PRE-RIGHTS

**PRE-RIGHTS PROJECT:**
Assessing impact and performance
of preventive measures
on EU Directives and Framework Decisions.

# D.4.8

# Practical Manual on Preventive Measures in Europe and Beyond: Promising Practices and Guidance

**PARTNERS**

CEI
CENTRAL EUROPEAN INITIATIVE

CSD CENTER FOR THE STUDY OF DEMOCRACY

AGENFOR INTERNATIONAL

L-Università ta' Malta

IPS INNOVATIVE PRISON SYSTEMS

Die Senatorin für Justiz und Verfassung
Freie Hansestadt Bremen

KEMEA

ROMANIAN-AMERICAN UNIVERSITY

**GRAPHIC DESIGN**
Studio Mark, Trieste

2022

## Project

| | |
|---|---|
| **ACRONYM** | PRE-RIGHTS |
| **TITLE** | Assessing impact and performance of preventive measures on EU Directives and Framework Decisions |
| **COORDINATOR** | InCE Iniziativa Centro Europea – Segretariato Esecutivo |
| **REFERENCE** | 831616 |
| **CALL** | JUST-JCOO-AG-2018 |
| **TYPE OF ACTION** | JUST-AG |
| **CONSORTIUM** | 1. InCE Iniziativa Centro Europea – Segretariato Esecutivo (InCE-SE), Italy<br>2. Center for the Study of Democracy (CSD), Bulgaria<br>3. Agenfor International Foundation (AGENFOR), Italy<br>4. Universita TA Malta (UOM), Malta<br>5. Qualify Just - IT Solutions and Consulting LDA (IPS), Portugal<br>6. Bremen Senate of Justice and Constitution (Bremen MoJ), Germany<br>7. Kentro Meleton Asfaleias (KEMEA), Greece<br>8. Universitatea Romano Americana Asociatie (RAU), Romania |

## Deliverable

| | |
|---|---|
| **NUMBER** | Deliverable 4.8 |
| **TITLE** | Practical Manual on Preventive Measures in Europe and Beyond: Promising Practices and Guidance |
| **LEAD BENEFICIARY** | AGENFOR |
| **WORK PACKAGE** | 4 |
| **DISSEMINATION LEVEL** | PU |
| **DUE DATE** | 30TH APRIL 2022 |
| **SUBMISSION DATE** | 30TH APRIL 2022 |
| **AUTHORS** | Fabrizia Bemer - International Cooperation - Public Prosecutor's Office of Florence<br>Paola De Franceschi – Italian Magistrate<br>Piero Suchan – Italian Magistrate<br>Ljubomir Petruljeskov - Program Lead, Eastern Europe and Central Asia - IDLO<br><br>Nicoletta Gallori (AGENFOR INTERNATIONAL)<br>Anna Marconato (InCE)<br>Sergio Bianchi (AGENFOR INTERNATIONAL) |

**TABLE OF CONTENTS**


*Introduction* 9

**1.** *CHAPTER I*
*Overview on Preventive Measures* 13

**2.** *CHAPTER II*
*Italian Legal System of Praeter Delictum Preventive Measures* 47

**3.** *CHAPTER III*
*Preventive Measures Outside EU: Moldova, Serbia, and Montenegro* 69

**4.** *Conclusion* 103

# Introduction

The scope of the **European Project "Pre-Rights"** is to promote a balanced and coherent implementation of preventive measures with a view to reach a higher level of juridical harmonization among the Member States.

The Consortium has focused on the following EU legislative tools:

- EU Directive 2014/41 on European Investigation Order (EIO);
- Framework Decision 2002/584/JHA on European Arrest Warrant (EAW);
- Framework Decision 2008/909/JHA on mutual recognition to judgments in criminal matters imposing custodial sentences or deprivation of liberty;
- Framework Decision 2008/947/JHA on mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternatives sanctions (EPO);
- Framework Decision 2009/829/JHA on mutual recognition to decisions on supervision measures as an alternative to provisional detention (ESO);

The above-mentioned judicial cooperation instruments have been discussed for a more efficient application of the instruments themselves, but in particular in relation to migration, radicalisation and violent extremism leading to terrorism.

The purposes are the following:

- Assessing the impact and performing of existing pre- and post-trial preventive measures, and *praeter delictum* preventive measures;
- Gathering information on their main characteristics, advantages, disadvantages and challenges;
- Reporting recommendations and most relevant reflections, principally based on national practices, and their applications by practitioners at European level.
- This Manual aims to offer an overview of the different preventive measures put in place by EU Member States, either to contrast criminal behaviour of individuals prosecuted or convicted for serious offences (pre-trial and post-trial measures), or to prevent the commission of crimes and protect society from threats to public safety (*praeter* or *ante delictum* preventive measures).

Not in all Member States pre-trial and post-trial measures are treated by the Judiciary, as it should be, because they usually involve heavy limitations to the rights of the defendant.

*Praeter delictum* measures, usually less invasive than pre-trial measures, are treated by Administrative Authorities (Law Enforcement Agencies), Intelligence Services, or by the Judiciary.

In this framework, a special regard is reserved to terrorism related offences and to the threat of radicalization of inmates. Useful remarks shall be dedicated to the suitable implementation of the fundamental instruments of judicial cooperation, namely the European Arrest Warrant, the European Investigation Order, the European Supervision Order, and the Mutual Recognition of Custodial Sentences, in the field of preventive measures.





This Manualis composed of three chapters, followed by conclusive remarks based on the performed analysis and results of the PRE-RIGHTS activities:

- Chapter 1, giving overview on Preventive Measures, in particular those conceived to tackle radicalisation and terrorism, applied in the Member States which participated to Focus Groups and Judicial Living Groups in the frame of the “PRE-RIGHTS” Project.
- Chapter 2, focusing on the Italian legal system of *praeter delictum* preventive measures.
- Chapter 3, providing examples of Preventive measures outside EU:  Moldova, Serbia, and Montenegro.

# CHAPTER I

## Overview on Preventive Measures

The topics that this Manual will treat show several interesting aspects and envisage the concrete and suitable application of all kinds of **preventive measures** in the Member States to tackle the risk of perpetration of crimes (in general) and of those related to political or/and religious radicalisation and terrorism (in particular).

As a first level of the approach to prevent the mentioned risks, there is a need of social and cultural prevention that could be complied through the educational system at each level (school, sport and cultural institutions). The second level is represented by the intelligence services. The third level is represented by pre-trial preventive measures, trial or/and post-trial preventive measures, of administrative and/or judicial nature or of s.c. "hybrid" nature, inside or outside the penitentiary system.

As explained further on, a useful combination of those different kinds of preventive measures would be of great importance.

Special attention will be reserved - in relation with each specific issue - to the respect of the necessary balance between priority respect for fundamental human rights and assurance for public and private security; and to the need in achieving a clearer definition among security and judicial authorities in prevention policies.

As a matter of fact, there are significant differences from country to country concerning the preventive measures to be used, connected to each country's history and legal system.

Within the PRE-RIGHTS project, Lawyers, Judges, NGOs specialized in this field, representatives of the Police Academy and the University had

the opportunity to discuss during dedicated Focus Groups and Judicial Living Labs (JLLs), having a national and transnational focus, depending on the cases. Focus Groups and JLLs represented valid occasions to gather the inputs from first-line practitioners and to draw a detailed picture on the set of preventive measures in different EU countries and their application

## SWEDEN

The following preventive measures on administrative level emerge from the survey:

- Control of public procurement processes, licences and permits in order to tackle organised crime groups (motorcycle gangs, illegal immigration, drug trafficking);
- Necessity of registration of the company into the PRV (Patent and Registration Office).

Those preventive measures ensure a positive result under the condition that the public administration is proactive and able to realise forms of penetrant, efficient and useful controls, in respect of the rule of law.

Sweden has stressed the problem of so called *"private and family life"* with possible infringement of art.8 ECHR; This matter is still under discussion.

A more serious and general problem could be represented by the fact that a specific aspect of the prevention of organised crime is focused - through appropriate legislative or administrative measures, on internal or external level - on the reduction of current or future opportunities for organized criminal groups to participate in lawful markets with the proceeds of crime.

Although such preventive measures are considered to be efficient, they raise - especially for EU Member States - problems concerning the compatibility of some exclusion procedures (like the Swedish model) with the internal common market and free competition requirements.





If exclusion in one State is more extensive with respect to the provisions of Directive n.93/37 EEC of the 14 th of June 1993[1] (e.g. based only on suspicion and not on a final sentence of conviction or on other equivalent acts), this could be in conflict with the EU legislation and could affect the equality among stakeholders on common market (also because in this field there is not a sufficiently strong harmonisation, coordination and cooperation on EU level), with negative outcomes for the openness and fairness of the free market in goods and services.

## ESTONIA

In Estonia, Organized Criminal Groups (in particular, specialized in smuggling precious metals from Russia through Estonia to the west, tax evasion and drug smuggling) have been imported from the former Soviet Union and afterwards from Russia. In 1991 Estonia became independent and introduced the Market Economy. Initially, from the point of view of international organised crime, Estonia was treated primarily as a transit country; now, as result of Estonia's economic development, organised crime groups are more and more making capital investments in Estonia, through use of money laundering and using bribery to great extent.

The main goals pursued in the criminal sector by Estonian legislator are the following:

1. restriction of the spreading of pirate goods;
2. more efficient protection of property and more safety on streets and places;
3. better availability of victim assistance;
4. avoiding recidivism;
5. decrease in criminal offences committed by youngsters.

[1] COUNCIL DIRECTIVE 93 / 37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts

A special preventive measure is "Occupational ban" for up to 3 years for a convicted offender, that means exclusion from participation to public tenders.

But concerning this preventive measure the danger of lack of a specific legal basis and, as consequence, the high possibility of challenge in Court (this point represents one of the most critical ones as undelined further on) has been stressed.

The primary focus in Estonia is ensuring internal integrity by anticorruption measures: a fundamental scope that should be taken in consideration for a general application in all Member States.

## THE NETHERLANDS

The traditional view that some given ethnic groups are specialised in special kinds of drug- trafficking should be discussed considering the ethical implications of such statements.

The Netherlands has been and is still considered as a "transit country" that is mainly affected by the so called "transit crime".

Making use of the means included in the 3rd level of preventive measures, these types of crimes could be countered via a preventive administrative route as well as by a repressive criminal justice route.

Therefore, permits - mainly in the fields of constructions, environment and tendering - can be refused (in order to tackle organised crime) on the basis of involvement in crime in any way, including future crime, but the suspicion must be backed up with reliable evidence, checkable by the applicant and by a Court (as concrete examples: new Metro Line and "Wallen Project" sex exploitation in Amsterdam[2]).

[2] Manrico Luzzani, Criminal Law Approaches Tackling Organized Crime N.4207907, Milano, Università del Sacro Cuore.





Under this aspect, we need to mention the "Bibov Law" of 18th of June 2002 (Bibov – office as a part of the Ministry of Justice – giving advices to authorised local authorities), a subsidiary law applicable in the fields of constructions, hotel and catering, sex industry and coffee-shops, environment (processing of waste), selling and purchasing of real properties, "opium" permits. As in Sweden and Estonia – problems could emerge with regard to art.8 ECHR as possible infringements of private and family life.

This issue should receive a proper consideration in the frame of the present project on EU level of an appropriate modification of this principle for reasons of contrast of organised crime also on administrative level, always with judicial guarantees.

The Netherlands has developed a serious system of administrative preventive measures, that could be taken as a larger example in EU, but such approaches - on the other hand - could be abused becoming the dangerous tools of a sort of "formally legal but in reality, illegal" extortion by public authorities if not counterbalanced by a judicial system that guarantees concretely the defense rights and fair trials.

## ROMANIA

In the National criminal law system, preventive measures have a compulsive nature and may be ordered by judicial authorities to ensure the proper conduct of the trial, prevent the absconding of the suspect or defendant from prosecution or from judgment, prevent the committing of further criminal offences concerning natural persons and legal persons.

The restriction of an individual's freedom is only possible against a person heavily suspected to have committed a criminal act.

Before ordering a judicial preventive measure, the hearing of the suspect or defendant must be performed (as in case of recognition and execution of an EAW).

Pre-trial detention in prison, after the formal start of a criminal proceeding, is applied significantly more than other alternative preventive measures.

Although the law provides for extended rights of defence, in reality the effective exercise of these rights remains limited: for instance, lawyers are often notified shortly before (about 30 minutes) their first appearance for pre-trial detention or preventive arrest. Judges also have sometimes too short time to study the case, so they need to rely on prosecutor's arguments. Often the ground for preventive arrest is the crime's seriousness, but the criteria is contrary to ECHR standards. In most cases of immigrants suspected of radicalisation, the use of alternative measures (house-arrest, judicial review or judicial review on bail) was not even taken in account by Romanian judges who consider them, in general, less effective. Once the preventive arrest is imposed, the Court will hardly impose a non-custodial measure[3].

The following custodial and not custodial preventive measures are provided by the Criminal Procedural Code and are applicable against natural persons:

1. **Taking in Custody** for 24 hours maximum: a) judicial authorities proceed to the formal hearing of the individual concerned, before ordering a preventing measure against him/her (also in case of execution of an EAW)[4]; b) against the order, the individual concerned may submit a complaint, remedy to be resolved by the Prosecutor supervising the prosecution and hierchically superior;
2. **Judicial Control**: issued by the Prosecutor, the Judge for Rights and Liberties, the Preliminary Chamber Judge or by the Court;
3. **Judicial Control on bail**;
4. **House-Arrest**, which can not be ordered against an individual suspected of having committed a criminal offence towards a family member, or of having previously committed the offence of escape. Competent is the Judge for Rights and Liberties, the Preliminary Chamber, or the Court;
5. **Pre-Trial Arrest**: this is the harshest measure and has an exceptional character; it can be applied in the same conditions of house arrest only by a Judge.

[3] At least those are the opinions that came out from the report of the Romanian delegation.

[4] the application of this guarantee on wider EU level could represent a suggestion (of course if, during the hearing, the concrete risk of escape is avoided)





Other preventive measures (outside a formal criminal investigation) of administrative nature in relation to radicalised persons (or in risk of radicalisation) are dealt under the umbrella of foreigner's legislation including: Asylum Act, Foreigner's Act, Act on National Security, pointing towards Romanian tendency of not allowing entrance or swiftly removing foreigners from the territory if there are reasons of national security by expulsion on administrative level. In those cases, which entail a constraint on fundamental rights or freedom, an authorisation on such acts must be given by the PPO attached to the High Court of Cassation and Justice of Romania.

Foreigners entering from States where terrorism is a serious issue, are allowed to enter Romania only after consultation with the competent National Authority in the field of combating terrorism (Intelligence Services). This approach based on nationality can be considered problematic in light of principles of equality and non discrimination.

Public Custody (called also "Immigration Detention") is not considered as a form of detention, but "a temporary accommodation" of "dangerous" or "undesirable" foreigners, pending their return to their country of origin or of transit.

There are two types of detention centres in which foreigners can be accommodated: A) Public Custody Centres (immigration detention) and B) Regular Penitentiaries for foreigners arrested and charged with criminal offences (usually not linked to radicalism or terrorism).

Taking in public custody is the measure of temporary restriction of freedom of movement on Romanian territory ordered towards foreigners either by the General Prosecutor upon the request of the Inspector-

ate of immigration (Ministry of Internal Affairs) or, in a formal further judicial phase, by the Court, to fulfil all the steps for removal under escort from the territory, for a maximum period of 30 days, under the following conditions: a) presenting a risk of evasion from removal under escort; b) avoiding the preparation of the removal process under escort; c) subject to expulsion.

As transit country for immigrants willing to reach Hungary and Western Europe, in the last period many immigrants left, without any authorisation, the Reception Centres and slept on public streets or abandoned houses, producing a worse reaction in the public opinion.

The coalition for the rights of immigrants and refugees founded in 2017 by 11 NGOs, does not have the right to access related to persons considered a risk for national security or suspected of terrorist activities, who can only be approached by persons (i.e., lawyers) having a special certificate (ORNISS certificate).

Finally, the matters of radicalisation and terrorism[5] fall under the competence of the DICT (Directorate for the Investigation of Organised Crime and Terrorism).

Concerning the procedure of execution of an EAW in respect to fundamental rights, the most significant step was the adoption of the four European Directives on procedural rights in criminal proceedings: right to interpretation and translation, right to access to a lawyer, right of information (complete and correct), right to free legal aid.

In the balance between the respect of the rights of the accused or convicted person and the compliancewith the principle of mutual trust among MS, the aim is to strictly respect the cooperation in EU, even if it restricts the rights of the individual concerned.

[5] In Romania, in 2019 there were only 3 cases.





## PORTUGAL & SPAIN

In Portugal, the main institution charged to prevent criminal extremism is UCAT (as in Spain: CITCO[6]), based on the contribution of the judiciary police, the national republican guard, the immigration and border services and the maritime police, as well as other institutions who act as observers. UCAT realises a valid and useful relationship, in connection with the prison – system, working especially by its intelligence unit with the police.

In Portugal no telephone–interceptions are legally allowed without a judicial order. For preventive aims the pre-inquiry phase is quite important, in particular for the exchanges between UCAT and national and foreign intelligence services: this inter-action should represent an example of the so-called “hybrid investigation”.

In Spain, intelligence-led investigations are always carried out under the supervision of judicial authorities (differently than in Italy, where the intelligence-unit ex art.226 Legislative Decree no.271/89 needs an authorisation from the District Prosecution Office only for wire-tapping); but the intelligence-services can always gather freely useful information from the Public Administration and open sources.

