

**PRE-RIGHTS PROJECT:**

Assessing impact and performance
of preventive measures
on EU Directives and Framework Decisions.

D.4.9

Scope of Application of European
Investigation Order (EIO)
and European Arrest Warrant
(EAW) in Terrorism-related Cases

PARTNERS



GRAPHIC DESIGN

Studio Mark, Trieste

2022

Project

ACRONYM	PRE-RIGHTS
TITLE	Scope of Application of European Investigation Order (EIO) and European Arrest Warrant (EAW) in Terrorism-related Cases
COORDINATOR	InCE Iniziativa Centro Europea – Segretariato Esecutivo
REFERENCE	831616
CALL	JUST-JCOO-AG-2018
TYPE OF ACTION	JUST-AG
CONSORTIUM	<ol style="list-style-type: none">1. InCE Iniziativa Centro Europea – Segretariato Esecutivo (InCE-SE), Italy2. Center for the Study of Democracy (CSD), Bulgaria3. Agenfor International Foundation (AGENFOR), Italy4. Università TA Malta (UOM), Malta5. Qualify Just - IT Solutions and Consulting LDA (IPS), Portugal6. Bremen Senate of Justice and Constitution (Bremen MoJ), Germany7. Kentro Meleton Asfaleias (KEMEA), Greece8. Universitatea Romano Americana Asociatie (RAU), Romania

Deliverable

NUMBER	Deliverable 4.9
TITLE	
LEAD BENEFICIARY	Center for the Study of Democracy (CSD)
WORK PACKAGE	4
DISSEMINATION LEVEL	PU
DUE DATE	
AUTHORS	Tatyana Novossiolova

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Introduction

Effective cross-border police and judicial cooperation is essential for combatting terrorism. Responding to terror attacks requires that arrangements and measures for identifying, apprehending, and bringing perpetrators to justice in a timely manner are in place.

The 2006 United Nations Counter-Terrorism Strategy advances a package of measures to prevent and combat terrorism such as implementing mutual judicial assistance and extradition agreements, strengthening cooperation between law enforcement agencies, and ensuring quick and accurate exchange of information¹. It underlines the need for “combating crimes that might be connected with terrorism, including drug trafficking in all its aspects, illicit arms trade, in particular of small arms and light weapons, including man-portable air defence systems, money-laundering and smuggling of nuclear, chemical, biological, radiological and other potentially deadly materials”. The Strategy further calls for the adoption of appropriate measures before and after granting asylum, for the purpose of ensuring that asylum-seekers have not engaged in terrorist activities and that the refugee status is not used to support, propagate, instigate, or carry out terror-related activities. During the Seventh Review of the UN Counter-Terrorism Strategy in 2021, the United Nations General Assembly expressed concern at the rising phenomenon of the use of international terrorist networks to facilitate the travel of foreign terrorist fighters to conflict zones and urged Member States to step up international cooperation to dismantle such

¹ United Nations General Assembly, **The United Nations Global Counter-Terrorism Strategy**, A/RES/60/288, 8 September 2006

networks and systematically address the multi-faceted threats posed by foreign terrorist fighters.²

One of the three overarching objectives of the Council of Europe Counter-Terrorism Strategy 2018-2022 is to ensure that terrorist offences committed in Europe or abroad are investigated in the most efficient and fastest possible manner, including through effective judicial and international co-operation and that those responsible are brought to justice and answer for their acts, in respect of human rights and the rule of law.³ Achieving this objective is broken into five complementary sets of activities as follows:

- Identifying best practices and developing recommendations, or guidelines on the gathering of evidence from conflict zones for the purpose of criminal prosecution of returned foreign terrorist fighters.
- Developing guidelines for gathering e-evidence on the internet for the purpose of prosecution of suspected terrorists.
- Facilitating dialogue and exchange of good practices and lessons learned on the conduct of criminal trials against, and the prosecution of, foreign terrorist fighters, including returnees and relocators.
- Strengthening cooperation in criminal matters through enhanced application of mutual legal assistance, extradition, and the use of joint investigative teams in relation to terrorism.
- Developing guidelines on common approaches to investigate and prosecute transnational organised crime and terrorism.

The EU Counter-Terrorism Agenda adopted in 2020 addresses police and judicial cooperation as part of the efforts to ensure effective response to terrorist attacks, or the threat thereof.⁴ Key measures that are

² United Nation General Assembly, **The United Nations Global Counter-Terrorism Strategy: seventh review**, A/RES/75/291, 30 June 2021

³ Council of Europe, **Council of Europe Counter-Terrorism Strategy (2018-2022)**, CM(2018)86-addfinal, 4 July 2018

⁴ Communication from the Commission to the European Parliament, the European Council, the

being implemented include the consolidation of EU legal framework for cross-border police cooperation and data sharing, enhancing existing capacities for preventing and investigating terrorism financing, and improving information exchange (e.g. electronic and battlefield evidence) and coordination in judicial proceedings in cross-border terrorism cases.⁵

This paper focuses on the scope of application for counter-terrorism purposes of two EU instruments designed to strengthen cross-border cooperation in criminal matters – the European Investigation Order (EIO) and the European Arrest Warrant (EAW). It provides an overview of the threat of terrorism and violent extremism in the EU, as well as indicative mechanisms that have been developed to promote police and judicial cooperation to counter this threat. The paper then outlines the key provisions of the EIO and EAW frameworks and illustrates through case studies how the instruments have been applied in terrorism-related cases.

