code share information; 16. All baggage information; 17. Number and other names of travellers on the PNR; 18. Any advance passenger information (API) data collected (including the type, number, country of issuance and expiry date of any identity document, nationality, family name, given name, gender, date of birth, airline, flight number, departure date, arrival date, departure port, arrival port, departure time and arrival time); 19. All historical changes to the PNR listed in numbers 1 to 18. Annex I, Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

128 Council of the European Union: State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16, p.12.

129 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, Recital 13.

130 Council of the European Union: State of play on implementation of the statement of the Members of the European Council of 12 February 2015, the JHA Council Conclusions of 20 November 2015, and the Conclusions of the European Council of 18 December 2015. Brussels, 4 March 2016, Doc. 6785/16, p.12.

131 Communication from the Commission to the European Parliament and the Council: Stronger and Smarter Information Systems for Borders and Security. Brussels, 6.4.2016 COM(2016) 205 final, p.15.

132 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, Recital 9.

Exchange of information on criminal records

One of the main objectives of the EU is that of affording its citizens a high level of security within the Area of Freedom, Security and Justice and, in order to guarantee this, the exchange of information on criminal records proves vital to combatting cross-border crime and terrorism, thereby contributing to the implementation of the principle of mutual recognition of sentences and judicial decisions within this area.¹³³ In this respect, Council Framework Decision 2008/675/JHA establishes that judicial authorities in Member States must account for the prior convictions of a person for various different offences in other Member States over the course of criminal proceedings, irrespective of the nationality of the person in question. Since this is highly sensitive information, the exchange of information between Member States' Criminal Records Registers guarantees a high level of data protection by means of the implementation of Council Framework Decision 2008/977/JHA of 27 November 2008, relating to the protection of personal data processed as part of police and judicial cooperation for criminal matters.

The need to improve and intensify the exchange of information on criminal convictions featured prominently in the Declaration on Combatting Terrorism¹³⁴, was reiterated in The Hague Programme¹³⁵ and subsequently found reflection in the Action Plan for the implementation of The Hague Programme¹³⁶ resulting in significant legislative progress. However, the shortcomings did not by then consist in the existence of a suitable legislative framework but instead, in practical terms, were due to the lack of a connected IT system of the Criminal Record Registers at European Union level using a European network.¹³⁷

This gap was remedied in part with the launch in 2012 of the electronic system ECRIS¹³⁸, the objective of which is permitting an effective exchange of information

133 Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA. Brussels, 19.1.2016 COM(2016) 7 final, p.5.

134 Declaration on Combatting Terrorism, Brussels, 29 March 2004. Doc. 7906/04.

135 Communication from the Commission to the European Parliament: The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice, Brussels, 10.5.2005 COM(2005) 184 final.

136 Council and Commission Action Plan implementing The Hague Programme on strengthening freedom, security and justice in the European Union (2005/C 198/01).

137 European Council, Brussels, 21 and 22 June 2007. Presidency Conclusions, Brussels, 20 June 2007. Doc. 11177/1/07 REV 1, para 30.

138 The current ECRIS system is based on Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States and on Council Decision 2009/316/JHA of 6 April 2009 on

between Member States about the criminal convictions pronounced in the EU in order to improve cooperation between national authorities as they counter terrorism and cross-border crime. It can be stated to a certain degree that, despite the fact that the possibility of exchanging information on third country nationals via ECRIS exists, there is no common European procedure or mechanism that does this effectively. In this regard, ECRIS is considered to be a key part of the fight against terrorism, radicalisation and violent extremism¹³⁹ and it is absolutely vital that within the Area of Freedom, Security and Justice, the competent national authorities are in a position to exchange information relating to those who have been convicted of criminal offences, whether they are EU nationals or not, while also making it possible for them to confer the same effects beyond the territory of the sentencing Member State¹⁴⁰.

Whilst until the present date no alternative to ECRIS has been found with respect to the exchange of information on the criminal records of third country nationals (TCNs) and the stateless, considering that systems such as SIS II, Prüm or EURODAC have been designed to respond to different objectives, the improvement to the ECRIS system with regard to the TCNs forms part of the strategy described in the European Agenda on Security and hence there is currently a proposal for an ECRIS Directive on the table¹⁴¹.