In this country, if an inmate is identified as a radical, he or she has to be placed under observation by the prison staff and police (as we will see further on, in Italy under surveillance by prison’s administration, or, if not in prison, by the police, on authority); but obviously, as being a radical is not a crime, if he or she is not formally suspected to have committed a crime, it is not legally possible to place him / or her under criminal investigation. Nevertheless, in the Spanish prisons the “Guardia Civil” has a liason officer (not in Italy).

In Portugal, the “Provedoria de Justica” (Ombudsman) is a very important actor in this regard (in Italy: “Garante dei Diritti dei Detenuti”). It seems that the Portuguese Ombudsman, in the matter of our interest,

[6] In order to overcome some difficulties in this field between CITCO and the penitentiary institutions, there is a practitioner charged to develop such links.

does not issue any recommendation to Portuguese Prisons, not even concerning maximum security prisons (in Italy: "Istituti Penitenziari di Massima Sicurezza" dedicated to inmates submitted to the special regime of "the maximum security"), also because in Portugal a particular legislation concerning radicalised individuals does not exist. A suitable solution should be, on one side, to reintegrate people in respect for fundamental human rights, on the other side, to protect society and prison population.

In Spain, NGOs and Health Departement are not very available to share useful information with governmental bodies (especially LEAs and Intelligence units).

Application of EU FWD n.909 in Spaincould be really a good tool for individuals who committed crimes abroad, as an essential part of their reintegration process thanks to proximity to their family and community.

In Spain, concerning counter-terrorism measures, on police level the coordination is carried out by CITCO. On judicial level, a special Court is competent for terror-related crimes and financing terrorism; it seems to be very difficult to use legal evidence in trial concerning foreign fighters, collected outside (i.e., in Iraq or in Siria).

Spain has been under the threat of terrorism for over 50 years, while in Portugal terrorism and violent extremism are not a big problem.

On the other side, always in Portugal, the judiciary police in all its areas and the prison-system are under the same "umbrella" - same Ministry of Justice.

The following specific proposals came out from the PRE-RIGHTS workshops and Focus Groups:

- possible inclusion of Prison and Probation Services in the UCAT and transmission of police information to prisons (in Portugal);
- interaction between inmate's family and social circles (but there are problems concerning the religious authorities in Spain and Portugal as well);





- project (like in Kazakhistan) to prepare the re-socialisation of foreign fighters who come back home;
- regarding EAW and its interaction with preventive purposes and measures, the strict application of the principle of speciality could be a disadvantage (in both countries). Maybe a "soft" derogation to this principle in cases of crimes linked to terrorism could be discussed on EU level (as we will consider further on);
- necessity of "hybrid" intelligence-led investigations, with a tacit distinction between the roles of each organised body: Law Enforcement, Intelligence Services, Judicial Authorities;
- general risk due to the fact that scopes of preventive measures prevail over individual rights and liberties; need to better correlate the use of preventive measures against radicalisation and terrorism with 1) the use of EAW and EIO (for EIO a possible innovative application, in criminal matter, could concern the s.c. "hybrid investigation" if the judicial authority would be involved since the first phase); 2) the use of instruments foreseen in FWD 829, 909 and 947;
- necessity to avoid concentration of too much powers into elected officials, who have to manage these problems without the necessary experience and can act under the influence of political interests.

## MALTA

In this country, it happens that often people kept under arrest remain in prison for years, waiting for the trial to begin.

Security services do not require the authorisation of a judge to collect intelligence; even interception of communications can be authorised by the Ministry of the Interior.

An Intelligence Unit is responsible for specific wiretappings of inmates's communications and for gathering information concerning prison's population. This Unit is entitled to monitor the communications between inmates and outsiders and in general what is going on inside the prison. It only has preventive aims on administrative and intelligence level.

Where there is a need to investigate on criminal level, the way to convert intelligence to evidence - to spend in Courts - could be to employ the judicial police, namely the police's office which acts under direct supervision of the PPO (as in Italy).

At any rate it is remarkable - and maybe not in compliance with the general EU principles of guarantee of human fundamental rights - that no judicial authorisation is required for phone interceptions between inmates and third persons.

The Maltese legal framework protects almost absolutely two categories of people: lawyers and priests (while for the other categories is different, like in Italy where the obligation of secrecy can be lifted for certain categories of professionals by the Prosecutor or the Judge).

## CYPRUS

According to Cypriot criminal procedure, a suspected person can be put under custody for a period of 8 days after a Court order has been issued and this "eight -days detention period" may be renewed by the court (upon a police request) for a maximum detention period of three months, or even longer but only before and during the trial for s.c. "serious criminal acts" (like crimes linked to terrorism).

In the country, there is no special intelligence unit within prisons (like, as we will see, in Belgium), but Cyprus has set up a network of civil servants, municipal officials, directors of high schools and police officers overseen by the Director General of the Ministry of Justice that has also the function of National Counterterrorism coordination and there is a certain flow of information inside this network, between all those actors, coordinated on central level, even in the absence of court's orders.

For the counsel of defence, it is legally impossible to request formally the issue of an EIO, in violation with the EU Directive 2014 /41.





## BELGIUM

In Belgium, a specialised District attorney is entitled to deal with cases of radicalisation (like in the Italian system: the DDA - art. 51 par 3*quater* criminal procedural code), but at a due time of the criminal investigation, when it is necessary to issue a search warrant and / or authorize wiretapping, a judge shall take the decision.

The police work in Belgium is pretty similar to the way the police works in Malta, Cyprus and Ireland: the police investigates without necessity to address to the public prosecutor or the investigation judge; unless the police decides to investigate formally (to carry to trial a defendant) or invasive provisions or measures (wiretapping) are requested: in those cases the police needs judicial intervention (absolutely different than in Italy, where since the first steps of a criminal investigation the police has the duty to inform the PPO and depends largely on this judicial authority).

In this country, there are special prisons where individuals convicted for violent extremism are concentrated, and the prison staff has the duty to inform the police about any significant event that would be evaluated once the concerned person is waiting to be definitively released. But before a "radicalised" individual is definitively released from prison, he/she is first referred to another court that takes the decision whether he/she is ready to return to society or not[7].

The Belgian Parliament has created a platform where everyone can speak out (it seems also if he / she represents a secret source) without being subject to indictment.

[7] This solution in Italy would be considered in contrast with the rule of strict application of the rule of law.

During the PRE-RIGHTS Focus Groups[8] ,a general list of preventive measures applied in EU Member States emerged:

- Social Preventive measures
- Bail
- Guaranty from a trustworthy person
- House Arrest
- Judicial Control
- Prohibition to leave the country
- Refrain from a specific type of activity
- Seizure of the passport
- Refrain from driving a given type of vehicle
- Social guaranty
- Supervision of the police
- Suspension of public function or profession
- Temporary arrest and
- Expulsion from the country where the individual risks to be radicalised.

## CROATIA

Croatia has transposed into national legislation all important EU legal acts and decisions of the Council of Europe and other international institutions related to radicalization and violent extremism leading to terrorism.

The Crime Prevention System in Croatia includes several bodies, each with a specific role, that work together for preventing criminal deeds and prosecuting perpetrators of criminal actions, ensuring their imprisonment once convicted definitely, and their rehabilitation after having served their sentence.

[8] Participants: Malta, Ireland, Cyprus, Belgium





This system is organised in cooperation with local governments.

Concerning the application of judicial preventive measures, they can be applied only by a judicial authority in the frame of a criminal procedure (by the State Prosecutor).

Prison and Probation Services cooperate with the Police, while civil society organisations play an active role in the protection of human rights of aliens, in particular of migrants applying for asylum. The Croatian Law Centre (CLC) offers free assistance to asylum seekers; monitors legality of conduct of police officers charged with procedures of illegal (or even legal) immigration in the frame of an agreement with the Ministry of Interior; CLC supervises the approach of migrants to the national system, carrying out educational activities in particular preventing the misuse of internet and social networks for radicalisation (from commercial social networks and communication platforms to the s.c. “Dark Web”).

Concerning the correlation between the PRE-RIGHTS survey results and EU Directives and Framework Decisions, in Croatia special preventive measures focused on persons who represent a real threat to national security are to be understood as provisions of repressive nature.

In respect to the principle of mutual recognition, the question whether a criminal offence was committed and, if so, the requested person (by an EAW) is its perpetrator, can only be subject of criminal proceeding, for which surrender is requested, and not of the surrender procedure itself, in which it is not permitted (save macroscopic elements of doubt) to examine whether there is a reasonable suspicion that the wanted person is the perpetrator.

In each County’s Office, a Prosecutor monitors the MLA cases and assists his/her colleagues – working all over the district – as intermediary with colleagues from EU Member States, being part of EJN Contact Points.

In cases of execution of custodial sentences imposed on Croatian citizens, who cannot legally be extradited to other MS, the proceeding must be transferred to Croatian judicial authorities. Otherwise, when the procedure of recognition and execution of a foreign judgment (as an

alternative to surrender) is started, there are serious problems of insufficient certificate from the FWD 2008/909.

One case has been reported, where a defendant was prosecuted for offences of preparing acts of terrorism and finance terrorism: the gathering of evidence required the assistance of USA authorities because perpetrators used Facebook profile for communication with accomplices. The execution of the formal MLA request lasted very long (difficulty to prove the probable cause) but fortunately it was possible to easily obtain information on police level (something that on EU level has become rare after the introduction of EIO) so that American authorities sent the documents as "spontaneous exchange of information".

In Croatia, radicalisation can not be considered a crime or criminal activity also if it can lead to violent extremism or terrorism. As in most EU Member States a double system of preventive measures is in force:

1. General Preventive Measures performed by schools, N.G.O.s, religious and cultural or sport organisations, addressed to wider and specific groups of youngsters;
1. Special Preventive Measures of competence of Security and Intelligence Agencies that collect data (through police and intelligence agencies) concerning specific groups or individuals related to violent radicalisation.

## GERMANY

Parallel to the adaptation of the legislative framework to the evolving threat of violent radicalisation and terrorism, the majority of countries seem to have experienced an extension of powers for the security authorities (in particular police and intelligence agencies) to whom has been gradually given the right to use "special means" or technologies to prevent and detect crimes related to terrorism.

This is the case of Germany, whose government since 2002 released adopted laws to improve the fight against terrorism through: 1) the expansion of competences of the security authorities such as improvement





of data exchange, prevention of entry of terrorist criminals, application of identity securing measures (Counter Terrorism Act 9/2002); 2) the creation of a joint data base to share information and files regarding terror-related cases between the police and intelligence services (Act 22/2006); 3) by allowing the Federal Criminal Police Office (BKA) to use special tools of data collection, to issue alerts for police observation or carry out surveillance activity.

Another suggestion coming out from the Focus Groups is the application of a wider use of the s.c. "Trojan Horse", like it is employed in Italy in the field of terrorism related crimes.

## POLAND

In this country, in the field of radicalisation and terrorism, the competent authority is mostly the Internal Security Agency that has established "The Terrorism Prevention Centre of Excellence (TPCoE)".

If there is a risk that the foreigner placed in a "guarded centre" will not comply with the binding rules of conduct, he/she may be placed in arrest inside the same guarded centre, even for 48 hours in isolation.

According to the Polish Code of Criminal Procedure, judicial preventive measures (like temporary arrest, bail, supervision of the police, ban for leaving the country) may be applied in order to secure a proper conduct of the proceedings or, in exceptional cases, to prevent the suspected or accused person to perpetrate further criminal offences (this specific aspect concerns also the execution of an EAW). However, the measure may be applied only if the collected evidence indicates a high probability that the accused person has committed the offence.

For years the main problem in Poland has been the overuse and the length of pre-trial detention (instead of non custodial measures) in relation with foreigners suspected of crimes (in particular against national security).

In 2018 – according to the report prepared by the "Helsinki Foundation of Human Rights" – in 94,92 % of cases prosecutor's request for prorogation of the temporary arrest was accepted (therefore, it seems to be very difficult to convince the court to impose a non custodial preventive measure).

Another serious issue in this country is that the access to the case file for judicial and (also) administrative cases can be limited to the counsel of defence[9], and this rule could be in contrast with respect of human rights. Therefore, if temporary arrest is applied during the investigation, the prosecutor allows access to the counsel of defence only to the evidence strictly related to the preventive measure and excludes the evidence from witnesses, when there is a well-founded fear for threat to life or freedom of the witness himself, or for a person closest to him/her[10]. These limitations make more difficult to challenge the application of the temporary arrest, because the Prosecutor and the Court aknowledge more evidence than the defence, with a possible infringement of the human right of a full defence. Moreover, in most cases the real time at disposal to study the (limited) file is very short.

The average duration of the pre-trial detention in Poland in the year 2018 was 12,9 months and by district courts 6 months; but there are temporary arrests lasting for years.

Concerning the application of specific prevention measures in relation to radicalization/ aliens/ stateless persons, there are no further legal provisions which could be tailored to these groups.

In 2016, however, Poland has introduced the "Act on Antiterrorist Activities" and amendments to other laws which set out a series of exceptional measures applicable to non nationals.

[9] This limitation does not exist, for instance, in the Italian Legal System

[10] This issue does not concern, for instance, the Italian Legal System, where the witnesses in danger receive special protection measures, but their statements are entirely accessible to the counsel defence.





Surveillance and also wiretapping are possible without court oversight and extraordinary surveillance powers are granted to the Internal Security Agency (ISA), without ensuring effective judicial review, allowing ISA to target foreigners for surveillance and Courts to authorise the detention of terrorism suspects for up to two weeks before being charged (art. 26, 2 par.).

On the other hand, in 2017 9 Polish NGOs have formed the "Consortium", an informal group which have operated for many years to support migrants and refugees and their integration in civil society in 4 regions throughout Poland. The "Consortium" was formed as a response to the anti-migrant and anti-refugee political environment.

Two other laws (item n.1650/2013 and item n.1176/2013) allow the application of preventive measures to foreigners (also not suspected to radicalisation and terrorism), as well as custodial measures and alternative measures (bail, residence in a designed place) that can be ordered or by the court or by the border guard and can be based on: a) risk of absconding; b) necessity to collect information from foreigners required for the ongoing procedure; c) necessity to ensure the return / transfer of foreigners to another country for reasons of public order or state security.

Upon requests of the Border Guards, foreigners detained due to the ongoing administrative procedure in the migration or asylum track, when the State Security is raised, are much often placed in arrest for foreigners than in the ordinary detention centres: that implies less rigorous conditions of detention.

The percentage of terrorism – related arrests in Poland is very low in relation with the general number in EU: from 0,4 % to 0,6 %.

Concerning the use of EIOs, such a tool of investigation can be used by the Prosecutor in all cases he should be competent in domestic cases (as hearing of witnesses) without any authorisation of the court; otherwise, the Polish Prosecutor needs such an authorisation from the court.

One of the problems by issuing EAWs by Poland is that often they are issued in trivial cases.

## SLOVAKIA

In Slovakia, there are three different Security bodies competent on matter of radicalisation and terrorism:

- the National Anti-Terrorist Unit established inside the structure of the N.A.K.A. (National Criminal Agency) and,
- the S.I.S (Slovak Intelligence Service) that, to the extent necessary for the performance of its tasks, has the right to access and provide information and personal data from the information systems of public authorities; such data can be provided and made available without the consent of the concerned person and shall not be disclosed to him/her.
- Military Intelligence; currently, both in asylum procedure and procedures for obtaining residence in Slovakia, a consent from the S.I.S and Military Intelligence is required. If such a statement is negative and based on "classified" information, this latter is secret also with regard to the asylum-seeker, whose right of defence in Court becomes impossible.

The Constitutional Court affirmed several fundamental principles: right of fair trial, prohibition of discrimination and equality before the law, right to effective remedy and for full judicial protection (art. 6, par.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, art.47 of the Charter of Fundamental Rights of the EU concerning fair trial and effective remedies, art.46 par. 1 and 2 of the Constitution of Slovak Republic).

However, expecting an unfavourable result in the Constitutional Court, Slovak Parliament adopted new amendments to the Act on the Residence of Foreigners and to the Asylum Act, resulted in circumvention of the disputed provisions of the law. Even if those amendments would be declared unconstitutional (as really happened), the Migration Office and the Foreign Police will currently continue to decide negatively on the grounds of national security, without any obligation to inform the concerned person about those specific grounds.





Also, this political decision could be considered – on European Level – an infringement of fundamental human rights.

The following laws must be remarked:

- Act no.4/2021 Coll. On the Prison and Judicial Guard Corps: within its competence, the Guard Corps also performs tasks in the field of prevention and fight against terrorism and organized crime concerning persons in criminal detention or in prison;
- Act no.475/2005 Coll. On the enforcement of Custodial Sentences and on Amendments to certain acts: an individual may be placed in a special section in security regime within the prison when he/she has been convicted for a particularly serious crime committed as a member of an organised, criminal or terrorist group, and also for preventive and high security reasons; he/she will be submitted to a special treatment – program;
- Act on the Residence of Foreigners regulates detention both for foreigners in irregular position – including in view of an administrative expulsion or of the execution of a penalty of expulsion on judicial level – and for asylum seekers; the maximum detention time is 18 months in an Immigration Detention Centre.

No information was given about the necessity of a judicial authorisation in this matter.

Concerning the social preventive aspect, the "Human Rights League - HRL", an independent non-governmental organisation, supports and helps refugees and foreigners, not especially aimed at prevention of radicalism and extremism. Other similar organisations are: CVEK, Marcena Marginal, Adra, Slovenska katolicka charita, Slovenska humanitna rada.