Council, the Economic and Social Committee and the Committee of the Regions, **A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond**, COM/2020/795 final, 9 December 2020

⁵ European Commission, **EU Police Cooperation Code: Tackling Cross-Border Serious and Organised Crime**

Cross-Border Cooperation for Counter-Terrorism in the EU

The threat of terrorism to the European Union is multi-dimensional encompassing three broad categories of risk:

- Risk of home-grown terrorism underpinned by different types of extremist ideologies;
- Risk of returning foreign terrorist fighters who have travelled to conflict zones;
- Risk of state-sponsored terrorism whereby individuals carry out terrorist attacks on behalf of foreign governments (Box 1).¹

Box 1: Trends in terrorism in Europe

- Jihadist terrorist attacks are largely carried out by lone actors with a diverse background.
- Jihadists terrorist attackers tend to use unsophisticated attack methods.
- Jihadist radicalisation and recruitment in prison remain a security concern and released prisoners continue to pose a threat.
- Hundreds of Europeans remain in detention camps in northeast Syria.
- Suspects arrested for planning right-wing terrorist or extremist attacks are increasingly young in age, and some are minors.

¹ Europol, **European Union Terrorism Situation and Trend Report 2021 (TESAT)**, 2021

- Numbers of left-wing and anarchist terrorist attacks remain stable.

Source: **European Union Terrorism Situation and Trend Report 2021 (TESAT)**, 2021.

Home-grown or domestic terrorism involves violence against the civilian population or infrastructure of a nation – often but not always by citizens of that nation and often with the intent to intimidate, coerce, or influence national policy.² Violent nationalist paramilitary groups such as the Provision IRA in UK and Basque ETA are indicative in this regard but it should be noted that home-grown terrorism is not solely inspired by separatist ambitions. The 2005 7/7 London bombings were carried out by British-born radicalised Muslims and Al-Qaeda claimed partial responsibility for the attacks.³ In 2011, a far-right neo-Nazi radical, Anders Breivik, carried out a bomb and shooting attacks in Oslo and Utøya killing 77 people.⁴ And in 2021, a Danish Muslim convert, Espen Andersen Brathen carried out a bow-and-arrow attack in Norway.⁵ One of those charged with participation in terrorist murder and the activities of a terrorist organisation in conjunction with the deadly Paris attacks in November 2015, Salah Abdeslam (born in Belgium) is also believed to belong to the ISIS Belgian cell responsible for the 2016 bombings at the Brussels airport and underground.⁶

The rise of home-grown terrorism in the EU over the recent years has drawn considerable attention to the need for preventing and countering violent radicalisation. Radicalisation is described as a “process by which an individual or group adopts a violent form of action, directly linked to an

² RAND Corporation, **Domestic Terrorism**

³ Michael Ray, **London Bombings of 2005**, Britannica

⁴ Michael Ray, **Oslo and Utøya attacks of 2011**, Britannica

⁵ **Norway Attack: Killer Held in Medical Custody amid Mental Health Investigation**, BBC News, 16 October 2021

⁶ **Paris Attacks: Who Were the Attackers**, BBC News, 27 April 2016; Paris and Brussels Bombers’ Links Uncovered, BBC News, 9 April 2016

extremist ideology with a social or religious political content that undermines the established political, social or cultural order”.⁷ Radicalisation and terrorism are linked and the process of radicalisation can have multiple causes and manifestations. Campelo et al. note that European youth have become increasingly involved in radicalisation. To account for this trend, the authors have proposed a three-level model of risk factors of radicalisation⁸ (Box 2). This model is consistent with the typology of the causes for radicalisation that can lead to terrorism suggested by Alex Schmid:

- **Micro-level** (individual level): e.g. identity problems, failed integration, feelings of alienation, marginalisation, discrimination, relative deprivation, humiliation (direct or by proxy), stigmatisation and rejection, often combined with moral outrage and feelings of (vicarious) revenge;
- **Meso-level** (wider radical milieu): the supportive or even complicit social surround which serves as a rallying point and is the ‘missing link’ with the terrorists’ broader constituency or reference group that is aggrieved and suffering injustices which, in turn, can radicalise parts of a youth cohort and lead to the formation of terrorist organisations;
- **Macro-level**: role of government and society at home and abroad, the radicalisation of public opinion and party politics, tense majority – minority relationships, especially when it comes to foreign diasporas, and the role of lacking socio-economic opportunities for whole sectors of society which leads to mobilisation and radicalisation of the discontented, some of which might take the form of terrorism.⁹

⁷ Nicolas Campelo et al. **Who are the European youths willing to engage in radicalisation? A multidisciplinary review of their psychological and social profiles**, *European Psychiatry*, vol.52 (2018), pp. 1-14. For a risk-assessment model of terrorism offenders inspired by Al Qaeda’s ideology, see Jutte Klausen et al. **Toward a Behavioral Model of “Homegrown” Radicalization Trajectories**, *Studies in Conflict and Terrorism*, vol. 39:1 (2016), pp.67-83

⁸ Nicolas Campelo et al. **Who are the European youths willing to engage in radicalisation? A multidisciplinary review of their psychological and social profiles**, *European Psychiatry*, vol.52 (2018), pp. 1-14

⁹ Alex P. Schmid, Radicalisation, **De-Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review**, ICCT Research Paper, International Centre for Coun-

