

EU and Member States' policies and laws on persons suspected of terrorism-related crimes

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EU and Member States' policies and laws
on persons suspected of terrorism-
related crimes

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), presents an overview of the legal and policy framework in the EU and 10 select EU Member States on persons suspected of terrorism-related crimes. The study analyses how Member States define suspects of terrorism-related crimes, what measures are available to state authorities to prevent and investigate such crimes and how information on suspects of terrorism-related crimes is exchanged between Member States. The comparative analysis between the 10 Member States subject to this study, in combination with the examination of relevant EU policy and legislation, leads to the development of key conclusions and recommendations.

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LIST OF ABBREVIATIONS

- 9/11** Terror attacks on the 11th of September 2001 in the United States of America
- ALF** Animal Liberation Front
- CCC** Cellules Communistes Combattantes, Belgium
- CJEU** Court of Justice of the European Union
- CNCDH** Commission nationale consultative des droits de l'homme
- CoE** Council of Europe
- CTG** Counter Terrorism Group
- ECTC** European Counter Terrorism Centre
- EDPS** European Data Protection Supervisor
- EIS** Europol Information System
- ELF** Earth Liberation Front
- ETA** Euskadi Ta Askatasuna, Spain
- EU** European Union
- G6** Group of 6 (Germany, France, Italy, Spain, Poland, UK)
- GTD** Global Terrorism Database
- ILOs** International Liaison Officers
- IRA** Irish Republican Army
- ISIL** Islamic State of Iraq and the Levant
- JHA** Justice and Home Affairs
- MS** Member States
- N17** November 17 Revolutionary Organisation, Greece

- NATO** North Atlantic Treaty Organisation
- NSU** National Socialist Underground, Germany
- OCAM** Organe de Coordination et d'Analyse de la Menace, Belgium
- PWGT** Police Working Group on Terrorism
- SIENA** Secure Information Exchange Network Application
- START** National Consortium for the Study of Terrorism and Responses
- TE-SA** EU Terrorism Situation and Trend Report, Europol
- TEU** Treaty of the European Union
- TFEU** Treaty of the Functioning of the European Union

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EXECUTIVE SUMMARY

As a result of a series of terrorist attacks in EU Member States in recent years, both the European Union (EU) and its Member States have enacted or revised legislation to respond to the terrorism threat. Such legislation aims, in particular, to deal with the phenomenon of “foreign terrorist fighters” and includes measures to enhance prosecutorial powers, expand the scope of measures for extradition and the revocation of travel documents, augment intelligence powers for surveillance, and to criminalise travel to foreign conflict zones. These measures refer, to a large extent, to substantive criminal law. They also introduce a number of measures of a procedural nature and increase coordination efforts in this area to meet these new challenges.

This study analyses these developments and provides an overview of the legal and policy framework in the EU and in 10 EU Member States on persons suspected of terrorism-related crimes. It looks into how Member States define suspects of terrorism-related crimes, what measures are available to state authorities to prevent and investigate such crimes and how information on suspects of terrorism-related crimes is exchanged between Member States. The comparative analysis between the 10 Member States subject to this study, in combination with the examination of relevant EU policy and legislation, leads to the development of key conclusions and recommendations. The study's key findings are:

EU legislation

The **competence for tackling terrorism is shared between Member States and the EU**. On the one hand, Article 3 (2) TEU establishes that the Union shall offer its citizens an area of freedom, security and justice by preventing and combating crime. The TFEU specifies that the EU has competence in the field of criminal law. On the other hand, Article 4 (2) TEU stipulates that the Union shall respect the essential functions of its Member States, which includes safeguarding national security. National security in particular remains the sole responsibility of each Member State. When framing terrorism as a matter of national security, therefore, Member States do have – and do use – the competence to act outside the scope of EU law. Furthermore, the **EU legal framework on terror suspects is a patchwork of different pieces of secondary legislation** including legislation that is either directly targeted at the fight against terrorism or legislation that addresses crime and suspects thereof in general terms.

The key trends and types of terrorism

There is a changing pattern of terrorism in many EU countries. In the 1970s and 80s most Member State authorities were concerned about terrorism from left-wing/anarchist (e.g. Italian Red Brigades, the Greek 17th November Revolutionary Organisation etc.), right-wing/fascist (e.g. Ordine Nuovo in Italy and Spanish New Force) and separatist groups (e.g. Irish Republican Army and the Basque Euskadi Ta Askatasuna). In recent years, some of these forms of terrorism do still exist (e.g. Nationalsozialistischer Untergrund (NSU) in Germany) but Member States have become more concerned about the threat deriving from jihadist terrorism due to its international nature and multiple attacks that have been carried out in Europe.

The increasing focus on jihadist terrorism by Member States is illustrated by statistics on a high number of suspects, criminal proceedings and arrests in regard to jihadist terrorism as compared to a relatively small number from other forms of terrorism such as left-wing, right-wing and separatist terrorism.

While acknowledging its focus on preventing, detecting, investigating and prosecuting jihadist terrorism, it is interesting to note that, across the 10 Member States examined, the total numbers of, and fatalities and injuries from, terrorist attacks have decreased over the period 1970-2016. However, the findings are more complex with different trends emerging across the Member States examined. For instance, although the relative potency of the terrorist attacks in the most recent time period (2010-2016) is higher than the equivalent figure in the 1990s and 2000s, it is not higher than the equivalent figure in the 1970s and 1980s.