### TRANSNATIONAL CONSIDERATIONS

Apart from the national frameworks already described before, other transnational considerations emerged especially during those Focus Group's meetings involving more countries.

Some general consideration may be argued concerning the specific Focus Group regarding **Croatia, Poland, Romania and Slovakia.**

The experiences in preventive measures that emerged from this workgroup are determined by national legal frameworks and procedures. Those countries have not so far faced a major terrorist or radicalisation attack.

The most relevant challenge raised by the participants was related to the need to ensure the balance between the right to security on the one hand, and the right to effective justice of the investigated persons, suspected of radicalisation and / or terrorism, on the other hand.

There is a need to further investigate and collect best practices from first-line practitioners that can be transposed into legislative changes (also on European Level).

Special problems have been underlined: 1) Use of pre-detention without sufficient guarantees (we propose to consider the mandatory prior hearing like in Romania); 2) Use of EIO also for gathering police-information and not only for formal elements of evidence (we propose to discuss the s.c. "hybrid investigation"); 3) Need of translation of the documents associated with an EAW and an EIO (it is proposed to avoid exaggerate supplementary requests from the executing state).

Other outcomes emerging from the ***Focus Group*** involving Bulgaria, Greece and Italy are worth to be mentioned:

**I)** In general, it was made clear the difference in aims, means and consequences between investigations aimed to gather evidence to be presented in trials, that therefore should rely on judicial authorisation or at least consent, and investigations carried out by intelligence agencies, whose evidence could not (normally) be presented in trials. But, at least in the Italian law-system, those investigations could also produce, if necessary, documental or witness elements of evidence with respect of renounce of secrecy for reasons of State Security; this should be considered a valid instrument – in some cases – s.c "hybrid investigation", already discussed.





The context of prison was also discussed: on the one hand, it was suggested to foster the quality of internal interviews with psychologists and psychiatrists and, on the other hand, to promote investigative interviews with accused or sentenced persons; in Italy there is the judicial collaboration system[11], at last foreseen by Act no. 45/2001.

None of the three countries seems to have applied the tools of judicial cooperation EAW and EIO in the matter of prevention, as they are considered investigative tools to be used once the crime has been committed. Only Italy considers – through art.27 of the Legislative Decree no.198/17 which transpose EU Directive 2014/41 on EIO – the possible application of an EIO for preventive purposes, but only in case of seizure and confiscation of goods, values and bank accounts, not for personal preventive measures.

Greece suggested an additional tool referred as "Discrete Surveillance Measure".

These are, at the end, the types of preventive measures that came out from the Focus Group:

- Controlled delivery of personal goods and mail in prison;
- Wiretapping inside and outside prison;
- Isolation and transfer of inmates;
- Pre-trial detention;
- Freezing of goods and bank accounts;
- House arrest;
- Special Surveillance.

**II)** Exchange of experiences: how the prevention system works or should work according to practitioners.

[11] It provides strict protection measures for witnesses and individuals under investigation (and their family members) who formally collaborate with the Judiciary

According to experts, there is a clear awareness of the phenomena of extremism, radicalisation and terrorism-related crimes in all three countries, despite the different level of threat they face.

In general terms, the same attention has to be given either to religiously motivated extremism and politically motivated one, but the three countries stated that the system should be equipped to face this threat and that there has already been reached a level of cooperation among the different actors that should be, at any rate, improved.

Specifically, in Italy and Bulgaria, it was claimed the need to improve the cooperation between the judicial system and civil actors, those latter often reluctant to cooperate with LEAs and/or the judicial system.

In Greece, instead, it was claimed sometimes a reluctancy of information sharing among LEAs and Intelligence Agencies which undermines investigation.

The adoption of a multi-disciplinary approach – as recommended by the UN Global Terrorism Strategy of 2015 – presents difficulties: there is a need to improve the system in order to create a clear communication line that ensures interaction between police officers, the judicial system, probation services and non – state actors like NGOs.

Main actors are: in the pre-trial phase it is always the Judge (or Supreme Administration Court in Bulgaria or Prosecutors in Italy in certain cases) who gives the authorisation for issuing and executing a preventing measure and who monitors the criminal investigation.

Further actors are to be mentioned in this scenery, as lawyers, who work for their client (radicalised individual) but who are at the same time "men of justice" and represent the linkage between the radicalised individual and the judicial authority, especially in order to find an agreement concerning a possible collaborative hearing that could lead to important advantages for both parties.





Other important actors to be involved in prevention are Intelligence Agencies and the Army (in Bulgaria) that can perform the functions of police in the prevention and countering of terrorism.

On the other hand, it was stressed out the risk of involving media in cases of radicalisation: the privacy of the individual should be maintained as much as possible to avoid any stigmatisation or media publicity.

In this scenery, a clear difference was made between a formal criminal investigation under judicial control and pre – investigation carried out without a formal suspect by the security services and also in these cases we have to mention again the value of "hybrid investigation".

**III)** Preventive measures in prison: experts seem to identify prison as a double-edge sword, on one side, considering it a place that does not prevent recidivism; on the other side, seeing prison as a "safe place".

In the Italian law-system, interviews in prison can be conducted by the Prosecutor (and by the Police in very rare cases in the first phase of investigation) to obtain useful information in exchange of protection and benefits. To make this measure effective, agreements between the individual and the State should be absolutely maintained because mistrust would create a real counter-effect[12].

This legal system inspired by the "philosophy" of deep and extended formal judicial cooperation does not exist on European Level and should be expanded.

[12] Italian law about the "Collaboratori di giustizia", also called "Pentiti": people who were formerly part of criminal organizations and decided to collaborate with a public prosecutor. The judicial category of pentiti was originally created in 1970s to combat violence and terrorism during the period of left- and right-wing terrorism known as the Years of Lead. During the 1986–87 Maxi Trial, and after the testimony of Tommaso Buscetta, the term was increasingly applied to former members of organized crime who had abandoned their organization and started helping investigators.

**IV)** Civil Society Prevention: it was made clear during the debate that police and civil society (NGOs, psychologists and counsellors) perform different roles in prevention (so they should be maintained).

As affirmed by one of the experts: the police have to detect, deter and tackle crime, while civil society organisations have a different role, that is to say when a crime is not committed – or even if committed – and there is the need to deal with radicalisation cases, a first step of prevention could be to assign to civil society organisations the role of "de-escalating" the further threat.

**V)** Identification of the main pre- and post-trial preventive measures currently in place and analysis of their main characteristics and application.

Above all, there is a certain level of harmonisation among the preventive measures applied in Bulgaria, Greece and Italy. The three countries apply similar measures and operate a distinction between legal preventive measures that need the authorisation of a judge but are kept secret (like phone- interceptions, bugging and freezing of goods or bank accounts) and administrative measures, that are always dealt by an ordinary judge (in Italy) or administrative judge (in Bulgaria), are limited in time and are known by the concerned person, as prohibition to change residence address, prohibition to approach certain places or people, regular registration to the police and seizure of passport.

The first legal preventive measure to be analysed is the **freezing of goods and bank accounts**, usually applied in cases of financing of terrorism.

In Greece, pending the preliminary investigation, the freezing of bank accounts is ordered by the Judicial Council or the Financial Prosecutor and may last up to 18 months.

This time limit (or a different one) could be discussed and extended on EU level.

After the criminal prosecution (i.e., after the indictment), freezing of bank accounts is imposed by order of the Examining Magistrate (the trial judge) which is valid for 5 years and is ratified or revoked by the court. According to the law on money laundering prevention, where the assets which constitute the criminal proceeds are not found or have been spent, assets of equivalent value can be frozen. Experts stated a certain lack (always concerning Greece) of international judicial cooperation when there is the need to execute measures on EU level, despite the existence of EU Regulation 1805/18[13], entered into force at the end of 2020.

Always concerning Greece, apart from the Judicial and Prosecutorial Authorities, in emergency cases (based on the 4 th Anti Money Laundering EU Directive of 2015), the freezing of assets may be ordered – for a period of up to 18 months – by Hellenic Financial Intelligence Unit, where a stand-alone unit operates with the aim of collecting and utilising the information provided by the Greek Police and Prosecutorial Authorities or by the competent authorities abroad regarding the freezing of the assets of persons alleged to be involved in terrorist acts or financing of terrorism.

The second measure was: a measure applied in all countries but with different terms of application.

In Greece, all deliveries that enter in prison can be controlled without judicial authorisation; according with art.254 of the Greek Penal Procedure Code such a measure can also be applied outside prison when serious crimes (like terrorism related crimes) are investigated and can also be addressed towards third persons different from the suspected person (as relatives), but in those cases only upon an authorisation of the Judicial Council.

In Greek's prison, besides the lack of technical means, there is a problem of understanding (linguistic and psychological) by the prison staff. Moreover, there is no separation of inmates based on the type of crimes they are investigated or convicted.

[13] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders

Greece and Bulgaria – in that differently from Italy – do not have both types of interceptions, preventive and judicial, and only these latter can be used in trial.

In Bulgaria (and not in Greece or Italy), before an individual has been formally accused as "simple suspect", his/her conversations with a lawyer can be intercepted and even used in trial.

In Greece, wiretapping, inside or outside prison, is always and only possible if authorised by the judicial authority.

Pre-trial detention is applied in all three countries.

In Italy, alternative measures are normally applied in cases of probability of sentences of less than 3 years detention. In cases related to radicalisation and terrorism, considered among the most serious crimes, no alternative measures are normally – or at least rarely – taken in consideration.

In Greece, pre-trial detention is normally imposed if it concerns crimes punishable with a sentence from 5 up to 15 years and it has a maximum length of 18 months. If the suspect is over 70 years old or suffers from serious health diseases, the house arrest is mandatory (like in Italy).

In Greece, in case of terror-related crimes, considering that in most of the cases those refer to misdemeanors and are normally sentenced to up to 5 years, alternative measures may be applied as alternative to pre-trial detention.

Usually, it happens that the Greek Public Prosecutor considers the possibility to avoid pre-trial detention or to reduce the sanction (that should be applied) if the individual shows real intentions and gives confession. If the suspect does so, then the sanction will be reduced. But Greece (nor Bulgaria, neither the other MM.SS.) does not have the valid Italian System of formal judicial collaboration, foreseen by Law no.45/2001 and art.270*bis* n.1), §3 and §4 of the Italian Criminal Code:and this could represent a proposal be extended on EU level.

Experts agreed that there is a need for a mix of all measures presented during the discussion.





For instance, in prison there are people of the same nationality detained together. Trying to mix them with detainees of other cultures, *"we'll see that they may change"* affirmed one expert. However, this proposal presents some risks and needs to be better verified because the real effect could be worse.

According to Greece, there is still little cooperation between public and private entities within this framework and among different countries too.

It was also stated the importance of training professionals – namely the police – in order to enable them to fast recognise terrorist content, of the need of legal advisors when dealing with such cases as well as the possible benefits of technology (like the wider use of the s.c. "Trojan Horse"), when dealing especially with on-line radicalisation.

The participants stressed the importance to extend the application of alternative non custodial preventive measures in this field, realising a larger consultation among all the stakeholders involved (Civil, Social, Probation, Judicial authorities).

General conclusions of this Focus Group's report are the following: the relation between civil society and public actors in the fight against radicalisation and violent extremism should improve, clearer guide-lines on sharing information should be depicted and specific roles defined, including the proposal of training to members of civil society, NGOs and health services.

Professionals, especially from the legal and security sector, seem to give preference to the s.c. "prison -culture", instead of application of alternative measures, as they consider prison a "safe place" where individuals can be monitored; but they seem not to consider the counter effects of prisons: lack of individual treatment, low possibility of access to education, possible fostering of criminal attitudes due to individuals contacts with other criminals.

Many relevant inputs arose as well during the International Focus Group involving Germany, France, Lithuania and Slovenia.

After having realized that there is no harmonisation among the above-mentioned Countries, neither about the assessment of the threat (at maximum level in France and Germany, and at minor level in Lithuania and Slovenia), nor about the understanding of preventive measures and application of such tools, the first question was if it is allowed to use preventive measures towards individuals, who have radical ideas but did not put them in action in any way. The answer should be negative, if the interior ideas do not produce effects of criminalisation in terms of terrorism or violent extremism, outside the interior sphere, towards other people.

In this Focus Group it also came out that the complexity of the phenomenon of radicalisation requires the engagement of a variety of actors: on judicial, administrative and social level, including police, intelligence, judicial authorities, private enterprises, NGOs, prison – health – and probation services. In particular, NGOs – together with probation services – have been identified as crucial actors in the release phase of individuals detained for terror-related crimes and in the de-radicalisation phase (with hopefully successful results).

With regard to the issue of exchange of useful information among the different actors, it was mainly discussed: 1) how to better share information and asses radicalisation cases between the above- mentioned different actors; 2) how to exchange data in respect of data privacy regulation, while the EU data protection law system does not forbid to exchange data, the matter is how to do it and who should be allowed to.

German experts suggested the **"Case Conference"**, a legal method in order to ensure, after having shared information, an effective result in a specific case by the combined engagement of all relevant actors, and the **"Special Coordination Units"** in charge of canalising the information, distributing it and specifically identifying a targeted treatment.

It was stated that the health (physical and mental) of an individual has priority on the risk of his/her radicalisation. Concerning the evaluation of threat, the case of Berlin market attack shows that prior information was shared but evaluated differently by the various actors.





From a transnational point of view, a good practice suggested was referred to the establishment and functioning of JIT's (provided by FW Decision 2001 / 465 JHA) that have realised positive results.

A clear distinction has to be done between formal criminal investigation and preventive one (totally secret). In this group the possibility to lead a s.c. "hybrid investigation" also emerged, what potentially leads to a criminal investigation and sometimes does lead to it.

Concerning the application of preventive measures in prison, the debate focused mainly on two topics: 1) the involvement of family members in investigations related to an individual at risk of radicalisation; in Germany, the answer is positive, but such kind of investigation should be conducted by the police (Judiciary Police and not Prison Police); in France,there are studies which offer concrete specific indications in this field, for instance concerning the religious aspects; 2) no infringements of human rights.

Civil Society and specifically social services are considered key-actors in prevention. Former extremists – who have been called to speak to students at schools – where taken as example of good de-radicalisation and prevention practice (as example: in Germany, the case of a young male returned from Syria to Germany).

In Slovenia, a radical political group that tried to recruit professionals of the police and the intelligence service in order to develop a political programme contrary to the Slovenian Constitution, announcing that Slovenia "was in danger", was dismantled.

In Germany, an Islamic leader, as the head of ISIS, was sentenced to over 10 years of prison, after been put in pre-trial detention.

In all interested countries, the pre-trial detention measure is generally applied to any type of crime, including terror related crimes, and must rely on the following strict rules: 1) risk of escape; 2) clear evidence of guilty; 3) tendency of recidivism.

The primary concern stressed out by experts during the debate was referred to the application of isolation and to the possible counter- effect that this measure could produce on radicalised individuals.

The second concern was how and who (only judicial authority) should determine if inmates are really dangerous, and that preventive measures based on grounds of religion are very difficult to be applied – but not surely impossible.

In general terms, experts, in the frame of the very fruitful work of the several groups – we will speak about further on – as well as in the frame of this last group we are specifically analysing, considered that a combination of all identified measures is the best practice to apply.

Training of the staff (being it teachers, social services, LEAS, prison or/ and probation services) is crucial, as well as a longer and more intensive level of education at the school (also by judges and prosecutors who go to schools), like in Bremen (Germany) and also in Italy.

On the contrary, too intensive surveillance or measures undertaken by the police could lead to a opposite result.

Concerning the European fundamental tools of cooperation and mutual trust (EAW and EIO), experts, always in general terms, agreed that those represent reactive instruments (the crime has already been committed) and should not be introduced in the prevention area.

In our opinion, both instruments could be extended to prevention if: a) For EAW, besides its principal purpose, it should be considere as a mean for "specific and wider effect of prevention of other crimes"; b) the Italian use of EIO in order to collect evidence for the issuing and execution of preventive measures concerning freezing and confiscation of proceeds and also for personal administrative preventive measures could be used as example (art. 27 of Dlvo. N.108/17, transposing the EIO Directive in national legislation).

Instead, it was suggested to make a larger use of other instruments of judicial cooperation, like FWD nn. 947 /08, 829 / 09 and 909 / 08.





Prevention as a 3- stage model, where NGOs and civil society play a key- role and should be taken more in account in order to be the ones who de- escalate the threat, before it turns to be a real threat of criminal value of competence of LEAs.

At last, all countries should understand the difference between information that should be shared on EU level in cases of criminal investigations (also potential) and those concerning political movements and adherent individuals.

In the Italian legal system, Legislative Decree no.108/17 provides that an EIO may be issued with the scope to gather evidence also for preventive measures concerning seizure and confiscation of properties (foreseen by EU Regulation no.1805/2018); but not in cases of preventive measures concerning individuals.