Box 2: Risk factors of radicalisation among European youth

– Individual factors

- Triggering event
- Psychologic vulnerability
- Experiences of abandonment
- Adolescence
- Psychiatric condition
- Personal uncertainty
- Perceived injustice
- Psychopathological mechanisms that are at stake during radicalisation and that reinforce radical engagement

– Micro-environmental factors

- Family dysfunction
- Friendship with radicalised individuals
- Dehumanisation to justify the use of violence
- Similarities with sectarian hold

– Macro-environmental factors

- Geopolitics
- Religiosity
- Societal polarisation
- Proposal for a new societal model

Source: Nicolas Campelo et al. **Who are the European youths willing to engage in radicalisation? A multidisciplinary review of**

ter-Terrorism – The Hague, March 2013. See also Asta Maskaliūnaitė, **Exploring the Theories of Radicalization**, *International Studies. Interdisciplinary Political and Cultural Journal*, vol. 17:1 (2015), pp. 9-26

their psychological and social profiles, *European Psychiatry*, vol.52 (2018), pp. 1-14.

The wide availability and accessibility of extremist content on the internet is an important factor impacting on the process of radicalisation. Research shows that the internet may enhance opportunities to become radicalised by enabling connection with like-minded individuals from across the world 24/7.¹⁰ In turn, online platforms, including social media channels, chat-rooms, and forums can serve as ‘echo chambers’ that confirm existing beliefs. While the internet may not replace in-person interactions altogether in the process of radicalisation altogether, it can facilitate the absorption of extremist content and complement offline contacts.

The risk posed by returning foreign terrorist fighters to Europe remains significant. The UN Security Council has defined the term ‘foreign terrorist fighters’ in its Resolution 2178 as follows:

“individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.”¹¹

Estimates show that in the early days of the Syrian civil war between 2011 and 2013 some 8,500 foreign fighters joined the hostilities, around 2,000 of whom coming from Western Europe.¹² A recent study indicates

¹⁰ Ines von Behr et al. *Radicalisation in the Digital Era: The Use of the Internet in 15 Cases of Terrorism and Extremism*, RAND Europe, 2013. On the issue of online radicalisation, see also Alexander Meleagrou-Hitchens and Nick Kaderbhai, **Research Perspectives on Online Radicalisation: A Literature Review, 2006-2016**, International Centre for the Study of Radicalisation (ICSR), 2017

¹¹ United Nations Security Council, **Resolution 2178 (2014)**, S/RES/2178 (2014), 24 September 2014. For a discussion on the definition of foreign terrorist fighters, see Alex P. Schmid, **Foreign (Terrorist) Fighter Estimates: Conceptual and Data Issues**, The International Centre for Counter-Terrorism – The Hague 6, no. 4, 2015

¹² **Up to 11,000 foreign fighters in Syria; steep rise among Western Europeans**, International Centre for the Study of Radicalisation (ICSR), 17 December 2013

that hundreds of European foreign fighters are still held in captivity by Kurdish forces in Syria and their fate remains uncertain.¹³ Commentators note that not all of those who travel to conflict zones, engage in terrorist activities upon their return.¹⁴ However, it is worth noting that two of the perpetrators of the notorious attacks against the French satirical magazine, *Charlie Hebdo* had trained with Al-Qaeda in the Arabian Peninsula in Yemen.¹⁵ All three attackers involved in the Bataclan concert hall shooting in Paris in November 2015 had travelled to Syria to join ISIS forces.¹⁶ Two out of the three perpetrators of the attack on Stade de France that same evening, have entered the EU with refugees coming Syria and the third perpetrator was a returning ISIS fighter.¹⁷

To harmonise existing approaches and good practices for stemming the flow of foreign terrorist fighters, UN Member States have developed the Madrid Guiding Principles, a practical tool comprising 35 principles intended to facilitate the implementation of UN Security Council Resolution 2178 (Box 3).¹⁸

¹³ Thomas Renard and Rik Coolsaet, From Bad to Worse: **The Fate of European Foreign Fighters and Families Detained in Syria, One Year after the Turkish Offensive**, Security Policy Briefs, Egmont Royal Institute for International Relations, 28 October 2020

¹⁴ Jeanine de Roy van Zuijdewijn and Edwin Bakker, **Returning Western Foreign Fighters: The Case of Afghanistan, Bosnia and Somalia**, The International Centre for Counter-Terrorism – The Hague 5, no. 2, 2014

¹⁵ **2015 Charlie Hebdo Attacks Fast Facts**, *CNN Editorial Research*, last updated 4 January 2022

¹⁶ **Paris Attacks: Who Were the Attackers?**, *BBC News*, 27 April 2016

¹⁷ **Paris Attacks: Who Were the Attackers?**, *BBC News*, 27 April 2016. See also Jon Henley et al. **Paris Attacks: EU in Emergency Talks on Border Crackdown**, *The Guardian*, 20 November 2015

¹⁸ United Nations Security Council Counter-Terrorism Committee, **Madrid Guiding Principles: A Practical Tool for Member States to Stem the Flow of Foreign Terrorist Fighters**, S/2015/939, 23 December 2015

Box 3: Madrid Guiding Principles Addressing Foreign Terrorist Fighters

I. Detection of, intervention against and prevention of the incitement, recruitment and facilitation of foreign terrorist fighters

– A. Understanding the threat and creating strategic partnerships.