The proposal of the new Directive introduces a series of changes in order to reinforce and fill the gaps of the current legal framework, and in this context one important mechanism is one part of ECRIS aimed at identifying in an efficient manner the Member States that hold information on the criminal record of TCNs, transposed in a 'hit/no hit' system, based on an *anonymised* indexed filter that will make it possible to replace the costly and ineffective 'generic requests', which have hindered Member State use of ECRIS for TCNs. The ineffectiveness of 'generic requests' is partly due to the impossibility of storing TCN fingerprint data, a measure to be implemented in the Proposal for a Directive and justified by the need to guarantee more certain

the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA.

139 European Parliament: Report on the proposal for a directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA (COM(2016)0007 – C8-0012/2016 – 2016/0002(COD)) Committee on Civil Liberties, Justice and Home Affairs. 27.6.2016, Doc. A8-0219/2016. Amendments 4 and 7.

140 White Paper on exchanges of information on convictions and the effect of such convictions in the European Union (SEC(2005)63), Recital 1.

141 European Commission: Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA. Brussels, 19.1.2016 COM(2016) 7 final 2016/0002 (COD).

identification of TCNs, considering the difficulties that lie in determining their identity, either because reliable ID documents do not exist or cannot be found, or even because the TCNs have very common surnames. Of particular concern is the possibility of storing offences committed by minors in the National Criminal Record Registers. In this regard, the EU leaves the response to this matter to the discretion of the national legislation of Member States¹⁴².

Europol Regulation

Europol's new legal framework is based on Article 88 of the Treaty on the Functioning of the European Union, which establishes that Europol will be governed by a Regulation adopted in accordance with the ordinary legislative procedure, with a scrutiny procedure that reinforces the role of the European Parliament and national parliaments. Moreover, in order to guarantee enhanced data protection, the European Data Protection Supervisor (EDPS) will cooperate with national control authorities.

By means of the new Regulation, greater efficiency and effectiveness is sought for Europol, and, in this respect, we should underscore a series of new stipulations such as the obligation falling on Member States to provide the Agency with the data that it requires to fulfil its objectives¹⁴³. Furthermore, a provision allows Europol to receive personal data directly from private entities and even to transfer personal data to individual entities, for the latter case in exceptional circumstances¹⁴⁴.

Also of note is the creation of an integrated model of data management that permits Europol to establish links and connection points between various investigations, detect new trends and patterns in organised crime, in addition to avoiding duplications given

¹⁴² Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA. Brussels, 19.1.2016 COM(2016) 7 final. On the basis of the new Article 4 a) of the Proposed Directive, a series of obligations is established for Member States as regards the convictions of a TCN that have been handed down on their territory and in this respect they will have “an obligation to store criminal record information; the obligation to distribute to the other Member States an anonymised index-filter with identity information on the TCN convicted in its territory for the purpose of identifying the Member States holding criminal record information on a TCN; and the obligation to update the index-filter in line with any deletion or alteration of the data included in it.”

¹⁴³ Recital 13, Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

¹⁴⁴ Art. 26, Regulation (UE) 2016/794 – EUROPOL, 11 May 2016.

the possibility of cross-referencing the data retained¹⁴⁵. For that matter, of particular interest are also the legislative provisions relating to the possibility of Europol exchanging personal data with services from third countries and with Interpol¹⁴⁶.

Major challenges

Prevention, combatting radicalisation and intercepting travel are some of the priorities of national authorities as part of their efforts to counter the trend of foreign fighters in an efficient and comprehensive manner¹⁴⁷ meaning that national legal instruments and anti-terrorism policies are subject to constant evolution in order to better respond to the changing terrorist threat.

Europol alerted at a very early stage that France, Spain and the United Kingdom are the countries most seriously affected by terrorism due to the number of terrorist attacks and suspects detained¹⁴⁸. Unfortunately, the scenario today has not changed and therefore we will briefly outline the changes introduced to national legislation by France, Belgium and Germany (since they have been the targets of recent terrorist attacks), the United Kingdom (because of Brexit) and Spain.