# CHAPTER II

# Italian Legal System of Praeter Delictum Preventive Measures

### The legal framework

Italian legal order in the criminal sector foresees preventive measures of different nature related to different scopes:

- ***pre-trial measures***, concerning individuals and property, applicable during the preliminary investigation, aimed to prevent the individual concerned from absconding and flew, and/or to perpetrate further offences, and/or to cause the disappearance of evidences; measures concerning property (seizure) are meant to freeze instrumentalities and proceeds from criminal offences[1]. Competent to issue a pre-trial measure is the Judge for Preliminary Investigation upon a request of the public prosecutor; the order imposing a pre-trial measure may be appealed before the local Court, whose decision may be challenged before the Court of Cassation;
- ***post-trial measures***, concerning individuals and property, applicable after the judgment but before it becomes definitive (*res*

[1] In relation to given crimes (as laundering, usury, extortion, mafia-related crimes etc…….) seizure (and confiscation) may be ordered for goods or properties owned by the individual concerned, whose value is disproportionate in respect of his earnings (declared to the fiscal administration) or activities, and that he cannot demonstate are the outcomes of a licit activity (art.240 bis criminal code).
Seizure (and confiscation) is also applicable towards goods/values/properties owned by legal persons when a given crime (ex. environmental crimes, tax crimes, etc…) was committed for their benefit by any person, acting either individually or as part of an organ of the legal person and having a leading position within the legal person (Legislative Decree n.231/2011).
In both cases the seizure is applicable to goods/properties/money which did not directly derive from the crime but are owned by the individual or legal person concerned, so called "for value".

*iudicata*) are the above-mentioned measures (sub a)[2], are aimed to prevent absconding of the person convicted and the disappearance of the proceeds of crime and/or strumentalities used to commit the crime (destinated to confiscation, once the judgment has become definitive). Competent to issue a post-trial preventive measure is the Trial Judge, who can issue it *ex novo* with the judgment, or just confirm the pre-trial measure issued before the indictment. When the judgment becomes definitive, preventive measures lose their role and efficacity, being substituted by the criminal sanction (detention, house-detention, affidavit to social services, suspended detention) and the security measurig property (confiscation);

- ***praeter or ante delictum measures***, which represent a specific topic in the Italian legal framework and will be treated in the present chapter.

The current legal framework for *ante* or *praeter delictum* preventive measures is **Legislative Decree no. 159 of 6 September 2011**, entitled "Anti-Mafia Code", which consolidates the legislation on anti Mafia action and preventive measures concerning individuals and property.

It repealed previous **Act no. 1423/1956** which was issued in order to adapt preventive measures (existing since 19th century prior to the unification of Italy in 1861, then reincorporated in the legislation of the Kingdom of Italy by Act no. 1409/1863, and later by the 1865 Consolidated Public Safety Act) in compliance with the fundamental principles and freedoms enshrined in the Italian Constitution (promulgated on 1948), as, in particular, personal liberty (Article 13), freedom of movement (Article 16), principle of legality in relation to criminal offences and security measures (Article 25, paragraphs 2 and 3).

Act no. 1423 of 27 December 1956 provided for the imposition of preventive measures against **"persons presenting a danger for security and public morality".**

[2] Also, in cases of seizure mentioned at note n.1.





While Act no. 1423/1956 was in force, the Constitutional Court intervened with several decisions to reaffirm the necessity and compulsory observance of the principle of legality in the application of preventive measures.

The new framework did not alter the categories of individuals concerned by Act. no. 1423/1956 but add other categories of individuals who, being suspected of the perpetration of serious crimes, are deemed to represent danger for public safety.

With Legislative Decree no. 7 February 2015 (which subsequently became Act no. 43 of 17 April 2015), urgent measures have been issued to combat international terrorism. As a result, new terrorist offences have been included in the Criminal Code, notably one relating to travel by foreign fighters for terrorist purposes. In addition, the scope of preventive measures concerning individuals (and property) has been extended. A new measure involving confiscation of passports and identity cards has been introduced.

### The role of National and European Courts

The current legal system of *prater delictum* preventive measures represents the outcomes of several judgments of the Constitutional Court and of the Court of Cassation, before and after the landmark judgment of the European Court for Human Rights in the ***case DE TOMMASO v. Italy***.

Summarising the judgment issued by the Grand Chamber on 23rd February 2017, the European Court examined the request of an Italian citizen who was placed under special police supervision for two years (on the basis of Act no. 1423/1956) with a compulsory residence order, by a decision of the Bari District Court of 11 April 2008, which found that he had "active" criminal tendencies and that he had derived most of his means of subsistence from criminal activity. Finally, he was dangerous. The preventive measure, which imposed several obligations on the applicant[3], was quashed ex tunc by a decision of the Court of Appeal of

[3] - to report once a week to the police authority; - to start looking for work within a month; - to

28 January 2009. The Court of Appeal stressed the necessity to establish that the individual posed a "current danger", not necessarily linked to the commission of a specific offence, but rather to the existence of a complex situation of a certain duration indicating that he had a particular lifestyle that prompted alarm for public safety; and found that at the time the measure had been imposed, the applicant's dangerousness could not have been inferred from any criminal activity[4].

The applicant complained that the preventive measure imposed on him had been arbitrary and excessive in its duration: he relied on Article 5 of the Convention[5] and Article 2 of Protocol No. 4.

live in his place of residence; - to lead an honest and law-abiding life and not give cause for suspicion; - not to associate with persons who had a criminal record and who were subject to preventive or security measures; - not to return home later than 10 p.m. or to leave home before 6 a.m., except in case of necessity and only after giving notice to the authorities in good time; - not to keep or carry weapons; - not to go to bars, nightclubs, amusement arcades or brothels and not to attend public meetings; - not to use mobile phones or radio communication devices; and - to have with him at all times the document setting out his obligations (carta precettiva), and to present it to the police authority on request. On 31 July 2008 the Bari prefecture ordered the withdrawal of the applicant's driving licence.

4 In several final judgments delivered between September 1995 and August 1999 the applicant had been convicted of tobacco smuggling; subsequently, until 18 July 2002, he had been involved in drug trafficking and handling illegal weapons, offences for which he had been sentenced to four years' imprisonment in a judgment of 15 March 2003, which had become final on 10 March 2004; he had served his sentence from 18 July 2002 to 4 December 2005. An offence of absconding had been committed on 14 December 2004 (while he had been subject to a compulsory residence order).

5 Article 5 provides:
"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of





The European Court, after a deep analysis of the Italian legislation in the field of preventive measures, and of the case-law of the Constitutional Court and the Court of Cassation, held that it did not comply with principles of legality, *sub specie* **precision, certainty and foreseeability** that have to be respected in any case of limitation of the rights granted by the Convention, and found the violation of **art. 2 Prot. n.4 ECHR** concerning the freedom of movement, affected by the preventive measure of special police supervision[6].

The Court of Strasbourg held that two aspects of the Italian legislation on preventive measures infringed the European Convention of Human Rights.

Firstly, the Court considered to much imprecise the rules referred to in art.1, n.1) and n.2) of Act no.1423/1956 (today: art.1, lett. a e b, D.Lgs. No. 159/2011), that indicate as assignees of preventive measures individuals who pose a generic danger, namely: a) those who should be considered, on the basis of factual elements, usually engaged in criminal activities; and b) those who should be considered, for their behavior and standard of living, on the basis of factual elements, as habitually living with the proceeds of criminal activities.

The European Court recall the Judgment of the Italian Constitutional Court n°177/1980[7] which set aside the law in respect of the category

persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

6 Article 2 of Protocol No. 4 provides:
*"Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
*Everyone shall be free to leave any country, including his own.*
*No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
*The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."*

7 The Judgment n°177 of the 22nd december 1980 quashed art.1 n°3 Act 1423/1956

of individuals *"whose outward conduct gives good reason to believe that they have criminal tendencies"*. But in respect of all other categories of individuals to whom the preventive measures were applicable, the National Court held that Act no. 1423/1956 contained a sufficiently detailed description of the types of conduct that could represent a danger to society; and pointed out that preventive measures should be based on the "factual evidence" revealing the individual's habitual behaviour and standard of living, or specific outward signs of his criminal tendencies.

The European Court observes that the imposition of preventive measures remains linked to a discretional analysis by the domestic courts, as neither the Act nor the Constitutional Court had clearly identified the "factual evidence" or the types of behaviour which must be taken in consideration in order to assess the danger to society posed by the individual and which may give rise to preventive measures[8].

Therefore, the ECoHR considers that section 1 of the Act no.1423/56 is not formulated with sufficient precision to provide protection against arbitrary interferences and to enable the applicant to regulate his conduct and foresee to a sufficiently certain degree the imposition of preventive measures.

The second focal point stressed by the ECoHR concerns the content of the preventive measure imposed to the applicant and provided for in sections 3 and 5 of Act no.1423/1956. The Court states that some of them are described in very general terms and their content is extremely indeterminate, in particular the provisions concerning the obligations to *"lead an honest and law-abiding life"* and to *"not give cause for suspicion"*.

The Court observes that the interpretation given by the Constitutional Court in its judgment no.282 of 2010[9] (subsequent to the facts of the DE

[8] The ECoHR notes that in the case DE TOMMASO the court responsible for imposing the preventive measure on the applicant based its decision on the existence of "active" criminal tendencies on his part, without attributing any specific behaviour or criminal activity to him; and on the fact that the applicant had no "fixed and lawful occupation" and that his life was characterised by regular association with prominent local criminals ("malavita") and the commission of offences.

[9] In judgment no. 282 of 2010 the Constitutional Court had to determine whether or not section





TOMMASO case - which had concluded that the obligations to *"lead an honest life"* and to *"not give cause for suspicion"* do not breach the principle of legalit) did not solve the problem of the lack of foreseeability of the applicable preventive measures, since under section 5(1) of the Act the district court could also impose any measures it deemed necessary in view of the requirements of protecting society.

The Court therefore considers that this part of the Act has not been formulated in sufficient detail and does not define with sufficient clarity the content of the preventive measures which could be imposed on an individual, even in the light of the Constitutional Court's case-law.

Following the principles affirmed in DE TOMMASO Judgment (concerning only preventive measures towards individuals), the Italian Constitutional Court had rendered two fundamental judgments which confirm the legality of preventive measures and depict their range of applicability.

In ***Judgment 24th January - 27th February 2019 n.24*** the Court quashed the provision of D. Lgs.159/2011 that allowed the application by the Judiciary of preventive measures, concerning both individuals

9(2) of Act no. 1423/1956 was compatible with art.25 §2 of the Constitution, as it provided for criminal penalties in case of failure to observe the requirement laid down in section 5(3), first part, of the Act, namely "to lead an honest and law-abiding life and not give cause for suspicion", and whether or not it infringed the principle that the situations in which criminal-law provisions are applicable must be exhaustively defined by law (principio di tassatività).
The Constitutional Court held that the inclusion in the description of the offence in question of summary expressions or elastic concepts do not infringe art.25 §2 of the Constitution: the overall description of the act allegedly committed (by the individual involved) enabled the trial court to establish the meaning of that element through a verifiable hermeneutic process; and the individual concerned to have a sufficiently clear perception of its prescriptive value. In that context, the requirement to "lead an honest life" become clearer, entailing a duty for the individual concerned to adapt his own conduct to a way of life complying with all of the other requirements laid down in section 5 of the Act.
The Court also found that the requirement to be "law abiding" referred to the duty for the individual concerned to comply not only with criminal laws, but with any provision whose non-observance would be a further indication of the person's danger to society. Regarding the requirement to "not give cause for suspicion", the Court noted that this should be seen in the context of the other requirements set out in section 5 of Act no. 1423/1956, such as the obligation for the person under special supervision not to frequent certain places or associate with certain people.

and property, on *"individuals who, on the basis of factual evidence, may be regarded as habitual offenders"* (art.4, par.1, lett.c Act n.159/2011).

The Constitutional Court underlines that the applicability of the preventive measure of special supervision requires not only the belonging to one of the individuals's categories reffered to at art.4 Legislative Decree no. 159/2011, but also the danger that the concerned individual may pose for pulic safety, as provided at art. 6, § 1, L.D. no. 159/2011: which requires to assess the previous criminal activities of the individual concerned and his current dangerousness, namely the consistent probability to commit in the future further criminal activities.

The pre-requisite of dangerousness represents the "contact point" between preventive measure and security measures, which are provided by the criminal code and are applicable at the end of a criminal proceeding jointly or instead of criminal sanctions[10].

For the Court, the pre-requisite of dangerousness (required for the preventive measure of special supervision) justifies the preventive feature of the measure, and excludes – as the judgment DE TOMMASO already did – its sanctionatory/criminal nature and consequently the application of the typical guarantees of the *matière pénale*.

With regard to the provision of art.1 point a) d.lgs. 159/2011 (previous art. 1, n.1, Act n.1423/1956), which concerns *"individuals who, on the basis of factual evidence, may be regarded as habitual offenders"*, the Court concludes that the provision, being radically imprecise and not emended by the case-law subsequent to the judgment DE TOMMASO, does not comply with articles 13 and 117 §1 of the Constitution, in relation with art. 2 of Prot. n. 4 ECHR, as regard to preventive measure concerning individuals (special supervision, with or without obligation to residence or ban to residence in a given place); and with art. 42 and art. 117 §1 of the Constitution in relation with art. 1 Prot. add. ECHR as regard to preventive measures against property (seizure and confiscation).

[10] The criminal penalty (detention) shall not be applied to individuals acquitted for mental insanity, who could be beneficiaries, if dangerous, of security measures (i.e., hospitalization in s.c. R.E.M.S. residenzial hospices for execution af measures of security)





With **Judgment 24th January - 27 February 2019 n.25**, the Constitutional Court stated the partial uncostitutionalityty of art.75 d.lgs. 159/2011[11], where it punish (as a crime or a misdemeanor) the infringement of obligations imposed with the preventive measure of special supervision (with/or without compulsory residence order or ban of residence in a given place or district) consisting in the non-observance of prescriptions of *"living lawfully"* and of *"respecting the rules"*, because of the violation of principle of foreseeability provided in general in art.**7 ECHR** and in particular in **art.2 Prot. n.4 ECHR**, in reference with art.117 §1 Constitution[12].

Finally, notwithstanding their applicability to individuals only suspected of having committed serious crimes or of living with the proceeds of crime, who pose a danger for public security, preventive measures are part of the Italian criminal order, are applied in compliance with fundamental principles enshrined in the Italian Constitution and EU legislation, are dealt by independent jurisdiction within a fair, 3-degrees jurisdictional proceedings (first instance, appeal, Cassation), possibility for the individual concerned to be examinated and heard by the competent Judge, or alternatively to remain silent, to invoke evidence, to bring testimony, to make statements.

[11] Art. 75 d.lgs. 159/2011 provides, at §1, that the individual who violates the obligations deriving from the preventive measure of special police supervision incurs in a sanction from 3 months to 1 year arrest (misdemeanor); at §2, that if the non-observance concerns the obligations and prescriptions related to the special police supervision with compulsory residence order or ban of residence in a given place, the sanction is from *1 to 5 years detention (crime) and the individual may be arrested by the Police even in there is no flagrante delicto.*

[12] Prior to the decision of the Constitutional Court is the Judgment of the Court of Cassation, United Sections, in case PATERNO' n.40076 of 5.09.2017 which stated the inapplicability of the crime ex art. 75 § 2, d.lgs. 159/2011 to the case of infringment to prescriptions of «living honestly» and of «respect laws», because excessively indeterminate, in conformity to the ECoHR's decision in the case *de Tommaso.*

### Preventive measures concerning individuals

Act no.159/2011 provides preventive measures concerning individuals to be applied either by the Chief of Police of the Province's district (*"questore"*) and by the Judiciary.

Pre-requisites for the application of all preventive measures is the belonging of the individual concerned to some given categories and the threat he/she represents for the public safety.

Preventive measures may be imposed by the **Chief of the Province's District Police** (*"questore"*) to the following persons (art.1):

- individuals who, on the basis of factual evidence, may be regarded as habitual offenders[13];
- individuals who, on account of their behaviour and lifestyle and on the basis of factual evidence, may be regarded as habitually living, even in part, on the proceeds of crime;
- individuals who, on the basis of factual evidence, may be regarded as having committed offences endangering the physical or mental integrity of minors or posing a threat to health, security or public order.

The Head of the Province's District Police, when individuals mentioned at art.1 pose a danger for public safety and are found outside the territory of their residence, may address them a motivated order to return to their place of residence and ban their coming back without a special authorization for a time limit maximum of three years (art.2: *"foglio di via obbligatorio"*).

The Head of the District Police of the Province where the individual, belonging to one of the categories of art.1, has his residence (*"dimora"*), may address to him an official warning (*"avviso orale"*) where the

[13] As mentioned before, the Constitutional Court in its judgment n.24/2019 had quashed out art.4 (provinding preventives measures applicable by the Judiciary) in the part where it refers back to art.1 lett. a); therefore, towards this category of individuals the preventive measures for which the *questore* is competent are still applicable.





individual is made aware that toward him there are clues of crime, and that he is invited to behave lawfully. The individual concerned in any time can ask the *"questore"* to revoke the 'official warning'; the Head of the local Police shall provide upon this request within 60 days; if he doesn't, the request is deemed accepted and the preventive measure revoked; in case of refusal, the concerned individual may address a hierarchical appeal to the Government's Representative of the Provincial Capital (*"Prefetto"*).

With the official warning, the Head of Province's District Police may prohibit to individuals who have been sentenced for offences committed with criminal intention the possession or the use of instruments for radio-transmission (to detect Police communications), radars, night sights, garments and accessorizes for ballistic protection, modified transport vehicles or armoured vehicles, weak offensive power weapons, toy weapons, other instruments (in free sale) for nebulization of gas or liquids, pirotecnic products and other instruments for emission of fire or liquids or gas, digitalized prgrams, programs for criptation of messages.

Against these bans, the individual may appel before the locale Court.