1. Terrorism and violent extremism are complex and context-specific.
2. Constructive dialogue between government agencies and civil society is a crucial factor in building community resilience, identifying and addressing grievances and identifying persons targeted for recruitment by terrorists.
3. Governments should provide support to services that engage with families; however, such services should be kept separate from security agencies.
4. States should devote resources to educational programmes that develop critical thinking skills and build awareness and understanding of different cultures.
5. States should protect the right to freedom of religion or belief.
6. States should make a special effort to establish partnerships with victims of terrorism and victim associations.

– B. Community engagement and empowerment of local communities and civil society.

7. States should consider developing comprehensive whole-of-society strategies to counter and prevent violent extremism.
8. States should make greater efforts to actively involve women in relevant programmes and strategies.
9. States should create mechanisms enabling young people to play a role in relevant policymaking discussions.
10. Engagement between government and non-governmental actors should be based on a foundation of trust and respect.

– **C. Community-policing and Internet-related law-enforcement initiatives.**

11. States need to reduce the corrosive effect of excessive force, arbitrary detention and impunity on community relations and legitimacy.
12. States should include effective and swift measures that are in line with human rights obligations to prevent and counter incitement to commit terrorist acts.
13. States should adopt a multi-stakeholder approach to developing improved methods for monitoring and studying terrorist content transmitted over the Internet and other communications technologies and countering incitement to commit terrorist acts.
14. States must ensure that any measures, including enforcement actions taken to restrict freedom of expression, comply with their obligations under international human rights law.

II. Prevention of travel by foreign terrorist fighters, including through operational measures, the use of advance passenger information and measures to strengthen border security

– **A. Operational measures to stem the flow of foreign terrorist fighters.**

15. Collection of information related to foreign terrorist fighters from various sources.
16. Reliance on analysis to make general information on foreign terrorist fighters actionable.
17. Transmitting analysis and information on foreign terrorist fighters nationally and internationally.
18. Effective utilisation of information related to foreign terrorist fighters at border points.
19. Addressing gaps in the use of advance passenger information and expanding its use to stem the flow of foreign terrorist fighters.

– **B. Practical measures to strengthen the overall security of borders.**

20. Coordinated border management.
21. Addressing spaces between official border crossings.

III. Criminalisation, prosecution, including prosecution strategies for returnees, international cooperation and the rehabilitation and reintegration of returnees

– **A. Criminalisation of acts aimed at stemming the flow of foreign terrorist fighters.**

22. States should ensure that the full range of conduct related to foreign terrorist fighters is criminalised and that such criminalisation is in accordance with their obligations under the applicable international law.
23. States should share experiences and good practices as they review and update their relevant legislation, and where necessary, seek legislative assistance and guidance.
24. States could explore regional approaches to addressing the criminalisation of acts related to foreign terrorist fighters.

– **B. Investigation and prosecution of criminal offences to stem the flow of foreign terrorist fighters.**

25. States should take steps to ensure that lawfully gathered intelligence that may not be used in court can serve as a basis for a criminal investigation, including the use of special investigative techniques, which could, in turn, generate admissible evidence.
26. States should build and strengthen public-private partnerships, in particular with social media service providers, while respecting international obligations and commitments regarding human rights, including freedom of expression.
27. States should consider taking steps to ensure effective inter-agency coordination, including by developing multi-agency

task forces and liaison officers in order to ensure a collective response.

28. States should consider involving their financial authorities in investigations related to foreign terrorist fighters at the earliest opportunity.
29. States should consider developing, as early as possible, ways to collect evidence regarding the purpose of travel that is consistent with their obligations under international human rights law.

– **C. Prosecution and rehabilitation strategies aimed at stemming the flow of foreign terrorist fighters.**

30. States should ensure that their competent authorities are able to apply a case-by-case approach to returnees, on the basis of risk assessment, the availability of evidence and related factors.
31. States should consider appropriate administrative measures and/or rehabilitation and reintegration programmes as alternatives to prosecution in appropriate cases.
32. States should ensure that their criminal justice systems are capable of dealing with all serious crimes committed by foreign terrorist fighters.

– **D. International judicial cooperation in stemming the flow of foreign terrorist fighters.**

33. States should consider reviewing national mutual legal assistance laws and mechanisms and updating them as necessary in order to strengthen their effectiveness.
34. States should consider designating mutual legal assistance central authorities and ensuring that such authorities have adequate resources, training and legal authority.
35. States should consider developing and implementing effective mechanisms for police-to-police cooperation and creative solutions to specific international cooperation challenges.

Source: United Nations Security Council Counter-Terrorism Committee, **Madrid Guiding Principles: A Practical Tool for Member States to Stem the Flow of Foreign Terrorist Fighters**, S/2015/939, 23 December 2015.

State-sponsored terrorist attacks can increase tensions between different ethnic and national communities in the EU, by importing pressure, intimidation and hostilities linked to foreign conflicts.¹⁹ In 2021, a Russian national was sentenced to life imprisonment in Germany for the murder of a Chechen rebel commander of Georgian origin.²⁰ According to the court, the murder was carried out on the order of state agencies of the Russian Federation and it was a serious violation of German law and sovereignty.