France

With regard to the range of counter-terrorism legislation in France, the French Penal Code dedicates Chapter II “Special Provisions” Art 422 - 1 to 7 to terrorist acts, classifying terrorist acts as separate offences to which a special procedural regime is to be applied. Furthermore, the French law of 23 January 2006 permits the freezing of assets following an order issued by the Ministry of Economy and Finances for all those who commit or who attempt to commit terrorist acts, therefore including people or entities. Likewise, Law No. 2012-1432 concerning security and combatting terrorism defines the advocacy of terrorist actions as a terrorism offence and permits “French justice to prosecute acts of terrorism committed abroad by French citizens or by those who habitually reside in France, allowing for those who have participated in terrorist training camps abroad to be prosecuted even if that have not committed reprehensible

145 Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation (EUROPOL) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA. Brussels, 24 February 2016. Doc. 14957/15 ADD 1.

146 Recital 32, Regulation (EU) 2016/794 – Europol, 11 May 2016.

147 Foreign Fighters: Eurojust’s Views on the Phenomenon and the Criminal Justice Response, 2015 Response, p.2. et seq.

148 Europol, TE SAT 2007. EU Terrorism Situation and Trend Report, March 2007, p.3.

acts on French territory, and for the freezing of the financial interests of those who incite terrorism”¹⁴⁹.

Nonetheless, we must point out that French counter-terrorism legislation fully reflects the provisions laid down in paragraph 6 of United Nations Security Council Resolution 2178 (2014), insofar as it classifies as an offence travel and the organisation of travel with a terrorist purpose; the participation in and association with a terrorist group, including all preparatory measures such as training, ideological indoctrination etc.; recruitment, including when an individual targeted by recruitment has not responded positively to a request; financing of terrorism, which makes it possible to bring direct prosecution measures against those who assist terrorists by means of the supply of funding; financial advisors and intermediaries, who, with full knowledge of the facts, participate in the management, concealment and transfer of funds¹⁵⁰.

Belgium

The Belgian legal framework for counter-terrorism is considered to be consistent and effective, and proof of this is Title I *ter* of the Belgian Penal Code and Articles 137 to 141*ter* that pertain to acts of terrorism. Moreover, the law of 18 February 2013, which amends Book II Title I *ter* of the Code classes as terrorist offences public provocation to commit a terrorist offence and recruitment for terrorism. This law transposes Framework Decision 2008/919/JHA of the Council of the European Union of 28 November 2008 amending Framework Decision 2002/475 /JHA of the Council, of 13 June 2002 on combatting terrorism, into Belgian legislation. Likewise, Belgian counter-terrorism legislation is in conformity with the Council of Europe Convention on the Prevention of Terrorism, which was opened for signature in Warsaw on 15 May 2005¹⁵¹.

Having said that, Belgian anti-terrorism legislation criminalises as terrorist offences the participation in and support to terrorist groups; the financing of terrorism; incitement to or the perpetration of terrorism offences, recruitment and coaching provided in order to enable others to commit terrorist offences, training and travel abroad with a terrorist purpose¹⁵².

Germany

In June 2015, Germany initiated new anti-terrorism legislation with a view to implementing the United Nations Security Council Resolution on foreign terrorist

149 France Diplomatie, 2013. <http://www.diplomatie.gouv.fr/es/asuntos-globales/defensa-y-seguridad/terrorismo/>.

150 Criminal justice response to the phenomenon of foreign fighters - Compilation of replies, Annex X. Doc. 5206/2/15 REV.

151 Council of Europe. Committee of Experts on Terrorism (CODEXTER). Profiles on counter-terrorism capacity. February 2014, p.I. www.coe.int/terrorism.