Preventive measures are applicable by the **Judiciary** to individuals belonging to given categories (art.4) and represent a danger for public security (art.6); in particular:

- those suspected to participate to a mafia organised criminal group (mafia, camorra, 'ndrangheta, other groups also of foreign origin);
- those suspected of having committed one of the crimes provided by art.51 section 3-bis of the criminal procedural code (organized criminal groups aimed to perpetrate crimes of smuggling of migrants counterfeiting in trade, slavery, trafficking in human beings, mafia-political electoral exchange, trafficking in waste, kidnapping aimed to extortion, trafficking in drugs, smuggling of goods), or suspected of the crime of ficticius transfer of values (art.512bis criminal code) or of abiding associates in criminal organized group (art.418 criminal code);

- individuals pertaining to the categories mentioned at art.1[14];
- individuals suspected of having perpetrate terrorism related crimes (referred to at art.51 section 3*quater* criminal procedural code) or having committed preparatory or executive acts directed to provoke subversion of the State's legal order through serious crimes as massacre (*"strage"*), arson, other intentional disasters or armed insurrection against the State (art.284), devastation and pillage (art.285), civil war (art.286), armed group (art.306), pandemic dissemination (art.438), empoisonment of water and food (art.439), kidnapping (art.605), kinapping aimed to extortion (art.630); or to perpetrate crimes of terrorism also international or to take part to a conflict in a foreign territory in support to a terrorist group (art. 270*sexies* criminal code);
- individuals having been members of political groups banned by Law 20 June 1952 n.645 (organization of the fascist party) and are suspected to continue an activity similar to the former;
- those who carry out preparatory or executive acts, which are relevant in the aim of the reconstitution of the former banned fascist party (art.1 Law n.645/1952), in particular through exaltation and practice of violence;
- outside cases referred to at lett. d), e) and f), individuals who have been convicted for crimes provided by Law n.895/1967 (possession of fire weapons) when their subsequent behaviour legitimates the suspicion, they are likely to committ similar crimes with the aim mentioned at point d);
- individuals who are instigators, senders and financiers of crimes referred to in previous points;
- individuals suspected of having facilitated groups or people who had taken part, in several occasions, to manifestation of violence

[14] The Constitutional Court, with decision 24 January - 27 February 2019, n°24, stated that art. 4, par.1, lett. c) of **d.lgs.** n. **159** del **2011**, does not comply with the constitution in the part where it provides that measure mentioned al "capo II" may be applied also to individuals referred to at art. 1, lett. a)".





mentioned at art.6 Law n.401/1989 (acts of violence commited during sport events), or individuals who are deemed (on the basis of their participation in several occasions to such kind of manifestations, or of the application toward them of the ban provided by the above mentioned rule) to commit crimes which pose a danger to order and public safety or for the incolumity of people during sport events;

- *bis* individuals suspected of the crime of aggravated fraud to detriment of public entities (art.640*bis* criminal code), of the crime of criminal association aimed to perpetrate crimes of embezzlement or misappropriation of funds (art.314, 316, 316*bis*, 316*ter*), bribery (art.317), corruption of a public official (art.318, 319, 319*ter*, 319*quater*, 320, 321), instigation to corruptionartt.322 and 322*bis*); individuals suspected of crimes of maltreatment and stalkingartt.572 and 612*bis* criminal code).

Requests for preventive measures are addressed to the Judiciary by the Head of provincial district Police (*questore*), the National Anti-mafia and Anti-terrorism Prosecutor, the Prosecutor of the Capital Town of the District where the person concerned is resident, the Head of the Anti-mafia Investigative Directorate (art.5).

Towards the individuals referred to at art.4 who pose a threat to public safety, a preventive measure entailing ***special police supervision*** may be imposed. Except for cases referred to at art.4 §1 lett. a) and b), if need, the ***prohibition on residence*** in a named district or province (different from that of residence or usual domicile) or in one or more region may be combined to the special police supervision.

When the previous mentioned preventive measures seem to be insufficient to grant public safety, an ***order for compulsory residence*** in a specified district (town of residence or usual domicile) and, if the individual gives it consent, with the precaution of the electronic bracelet (art.6).

Competent to evaluate the request for a preventive measure and issue an order for application of such a measure concerning individuals is the Court sitting in the provincial capital of the district where the indi-

vidual is resident or has his domicile (art.7).

The court, sitting in camera (but at the request of the individual concerned, a public hearing may be held), shall hear submissions from the public prosecutor and the counsel of defence (who can file writtern pleadings). The individual concerned has the right to be present, the right to be assisted by counsel and to give an oral statement or to remain silent; if detained or subject to a deprivation of liberty in a place located outside the district of the Court, his participation shall be granted through videoconference.

Specific rules provide the terms for summoning the parties to the hearing.

The Court in camera shall examine the facts, evaluate the clues, hear the witnesses (if need) and then issue a motivated decree - holding or rejecting the request for a preventive measure within 30 days (art.7).

After the decision of the District Court, two further degrees of proceedings are granted: the Court of Appeal and the Court of Cassation.

The public prosecutor and the individual concerned may appeal within ten days; the appeal does not have suspensive effect.

The Court of Appeal, sitting in camera, shall give a reasoned decision within thirty days (art.10).

Against the decision of the Court of Appeal, the Public Prosecutor, the individual concerned and his counsel may lodge an appeal – for alleged violations of rules – before the Court of Cassation. The High Court, sitting in camera, shall give its ruling within thirty days (art.10 §3).

When adopting one of the measures provided for in art.6, the district court must specify how long it is to remain in force – between one and five years (art.8) – and must lay down the rules (*"prescrizioni"*) to be observed by the individual concerned.

Therefore, when imposing the measure of special supervision toward a person suspected of living of the proceeds of crime, the Court shall prescribe her to look for work and housing within a short space of time





and inform the authorities accordingly and not move away from the designated address without permission.

In any case, the court shall order the individual:

- to respect rules, not to move away from the place of residence without permission of the Police authority;
- not to associate with individuals who have a criminal record and are subject to preventive or security measures;
- not to return home later than a specified time in the evening or to leave home before a specified time in the morning, except in case of necessity and only after giving notice to the authorities in good time;
- not to keep or carry weapons;
- not to go to public places;
- and not to attend public meetings.

Furthermore, the district court may impose any other measures it considers necessary to protect the society, in particular a prohibition to reside in given areas or, for individuals referred to in art.1, § 1, lett. c), and 4, § 1, lett. i-ter), the prohibition to approach certains places, usually attended by people who need special protection or minors.

Urgent measures can be adopted pending the proceedings for application of the special supervision combined with a compulsory residence order or a ban to remain in a given place (art.9): in particular, the President of the District Court shall issue an order imposing the temporary withdrawal of the individual's passport and the suspension of the validity of any equivalent document entitling the holder to leave the country.

Where there are particularly serious grounds, the President may impose the provisionally enforcement of the compulsory residence or exclusion order toward the individual concerned until the preventive measure has become executive.

The order imposing a preventive measure is forwarded to the Head of the Police of the Province (*"questore"*) for its execution.

The order can be revoked or modified, on demand of the individual concerned, when the grounds for application are modified or estinguished. It can also be modified *in peius* upon a request of the proposing entities (Public Prosecutor's Office, etc..) where there are serious needs to protect public safety or when the individual has violated the obligations of the original measure.

The effects of preventive measures are aimed to monitor the interaction between the individual concerned and the outside society through various restrictions to commercial and professional activities: no authorization or licences for trade, ban to participate to public procurements, no public authorizations for exploitation of public waters or public areas or public works pertaining to the Public Administration or public services, no public financial contributions or loans, no weapon's permits (art.67).

The individual concerned may request (to the competent Court of Appeal) his rehabilitation (art.70) after three years from the expire of the preventive measure, if he has given proof of constant and effective good beahviour; with the rehabilitation all effects and prohibitions deriving from the preventive measure end.

Significant are the provisions which introduce aggravating circumstances for given serious offences (referred to at art.71), for offences commited with weapons and munitions (referred to at art.72), for driving without licence[15] when perpetrated by individuals who are assignees of a preventive measure during the period of its application and after three years from its expiration.

Any breach of a preventive measure is punishable by a custodial sentence (art.75): if the violation concerns the special police supervision with compulsory residence a sanction from 1 to 5 years detention is provided (crime); if the infringement concerns the special police supervision the sanction is 3 months to 1 year detention (misdemeanor).

[15] This infringment represents a criminal offence only if the author is recidivism





Other relevant rules provide special derogations to some procedural provisions:

- towards the individuals referred to at art.4, the arrest of a suspected of a crime is allowed beyond the requisites referred to at art.384 criminal procedural code[16] (art.77);
- wiretapping and interception of communication may be authorized by the Public Prosecutor in order to control if individuals assegnees of preventive measures are still keeping on illegal activities (art.78);
- financial investigations may be conduct towards individuals assegnees of a preventive measure, in order to control their compliance with tax imposition rules and to verifiy their respect to prohibition/inibitions inherent to the preventive measure.

### Preventive measures concerning property

While preventive measure concerning individuals are conceived to put under control people who represent a threat to public safety; preventive measures concerning property pursue the different scope of freezing goods, values and money which are supposed to have been obtained through criminal activities.

They are different from pre-trial or post-trial measures against property, which are applicable pending a criminal proceeding or at the end of the trial with the conviction's judgment.

Preventive measures against property may be imposed towards the individuals referred to at art.4 and legal of physical persons indicated by the U.N. Committee for Sanctions or other international entities competent to freeze founds or economic resources, when there are serious grounds to believe that such funds or financial resources may be used

[16] Art.384 Criminal procedural code (*"fermo di indiziato di delitto"*) provides that the police, even when there is no *flagrante delicto*, is entitled to arrest the individual suspected of a crime punishable with a penalty not inferior to 2 years (at minimun) and superior to 6 years (at maximunm) when there are sufficient clues and flight risk.

for financing terrorism related activities (art.16).

The initiative of the request for a preventive measure concerning property pertains to the same authorities entitled to propose a personal preventive measure, which are enabled to conduct (through the financial Police *"Guardia di Finanza"*) appropriate financial and estate investigation towards individuals referred to at art.16 and their relatives.

Preventive measures concerning individuals and those concerning property may be requested and disposed separately. This means that the application of a preventive measure agaist property does not require the previous or contemporary application of a preventive measure concerning the individual nor the threat to public safety at the time of the request, notwistanding the property in itself should represent a danger because of its origin and possibile circulation and laudering. The nature of danger justifies the imposition of the measure also in case of death of the individual who could be or has already been proposed for its application or is absent or has his residence abroad: in this event, the proceedings will be held or procede against the heirs (art.18).

Prior to the confiscation, the seizure may be required (by the authorities entitled to require the preventive measure) when there are urgent reasons to avoid the disappearance of the goods (art.22).

The District Court, once requested of a preventive measure, may order, on its own motion, the seizure of goods or properties that the individual proposed for the preventive measure owns, directly or indirectly, when their value is disproportioned in respect of his incomes or earnings or his economic activity if - on the basis of sufficient clues - there are serious grounds to believe that they are the outcomes of illegal activities or their reuse (art.20).

Where the seizure of such assetts is impossible because the individual concerned does not yet possess them or has legally transferred them to third persons, seizure and subsequent confiscation may involve other goods of an equivalent value and of licit origin owned by the individual (art.25).





In case of fictitious ownership or transfer of goods to third persons (art.26), the Court that issue the order of confiscation states the nullity of the negotial act of transfer. The acts of property's disposal concluded in a period of two years before the request for the preventive measure (seizure or confiscation) are presumed to be fictitious (art.26).

When the outcomes of the financial investigations reveal serious clues that the free exercise of given economic activities is subject to intimidation or subjugation as provided for in art.416bis criminal code (mafia organized criminal group), or may favorise the activities of individuals assignees of preventive measures or who are tried for serious crimes (kidnapping, extortion etc…), the District Court may order the judicial administration of assetts related to economic activities (art.34) or the judicial control of enterprises (art.34 bis).

The District Court issues a motivated order of confiscation of the goods seized that the individual concerned owns personally or through other physical or legal persons, goods of which he can not justify a legitimate source and have a disproportionate value in respect to his earnings (declared to the fiscal administration) or his economic activity; and also, of the goods which are the outcomes of illicit activities or represent their reuse. Anyway, the individual can not give as a justification the fact that those goods represent the outcomes or the reuse of tax evasion.

A presumption, or suspect, concerning the illicit origin of goods or incomes is sufficient to start a proceeding for the application of a preventive measure against property: the perpetration or the evidence of a crime is not required, nor the conviction of the individual who owns the goods concerned. The clues that the competent Court shall examin pertain to the presumed illict origin of the assetts and of the illicit activity.

The order of confiscation (and the rejection of the request of confiscation) may be challenged before the Court of Appeal - as provided for preventive measures concerning individuals (art.10) - within ten days from the notification of the decision of first instance. The complaint does not have a suspensive effect. The Court of Appeal shall decide within 30 days since the proposition of the complaint.

The decision of second instance may be challenged before the Court of Cassation for grounds of violation of rules of law. The same time-limits of the former decision era provided.

The repeal of an order of confiscation may be requested in case of discovery of new evidences, when factual elements established in criminal judgments exclude the clues on which the confiscation was based on, when the decision on confiscation has been based on facts ascertained as fake (art.28).

In the field of judicial cooperation on criminal matters, ***Regulation (EU) 2018/1805*** of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders should be applicable to preventive measures concerning property.

Indeed, the 13een recital of the Regulation indicates that this legislative tool should apply to all freezing orders and to all confiscation orders issued within the framework of "proceedings in criminal matters" (autonomous concept of Union law interpreted by the Court of Justice of the European Union); term that covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence, not only orders covered by Directive 2014/42/EU[17].

But it also covers other types of order issued without a final conviction. While such orders might not exist in the legal system of a Member State, the Member State concerned should be ableto recognise and execute such an order issued by another Member State (while freezing orders and confiscation orders issued within the framework of proceedings in civil or administrative matters should be excluded from the scope of the Regulation).

Recital 14 indicates that the Regulation should cover freezing orders and confiscation orders related to criminal offences covered by Directive 2014/42/EU, as well as freezing orders and confiscation orders related to other criminal offences. Therefore, criminal offences covered by the

[17] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union





Regulation should not be limited to particularly serious crimes having a cross-border dimension, as Article 82 of the Treaty on the Functioning of the European Union (TFEU) does not require such a limitation for measures laying down rules and procedures for ensuring the mutual recognition of judgments in criminal matters.

In conclusion, EU Reg.2018/1805 should allow that seizure and confiscation ordered by an Italian District Court spread their effect on other Member States, where properties and goods are located, and should be executed by the Judicial Authority of the requested MS thanks to the principle of mutual recognition.

# CHAPTER III

# Preventive Measures Outside EU: Moldova, Serbia, and Montenegro

### Definition and the basic legal concepts

This Chapter is providing examples of preventive measures outside EU in order to give also an overview of judicial cooperation in criminal matters between third countries and the Member States of the European Union. Specifically, these countries – The Republic of Moldova; the Republic of Serbia; and Montenegro – have been placed at the center of this analysis since they represent three positive examples on how such countries have transposed EU legal acts regulating judicial cooperation in criminal matters into their legal systems.

For both developed and developing countries, organized crime poses a significant economic and social threat. With efforts to oppose organized crime as successfully as possible within individual countries, there is a growing need to build and improve the capacity of state to combat criminal activities that extend beyond national borders.

Organized crime is a complex phenomenon. Although, at first glance, it looks convenient to identify criminal acts and conduct criminal investigations on them by areas of actions, this leads to oversimplification of the situation. Experience teaches us that most areas of criminal activity are interconnected, for example, money laundering and the use of firearms. The perpetrators of these crimes are flexible enough to change their activities according to the available possibilities while mitigating identified risks in the process. It is therefore equally important that the efforts made to combat them will be proportionally flexible. Economic and financial crimes, corruption, and organized crime activities have an increasingly transnational character. As such, a criminal investigation

conducted on them regularly requests that the investigating authorities collect evidence beyond the borders of a particular state. Also, in the world of networked financial institutions present in numerous countries, gathering evidence of an exclusively domestic financial case crime or corruption often requires obtaining evidence from foreign jurisdictions.

Nowadays, more than ever before, it is necessary for police and judicial authorities to cooperate effectively and help each other if they want to get a criminal investigation, prosecution and court proceedings conducted in the right way. A promising trend is that many states have enacted laws allowing the provisions to help foreign judicial systems. The number of states that have committed themselves to international conventions or agreements mutual legal assistance in criminal matters has also increased. These contracts usually specify the forms of assistance, the conditions that must be met in order for the assistance to be provided, the obligations of cooperating states, the rights of the accused as well as the procedure for filing and acting on relevant requirements[1].

International judicial cooperation means proceedings of requests for assistance of judicial authorities (courts, public prosecutor's offices, notaries etc.) by a competent legal authority in the territory of another country. International agreements allow for mutual recognition of court judgements and performance of procedural acts (delivery of documents, collection of evidence, legalization of documents issued abroad) in the territory of another country and resolution of various legal issues with the involvement of the public authorities of another country.

The competence of the judicial authorities in international communication currently depends mainly on state's laws and international agreements (conventions, legal assistance agreements, EU legal framework). As a rule, in the framework of an international agreement, one authority is assigned to coordinate the provision of legal assistance. Usually, it is the Ministry of Justice, but depending on the judicial system of the state, this function may be delegated or performed, for example, by the

[1] https://rm.coe.int/mutual-legal-assistance-manual-srb/1680782928





public prosecutor's office or other judicial authorities.