Europol and Eurojust implement a broad array of activities to support EU Member States in preventing and countering terrorism. The European Counter Terrorism Centre (ECTC) set up in 2016 aims to provide tailor-made operational support to EU Member States through a four-pillar approach:

- Facilitation of information exchange and cross-border cooperation;
- Effective operational support, coordination and expertise for national investigations;
- Proactive mitigation of the use of social media for radicalisation purposes and support for operational analysis in online investigations;
- Central strategic support capability (Box 4).²¹

¹⁹ Europol, **European Union Terrorism Situation and Trend Report 2021 (TESAT)**, 2021

²⁰ **Germany Expels Russian Diplomats after Hitman Sentenced in Berlin**, *BBC News*, 15 December 2021

²¹ Europol, **European Union Terrorism Situation and Trend Report 2021 (TESAT)**, 2021

Box 4: Role of Europol's European Counter-Terrorism Centre (ECTC)

- Act as an information hub for counter terrorism, with unique information and intelligence-sharing capabilities for law enforcement authorities.
- Deploys operational teams and provides on-the-spot support technical criminal and technical analysis, including digital forensics and facial recognition technology to tackle serious organised crime and terrorism.
- Monitors and detects terrorism financing through a Terrorist Finance Tracking Programme (TFTP) which enhances the ability to map out terrorist networks and identify terrorist money flows.
- Conducts online investigations and analysis of Internet-based communications of terror suspects.
- Provides CBRN-e expertise in terms of capacity building and regular threat assessment and monitoring.
- Hosts a Counter Terrorism Joint Liaison Team (CT JLT) which serves as a platform for swift exchange of operational information and actionable intelligence among EU and associated non-EU countries.
- Hosts a EU Internet Referral Unit (EU IRU) which coordinates EU efforts to tackle access to online terrorist propaganda.
- Acts as a conduit between the European Cybercrime Centre (EC3) and counter terrorism units in EU Member States and non-EU countries.
- Maintains an Advisory Network on Terrorism and Propaganda which provides a platform for exchange between researches in academia and industry and the European law enforcement community.
- Deploys migration officers at migration hotspots to support the detection of returning foreign terrorist fighters.

Source: Europol, **European Union Terrorism Situation and Trend Report 2021 (TESAT)**, 2021.

Eurojust provides indispensable support to EU Member States at different stages of terror-related criminal proceedings through a range of operational mechanisms designed to facilitate judicial cooperation. Eurojust supports the use of Joint Investigation Teams (JITs) during the entire life-cycle of cross-border investigation.²² A JIT comprises a legal agreement between competent authorities (e.g. prosecution offices, law enforcement agencies, judiciary) of two or more States for the purpose of carrying out criminal investigations.²³ Eurojust can assist with the planning, setting up, deployment, and evaluation of JITs' activities.

The European Judicial Counter-Terrorism Register (CTR) administered by Eurojust collects information on ongoing and concluded judicial counter-terrorism proceedings from EU Member States, in order to identify potential linkages and coordination needs.²⁴ Information transmitted in the framework of the CTR is processed within the secure environment of the Eurojust Case Management System (CMS) which allows cross-checking both across jurisdictions and crime types.

Eurojust can play a key role in cross-border counter-terrorism cases when parallel or linked investigations are carried out in two or more States.²⁵ This is particularly important in cases involving returning foreign terrorist fighters. Eurojust facilitates information exchange, helps resolve jurisdictional issues and challenges that national authorities may face with the gathering and admissibility of evidence including e-evidence and battlefield evidence, and enhances multilateral coordination (Box 5).

²² Eurojust, **Joint Investigation Teams**

²³ Eurojust, **Supporting Judicial Authorities in the Use of Joint Investigation Teams**

²⁴ Eurojust, **European Judicial Counter-Terrorism Register (CTR)**

²⁵ Eurojust, **Eurojust Casework on Counter-Terrorism: Insights 2020 – 2021**, 17 December 2021

Box 5: Judicial Cooperation with in Prosecuting Foreign Terrorist Fighters

This case concerns an investigation that Italy launched related to the alleged activities of a criminal group suspected of being involved in the recruitment of Italian and foreign mercenaries to be sent to the theatre of conflict of Ukraine. In parallel, the Ukrainian authorities were also investigating an Italian national who had allegedly been involved in the activities of armed troops in the Donbas region. Both Italy and Ukraine requested assistance from Eurojust in obtaining information about investigated persons and hearing witnesses or suspects. On 2 July 2019, the Court of Genoa, Italy sentenced an Albanian-born man to 20 months of imprisonment for training and recruiting individuals to join the conflict in the Donbas region of Ukraine, which was aimed at undermining the constitutional order or the territorial integrity of the Ukrainian State. A co-defendant of Moldovan origin found guilty of combating, after being trained and recruited, in the Donbas conflict was handed a suspended sentence of 16 months. The court defined as an aggravating circumstance the contribution of a transnational organised crime group to committing the crimes mentioned above.

Source: Eurojust, **Eurojust Casework on Counter-Terrorism: Insights 2020 – 2021**, 17 December 2021.

A crucial aspect of counter-terrorism is to ensure that the victims of terrorist offences have access to justice in a way that fully upholds their legal rights. Eurojust provides assistance and coordination to facilitate judicial cooperation for addressing challenges that cross-border victims may face in the course of a counter-terrorism investigations and criminal proceedings. (Box 6).