152 Criminal justice response to the phenomenon of foreign fighters - Compilation of replies, Annex II. Doc. 5206/2/15 REV 2.

fighters. Accordingly, Germany has classified as an offence of a terrorist nature all travel outside of the country with the intention of receiving terrorist training and financing terrorism (Law amending preparation as a serious and violent offence that endangers the security of the state, 12 June 2015), and similarly implements a series of passport and ID document restrictions for foreign fighters (Law amending the law on identity documents and the use of a substitute ID card, 20 June 2015)¹⁵³.

Here, the German Criminal Code criminalises visits to a terrorist training camp with the purpose of preparing a terrorist attack; incitement to the commission of terrorist offences; offences relating to the support, recruitment and membership of a terrorist organisation; the preparation or commission of a serious and violent offence that endangers the security of the state; travel abroad to receive terrorist training and the financing of terrorism.¹⁵⁴ We must also mention that paragraph 1 of Article 91 of the German Criminal Code incriminates any person who produces or supplies to another written material whose content might serve as instruction for the commission of a serious, violence offence that endangers the security of the state if the circumstances of its dissemination are conducive to rousing or encouraging other persons to prepare to commit such an offence. Likewise, paragraphs 1 and 2 of Article 91 incriminate anybody who obtains written material with the aim of committing a serious violent offence that jeopardises the security of the state¹⁵⁵.

United Kingdom

The Terrorism Acts of 2000 and 2006 foresee a variety of criminal provisions that even allow for the prosecution of potential foreign fighters. Accordingly, acts that are deemed crimes include the financing of terrorism, the participation and/or direction of a terrorist group, incitement to terrorism and journeys taken to join the ranks of a terrorist organisation. Similarly, in March 2015, the United Kingdom adopted the Serious Crime Act that permits the prosecution of those people who have received terrorist training abroad and who have links to the UK or who are seeking to carry out attacks on its territory¹⁵⁶.

153 Global Legal Monitor. Germany: New Anti-Terrorism Legislation Entered into Force. <https://www.loc.gov/law/foreign-news/article/germany-new-anti-terrorism-legislation-entered-into-force/>.

154 Criminal justice response to the phenomenon of foreign fighters - Compilation of replies, Annex VI. Doc. 5206/2/15 REV 2. See also: International Centre for Counter – Terrorism – The Hague: The Foreign Fighters Phenomenon in the European Union Profiles, Threats & Policies. DOI: 10.19165/2016.1.02. p. 34.

155 Commission Staff Working Document. Accompanying the document. Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/919/JHA amending. Framework Decision 2002/475/JHA on combating terrorism (COM(2014) 554 final). Brussels, 5.9.2014. SWD(2014) 270 final, p.3.

156 International Centre for Counter – Terrorism – The Hague: The Foreign Fighters Phenomenon in the European Union Profiles, Threats & Policies. DOI: 10.19165/2016.1.02. p.41.

The main terrorist threat that the United Kingdom faces continues to be an Islamist one, above all one emanating from Syria and Iraq. On the other hand, it is estimated that in the country there are approximately 350 returned combatants, which led to an increase in the threat level due to a situation in which the risk of attack is highly likely.¹⁵⁷ In June 2016, the United Kingdom voted to leave the EU, which according to the British Director of Europol, Rob Wainwright, will have the consequence of jeopardising the country's potential to combat terrorism, as a result of the loss of access to databases and information systems, in addition to the operational projects being undertaken in the EU.¹⁵⁸ Without the shadow of a doubt, the success of activities to combat terrorism demands close international cooperation and collaboration¹⁵⁹.

Spain

The Preamble to the new Spanish Counter-terrorism Act underscores that “Spain’s experience of countering terrorism [...] has allowed it to develop effective criminal legislation to counter terrorism predominantly marked by armed groups such as ETA and GRAPO”. Consequently, although it is true that aspects and the modus operandi of Islamist terrorism are totally different to that of the aforementioned terrorist groups, the view is that “Spanish criminal counter-terrorism legislation constitutes a typical example of legislation of an exceptional and emergency nature”¹⁶⁰.