Judicial cooperation in the EU is governed by the principle of mutual recognition, by direct communications among judicial authorities (prosecuting authorities), by the circulation of information and evidence with simplified formalities, and by the principle of matching, as possible and with respect to the requested State constitutional principles, the needs of the requesting State. The principle of mutual recognition between EU Countries led to a real change in the philosophy of judicial cooperation. It is based on the mutual confidence that EU countries have in each other's systems, founded on the common respect of human rights and fundamental freedoms as asserted in the Treaty of the European Union. Since the EU adhesion process guarantees the respect of the acquis, each national judicial authority must recognize decisions made by the judicial authority of another EU country with a minimum of formalities and with very few exceptions. Such objectives are fulfilled, in a context of different legal systems and constitutional traditions, through EU legal instruments, in Procedural Law and in substantive Criminal and Civil Law, and through the support of specific bodies in charge of judicial cooperation (such as Eurojust, European Judicial Networks in criminal and in civil matters)[2].

Judicial cooperation in criminal matters between third countries and the Member States of the European Union that have transposed EU legal acts regulating judicial cooperation in criminal matters into their legal systems is usually regulated by Law. Judicial cooperation in criminal matters includes:

- European Arrest Warrant (EAW)
- European Investigation Order (EIO)
- European protection order

[2] https://cosdt.me/publikacije/EUROL-2-Training-Programme-Judicial-Cooperation-with-Training-plan/

The basic principles of judicial cooperation in criminal matters between the Member States of the European Union and third countries are:

- The principle of respect for fundamental rights
- The principle of proportionality
- The principle of mutual recognition of the decisions of the Member States
- The principle of effective cooperation and the principle of direct cooperation[3]

According to the recent judgement of the Court of Justice of the European Union[4], an EAW can also be issued on the basis of a sentence imposed in a third country, provided that the sentence was recognised in the issuing EU Member State. The prerequisites for this are, however, the imposition of a custodial sentence of at least four months and compliance with the EU's fundamental rights in the third-country criminal proceedings[5].

Regarding the EIO, the Directive 2014/41/EU on the European Investigation Order in criminal matters, more precisely art. 34 (1) states that: "[...] this Directive replaces the European Convention on Mutual Assistance in Criminal Matters [...]".[6] Art. 34(1) clarifies that the EIO prevails over traditional Mutual Legal Assistance (MLA) conventions and protocols that were the main legal basis for evidence-gathering in the context of judicial cooperation in criminal matters. Hence, the Directive is also applicable between Member States adn Third States. Emphasis must be placed on the fact that the Directive is replacing but not repealing the traditional MLA conventions and protocols. Therefore, the traditional MLA conventions and protocols must remain in place in order to continue cooperation with third countries that are parties to these international treaties.[7]

[3] Republic of Montenegro, Law on Judicial Cooperation in Criminal Matters with member states of the European Union

[4] Case-488/19- Minister for Justice and Equality, 17 March 2021, ECLI:EU:C:2020:206;

[5] T. Wahl, "CJEU: Convictions of Third Countries Executed in EU Member States Can Be Subject of an EAW", 12 April 2021, https://eucrim.eu/news/cjeu-convictions-of-third-countries-executed-in-eu-member-states-can-be-subject-of-eaw/.

[6] European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959;





## REPUBLIC OF MOLDOVA

### General Overview

The Republic of Moldova condemns terrorism in all its forms and manifestations and supports the international community's position regarding the determination of terrorism as one of the main threats to the states' security.

The Republic of Moldova supports international cooperation and actively participates in activities directed towards combating terrorism elaborated by international organizations through regulation and practical measures. At the same time, the Republic of Moldova considers that keeping "frozen" conflicts in different regions of the world, which are under the limited or entire control of extremist separatist forces, facilitate money laundering, illegal migration, human trafficking, weapons and drugs trafficking. That overall creates a favorable environment for international terrorism.

Actively participating in the process of consolidation of its capacities regarding the prevention and combating of terrorism, the Republic of Moldova unconditionally respects international agreements in the field of human rights and fundamental freedoms as the basis for its internal regulations.

Fully accomplishing the goal of counteracting terrorism, the Republic of Moldova is a member of the global counter-terrorism coalition and supports the international community's efforts in counter-terrorism activity, as confirmed by the Parliament of the RM.

[7] J.A. Espina Ramos, The European Investigation Order and its Relationship with other Judicial Cooperation Instruments, https://eucrim.eu/articles/european-investigation-order-and-its-relationship-other-judicial-cooperation-instruments/

International legal assistance in criminal matters has its legal basis in the international instruments ratified by the Republic of Moldova, as well as the applicable national instruments. When speaking about international framework, the European Convention on Mutual Assistance in Criminal Matters from Strasburg, April 20, 1959 is the most used. The convention is supplemented by its additional protocols, that are apllicable only between RM and the states that have ratified the Convention too.

## LEGAL FRAMEWORK

### – A. International Framework

#### a. Multilateral conventions

| |
|---|
| European Convention on Mutual Assistance in Criminal Matters and its Additional Protocols on April 20, 1959 (ratified by Decision nr. 1332-XIII FROM 26.09.97) |
| The United Nations Convention against Transnational Organized Crime and its Protocols, 15.11.2000 |
| Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases, 22.01.1993, Minsk |
| The International Convention for Suppression of the Financing of Terrorism, 09.12.1999, New York |
| The European Convention on Information on Foreign Law, 07.06.1960, London |
| Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism adopted in Warsaw, May 16, 2005 (ratified by Law nr. 165-XVI as of 13.07.2007) |
| The Council of Europe Convention on the Prevention of Terrorism, adopted in Warsaw on May 16, 2005 (approved by Law 51-XVI as of 07.03.2008) |
| The International Convention for the Suppression of Acts of Nuclear Terrorism, adopted in New York on April 13, 2005 (ratified by Law nr. 20-XVI as of 21.02.2008) |
| The Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted in Rome on March 10, 1988 (approved by Law nr. 192- XVI as of 28.07.2005) |





| |
|---|
| The Protocol on the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, adopted in Rome on March 10, 1988 (approved by Law nr. 193-XVI as of 28.07.2005) |
| The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (ratified by Law nr. 274 as from 16.12.2016) |

#### b. Bilateral conventions

In addition to the multilateral conventions of the Council of Europe and the UN to which the RM is a party, the following bilateral treaties are applicable:

| |
|---|
| Treaty between RM and Republic of Lithuania on legal assistance in civil, family and criminal matter, 09.02.1993 |
| Treaty between RM and Romania on legal assistance in civil, family and criminal matter, 06.07.1996 |
| Treaty between RM and Ukraine on legal assistance in civil, criminal matter, 13.12.1993 |
| Treaty between RM and Republic of Azerbaidjan on legal assistance in civil, family and criminal matter, 26.10.2004 |

The provisions of the international treaties to which RM is a party, as well as other interenational obligations have priority over the provisions of the national legislation. If the RM and the requeste/requesting State are contracting parties of several international treaties, the provisions of the treaty that provides better protection on human rights and freedoms shall be applicablie.

In the absence of any international treaty, the international legal assistance shall be provided according to the principle of reciprocity through diplomatic channels.[8]

[8] Ministry of Justice, Guide on international legal cooperation, http://www.justice.gov.md/public/files/file/GHID_cu_privire_la_cooperarea_juridica_internationala.pdf;

## – B. National Framework

Constitution of the Republic of Moldova, 29.07.1994

Law no. 371 of 01.12.2006 on international legal assistance in criminal matters

Law nr. 120, 21.09.2017 on the prevention and combating of terrorism

The given Law establishes the normative and organizational framework for the prevention and combating terrorism, determines how to coordinate the measures taken by competent authorities in the field of prevention and combating terrorism, rights, responsibilities and guarantees of the people that participate directly in counterterrorism operations or those who have suffered from a terrorist act. Also, this Law determines the negotiation conditions with terrorists and conditions of hostage's release by competent authorities from the Republic of Moldova, as well as the possibility of asking, in an established manner, for necessary assistance from other countries. Thus, there are implemented provisions of the EU Directive 2016/681 of the European Parliament and the European Council from April 27, 2016, on the use of data from passenger name records (PNR) to prevent, detect, investigate and prosecute terrorist offences and serious crimes.

Law no. 54, 21.02.2003 on counteracting extremist activity

Article 278, Criminal Code RM no.985, 18.04.2002

It defines terrorism as the setting off of an explosion, causing conflagration or committing other acts which pose the danger of death or bodily or mental harm, causing fundamental damage to the property or the environment or other serious consequences. This act is committed with the aim of intimidating the population or a part thereof, attracting society's attention to political, religious ideas or ideas of another nature of the offender or to force the state, an international organization or a judicial person to commit or abstain from committing any act, as well as threatening to commit such acts with the same aims

Law no. 308 of 22.12.2017 on preventing and combating money laundering and terrorist financing

Law no. 371 of 01.12.2006 on international legal assistance in criminal matters

Decision no. 464 of 27.09.2001 of the Parliament of the Republic of Moldova on combating terrorism





## – C. Institutional Framework

- The President of the Parliament of the Republic of Moldova coordinates the entire activity of preventing and combating terrorism
- The Government is the main authority responsible for the organization of counter-terrorism activities and the supply of necessary forces, means and resources
- The Security and Intelligence Service of the Republic of Moldova is the national authority that directly carries out the antiterrorist activities
- The General Prosecutor's Office carries out activities of preventing and counteracting terrorism by conducting criminal proceedings in cases involving offences of a terrorist character
- The Antiterrorist Centre is a national specialized authority within the Security and Intelligence Service empowered with the prevention and combating of terrorism

**The Antiterrorist Centre** has the following basic tasks:

- Coordination of measures for preventing and combating terrorism carried out by the responsible public authorities
- Combating terrorism by means of prevention, detection and stopping terrorist activity, including on an international level
- Assessment of risk factors and terrorist threats to the national security of the Republic of Moldova, gathering of information concerning the state, dynamics and trends of the terrorism phenomenon
- Forecasts concerning the evolution of the operational situation on preventing and combating terrorism at national, regional and international level; checking the state and assessing the level of antiterrorism protection to critical infrastructure objectives, and coming with a set of recommendations to increase their security level
- Ensuring information exchange with authorities carrying out activities aimed at preventing and countering terrorism, with similar anti-terrorist structures of other countries and international ones, performing other forms of cooperation

- Providing assistance to competent authorities in preventing terrorism, cooperation with mass-media and civil society to promote antiterrorist measures, developing an attitude of rejection toward extremism and terrorism
- Providing assistance in the planning and organizing of command and operational tactical activities at local, national, and regional levels

**The General Prosecutor's Office** carries out activities of preventing and counteracting terrorism by conducting and carrying out criminal proceedings in cases involving offences of a terrorist character.

### – D. The Ministry of Internal Affairs prevents and counteracts terrorism by:

- Stopping the attempts of terrorists to cross the state border of the Republic of Moldova
- Ensuring the maintenance of the state border regime, of the border area regime, and public regime and order at the state border crossing points
- Performing activities of civil protection, organizing rescue works, carrying out other urgent measures to liquidate the consequences of terrorist activities
- Carrying out criminal investigations on offences having a terrorist character attributed to its competencies by law
- Organizing and performing informational-analytical activities regarding the offences of a terrorist character within the framework of its competences
- Participating at ensuring legal regime in the area of anti-terrorist operation with the implication of the military personnel of the Carabineer Troops Department
- Participation of a special destination unit in performing counterterrorism interventions at the request of the Antiterrorist Operational Command





- Providing the necessary logistical and operational assistance and special means and techniques at the request of the Antiterrorist Operational Command

### – E. The Ministry of Foreign Affairs and European Integration

- Participates, along with other central specialized authorities, in performing the provisions of this Law on the international cooperation
- Participates, along with other central specialized authorities, in solving interstate problems referring to the regulation of exceptional situations related to terrorist activity
- Cooperates with the Security and Intelligence Service in order to ensure antiterrorist protection of the diplomatic missions of the Republic of Moldova abroad

### – F. International cooperation[9]

International judicial assistance in criminal matters is regulated by *chapter IX of Title III of the Criminal Procedure Code of the Republic of Moldova regarding the international judicial assistance in the field of criminal law*, which is divided into the following sections:

- **Request for rogatory commission**
- **Extradition**
- **Transfer of convicts**
- **Acknowledging criminal judgments of Foreign Courts**

As well as by the **Law of the Republic of Moldova nr. 371- XVI as of 1st December 2006 on International Judicial Assistance in Criminal Matters.**

The Convention of the Council of Europe on Prevention of Terrorism, adopted in Warsaw on 16th May 2005, the European Convention on the Suppression of Terrorism and the Protocol for amending the Convention,

[9] https://rm.coe.int/profiles-on-counter-terrorism-capacity-republic-of-moldova/16808aef3d

ratified by the Republic of Moldova in 2008, 1999 and 2004, respectively, together with other international tools in this field, facilitate the process of extradition of persons who commit offences of a terrorist character.

Under international judicial assistance, the following main principles have been determined:

- supremacy of treaties to which the Republic of Moldova is a party or other international commitments of the Republic of Moldova in terms of national legislation;
- in cases when the Republic of Moldova, the state from which the information is requested or the state which requests the information are party to a number of international agreements on judicial assistance and between the provisions of these normative acts arise any divergences or incompatibilities, will be applied the provisions of that treaty which ensures superior protection of the human rights and freedoms;
- the Ministry of Justice can decide not to execute a judiciary decision regarding the admission of offering international judicial assistance, in cases involving matters of fundamental national interest. This competence is aimed to respect the person's rights, during the implementation of the final decisions adopted in their favor;
- requests regarding international judicial assistance in criminal matters are processed via the Ministry of Justice or General Prosecutor's Office directly and/or with the assistance of the Ministry of Foreign Affairs and European Integration of the Republic of Moldova except for those cases when, on the basis of reciprocity, another type of request is stipulated;

Judicial assistance, offered or requested **by the Republic of Moldova is determined by the legislation of the Republic of Moldova and by the legislation of the relevant state**, especially as regards:

- announcement of procedural acts or judicial decisions relating to a physical person or a legal entity abroad;
- hearing of persons as witnesses, suspects, accused or convicted persons, defendant or a civilly responsible part;





- execution of the request and inquisition at that moment, rising the objects and documents and pass them abroad, sequestration, confrontation, acknowledging, identification of the telephone's subscribers, the wiretapping, performing of expertise, seizure of goods obtained as a result of committing a crime or other actions of criminal investigation stipulated by the Criminal Procedure Code;
- citation of witnesses, experts or of pursued persons by the institutions of criminal investigation or by the Court, taking over criminal investigation at the request of a foreign state;
- the pursuit and extradition of persons who have committed a crime or for executing the punishment in the form of deprivation of liberty;
- recognition and execution of foreign sentences;
- transfer of convicted persons; announcement concerning the certificate of conviction;
- other actions that do not violate the provisions of the Criminal Procedure Code of the Republic of Moldova and the Law on International Judicial Assistance in Criminal Matters.

The Republic of Moldova supports and actively participates in the initiatives of the Council of Europe in the field of counteracting terrorism.

The Republic of Moldova ratified the European Convention on the Suppression of Terrorism (1977) and the Protocol amending the European Convention on the Suppression of Terrorism (2003), as well as other European conventions on extradition and judicial assistance in criminal matters.

On 1st of May 2008 was ratified the Convention of the Council of Europe on Preventing of Terrorism and on Money Laundering, Searching, Seizure and Confiscation of the proceeds resulted from Crime and from Terrorism Financing as from 2005.

Also, on 16th of December 2016 the Republic of Moldova ratified the Additional Protocol to the Convention of the Council of Europe on Prevention of Terrorism, opened for signature in Riga, 22.10.2015, with all necessary amendments for implementing its provisions in the national legislation.

According to national legislation in the field of preventing and counteracting terrorism, in accordance with international treaties to which the Republic of Moldova is a party, RM cooperates with law enforcement authorities and intelligence services of other states, as well as international organizations which activate in the field. In order to ensure the security of person, society and the state, the Republic of Moldova pursues persons involved in terrorism activities on its territory, including the cases when these activities were planned or committed outside its territory but did cause harm to RM and also in other cases provided by international treaties to which the Republic of Moldova is a party.

### – G. Cooperation between Republic of Moldova and EU institutions[10]

The EU cooperates with Moldova in the framework of the European Neighborhood Policy and its eastern regional dimension, the Eastern Partnership. The key goal is to bring Moldova closer to the EU.

The ENP Action Plan contain some objectives in the field of counterterrorism. However, those are generally vague and mainly concern establishing or reinforcing political dialogue on terrorism-related issues.

The Republic of Moldova is the only country in the Eastern Partnership that signed the Agreement on Operational and Strategic Cooperation with EUROPOL and Eurojust, providing an effective exchange of information and criminal intelligence[11].

### Cooperation with Europol[12]

The European Union Agency for Law Enforcement Cooperation, better known under the name Europol, formerly the European Police Office and Europol Drugs Unit, is the law enforcement agency of the European

[10] https://mfa.gov.md/en/content/justice-and-home-affairs

[11] Counter-terrorism cooperation and the European Neighborhood Policy by Chantal Lavallée, Sarah Léonard, Christian Kaunert

[12] Strategic Cooperation Agreement between the RM and the European Police Office, 2007;





Union (EU) formed to handle criminal intelligence and combat serious international organized crime and terrorism through cooperation between competent authorities of EU member states.