Box 6: Support for Terrorism Victims

On 18 July 2012, a suicide attack took place at the parking lot of the airport of the Bulgarian coastal city of Burgas about a metre away from a bus intended to transport Israeli tourists. The attack caused the death of

five Israeli tourists and the Bulgarian bus driver, and injured another 38 Israeli tourists. The perpetrator was a Lebanese-French national and two other individuals – an Australian and a Canadian national both of Lebanese origin, were indicted during the investigation. Bulgarian authorities request assistance from Eurojust regarding the participation of Israeli victims and witnesses in the trial through a videoconference. They had been interviewed during the pre-trial phase; however, hearing them in court during the trial phase appeared difficult due to impossibility to travel to Bulgaria. Eurojust facilitated the transmission of MLA requests. On 21 September 2020, the Specialised Criminal Court in Bulgaria found the two defendants, tried in absentia, guilty of terrorism resulting in the death of the six victims, attempted murder of more than two persons, and material damage for which they were given life imprisonment with the possibility of parole.

Source: Eurojust, **Eurojust Casework on Counter-Terrorism: Insights 2020 – 2021**, 17 December 2021.

Application of the European Investigation Order in Terrorism-Related Cases

The European Investigation Order (EIO) introduced by Directive 2014/41/EU aims to simplify and speed up cross-border cooperation on criminal matters.¹ EIO is a judicial decision that is issued to carry out investigative activities and obtain evidence in another Member States, in accordance with the principle of mutual recognition. EIO does not cover the setting up of JITs nor the process of gathering of evidence within such teams (Article 3). Terrorism is among the categories of offences for which the principle of dual criminality is waived, provided that the offence is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years (Article 11). The execution of a EIO should meet specific deadlines, whereby a decision on the recognition or execution of the Order by the executing authority has to be taken within 30 days after receipt. Following the decision to recognise the EIO, the investigative measure has to be carried out within 90 days (Article 12).

A recent analysis on the application of EIO by Eurojust has identified several areas in which further work is needed, in order to ensure that the instrument functions in a harmonised manner. These include:

- **Clarifying the scope of the EIO.** Questions on the interrelationship between the EIO Directive with other instruments can complicate the execution of EIOs. Cross-border surveillance and covert investigations are a case of point, as Members States remain divided between those that define these instruments as judicial cooperation (EIO) and those that define them as police cooperation.

¹ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters

- **Clarifying the content of the EIO and assisting with requests for additional information.** The execution of the EIO can be put on hold because of missing, unclear or contradictory information regarding the content of an EIO. At the same time, it is important to ensure that request for clarification and additional information are legitimate and do not go beyond what could reasonably be considered justified under the mutual recognition regime (Box 7).
- **Bridging differences between national legal systems.** The EIO Directive operates without prior harmonisation of rules on admissibility of evidence and national authorities may interpret certain aspects of the EIO differently. It has been recommended that for particular concepts – e.g. interception of telecommunication; cross-border surveillance; use of speciality rule; temporary transfer of a person in custody in the executing State for the purpose of carrying out an investigative measure – a common EU interpretation need to be developed.
- **Ensuring a correct and restrictive interpretation of the grounds for non-execution.** Recurring issues remain with executing authorities invoking the dual criminality ground in relation to investigative measures to which this ground does not apply, such as hearings of a witness or a suspect. In some cases, the dual criminality ground is sometimes being invoked by executing authorities even though the issuing Member State's law should be the reference point for the list of offences listed in Annex D of the EIO Directive.
- **Speeding up the execution of EIOs.** It is suggested that the 'urgency' on the EIO form is not misused and whenever it is ticked, there should be a clear explanation why the execution of the requested measure is urgent.
- **Facilitating direct contact and exchange of information between issuing and executing authorities.** The role of Eurojust in acting as a conduit between national authorities has been highlighted, particularly with regard to the resolution of practical and legal concerns.
- **Addressing language issues.** A good translation of an EIO is key to avoid misunderstandings and unnecessary delays. It is mandato-

- ry that the EIO is issued and signed in the official language of the issuing Member State and then translated in the official language of the executing Member State.
- **Encouraging the use of Annex B (which contains a sample for confirming the receipt of an EIO) and Annex C (which contains a sample form for notifying a Member State about the interception of telecommunication that will be, is or has been carried out on its territory without its technical assistance) of Directive 2014/41/EU.** There is a need for enhancing awareness among national authorities of the value in using Annex B and Annex C of the EIO Directive.
- **Transmitting EIOs to the competent executing authority.** Owing to significant differences between the Member States regarding the distribution of competence for 'executing judicial authorities', practitioners may require assistance in identifying the respective competent authority.
- **Coordinating the execution of EIOs in different Member States and/or together with other instruments.** There is a need for strengthening coordination in multilateral cases when parallel or linked investigations in two or more Member States are carried out and several instruments for judicial cooperation are being used (Box 8).²

Box 7: Request for Additional Information to Execute an EIO

Executing authorities may request additional information before a decision on the execution of the EIO is made. One distinctive case concerns the infiltration of several Member States by terrorist suspects affiliated with Islamic State (IS). Upon a request by the executing authority, the issuing authority provided additional evidence, including reference to detailed statements from other suspects indicating that suspect named

² Eurojust, **Report on Eurojust's Casework in the Field of the European Investigation Order**, 10 November 2020. See also Eurojust, **Joint Note of Eurojust and the EJM on the Practical Application of the European Investigation Order**, 1 June 2019

in the EIO had participated in IS and attended a military training camp before he moved to Europe. Despite the provided additional information and the suspect's dangerous personality, the executing authority decided not to execute the EIO on the ground that 'the evidence against the suspect was deemed insufficient'.