The rights granted to suspects of terrorism-related crimes

The majority of Member States do not appear to have a formalised legal definition for 'suspects' in general. In some countries different terms are, however, used in practice, which reflect the different stages of the criminal procedure. The rights granted to the different categories of 'suspects' should be the same under criminal procedures. All definitions refer to a situation where a person is suspected of *having committed* terrorism or a terrorism-related crime. However, one of the difficult issues relates to the right of suspects in the sense that they are suspected of *intending* to commit terrorism or terrorism-related crimes *in the future*. There are substantial differences between Member States in relation to this latter category of suspects. There are different categories of rights available to different types of individuals:

1. The rights afforded to every individual (persons who are not under suspicion and who usually have full access to criminal justice rights stipulated in the Charter of Fundamental Rights);
2. The rights afforded to a "person of interest" (here the rights afforded to individuals are often not clear and/or more limited than under Category 1 and 4);
3. The rights afforded to an individual who has been subject to an administrative measure (here the rights afforded to individuals are often not clear and / or more limited than under Category 1 and 4);
4. The rights afforded to an individual where criminal proceedings have commenced (here the rights of persons are clearly outlined by national legislation and strengthened by provisions outlined in the Suspects' Rights Package).

Information exchange tools at Member State level

There is a complex information exchange landscape at the EU level: information exchange occurs through **multiple co-existing information exchange mechanisms, both formal and informal, with significant variety in the level of information sharing** (e.g. international, EU and national), which is further complicated by the fact that many agencies at Member State level have overlapping competences. For example, at Member State level the competence of collecting and exchanging data is shared between police agencies, internal intelligence agencies and external intelligence agencies. Due to overlapping competence of all these bodies, problems in information sharing arises even at the national level, especially in decentralised countries where competence is not only shared between different agencies but also between the regional and federal levels.

At the EU level, formal mechanisms to exchange data are provided by Europol (via the Secure Information Exchange Network Application (SIENA) and the European Counter Terrorism Centre (ECTC)) and Eurojust. Additionally, the European Information Exchange Model outlines a legislative framework for information exchanged through the Prüm Council Decision (2008/615/JHA) and the so-called Swedish Initiative (2006/960/JHA). Important informal initiatives include the Counter Terrorism Group (CTG), the Police Working Group on Terrorism (PWGT) and the G6 (the Group of Six is the unofficial group of interior ministers of the six EU member states with the largest populations: Germany, France, United Kingdom, Italy,

Spain and Poland) as well as the use of liaison officers and bilateral intelligence sharing cooperation.

There is very little publicly available information on formal information exchange practices and the efficiency of these mechanisms. The key finding in relation to information exchange tools, therefore, is that there is a significant lack of transparency in the use of mechanisms, which has led to a situation, where limited conclusions can be drawn on the nature, efficiency and effectiveness of information sharing mechanisms at the EU and Member State level.

Suggestions for further consideration

Based on the key findings, the study provides a number of recommendations on what future actions could look like. The overarching principle in relation to both the rights of terror suspects and in relation to information sharing tools is **the need for greater transparency, data availability and follow-up research**.

First, Member States should continue exchanging views on how **the definition of terrorism** is implemented in national law and interpreted in practice. This could contribute to the development of best practices and make it clearer under which circumstances an individual would be considered to be a suspect of terrorism rather than of other forms of serious crime.

Second, there may be a case for introducing **a comprehensive database including statistics on terrorism** for EU countries in order to adequately analyse the evolution and current state of terrorism in the EU. This would help to analyse contemporary terrorism in its historic context and would provide a more solid foundation for political decisions on which measures have been efficient in fighting terrorism and which have not.

Third, there is a tendency for Member States to deal with terror suspects outside of criminal procedural law. Member States should, therefore, provide **more clarity on the different categories of suspects and which legal framework/rights is linked to each category** and should ensure that fundamental rights as mentioned in Title VI of the EU Charter of Fundamental Rights are available to all suspects of crime.

Fourth, most EU Member States investigated under the framework of this study do not specify in criminal legislation a definition of the term 'suspect'. It has, however, been shown that in practice, **there are different categories of suspects**. This includes 'persons of interest' or 'indication' which mainly covers suspects that have not yet committed a terrorism-related crime but who are suspected of planning to commit a crime or who support the planning of a crime. These categories of suspects are usually not covered by criminal procedure laws in Member States but rather regulated by a different body of law such as the law applicable to policing and intelligence services. This deprives those suspects of crime of several safeguards such as the rights to access a lawyer, right to remedy and redress. There may be a case, therefore, for **updating the 'Suspects' Right Package'** to stress that the term 'suspects' shall be understood broadly.

Fifth, there is a need for **greater transparency**. Member States shall collect and publish data regarding the mechanisms and legal basis used to share information between Member States at the EU level and bilaterally. Furthermore, data shall be collected and published on the effectiveness and efficiency of these tools (e.g. how many prosecutions and convictions have taken place due to data received from other countries).

Ultimately, once more information and statistics have been made available, follow-up research will be necessary to **clarify important outstanding questions** including, among others, the **availability of oversight mechanisms** when individuals are monitored and the efficiency of information exchange mechanisms.