EUROPOL works closely with law enforcement authorities in the EU Member State and third countries.

The Republic of Moldova cooperates with the European Police Office (Europol) on the basis of:

- The Strategic Cooperation Agreement signed in 2007
- The Operational and Strategic Cooperation Agreement signed on December 18, 2014

Starting with 2013, the Republic of Moldova has seconded a liaison officer to Europol.

**The purpose** of the Operational and Strategic Cooperation Agreement is to establish cooperative relations between Europol and the Republic of Moldova in order to support the Member States of the European Union and the Republic of Moldova in preventing and combating organized crime, terrorism and other forms of international crime, in particular through the exchange of information between Europol and the Republic of Moldova.

The Republic of Moldova designated a national contact point to act as the central point of contact between Europol and other competent authorities of the Republic of Moldova. The national contact point was set up within MIA.

The following forms of cooperation are used according to the agreement:

**Exchange of information -** the transmission of personal data and classified information with the purpose of preventing or combating the criminal offences

**Association to analysis groups -** Europol may invite experts from the Republic of Moldova to be associated with the activities of analysis groups

**Participation in joint investigation teams**; Europol and the Republic of Moldova offer each other support in the facilitation of the setting up and operation of joint investigation teams

According to the Agreement, the competent authorities in the Republic of Moldova responsible under national law for preventing and combating the criminal offences are:

- Ministry of Internal Affairs
- Information and Security Service
- Ministry of Finance (Customs Service)
- National Anti-Corruption Center
- General Prosecutor's Office

### Cooperation with Eurojust[13]

Eurojust is an agency of the European Union (EU) dealing with judicial cooperation in criminal matters. It was established in 2002 with the goal to enhance the effectiveness of the competent authorities within the Member States when they are dealing with the investigation and prosecution of serious cross-border and organized crime.

In the 2013, Eurojust was involved in 188 cases with 47 third States, and in June 2014, the JITs Network Secretariat (hosted by Eurojust at its premises in The Hague) held its 10th Annual Meeting on the subject of increasing cooperation with third States.

[13] Agreement on Cooperation between Erojust and the RM, 10 July 2014;





In 2014 Republic of Moldova signed the Cooperation Agreement with Eurojust. **The purpose of the Agreement** is to enhance the cooperation between Eurojust and the Republic of Moldova in combating serious crime, in particular organized crime and terrorism. Cooperation between Eurojust and third States helps to accelerate or facilitate the execution of extradition and mutual legal assistance requests, clarify legal requirements and relevant legislation and identify competent national authorities.

The cooperation agreement governs closer cooperation and makes provision for the exchange of operational information, including personal data, in accordance with Eurojust's data protection rules.

The cooperation agreement also allows Moldova to second a Liaison Prosecutor to Eurojust and for Eurojust to post a Liaison Magistrate to Moldova. The competent authority of the RM for the execution of the Agreement is the Prosecutor's Office of the Republic of Moldova.

### Cooperation with Frontex

When it comes to border controls, which can also contribute to fighting terrorism, working arrangements have been signed by the European Border Police and Coast Guard Agency (FRONTEX) which is the European border management agency, with all six Eastern ENP partners, namely Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

Moldova's relations with the European Border Police and Coast Guard Agency (FRONTEX) are based on the Working Arrangement on the Establishment of Operational Cooperation of August 12, 2008, and the Cooperation Plan for 2015-2017, which was updated in 2018, through a new collaboration plan for the 2018-2020 period.

Cooperation includes information exchange, training, research and development, risk analysis and joint operations.

The Border Police and the FRONTEX Agency are in constant contact with the development dimension, especially with regard to surveillance equipment and automated systems that may be relevant to the integrat-

ed border management system. Furthermore, Border Police officers are involved in the implementation of the border security system of the EUROSUR platform.

### Cooperation with European Monitoring Center for Drugs and Drugs Addiction

The Memorandum of Understanding with the European Monitoring Center for Drugs and Drug Addiction (EMCDDA) was signed in 2012. In this regard, Moldova has designated the National Drug Observatory as a contact point for the EMCDDA.

## REPUBLIC OF SERBIA[14]

The Republic of Serbia recognizes the threat that terrorism poses to the fundamental values on which it rests, such as the rule of law, human rights and democracy, including freedom, peace and safety of citizens, sovereignty and territorial integrity, stability and safety of the state and legitimately elected authorities, as well as international peace and safety of the international community.

National policy in this field is based on condemnation of all acts of terrorism – regardless of circumstances, forces that committed them, location, time and method of execution. At the same time, the Republic of Serbia disapproves the association of terrorism with any particular religious, ethnic or other group.

Prevention and struggle against terrorism are important aspects of the achievement of foreign policy priorities of the Republic of Serbia in its endeavors to ensure long-lasting global and regional stability and to curb security threats posed by terrorism and other terrorism-related threats.

[14] https://rm.coe.int/serbian-national-strategy-for-the-prevention-and-countering-of-terro-ri/168088ae0b





The Republic of Serbia recognizes the universal character of terrorism and extremism, as well as the need for continuous and broad-based cooperation of states at the global and regional level, for the purpose of adopting a joint approach, which is, as a priority, realized through the United Nations and other international organizations. Within security policy and facing the current security threats, the Republic of Serbia, as an EU candidate country, gives its full contribution through active participation within European policies in the struggle against terrorism, and at the bilateral level by respecting generally accepted international principles and standards.[15]

### LEGAL FRAMEWORK

#### – A. International Framework

| |
|---|
| CoE Convention on the Prevention of Terrorism (2003) |
| International Convention for the Suppression of the Financing of Terrorism, Official Gazette of the FRY –International Treaties, No. 7/2002 |
| International Convention for the Suppression of Terrorist Bombings, Official Gazette of the FRY –International Treaties, No. 12/2002 |
| European Convention on the Suppression of Terrorism, Official Gazette of the FRY - International Treaties, No. 10/2001 |
| Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism, Official Gazette of the Republic of Serbia –International Treaties, No. 19/2009 |
| Protocol on the European Convention on the Suppression of Terrorism, Official Gazette of the Republic of Serbia –International Treaties, No. 19/2009 |

[15] https://rm.coe.int/profile-serbia-2021-fin-eng-2787-3974-7332-v-1/1680a2fc26

European Convention on Extradition, Official Gazette of the FRY – International Treaties, Nos. 10/2001, 12/10

- Additional Protocol to the European Convention on Extradition - Official Gazette of the FRY, International Treaties, No. 10/2001;
- Second Additional Protocol to the European Convention on Extradition, Official Gazette of the FRY – International Treaties, No. 10/2001;
- Third Additional Protocol to the European Convention on Extradition, Official Gazette of the Republic of Serbia – International Treaties, No. 1/2011;
- Fourth Additional Protocol to the European Convention on Extradition, Official Gazette of the Republic of Serbia – International Treaties, No. 13/2013;

European Convention on Mutual Legal Assistance in Criminal Matters, Official Gazette of the FRY, International Treaties, No. 10/2001

European Convention on Transfer of Proceedings in Criminal Matters, Official Gazette of the FRY, International Treaties, No. 10/2001

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (hereinafter: the Strasbourg Convention), adopted in 1990, Official Gazette of the FRY- International Treaties, No. 7/02, and Official Gazette of Serbia and Montenegro – International Treaties, No.18/05

International Convention for the Suppression of the Financing of Terrorism, passed by the United Nations General Assembly on 9th December 1999

European Convention on the Suppression of terrorism, passed in Strasbourg, on 27th January 1977.

## – B. National Framework

Constitution of the Republic of Serbia (RS Official Gazette, No 83/2006

The Law on Restriction of Disposal of Property for the Prevention of Terrorism

Law on Border Control, the Law on Asylum and Temporary Protection and the Law on Foreigners, which were passed on March 22, 2018

The Law on Defense (Official Gazette of the RS, Nos. 116/07, 88/09-as amended, 104/2009-as amended, and 10/15)





Law on the Prevention of Money Laundering and the Financing of Terrorism (AML/CFT Law), Official Gazette of RS, 113/17 and 91/19)

The Law on Organization and Competence of State Authorities in Combating Organized Crime, Terrorism and (Official Gazette of the RS Nos. 94/16 and 87/2018 – other law)

The Law on International Legal Assistance in Criminal Matters (Official Gazette of the RS No. 20/09)

The Law on the Execution of the Prison Sentence for Criminal Offences of Organised Crime (Official Gazette of the RS No. 72/09 and 101/10)

The Law on Assumption of Jurisdiction of Military Courts, Military Prosecution and Judge Advocate General (Official Gazette of the RS No. 137/04)

The Criminal Code (Official Gazette of the RS, Nos. 85/2005, 88/2005 – correction, 107/2005 – correction, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019

The Law on the Seizure and Confiscation of Proceeds of Crime Act ("Official Gazette of the RS", Nos. 32/2013, 94/2016 and 35/2019)

The Criminal Procedure Code (Official Gazette of the RS Nos. 72/11,101/11,121/12,32/13,45/13 and 55/14

Law on the Freezing of Assets with the Aim to Prevent Terrorism and Proliferation of Weapons of Mass Destruction (Official Gazete of RS, nos. 29/2015, 113/2017 and 41/2018)

## – C. Institutional Framework[16]

- National Security Council - The highest body of the Republic of Serbia dealing with the problem of terrorism, among its other 6 activities
- Bureau for Coordination of Security Services of the Republic of Serbia - The operative organ of the National Security Council, which co-ordinates the work of the security services at an operational level and implements the conclusions of the National Security Council.

[16] Annual Exchange of Information on the OSCE Code of Conduct on Politico-Military Aspects of Security (https://www.osce.org/files/f/documents/a/7/483110.pdf)

- Prosecutor's Office for Organized Crime, as a Prosecutor's Office of Special Jurisdiction – centralized competence
- Special Department of the Higher Court in Belgrade and Special Department of the Appellate Court in Belgrade – centralized competence
- Ministry of Interior (Service for Combating Terrorism and Extremism, Special Anti-Terrorist Unit, Gendarmerie, Service for Fighting Against Organized Crime, Emergency management sector, Border Police Directorate)
- Ministry of Finance (Directorate for Prevention of Money Laundering, Customs Administration and Tax Administration)
- Security-Intelligence Services (Security Information Agency, Military Security Agency and Military Intelligence Agency)
- Ministry of Foreign Affairs
- Ministry of Justice (Sector for Normative Affairs, Sector for International Legal Assistance, Directorate for Execution of Criminal Sanctions)
- In addition, the institutions responsible for supervising and monitoring the work of the executive parts of the national security system in the Republic of Serbia have a significant role in this regard: the Government, the National Assembly, independent state institutions and control bodies, as well as the Office of the National Security Council and Classified Information Protection
- Counterterrorism and Extremism Service
- Permanent Mixed Working Group against terrorism - Following the experiences of the developed countries of the world, representatives of all state bodies in the Republic of Serbia responsible for the fight against terrorism have been delegated to the mentioned team. One of the primary tasks of the team - as the umbrella body in the Republic of Serbia for the mentioned area, is to lead at a strategic and tactical level to better and faster connection and coordination in the work of competent state bodies, and thus their more efficient action in the fight against terrorism





## – D. International cooperation[17]

The Republic of Serbia has developed a normative and institutional system for international cooperation in the field of the suppression of international terrorism.

### United Nations

The Republic of Serbia provides continued support to the UN in its efforts to promote and preserve peace and security through the participation of representatives of the Republic of Serbia in peacekeeping operations in the UN missions in Lebanon (UNIFIL), DR Congo (MONUSCO), Cyprus (UNFICYP), the Central African Republic (MINUSCA), and the Middle East (UNTSO). Moreover, as a country that strongly condemns terrorism in all its forms and all types of extremism and radicalism, the Republic of Serbia is firmly committed to helping eliminate this threat at the national, regional and global levels. To that end, the Republic of Serbia is making efforts to fully implement all the relevant UN resolutions and conventions and the UN Global Counter-Terrorism Strategy, and it actively participates in the Global Coalition to Defeat ISIS. The Republic of Serbia is currently a signatory of 15 international legal instruments (conventions) on combating terrorism, which makes it one of the top countries of the United Nations by the number of ratified universal anti-terrorism instruments.

### Council of Europe

The Republic of Serbia has been a member of the CoE since 3 April 2003 and a signatory to the conventions pertaining to the fight against terrorism. In addition, the Republic of Serbia actively participates in the work of the relevant committees related to the fight against terrorism, such as,

[17] https://rm.coe.int/serbian-national-strategy-for-the-prevention-and-countering-of-terro-ri/168088ae0b
https://rm.coe.int/profile-serbia-2021-fin-eng-2787-3974-7332-v-1/1680a2fc26

for example, Committee on Counterterrorism (CDCT) and Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism – MONEYVAL.

### Interpol

The Republic of Serbia has been a member since September 24, 2001. Each of the member countries hosts an INTERPOL National Central Bureau (NCB). It connects national law enforcement with other countries and with the General Secretariat via INTERPOL secure global police communications network called I-24/7.

The Department for INTERPOL Affairs, ie., the National Central Bureau of INTERPOL Belgrade, as part of the Directorate for International Operational Police Cooperation, is the contact point of the Ministry of the Interior for communication between Serbian and foreign police services through INTERPOL's secure communication channel for exchanging data of operational importance for the police.

### The Organization for Security and Cooperation in Europe

The Republic of Serbia has been a member of the Organization for Security and Cooperation in Europe (OSCE) since 10 November 2000. On 27 November 2000, at the meeting of the OSCE Ministerial Council in Vienna, the Republic of Serbia signed the OSCE key documents (the Helsinki Final Act, the Charter of Paris, and the Istanbul Charter), thereby accepting all rules, standards and obligations arising from those documents.

In 2015, Serbia was chairing the OSCE. The Chairmanship ended at the Ministerial Council in Belgrade, held at the Belgrade Arena on 3–4 December 2015. The OSCE Ministerial Council session was attended by 44 delegations at the ministerial level. Several decisions were adopted: the Declaration on Reinforcing OSCE Efforts to Counter Terrorism in the Wake of Recent Terrorist Attacks; the Declaration on Preventing and Countering Violent Extremism and Radicalization Leading to Terrorism; the Declaration on the OSCE Activities in Support of Global Efforts in





Tackling the World Drug Problem; the Declaration on Youth and Security; the Ministerial Statement on the negotiations on the Transnistrian settlement process in the "5+2" format.

### European Union

EU Commissioner for Home Affairs and the Western Balkan partners signed in October 2018 in Tirana, the Republic of Albania, a joint action plan to fight terrorism, containing concrete steps to improve cooperation in the fight against terrorism and prevent radicalization in the next two years. This is one of the key priorities of the EU Commission's 2018 strategy for a "Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans". The Republic of Serbia cooperates with the Europol, pursuant to the Law on the Ratification of the Agreement on Operational and Strategic Cooperation between the Republic of Serbia and Europol (Official Gazette of the Republic of Serbia, No. 8/14 - International Agreements), which came into force in June 2014, together with the Memorandum of Understanding on Data Assurance and Confidentiality between the Republic of Serbia and EUROPOL and the Bilateral Agreement between the Republic of Serbia and Europol for the establishing of the interconnection between computer networks.

Agreement on cooperation between the Republic of Serbia and EUROJUST was signed on 12 November 2019, ratified on 9 December 2019. The Republic Public Prosecutor appointed the Liaison Prosecutor for Serbia at Eurojust - Deputy Republic Public Prosecutor who is operational in The Hague headquarters from March 2020.

# MONTENEGRO

### General Overview[18]

Montenegro is fully committed to combating all forms of terrorist activities and the financing of terrorism. Montenegro is open to international cooperation to help collect the necessary evidence and data for the effective suppression of those threats and also to exchange knowledge and experience with other colleagues. Being a member of the relevant UN organisations, INTERPOL and SECI Centre, Montenegro is committed to cooperation to combat all forms of terrorist activity.

Montenegro's legal framework is largely aligned with the EU acquis. However, Montenegro has yet to adopt the strategy for the prevention and suppression of terrorism, money laundering and terrorism, which expired in 2018. The strategy for the suppression of violent extremism was adopted in February 2020. Coordination should be enhanced between the two policies that are closely interconnected, to avoid overlap and working in silos.

In November 2019, Montenegro and the EU signed an arrangement to implement the Joint Action Plan on Counterterrorism for the Western Balkans, in the framework of which Montenegro submitted its first semi-annual report in August 2020[19].

Montenegro continued to cooperate closely with Interpol and Europol and to contribute to the Terrorism Risk Assessment and Analysis for the Western Balkans. Montenegro is actively participating in the implementation of the Western Balkan Counter Terrorism Initiative (WBCTi). Cooperation with the EU Internet Referral Unit (IRU) at Europol in dealing with terrorist content online has started. Threat assessment needs to be conducted in a more analytical and inclusive way, in order to create a common understanding of main threats and risks amongst the concerned stakeholders and to priorities the risks to be addressed.

[18] https://rm.coe.int/profiles-2013-montenegro-en/168064102b

[19] https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/montenegro_report_2020.pdf





Mutual legal assistance in Montenegro is mainly provided based on multilateral and bilateral agreements, and if there is no international agreement or if specific issues are not regulated by agreements, domestic legislation applies. Montenegro is a signatory to several multilateral conventions in the field of MLA in criminal matters. The most important among these are the conventions of the Council of Europe: The European Convention on Mutual Assistance in Criminal Matters of Strasbourg, 1959 and its Additional Protocols, the European Convention on Extradition, Paris 1957 and its Additional Protocols, the European Convention on the Transfer of Sentenced Persons, Strasbourg, 1983 and its Additional Protocol, the European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 1982.