Source: Eurojust, **Report on Eurojust's Casework in the Field of the European Investigation Order**, 10 November 2020.

Box 8: A Multilateral Investigation of a Terrorism-Related Cases Using EIO

Case study 1: This case concerns a large-scale investigation carried out by the Italian authorities against an alleged foreign terrorist fighter. The need for multilateral coordination was identified on the basis of information submitted to the European Judicial Counter-Terrorism Register (CTR). The case was opened towards five EU Member States, one third country and Europol. The Italian authorities sought to identify, through the CTR's functionalities and judicial cooperation tools, possible links with the main target of their investigation, as well as other terrorism cases. Multiple European Investigation Orders (EIOs) and mutual legal assistance (MLA) requests were issued in a bid to gather further evidence, share available information and hear witnesses. Eurojust organised two coordination meetings to enable national authorities to discuss developments in the ongoing investigations and the execution of EIOs and MLA requests, assess judicial cooperation and coordination needs, and agree on further steps and actions to be implemented. In May 2021, the main target of the Italian investigation was sentenced to four years of imprisonment for participation in a terrorist organisation.

Case study 2: This case concerns a Syrian national suspected of terrorist offences linked to the Islamic State (IS) who allegedly took part in the public executions of some 20 persons in Syria in 2015 that were broadcasted on social media. The individual held a refugee status in Greece

and was detained in December 2018 on presenting false documents at an airport in Hungary. As his deportation to Greece was being arranged, the individual was identified as an IS affiliate. To gather the necessary evidence, the Hungarian authorities issued EIOs towards Belgium and later towards Greece and Malta. Assistance with the analysis of the video content showing the suspect was sought from Belgium and France. Cooperation with Eurojust was also sought to ensure that the EIOs were transmitted in a timely and effective manner and that any requests for clarification and additional information were addressed. Eurojust, together with the Genocide Network, was further requested to provide the national authorities with examples of existing case-law, which assisted the Hungarian authorities in their decision to extend the charges against the suspect from terrorism to include crimes against humanity. The indictment against the suspect was issued in September 2019 and in March 2020 he was sentenced to life prison.

Source: Eurojust, **Eurojust Casework on Counter-Terrorism: Insights 2020 – 2021**, 17 December 2021; **Eurojust, 2019 Eurojust Report on Counter-Terrorism**, 9 December 2020. See also **ISIS Soldier Hassan F Handed Life Sentence**, *Hungary Today*, 12 March 2020.

Application of the European Arrest Warrant (EAW) in Terrorism-Related Cases

The European Arrest Warrant (EAW) introduced by Council Framework Decision 2002/584/JHA is a judicial instrument issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.¹ The EAW is executed on the principle of mutual recognition and in line with the obligation to respect fundamental rights and fundamental legal principles (Art.1(2,3)). Verification for double criminality for terrorism offences is not required provided that such offences are punishable by a custodial sentence or a detention order for a maximum period of at least three years in the issuing Member State (Art. 2(4)). The executing judicial authority may verify double criminality for offences that are not on the list of 32 offences, or for offences that are on the list but the threshold of three years is not met (Box 9).² In cases where the requested person consents to their surrender, the final decision on the execution of the EAW should be taken within a period of 10 days after consent has been given (Art. 17(2)). In other cases, executing authority should take a final decision on the execution of the EAW within a period of 60 days after the arrest of the requested person (Art. 17(3)).

¹ **2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States**; For additional information, see **European Arrest Warrant**

² European Commission, **Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States**, COM/2020/270 final, 2 July 2020

Box 9: Dual Criminality – Case C-717/18, X, Judgment of the Court of Justice of 3 March 2020

In 2017, a Spanish court convicted X for acts involving the glorification of terrorism and humiliation of victims of terrorism that were committed in 2012 and 2013. The acts constituted offences under Article 578 of the Criminal Code in the version in force at the time when they were committed. The court imposed on him the maximum prison sentence of 2 years stemming from that version of the criminal law provision. In 2015, that provision was amended and now provides for a custodial sentence of a maximum of 3 years. In 2018, the Spanish court issued an EAW against X towards Belgium for the offence of ‘terrorism’, which features in the list of offences which do not require double criminality verification. The executing Belgian court had doubts as to which version of Article 578 of the Spanish criminal code it had to take into account to verify whether the threshold of a custodial sentence for a maximum period of at least 3 years was met: the version of the Criminal Code applied in the main criminal proceedings, or the version applicable at the date of issue of the EAW. This question was referred to the Court of Justice of the European Union (CJEU). The CJEU ruled that the executing judicial authority must take into account the law of the issuing Member State in the version applicable to the facts giving rise to the case in which the EAW was issued. The CJEU noted, however that the executing authority cannot simply refuse to execute the EAW but that it must assess dual criminality.

Source: Eurojust, **Case-law by the Court of Justice of the European Union on the European Arrest Warrant**, 8 December 2021.