1. INTRODUCTION AND METHODOLOGY

Optimity Advisors, in collaboration with a team of independent experts (Professor Piet Eeckhout, Dr Cian Murphy, Professor Lorena Bachmaier and Professor Benedetta Galgani), has developed this research paper commissioned by the Policy Department on Citizens' Rights and Constitutional Affairs of the European Parliament's Directorate-General for Internal Policies entitled *EU and Member States' policies and laws on persons suspected of terrorism-related crimes*. This study presents the results of the data collection activities as well as the analyses undertaken.

The findings presented in this study take developments up until October 2017 into account and are based on desk research at EU and national levels as well as on interviews conducted with experts in the ten EU Member States examined. An overview of all stakeholders contacted in the framework of this study can be found in appendix 3. Furthermore, the findings have been discussed and validated during an expert workshop that took place on 6 October 2017 in London.

1.1. Structure of the report

The report is divided into six sections. **Section 1 provides an overview of the report/study** structure and the status of each research element. It also presents the scope of the study and the adopted methodology. **Section 2 provides an overview of the legal definition of terrorism** and explains which types of terrorism are currently prevalent in the EU. It also provides an **overview of the EU legal framework on combating terrorism** by providing an overview of: the EU competences in the field of terrorism, key legislative instruments, existing policy documents on terrorism and the way in which anti-terror measures have the potential to interfere with a range of different fundamental rights.

Section 3 provides an overview of the key trends of terrorism in the European Union. By compiling statistics from different sources such as Europol, national statistics and the Global Terrorism Database, it provides an overview of the development of terror attacks in the EU over the last three decades, the number of attacks by country, and the number of arrests and convictions with regard to terrorism and related crimes.

Section 4 examines the rights granted to suspects of terrorism and related crimes in 10 selected Member States. By focusing on both legislation and practices, it analyses how Member States define terror suspects, the measures Member States have at their disposal to investigate terror suspects, the oversight mechanisms linked to those measures and the fundamental rights concerns raised by those measures. Subsequently, **Section 5 focuses on evaluating and comparing information sharing tools and practices.** The section provides an overview of the EU and national legislative frameworks and presents the different information sharing channels used by Member States.

Lastly, **Section 6 draws conclusions** from all preceding sections and provides recommendations on where further research is necessary and how current practices may be changed.

In addition, the appendices to this report present 10 EU country reports on Belgium, Germany, Greece, Spain, France, Italy, the Netherlands, Poland, Sweden and the UK (Appendix 1) and a list of stakeholders consulted for the study (Appendix 3).

1.2. Scope of the study

This study provides an overview of existing EU and national legal frameworks on suspects of terrorism-related crimes as well as information sharing mechanisms between Member States. More specifically, it tackles three overarching objectives as outlined below.

OBJECTIVE 1: Identify which are the relevant national and EU legal provisions for persons suspected of terrorism-related crimes and how EU Member States apply them.

Under Objective 1, the rights linked to the determination of a person as a 'suspect' in national legislation is analysed and compared against relevant EU legislation. Primarily, this assessment identifies whether Member State practices or legislative provisions are in conflict with fundamental rights. The assessment will also highlight problems and / or good practices at national level. This analysis accounts for new / modified Member States' legislation on terrorism-related crimes and focuses on five aspects:

- First, the content of the term 'suspect' in the EU and Member State legislation is analysed. It is not only important to scrutinise the legal meaning of the term but also to assess how it is used and understood in practice.
- Second, the judicial or other authority/authorities that are competent to take decisions relating to the definition of a person as a suspect of terrorism-related crimes is analysed.
- Third, it is assessed who monitors the implementation and the impact of such a decision.
- Fourth, it is scrutinised which rights are granted to suspects and whether judicial oversight exists.
- Ultimately, it is assessed whether fundamental rights exceptions are raised before courts in Member States and in the EU with regard to rights of suspects on terrorism-related crimes and the impact of such case law.

OBJECTIVE 2: Understand how the competent authorities of EU Member States exchange information relating to persons suspected of terrorism-related crimes; how competent authorities use data and what the effects of these data exchanges are.

Under Objective 2 an overview of existing laws and practices is provided on how information exchange is executed between Member States, through Europol or other information-sharing channels on suspects of terrorism-related activities. An emphasis is put on recent changes to both legislation and practices at Member State level. In circumstances of information exchange between Member States it is necessary to identify how competent authorities interpret the information, considering potential differences in the content of the term 'suspect' and the rights associated with the term.

Apart from analysing the procedure applied to the exchange of data, a qualitative assessment, scrutinising whether the (new) information sharing tools are efficient by contributing to the efficient prevention, detection, investigation and prosecution of terrorism-related crimes, is conducted to the extent possible. Whether the information exchange sufficiently respect the rights of suspects is scrutinised here. While assessing laws and practices in Member States statistical data is used to the extent available (e.g. of the number of persons listed and databases and interconnections used for this purpose).

OBJECTIVE 3: Development of policy recommendations based on current problems and / or best practices.

Based on the findings from the first two objectives and actions to be taken, considering both gaps and problems encountered and successes or good practices identified, policy recommendations for further EU action or legislation are developed.

1.3. Study methodology

The methodology used for this study comprised comparative and legal analysis techniques, in combination with expert opinion, to analyse the qualitative and quantitative data collected through the following means:

- **Country reports** covering 10 Member States (Belgium, Germany, Greece, Spain, France, Italy, the Netherlands, Poland, Sweden and the UK);
- **Desk research** assessing information published at EU level, internationally and in the case study countries;
- **Interviews** covering European institutions, as well as national stakeholders in the case study countries (an initial list of interviewees and persons contacted can be found in Appendix 4); and
- **Expert workshop**, held in London on the 6 October 2017 with the study experts Professor Piet Eeckhout and Dr Cian Murphy, as well as a representative of the European Parliament's Policy Department.