With a view to better and more accurate regulation and simplifying and accelerating the process of providing MLA in criminal matters and to bilaterally create the conditions for stronger, mandatory and more effective cooperation with the countries of the region in the fight against all forms of crime, particularly organized crime and corruption, Montenegro signed a number of bilateral agreements with the countries of the region, with which the discharge of legal assistance is the most frequent, such as Serbia, Bosnia and Herzegovina, Croatia, Italy, Macedonia.

In the event that an issue arising in the relations between two countries is not regulated by a bilateral agreement or multilateral conventions to which Montenegro and the other country are parties, these issues are resolved on the basis of international courtesy, in accordance with national laws. The most important regulations of Montenegro regarding judicial cooperation in criminal matters are the Law on Mutual Legal Assistance in Criminal Matters, the Criminal Procedure Code, the Law on Prevention of Money Laundering and Financing of Terrorism, the Law on Witness Protection Act, the Law on liability of legal persons for criminal offenses, the Law on Seizure, Confiscation and Management of Property Obtained Through Criminal Activity, the Law on Internal affairs and the Law on Courts, the Law on State Prosecution Office and the Law on Special State Prosecution Office.

Ministry of Justice promoted the adoption of the Law on Judicial Cooperation in Criminal Matters with Member States of the European Union, which purpose is to introduce in Montenegrin legislation fundamental tools of EU such as, e.g., the European Warrant of Arrest, and better regulate the judicial cooperation in criminal matters between the competent judicial authorities of Montenegro and the judicial authorities of another Member State of the European Union.

The Law transposes relevant EU legislation in the field (Directives, Framework Decisions, Council Decisions) into Montenegrin national legislative framework.

The most important among them are:

1. The European arrest warrant and surrender procedure;
2. Order for securing property or evidence;
3. The European order for obtaining evidence;
4. Recognition and enforcement of decisions on confiscation of property or objects
5. Recognition and execution of fines decisions
6. Recognition and execution of judgments to imprisonment or measures involving deprivation of liberty
7. Recognition and execution of judgments and decisions imposing probation measures and alternative sanctions
8. Recognition and enforcement of decisions on security measures. The Law, adopted in December 2018, will enter into force once Montenegro joins the European Union[20].

[20] https://cosdt.me/publikacije/EUROL-2-Training-Programme-Judicial-Cooperation-with-Training-plan





## LEGAL FRAMEWORK

### – A. International framework

| |
|---|
| Council of Europe Convention on the Prevention of Terrorism [CETS No. 196] |
| Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism [CETS No. 198] |
| Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime [ETS No. 141] |
| European Convention on the Suppression of Terrorism [ETS No. 90] |
| Protocol amending the European Convention on the Suppression of Terrorism [ETS No. 190] |
| European Convention on Mutual Assistance in Criminal Matters [ETS No. 30] |
| European Convention on Extradition [ETS No. 24] |
| European Convention on the Transfer of Proceedings in Criminal Matters [ETS No. 73] |
| European Convention on the Compensation of Victims of Violent Crimes [ETS No. 116] |
| International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 2005) |

### – B. National

Establishing a contemporary and comprehensive legislative framework in accordance with relevant international standards is a key precondition for effective prevention and suppression of terrorism. The authorities responsible for the prevention and suppression of terrorism engage in constant evaluation of the efficacy of the legal framework and take care of the promotion in accordance with needs. Several laws pertaining to this criminal-legal area or referring thereto regulates the jurisdiction, powers and actions of government authorities involved in

the fight against terrorism as follows.[21]

| |
|---|
| Criminal Code (Official Gazette of the Republic of Montenegro 70/03 and 47/06 and Official Gazette of Montenegro 40/08, 25/10, 32/11, 40/13 and 56/13) |
| Criminal Procedure Code (Official Gazette of Montenegro 57/09, 49/10 and 47/14) |
| Law on the Armed Forces of Montenegro (Official Gazette of Montenegro 88/09, 75/10, 40/11 and 32/14) |
| Law on Prevention of Money Laundering and Terrorist Financing (Official Gazette of Montenegro number 33/14) |
| Law on Asylum (Official Gazette of the Republic of Montenegro, 45/06, 73/10 and 40/11) |
| Law on Prevention of Money Laundering and Terrorist Financing (Official Gazette of Montenegro number 33/14) |
| Law on Border Control (Official Gazette of Montenegro 72/09, 39/13) |
| Law on Defense (Official Gazette of Montenegro 86/09, 88/09, 25/10, 40/11 and 14/12) |

### – C. Institutional framework

Competent authorities for combating terrorism in Montenegro are:

The Ministry of Foreign Affairs performs administrative affairs related to: situation analytical monitoring and strategic planning in the area of fight against crime, public order and peace, traffic safety and other areas of police work and actions, instructive action for the implementation of strategies and policies in these areas; oversight and internal control over the performance of police duties and procedures, expertise, legality and efficiency of the police work; proposing, monitoring and implementation of mechanisms for efficient fight against human trafficking; citizenship, travel documents, immigration, asylum granting, naturalization, Identification Cards, residence and related to this, proper records

[21] https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/montenegro_report_2020.pdf
https://wb-iisg.com/wp-content/uploads/2021/01/Montenegro_Strategy-for-the-Prevention-and-Suppression_of-Terrorism-Money-Laundering-Terrorism-Financing.pdf





keeping; Unique Identification Number, name, civil registers; vehicles and drivers records; procuring weapons and weapons parts; armament, military equipment and dual-use goods transportation by land and water; personal data protection; production, trade and transport of explosive substances; trade, transport and storage of flammable liquids and gases; transportation of non-flammable, hazards liquids and gases, explosives transport; risk management, management of protection and rescue in emergency situations and emergencies recovery management (earthquakes, fires and other natural and technical and technological disaster.

The Ministry of Justice performs tasks of the state administration relating to: criminal legislation, international legal assistance; the preparation of strategies, projects and programs and monitoring their implementation; preparation of necessary reports and measures for the implementation of ratified conventions in the field of judiciary; preparation and implementation of international agreements in the field of international assistance; preparation of laws and secondary legislation and their implementation, which are related to the organization, jurisdiction and work of courts, public prosecutor and misdemeanor authority, attorneys and legal assistance.

The Ministry of Defense proposes Defense Plan of Montenegro; proposes organizational formation structure and the size of the Armed Forces; determines the content and method of making the Defense Plan of Montenegro; ensures the implementation of decisions and other acts of the President of Montenegro and the Government concerning the affairs of the defense system; executes defined defense policy; organizes and performs international cooperation in the field of defense; organizes electronic communication and data protection for the needs of the defense system; organizes and carries out military intelligence, counterintelligence and security activities; performs other duties in accordance with the law. Division for Military Intelligence and Security Affairs, as an organizational unit of the Ministry of Defense, organizes and carries out military intelligence, counterintelligence and security activities of the Ministry and Armed Forces.

The Agency for National Security collects data and information, through the use of special methods and means determined by law, on potential threats, plans or intentions of organizations, groups and individuals that are directed against the territorial integrity, security and the national legal order determined by the Constitution, and draws attention to the potential challenges, risks and threats to security.

The Administration for Prevention of Money Laundering and Terrorism Financing in accordance with the Law on Prevention of Money Laundering and Terrorism Financing, performs tasks of the Administration related to detecting and preventing money laundering and terrorism financing determined by this Law and other regulations. The Administration for Prevention of Money Laundering and Terrorism Financing is organized as a financial intelligence service of an administrative type. The Administration is responsible for tasks related to detecting and preventing money laundering and terrorism financing related to gathering, analyzing and submitting to the competent bodies of data, information and documentation necessary for the detection of money laundering and terrorism financing.

### – D. International cooperation[22]

Montenegro is a member of INTERPOL and on a daily basis it cooperates with national law enforcement agencies and INTERPOL member countries in conducting international criminal investigations.

It is worth mentioning that the relevant law enforcement agencies do have bilateral or multilateral treaties that can serve as a basis for the effective exchange of information necessary for the suppression of the terrorist and their activities. International cooperation in Montenegro is carried out based on the ratified conventions dealing with the international cooperation and based on the law on mutual legal assistance in criminal matters. The law is applicable where there is no international

[22] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064102b





agreement or if certain issues are not regulated under an international agreement. In this case, international legal assistance shall be provided in accordance with this law, given that there is reciprocity or that it can be expected that the foreign state would execute the letter rogatory for international legal assistance of the domestic judicial authority. Extradition is carried out according to the law on mutual legal assistance in criminal matters and according to the relevant international agreements. The extradition of Montenegrin citizens is not permitted except where there is a bilateral agreement.

# CONCLUSION

## Proposals of improvement at EU level and closing remark

Firstly, a general conclusion on the whole report is that there is no shared concern about the phenomena of radicalisation and violent extremism leading to terrorism in Europe and about the need of a harmonised understanding of prevention. This depends on the different level of threat that each country has been facing throughout the years (France, Germany, Spain and Italy on one side, and Croatia, Portugal, Slovakia, Slovenia, Poland, Romania, Malta and Cyprus on the other side). The main idea is that those phenomena could be prevented at the best through social and integration activities.

Different approaches in the countries of higher level of risk seem to be applied in cases of national terrorism (extreme-left and extreme-right, anarchism) or international terrorism (ISIS); while countries of minor risk consider mainly the risk of radicalisation and violent extremism related to illegal migration flows and immigration hotspots.

For this reason, once again, the stress is on the word "cooperation", which is based on mutual trust, not on blind trust, but trust and the will to learn the best practises from one another, and put them together so to become the "EU Common Acquis": the different projects promoted by the European Commission have this aim, and this Hanbook has also taken into consideration previous projects on the same subject, so to integrate their "acquis" (i.e., Sat-Law Project).

Howewer, the desire was clearly expressed to better engage at the first stage civil society and in particular specialised NGOs to intervene in a de-escalation process, instead of hand over to LEAs a radicalisation related case. As the umbrella of radicalisation-related crimes is very broad

and is often confused with terror-related crimes, there seems to be a trend to avoid alternative measures in such cases.

As mentioned before, some of the experts seem to share a certain "culture of prison", looking at the penitentiary system as a "safe place" where to detain risk-individuals with the aim of monitoring and controlling them. The outcome is: more immediate safety for the community, but often (and for a longer period) penitentiary environment has showed to produce the opposite effect increasing the threat.

Experts seem reluctant to use EAW and EIO in cases of preventive measures praetor delictum considering them not applicable if a crime has not been committed.

The sole reflection made is referred to the possibility to apply the EIO in cases of preventive measures targeting property, which imply the seizure of bank accounts or valuable goods, after gathering evidence through an EIO (i.e., as the Italian EIO provided by Dlvo. 108 / 17 allows to do); but the final confiscation should be possible if based on EU Regulation 1805 / 18.

Possible gap with regard to the EAW FD is the lack or proportionality assessment: in fact, there is no explicit requirement for the issuing State to conduct proportionality checks, while for the executing stage the EAW FD does not explicitly allow the refusal of the surrender when the use of the EAW seems to be disproportionate and / or less restrictive instruments are available.

Nevertheless, art.12 EAW FD envisages alternative measures to prevent the person from absconding before surrender (obligation to report to the police, travel ban, probation order, house-arrest). When a person is arrested on the basis of an EAW, the executing judicial authority shall take the decision on whether the requested person should remain in detention (in accordance with the law of the executing M.S.) or be provisionally released, provided that the said M.S. takes all the measures it deems necessary to prevent the person from absconding. The question is if (and how) the application of art.12 EAW FD is possibile in case of terrorism related crimes.





Other general principles enshrined in the case-law of the ECoHR have to be considered:

- The importance of the promptness or speediness of the requisite judicial control;
- The deprivation of liberty must be necessary in the circumstances; detention is justified only as a last resort where other, less severe, measures have been considered and found to be insufficient to safeguard the public and individual interest;
- Refusal of Belgium to execute a Spanish EAW for the purpose of criminal proceedings concerning terrorist killing based on the grounds of inadeguate conditions of detention.

The following General Proposals at EU level may be affirmed:

1. Reconsideration of the primary value of the protection of personal data, to be balanced with the scope of prevention (also on administrative level) of the development of organised crime and terrorism (see art. 8 ECHR);
2. Approval of specific cooperation agreements concerning collection of evidence in third countries (like Irak and Syria), concerning terrorism related crimes (ex. "foreign fighters") to be used in trials in EU M.S. with Eurojust support;
3. Possibility of a "soft" derogation, in serious cases of terrorism related crimes, to the principle of speciality in the matter of execution of EAWs;
4. Clear up that, for the scope of a s.c. "Hybrid Investigation", in case of presence of a judicial authority in any way (and therefore also in a marginal role), an EIO can be used as issued in any case of "criminal matters";
5. Discussion and evaluation of the legal principle of the possibility to execute wire-tapping and / or bugging -surveillance only and in any case on the base of a judicial authorisation and not only administrative one;
6. Discussion and evaluation if the Romanian internal rule of a mandatory hearing (in concrete conditions that avoid

the possibility of absconding by the suspected or accused or convicted person) before the definitive application of a judicial preventive measure of custody or house -arrest, and therefore also in case of passive execution of an EAW, should be extended on European Level;

7. Possible extension on European Level of the Italian legal system of judicial cooperation with s.c "crown witnesses" or suspected or indicted or convicted persons in the specific field of crimes linked to terrorism with benefits for the gathering of evidence from the interior of the criminal organisation in order to better develop the investigations and use the collected evidence in trials with creation of a valid and safe protection system;
8. Possible introduction on EU level of mandatory and not optional reasonable time-limits concerning the validity of seizure or freezing orders up to a definitive confiscation order;
9. Abolition of the possibility to intercept in any phase (also in the first one) of a criminal investigation conversations between the defence counsel and the suspect/indicted/ convicted person and of the possibility to limit the fundamental right of the above mentioned persons to have access to the complete file in case of application of a preventive measure (at least a judicial one, but we think that has to represent a general rule) in order to grant the right to challenge this measure; no possibility of prolongation of the definitive detention period but only possibility of application for rehabilitative purposes of non detentive further preventive measures by the competent judicial authority;
10. Possible extension of the application of EIOs to administrative preventive measures linked to a (also only potential) criminal investigation, first of all concerning the freezing and confiscation of valuables goods and proceeds, but also to personal ones (i.e., police supervision);





11. Application, in the largest way in each M.S. of the following FWDs:

- N. 2009 / 829 concerning the European Supervision Order (ESO), whose measures may be applied instead of custodial measures; the scope of this instrument is to ensure that people can live in a unique area of Freedom, Security and Justice and to prevent discrimination between individual's resident in the M.S. where the trial is held and those who are resident abroad, so reducing the number of EAWs used for prosecution;
- N. 2008/ 947 concerning the European Probation and Alternative Sanctions Orders;
- N. 909 / 2008 concerning the recognition and execution of judgments that apply custodial penalties in the M.S. where the convicted person is resident and / or has the centre of his family or working interests.

Finally, the suggestion is a fruitful and open debate at European Level based on the different realities of Member States (reported in Part I). After assessment of all considerations and proposals (reported in Part II), the fundamental purpose should be to improve and harmonise (as far as possible) on European Level the necessary balance between the respect of human right of liberty and the need of public and individual security, in the struggle against terrorism and radicalisation with the scope of realising the widest space of jurisdicalisation.

In relation to the fundamental tools of mutual cooperation in criminal matters between Member States - with special regard to EAW and EIO - experts agreed that they represent efficient instruments when an offence has been committed, but should not be extended to the field of preventive measures praeter or ante delictum. In fact, EIO and EAW do not directly concern preventive measures in strictu senso as they applied when a crime has been already perpetrated.

Nevertheless, art.4 EU Directive no.41/2014 seems to give enough space for applying the EIO in proceedings only potentially related to committed crimes, which do not yet involve a criminal investigation, but pre-investigations or administrative investigations which can lead to formal criminal investigations (or are connected or derive from) as s.c. “hybrid investigations”.

In this regard, the EIO Directive seems to let a certain marge of application to the field of preventive measures when linked to criminal aspects: and this could represent an interesting proposal at national and EU level.

**Acronymous**

**DDA**: District Anti-Mafia Directorate

**EAW**: European Arrest Warrant

**EIO**: European Investigation Order

**ECHR**; European Court of Human Rights

**ESO**: European Supervision Order

**EJN**: European Judicial Network

**EU**: European Union

**FRONTEX**: European Border Police and Coast Guard Agency

**FWD**: Framework Decision

**IRU**: Internet Referral Uniti ISIS - Stato Islamico

**JIT**: Joint Investigation Team

**LEA**: Law Enforcement Agency

**MLA**: Mutual Legal Assistance

**MS**: Member State

**N.A.K.A**: Slovakian National Crimininal Agency

**NGO**: Non-Governmental Organization

**OSCE**: Organization for Security and Cooperation in Europe

**PRV**: Patent and Registration Office

**PPO**: Public Prosecutor Office

**SECI**: Southeast European Law Enforcement Center

**S.I.S**: Slovak Intelligence Service





**UN**: United Nations

**UNIFIL**: Republic of Serbia in peacekeeping operations in the UN missions in Lebanon

**WCTi**: Western Balkan Counter Terrorism Initiative (WBCTi)

PRE-RIGHTS

This project is co-funded
by the European Union's
Justice Programme (2014-2020)