The EAW was adopted following the 9/11 attacks to try and address the problem of terrorism and as such, it has a key role to play in bringing those accused of terrorism and serious crime to justice.³ The EAW largely reflects a paradigm shift toward legal cooperation based on mutual trust and high level of confidence, as Member States automatically recognise

³ UK Parliament, Select Committee on European Union, **European Arrest Warrant – Recent Developments**, Thirtieth Report, 2006

(subject to limitations and exceptions) each other’s judicial decisions ordering the arrest of a person.⁴

In 2019 alone, 274 were issued for terrorism offences.⁵ Examples of terrorism-related cases in which EAW has been used are provided in Box 10. It is worth noting that EAW has been instrumental for apprehending the perpetrators of high-profile attacks, such as the November 2015 Paris attacks and the 7/7 bombings in the UK.⁶ In 2020, the European Commission published an assessment report on the implementation of 2002/584/JHA which recognised the efforts made by Member States to transpose the provisions of the Framework Decision noting that the incomplete and/or incorrect transposition of the Framework Decision hampers the application of the principle of mutual recognition in criminal justice matters.⁷

Box 10: Use of EAW in Terrorism-Related Cases

- In 2014, Spanish authorities issued a European Arrest Warrant in the name of a member of *Euskadi ta Askatasuna* (ETA) with several previous terrorism convictions. The individual was arrested in the UK together with another ETA affiliate in 2016 and later surrendered to the Spanish authorities. In 2018, he was found guilty of

⁴ Jan Wouters and Frederik Naert, **Of Arrest Warrants, Terrorist Offences and Extradition Deals. An Appraisal of the EU’s Main Criminal Law Measures against Terrorism after ‘11 September’**, *Common Market Law Review*, vol. 41:4 (2004), pp. 909-935; Oldrich Bures, **European Arrest Warrant: Implications for EU Counterterrorism Efforts**, *Central European Journal of International and Security Studies*, vol. 3:1 (2009)

⁵ European Commission, **Commission Staff Working Document: Statistics on the Practical Operation of the European Arrest Warrant – 2019**, SWD(2021) 227 final, 6 August 2021

⁶ Mark Oliver, **Bomb Suspect ‘Charged in Rome’**, *The Guardian*, 1 August 2005. See also Candela Fernandez Gil-Delgado, **The European Arrest Warrant Figure in The Field of Terrorism**, Finabel – European Army Interoperability Centre, 26 November 2020

⁷ European Commission, **Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States**, COM/2020/270 final, 2 July 2020

participation in a terrorist organisation and sentenced to prison of nearly six years.⁸

- In January 2015, Bulgarian authorities arrested Fritz-Joly Joachin, a 29-year-old French national and Muslim convert of Haitian origin with links to the perpetrators of the attack on Charlie Hebdo's offices. Two EAWs were issued in his name: the first alleging that he had abducted his three-year-old son and was likely to take him to Syria and the second alleging that he participated in a criminal group that plotted acts of terrorism. He was arrested at a border checkpoint when he tried to cross into Turkey and surrendered to France.⁹
- In June 2014, a French court ordered the extradition of a French national of Franco-Algerian origin, Mehdi Nemmouche to Belgium under a European Arrest Warrant. Mr Nemmouche was later convicted for the Brussels Jewish Museum murder in which four people were fatally shot in broad daylight. He was arrested during a routine customs check in Marseille as he arrived on a coach from Amsterdam a few days after the shootings. A Kalashnikov rifle and a handgun matching those used in the attack were found on him. Prior to that, Mr Nemmouche spent about a year in Syria with IS.¹⁰
- In April 2016, Salah Abdeslam, a French national accused of planning the November 2015 Paris terrorist attacks was surrendered by Belgian authorities to France under a European Arrest Warrant. Mr Abdeslam spent four months on the run in the aftermath of the attacks. During the trial in 2021, he sought to justify the 2015 attacks that murdered some 130 people as a retaliation to the French military action against IS.¹¹

⁸ Europol, **European Union Terrorism Situation and Trend Report 2019**, 2019

⁹ **Bulgaria to Extradite Frenchman Linked to Charlie Hebdo Gunmen**, *The Irish Times*, 20 January 2015

¹⁰ **Brussels Jewish Museum Murders: Nemmouche to Be Extradited**, *BBC News*, 26 June 2014; **Brussels Jewish Museum Murders: Mehdi Nemmouche Jailed for Life**, *BBC News*, 12 March 2019

¹¹ **Paris Attacks suspect Salah Abdeslam Extradited to France**, *BBC News*, 27 April 2016; **Paris Attacks Trial: Abdeslam Blames France for Bombing IS**, *BBC News*, 15 September 2021

- In 2019, Austria arrested a Turkish member of DHKP-C (Revolutionary People's Liberation Party-Front') based on a European Arrest Warrant issued by Greece.¹²
- Portuguese authorities arrested a Spanish national, prominent in the anarchist milieu, in compliance with a European Arrest Warrant issued by the Spanish judicial authorities. The suspected terrorist offender was surrendered to Spain in 2020.¹³
- In 2021, Bulgarian authorities detained a Belgian national of Moroccan origin, Yassin Lashiri. Mr Lashiri was trying to cross illegally the Bulgarian-Turkish border. His identity documents were also forged. Mr Lashiri has a 20-year prison sentence for terrorism offences in Belgium and is wanted with a European Arrest Warrant.¹⁴

¹² Europol, **European Union Terrorism Situation and Trend report (TE-SAT) 2020**, 2020

¹³ Europol, **European Union Terrorism Situation and Trend Report 2021 (TESAT)**, 2021

¹⁴ **A Belgian National of Moroccan Origin Convicted for Terrorism to Be Extradited**, *Bulgarian National Radio*, 22 November 2021



PRE-RIGHTS



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