The rationale for selecting the 10 Member States is provided in the table below. The selection – conducted in consultation with the study experts and the European Parliament – aimed to account for an adequate geographical representation of Member States and by minding their exposure to terrorism and / or their particular anti-terror legislation.

Table 1: Rationale for 10 selected EU Member States

Belgium
A relatively small Member State, but one that has seen a spike in violent incidents in recent years and which has recorded the highest number of detained suspects and convictions. Its legal system's suitability to counter-terrorism operations is now of significant concern for both its own national security and (given its centrality to EU governance) EU security. The threat level in Belgium is thought to be 'high' ¹ – indeed it is the only small Member State to attract that rating – and as such merits consideration.
France
France is extremely pertinent as a large EU Member State that has been the subject of numerous terrorist attacks in recent years. In response, France has initiated a series of legislative changes providing authorities greater policing power to respond to terrorist threats and attacks, including provisions specific to the rights of suspects.
Germany
Germany is an important focus for similar reasons to France. It is a large EU Member State that has been subject to a recent terrorist attack and has subsequently been tightening its anti-terror laws. Germany has also developed a range of case law relating to the approach to identifying suspects of terrorism and their rights.
Greece

¹ Ibz Crisiscentrum, *Menace terroriste*, 2017. Available at: <https://centredecrise.be/fr/content/menace-terroriste>.

Much of the recent counter-terrorism debate has taken as its focus the migration of individuals from Middle Eastern and North African (MENA) states and whether such migration poses an increased threat of terrorism. Greece is a key point of entry and, as a South-Eastern Member State, provides geographic diversity as well as a key example to consider the necessity and feasibility of measures to address 'foreign terrorist fighters'.

Italy

Italy is also a large EU Member State. Though not subject to any major terrorist attacks in recent years, Italy has modified its legislative framework to address 'foreign terrorist fighters', a problem in other Member States such as Germany and France. In the wake of the London Bridge terrorist attack on 4 June 2017, it has become clear that, prior to the attack, Italian authorities shared information with UK authorities in relation to one of the perpetrators.

Netherlands

The Dutch legislator in February 2017 adopted three laws related to combating terrorism. These laws form a key part of the country's Integral Approach Jihadists Action Programme. However, criticisms of the new legislative measures exist. For example, the Commissioner for Human Rights of the Council of Europe called into question whether the new laws appropriately safeguard the rights of suspects, in particular the right to a fair trial.

Poland

The largest of the newer Member States, Poland, uses the European Arrest Warrant extensively. In broader terms, however, Poland is an interesting case for other reasons. Its approach to counter-terrorism offers insight because, in comparison with the four Member States required by the Terms of Reference (ToR), its threat level is considered to be 'low'. It is, indeed, the only large Member State understood to have a low threat level, which provides useful contrast in the study.

Spain

Spain is another large EU Member State that has updated its legal framework in recent years in response to UN Security Council Resolution 2178 on 'foreign terrorist fighters'.

Sweden

Sweden has significant cases of returnees from Syria, has accepted high numbers of Syrian refugees and Stockholm was recently the subject of a terrorist attack. In response, Swedish legislators have recently agreed that more needs to be done to fight terrorism, and a number of proposals have been tabled.

United Kingdom

The UK remains the Member State with the lengthiest record of domestic counter-terrorism law. Although it has an opt-out from the Framework Decision on Combating Terrorism (and will not take part in the Directive), and although 'Brexit' will alter its relationship with the EU further, it nevertheless remains (in the short-term) subject to EU law, and (in the longer term) a key regional partner for the EU in security. It is often quick to implement UN Security Council resolutions (from which many policy objectives derive) and plays a role in shaping those resolutions.

2. EU LEGAL FRAMEWORK ON COMBATING TERRORISM

This section describes the EU legal framework on combating terrorism. Firstly, it outlines the EU competences on addressing terrorism. Secondly, it provides a definition of terrorism, which has been recently revised with Directive 2017/541.² Thirdly, an overview of policy strategies is provided as well as ultimately, an overview of relevant EU legislation.

2.1. EU competence on terrorism

Article 3 (2) TEU establishes that the Union shall offer its citizens an area of freedom, security and justice by preventing and combating crime. To implement Article 3 (2) TEU, the TFEU specifies that the EU has competence in the field of criminal law. Article 83 (1) TFEU defines a list of serious crimes that are commonly regulated at EU level. This list includes terrorism and other crimes such as computer crime, organised crime, money laundering, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, corruption and counterfeiting of means of payment.³ Article 83 also stipulates that the EU will "have the competence to establish minimum rules concerning the **definition of criminal offences and sanctions** in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis."⁴ In specific terms, these rules can refer to jurisdiction, procedure, and / or investigations concerning the relevant crimes.⁵

The key secondary law instrument is **Directive (EU) 2017/541 on combating terrorism** replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. The Directive was adopted early 2017 and has to be transposed by Member States by 8 September 2018. Both the Framework Decision and the Directive define terrorist offences, offences related to a terrorist group and offences related to terrorist activities (as mentioned in the next section). In addition, both the Framework Decision and the Directive provide some general direction to Member States on what behaviours to criminalise as terrorism or terrorism-related offences. There are some changes in regard to the Directive, which in contrast to the Framework Decision also criminalises "Public provocation to commit a terrorist offence" and "providing and receiving terrorism training". Both instruments penalise terrorism and related offences. For example, both instruments include guidance on maximum custodial penalties and other eligible punishments (e.g. exclusion from public benefits and aid).