In this regard, terrorism offences are classified in Organic Law 2/2015, which amends Organic Law 10/1995, and which criminalises terrorist financing, participation in a terrorist organisation, incitement and recruitment to terrorism, training with a terrorist purpose and also travel abroad with the intention of joining a terrorist group or to commit an act of terrorism¹⁶¹. We should mention that Article 579 Paragraph 1 classifies as an offence provocation, conspiracy or incitement to commit terrorism offences by means of the distribution or public dissemination of messages or slogans designed to provoke, encourage or facilitate the commission of any of the offences classified under the chapter on terrorist groups and terrorism offences (Articles 571 to 580) or to create or increase the risk of these being committed.

After a brief overview of the legislative changes introduced by the aforementioned countries, we should mention that despite the significant progress made at legislative level in the EU and particularly in the Member States, Eurojust has warned of the challenges faced by competent national authorities when investigating and assessing

157 Contest The United Kingdom’s Strategy for Countering Terrorism Annual Report 2015.

158 *The Guardian*, 12 June 2016.

159 Contest The United Kingdom’s Strategy for Countering Terrorism Annual Report 2013.

160 DE LA CUESTA, J. L.: *Legislación antiterrorista en España, SOS Attentats, Terrorisme, victimes et responsabilité pénale internationale*, Paris, 2003 (ISBN: 2-7021-3426-2), p.5.

161 Organic Law 2/2015, of 30 March, amending Organic Law 10/1995, of 23 November, of the Penal Code, regarding terrorism offences.

“strong evidence” in cases of suspected travel abroad for the purpose of receiving training to commit terrorist attacks, given the impossibility of entering into judicial cooperation with the authorities in Syria to obtain credible evidence of the activities of returnees. Evidence that moreover is able to be classified within different categories of risk to international security: high, moderate and low¹⁶².

Likewise, Eurojust also insists upon one of the other challenges faced by national competent authorities and that lies in the difficulty of obtaining electronic evidence from other jurisdictions in order to demonstrate support or participation in online terrorist activities, such as the interception of voice communications like Skype or Viber, given the restrictions vis-à-vis data retention and the difficult cross-border cooperation experienced with internet service providers both inside and outside of Europe. In this vein, the Agency has highlighted a series of obstacles and, among these, it mentions: 1. Absence of common legal standards for interceptions of VoIP; 2. The difficulty in identifying IP addresses for communications originating from call shops or Internet Cafes; 3. Gaps in national legislations to criminalise and prosecute as terrorist offences the hosting and administration of a website with terrorism-related material; 4. Lack of harmonisation of laws at EU level in relation to the period of retention of data, which can create difficulties in gathering evidence and judicial cooperation; 5. Obstacles regarding the freezing of a personal account on a social network (e.g. Facebook) when the Internet Service Provider (ISP) is located in a different jurisdiction to the investigation¹⁶³.

However, recognising the progress that has been made and continues to be made not only at legislative, but also at operative, level, counter-terrorism measures at EU level, and more specifically at the level of each Member State, may be considered to be adequate provided that integration and cooperation between Member States becomes as complete as possible. Unfortunately, a great deal remains to be done.

CONCLUSIONS

Over the course of this essay, the author has highlighted a series of EU measures and instruments implemented with a view to tackling the phenomenon of global terrorism that threatens not only the internal security but also the external security of the region.

Just as has been repeatedly mentioned, the EU, as it stands committed to its objective of guaranteeing an Area of Freedom, Security and Justice for its citizens, has opted to combat terrorism and extremist radicalisation by means of a series of measures that can be described as *Hard Responses* and *Soft Responses*, designed to create

162 Foreign Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response, p.2.

163 Foreign Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response, p.3.

an internal security structure. Although it is true that progress has been made, it is also true that there still remain a series of shortcomings and gaps that hinder a firm and robust response to the phenomenon of terrorism.

In order to remedy these shortcomings, it is imperative on the one hand to update and harmonise legal instruments and, on the other hand, to improve urgently the exchange of information between the competent authorities of Member States, as well as interconnecting all of the existing information systems, enhancing border security and working at judicial cooperation level with the authorities in Syria with a view to obtaining solid evidence of the activities carried out there by returnees.

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