Particularly relevant for this study, the Directive (in contrast to the Framework Decision) stresses that Member States shall ensure that effective investigative tools are available to law enforcement authorities, which shall be similar to those used in organised crime or other serious crime cases.⁶ At the same time, the Directive and the Framework Decision stress that the provisions of "(...) this Directive shall not have the effect of modifying the obligations to respect fundamental rights and fundamental legal principles, as enshrined in Article 6 TEU."⁷

Articles 20 and 23 of the Directive show that within the framework of implementing the Directive, **EU Member States should not treat suspects of terrorism differently than suspects of other crimes.** At the same time, Article 4 (2) TEU stipulates that the Union

² Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *OJ L 88*, 31.3.2017, pp. 6–21.

³ Article 83 (1) TFEU.

⁴ Mitsilegas, V., *EU Criminal Law*, Hart Publishing, 2009, p. 107. For an example of minimum rules see: "Commission proposal for a new Directive on the protection of the euro and other currencies against counterfeiting on 5 February 2013", ((COM (2013)42)).

⁵ Peers, S., *EU Justice and Home Affairs Law*, Third Ed, Oxford University Press, 2011, p. 763.

⁶ Directive (EU) 2017/541, op. cit. Article 20 (1).

⁷ Directive (EU) 2017/541, op. cit. Article 23.

shall respect the essential functions of its Member States, which includes safeguarding national security. National security in particular remains the sole responsibility of each Member State.⁸ Therefore, when framing terrorism as a matter of national security, Member States could argue that some aspects of the Directive do not apply, illustrating the dispersed competence between Member States and the EU in respect to combating terrorism.⁹

2.2. Definition of terrorism

Defining terrorism is a difficult undertaking and no consensus exists in academia on how precisely to conceptualise terrorism in sociological, political and legal terms.¹⁰ This is not least because terrorism can take many different forms and be inspired by different ideologies as explained further in Section 3. In legal terms, the EU Directive on terrorism – similar to the Framework Decision – adopts a very broad definition. The key difference is that the Directive incorporates the increasingly prevalent element of cybercrime under “illegal system interference”. All offences must have the aim: “[to] seriously intimidate a population; unduly compel a government or an international organisation to perform or abstain from performing any act or; seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or international organization”.¹¹ A full list of the acts to be defined as terrorist offences under national law, when committed with the requisite intention, is listed below, with all acts, which were not included in the previous Framework Decision, highlighted in bold.¹²

- Attacks upon a person’s life which may cause death;
- Attacks upon the physical integrity of a person;
- Kidnapping or hostage-taking;
- Causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
- Seizure of aircraft, ships or other means of public or goods transport;
- Manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, **radiological** or nuclear weapons, as well as research into, and development of, chemical, biological, **radiological** or nuclear weapons;
- Release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life;
- Interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
- **Illegal system interference for terrorist purposes;¹³ and**

⁸ Article 4 (2) TEU.

⁹ Interestingly, the CJEU often refrains from labelling ‘terrorism’ as a matter of national security as this would imply a limited competence for the EU in this field. Instead the CJEU argued that terrorism is threatening ‘international security’ in Cases C-402/05 and C-415/05 *Kadi and Al Barakaat International Foundation v Council and Commission* of 3 September 2008, para. 363, and Cases C-539/10 P and C-550/10 P *Al Aqsa v Council* of 15 November 2012, para. 130.

¹⁰ See for example: Richards, A., ‘Conceptualising terrorism’, *Studies in Conflict and Terrorism* 2014, Volume 37, Issue 3.

¹¹ Directive (EU) 2017/541, op. cit. Article 3, (2).

¹² Ibid. Article 3, (1).

¹³ Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, *OJ L 218, 14.8.2013, p. 8-14* defines Illegal system interference as “seriously hindering or interrupting the functioning of an information system by

- Threatening to commit any of the acts listed in the previous points.

Offences relating to a terrorist group include directing that terrorist group or participating in activities to knowingly contribute to its criminal activities.¹⁴ The Directive defines a 'terrorist group' as "*a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences; 'structured group' means a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure*".¹⁵ Title III of the Directive outlines offences related to terrorist activities and includes¹⁶:

- Public provocation to commit a terrorist offence (Article 5);
- Recruitment for terrorism (Article 6);
- Providing training for terrorism (Article 7);
- Receiving training for terrorism (Article 8);
- Travelling for the purpose of terrorism (Article 9);
- Organising or otherwise facilitating travelling for the purpose of terrorism (Article 10); and
- Terrorist financing (Article 11), plus other offences (Article 12).

As shown, the legal definition of terrorism is left intentionally broad to account for different behaviours, which would classify as terrorism and also to account for different types of terrorism (as further explained in Section 3). This broad definition can be criticised for leaving a wide discretion to Member States that may ultimately lead to divergences in the EU. A broad definition of terrorism also leaves a large margin on classifying an act as terrorism on a practical level. The difficulty of determining the boundary between serious crime and terrorism is well illustrated with the Munich rampage of 2016. In this case, the offender's shooting of nine victims has been classified as rampage by the law enforcement authorities. However, a year later, two out of three independent reviews commissioned by the city of Munich came to the conclusion that the shooting should have been classified as right-wing terrorism rather than a rampage. This shows that criminalising 'intent or motivation' rather than an 'action' depends on interpretation and may lead to confusion on how to penalise offenders. It may also have a negative impact on the legal certainty of suspects if there is a lack of clarity regarding the laws applicable to penalise them.

2.3. EU strategy on counter-terrorism

The main policy document on terrorism is the EU Council Counter-Terrorism Strategy adopted in December 2005. This strategy structures the response to terrorism around four core pillars (see text box below). In 2015, the Council released a statement in response to the terror attacks in Paris. The statement laid down the EU's strategy on terrorism, which is broadly aligned to the four pillars laid down in 2005 by focusing on securing (or protecting) citizens and preventing radicalisation. However, the statement also emphasised the need for more cooperation mechanisms with international partners both in regard to sharing information

inputting computer data, by transmitting, damaging, deleting, deteriorating, altering or suppressing such data, or by rendering such data inaccessible, intentionally and without right(...)" (Article 4).

¹⁴ Directive (EU) 2017/541, op. cit. Article 4.

¹⁵ Ibid. Article 2.

¹⁶ Ibid. Articles 5-12.

but also more generally in regard to addressing conflicts in the Southern Neighbourhood and a dialogue among cultures.¹⁷

Apart from those two strategic documents, terrorism also features in other high-level policy documents by the Council, the Commission and the Parliament. For example, key objectives in respect to threats to security (including terrorism) are enshrined in the policy programmes adopted after each JHA Council meeting.¹⁸ Furthermore, the European Commission adopted the "European Agenda on Security" in 2015, which mentions that tackling terrorism and preventing radicalisation is one of its top three priorities.¹⁹

A more detailed account of the EU counter-terrorism strategy can be found in the study *The European Union's Policies on Counter-Terrorism Relevance, Coherence and Effectiveness*, conducted for the European Parliament in 2017.²⁰

Box 1: Core elements of the EU counter-terrorism strategy.²¹

The four pillars of the EU counter-terrorism strategy

- **PREVENT** people from turning to terrorism and stop future generations of terrorists from emerging;
- **PROTECT** citizens and critical infrastructure by reducing vulnerabilities against attacks;
- **PURSUE** and investigate terrorists, impede planning, travel and communications, cut off access to funding and materials and bring terrorists to justice; and
- **RESPOND** in a coordinated way by preparing for the management and minimisation of the consequences of a terrorist attack, improving capacities to deal with the aftermath and taking into account the needs of victims.

2.4. Relevant legislation

2.4.1. EU legislation on terrorism

One of the first EU measures on terrorism was of an administrative nature. In order to implement UN Resolution 1267 (1999) – which set up the sanctions regime targeted at al-Qaeda and associated individuals – the EU adopted Regulation 337/2000.²² The purpose of the Regulation was to provide a legal basis for the freezing of all assets of those individuals mentioned in the UN sanctions list. One of the persons included in the UN sanctions list was Yassin Abdullah Kadi. He appealed the decision to be included in the EU sanctions regulation because the Regulation infringed several of his fundamental rights which included the right to respect for property, the right to be heard before a court of law and the right to effective

¹⁷ Conclusions of the Council of the EU and of the Member States meeting within the Council on Counter-Terrorism, 20/11/2015. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2015/11/20/jha-conclusions-counter-terrorism/pdf>.

¹⁸ Multiple action plans have been adopted since the entry into force of the Amsterdam Treaty and are usually named after the place in which they were concluded: Vienna Action Plan (1998), Tampere programme (1999), Laeken conclusions (2001), Hague programme (2004), Stockholm programme (2010).

¹⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Agenda on Security*, COM(2015) 185 final.

²⁰ Wensink, W. et al., *The European Union's Policies on Counter-Terrorism Relevance, Coherence and Effectiveness*, Directorate General for Internal Policies Policy Department for Citizens' Rights and Constitutional Affairs, January 2017.

²¹ Council of Ministers, *The European Union Counter-Terrorism Strategy*. Document number 14469/4/05.

²² Council Regulation (EC) No 337/2000 of 14 February 2000, *OJ 200 L 43*, p. 1, which was repealed by Council Regulation (EC) No 467/2001 of 6 March 2001, *OJ 2001 L 67*, p. 1. On 27 May 2002, the Council adopted Council Regulation No 881/2002, which repealed Council Regulation (EC) No 467/2001, *OJ 2002 L 139*, p. 9.

judicial review. After two separate cases, the CJEU held that the Regulation breached due process rights and required the removal of Mr Kadi from the sanction list.²³

Apart from the asset freezing, there are several other EU legislative measures on terrorism that cut across many different policy areas including, among others, transport, finance, weapons, criminal justice and border control. In the box below, legislation is presented that is relevant for the rights to suspects of terrorism and terrorism-related crimes. It has to be noted that this list includes legislation that exclusively and directly refers to terrorism and legislation that is not exclusively addressing terrorism but which is relevant for combating terrorism.

Box 2: EU legislation relevant for combating terrorism.

The three categories of counter-terrorism legislation impacting rights of suspects

Core legislation criminalising terrorism

- Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

Data processing regimes where data is collected or misappropriated to combat terrorism

- Schengen Information System II (SIS II)²⁴
- Passenger Name Records (PNR) (including both the EU PNR Directive and international PNR regimes with the US and Australia)²⁵
- Eurodac²⁶
- Visa Information System (VIS)²⁷
- Advanced Passenger Information Directive (API)²⁸
- The annulled Directive 2006/24/EC (Data Retention Directive)²⁹

Criminalising terrorist financing

- EU-US Terrorist Financing Tracking Programme (TFTP)³⁰
- Anti-Money Laundering Directive.³¹

²³ *Kadi I*, C-402/05 and C-415/05, op. cit. *Kadi II*, joined cases C-584/10, C-593/10, op. cit.

²⁴ As laid down in Regulation (EC) No 1987/2006; Council Decision 2007/533/JHA and Regulation (EC) No 1986/2006.

²⁵ Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016, *OJ L 119*, 4.5.2016, pp. 132-149.

²⁶ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013, *OJ L 180*, 29.6.2013, pp. 1-30.

²⁷ Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS), *OJ L 213*, 15.6.2004, pp. 5-7.

²⁸ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, *OJ L 261*, 6.8.2004, pp. 24-27.

²⁹ The Data Retention Directive was annulled by the CJEU in 2014. However, several Member States still have data retention regimes in place. In addition, the Estonian government announced its intention to restart discussions on data retention on a technical and political level during its Presidency (see: Estonian Presidency, The Estonian Presidency Programme for the Justice and Home Affairs Council (JHA), 2017). Available at: https://www.eu2017.ee/sites/default/files/2017-07/EU2017EE%20JHA%20Programme_0.pdf

³⁰ Council Decision of 28 June 2010 on the signing, on behalf of the Union, of the Agreement between the European Union and the United States of America on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, *OJ L 195*, 27.7.2010, pp. 1-2.

³¹ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, *OJ L 141*, 5.6.2015, pp. 73-117.

- Asset Freezing (Council Regulation No 881/2002)

2.4.2. The fight on terrorism and fundamental rights

While terrorism is aimed at destructing democracy, the rule of law and fundamental rights – most notably the rights to life, liberty and physical integrity – legislation combating terrorism can by itself also pose challenges to the effective safeguarding of fundamental rights. While the fight against terrorism can conflict with many different fundamental rights, in the following the focus is on challenges in the EU context:

- **The right to an effective remedy and to a fair trial (Article 47 of the Charter of Fundamental Rights):** Every individual has the right to an effective remedy and a fair and public hearing within a reasonable time by an independent and impartial tribunal. Particularly when individuals are only suspects or 'persons of interest' in relation to terrorism or related crimes they may not be aware of, for example, surveillance carried out on them and that means that they do not have access to effective remedies.
- **The right to the presumption of innocence and right of defence (Article 48 of the Charter of Fundamental Rights):** Every individual who has been charged shall be presumed innocent until proven guilty according to law. Concerns have been expressed that surveillance of communication data may lead to a reversal of the presumption of innocence since individuals may turn more easily to suspects than before the era in which data was collected on a large scale.³²
- **The right to liberty (Article 6 of the Charter of Fundamental Rights):** All persons are protected against unlawful or arbitrary interference with their liberty. While any EU Member State may lawfully detain persons suspected of terrorist activity it is important that due process is granted and judicial scrutiny is provided for. In the context of recent terror attacks some countries may want to apply detention to prevent the execution of terror attacks. While efficiency is very important in this context, the right to liberty shall not be disproportionately interfered with.
- **The right to privacy and data protection (Articles 7 and 8 of the Charter of Fundamental Rights):**³³ Problematic state powers in relation to the right to privacy are for example extended police powers for stop and search as well as search warrants due to terror suspicion. In relation to data protection, state powers to access traffic and location data are of particular concern. In regard to the latter it is worth pointing out that Member States increasingly rely on indiscriminate data retention and access regimes that could interfere with the rights citizens beyond merely suspects.³⁴
- **Freedom of Association and expression (Articles 11 and 12 of the Charter of Fundamental Rights):** Due to the criminalisation of terrorism-related crimes such as the glorification of terrorism and joining terror organisations, some legislation may conflict with the rights to expression and assembly.
- **Right to non-discrimination (Article 21 of the Charter of Fundamental Rights):** Since most of modern terrorism is based on fundamentalist Islamic beliefs there is a risk of counter-terror legislation to profile potential suspects based on their

³² Mitsilegas, V., 'The Value of Privacy in an Era of Security: Embedding Constitutional Limits on Pre-emptive Surveillance', *International Political Sociology*, Vol. 8, Issue 1, March 2014.

³³ Note that the European Convention on Human Rights (ECHR) only stipulates the right to privacy while case law extends the concept of privacy to data protection.

³⁴ This has been considered a concern in joined cases C-293/12 and 594/12 which annulled the Data Retention Directive. Note that the Directive has been adopted in the context of the London and Madrid bombings but applies not only with terror offences but also serious crimes.

religious beliefs. While legislation is usually formulated in a way to prevent discrimination, this seems to be a concern in respect to law enforcement practices.

Counter-terror legislation may also conflict with a range of other rights not mentioned above. For example: the rights of the child (e.g. in Germany laws have been amended to extend investigative measures to minors); the right to religion (several countries have prohibited full face veils due to an alleged public security threat); and the right to asylum (several countries have adopted laws allowing for the deportation of terror suspects).

2.4.3. The Suspects' Rights Package

Apart from the above-mentioned fundamental rights, secondary EU legislation also protects the rights of suspects of terrorism-related crimes. The Charter of Fundamental Rights stipulates that national procedural law and associated policies must reflect the EU Charter of Fundamental Rights in order to "*share a peaceful future based on common values*"³⁵ and, specifically in cases of criminal proceedings, must follow the rights of suspects outlined in "Title VI: Justice" of the Charter. Furthermore, the European Commission was mandated as part of the Stockholm Programme³⁶ to strengthen the procedural rights of suspects to ensure compliance with the above safeguards across the EU.³⁷ It created a "Roadmap on Procedural Rights"³⁸ in 2009 that outlined legislative measures to provide greater clarity and continuity. These measures and subsequent Directives form the "Suspects' Rights Package". The package does not define the term "suspect" and is applicable to suspects of all crimes (rather than suspects of terrorism-related crimes only). The key provisions of the Suspects' Rights Package are outlined in the table below.³⁹ It is important to note that not all EU Member States participate in all the measures mentioned in the table due to opt-outs.⁴⁰

Table 2: Procedural Rights of suspects of crime.

Measure	Description	Directive
Translation and Interpretation	The suspected or accused person must be able to understand what is happening and to make him / herself understood – e.g. may need an interpreter or have hearing impediments	Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings
Information on rights and Information about the charges	The individual should get information on their basic rights – written or orally and be promptly informed about the nature and cause of the accusation. If charged, the individual should be given the information necessary for the preparation of their defence.	Directive 2012/13/EU on the right to information in criminal proceedings Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be

³⁵ Charter of Fundamental Rights of the European Union, 2012/C, 326/02, preamble.

³⁶ The Stockholm Programme – *An open and secure Europe serving and protecting citizens*, OJ C 115 of 4.5.2010.

³⁷ European Commission, *Rights of suspects and accused*. Available at http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm

³⁸ Resolution of the Council of 30 November 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.

³⁹ European Commission, *Rights of suspects and accused*, *op. cit.*

⁴⁰ Denmark opted out of all Directives; Ireland and the UK opted out of all but Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, pp. 1-7 and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, pp. 1-10.

Measure	Description	Directive
		present at the trial in criminal proceeding
Legal advice and Legal aid	This should be given at the earliest appropriate stage of the criminal proceedings through a legal counsel	Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings
Communication with relatives, employers and consular authorities	The right to have at least one person informed of the deprivation of liberty and, if this deprivation occurs in a foreign state to the individual, the right to have the competent consular authorities informed.	Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty
Special safeguards for suspected or accused persons who are vulnerable	Special attention should be shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition.	Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings
A Green Paper on pre-trial detention	To examine appropriate measures of the time a person can spend in detention before being tried in court and during the court proceedings.	

3. TERRORISM IN THE EU

This section delves into the context of terrorism in the EU by presenting a brief assessment of its evolution and covers the prominent ideologies, attack methods and frequency, and potency of terrorist attacks. Subsequently, available data on the judicial side of terrorism in the EU are presented, including those related to arrests, convictions and penalties for terrorism-related crimes.

3.1. Types of terrorism

Although the legal definition of terrorism, presented in section 2.2, is generic, different types of terrorism exist. Europol, in its annual EU Terrorism Situation and Trend Report (TE-SAT), defines the most prominent types as follows:⁴¹

- **Jihadist terrorism:** Acts committed under this banner aim to reject democracy on religious grounds. In particular, it relates to terrorist activities conducted by Sunni Islamists who believe they are facing a 'Crusader alliance' comprising Christians, Jews and Shia Muslims. The most prominent example is the so-called Islamic State of Iraq and the Levant (ISIL).
- **Ethno-nationalist and separatist terrorism:** This can be influenced by nationalism, ethnicity and / or religion. Often in combination with left- or right-wing ideologies, separatist groups aim to "carve out a state for themselves from a larger country, or annex a territory from one country to that of another".⁴² Prominent historic examples include the Irish Republican Army (IRA) and the Basque Euskadi Ta Askatasuna (ETA).
- **Left-wing and anarchist terrorism:** Actors under this type of terrorism aim to implement a communist or socialist structure, and a classless society, entirely replacing a country's existing political, economic and social system. Anarchists are reported to be a sub-category of left-wing terrorism who promote revolutionary, anti-capitalist and anti-authoritarian agendas. Prominent left-wing terrorist groups include the Italian Red Brigades and the Greek 17 November Revolutionary Organisation.
- **Right-wing terrorism:** Similar to left-wing terrorist actors, right-wing terrorist groups aim to implement a complete overhaul of an existing political, economic and social system. Their core concept, however, is one of supremacism – i.e. "the idea that a certain group of people sharing a common element (nation, race, culture, etc.) is superior to all other people".⁴³ Neo-Nazis, neo-fascists and ultra-nationalists are variations of right-wing terrorism.
- **Single-issue terrorist groups:** These aim to change a specific policy or practice, as opposed to the complete overhauls sought by right- and left-wing terrorists. Prominent examples include the Animal Liberation Front (ALF) and the Earth Liberation Front (ELF).

3.2. Evolution of terrorist threats in the EU

Significant research focus has been granted to terrorism and terrorism-related topics in recent years. As such, a substantial bank of data on terrorist attacks across the globe is available⁴⁴ and the evolution of terrorism in the EU can be charted in some detail. An analysis

⁴¹ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017.

⁴² *Ibid.* p.55.

⁴³ *Ibid.* p.55.

⁴⁴ Primarily, these data are sourced from the Global Terrorism Database, maintained and operated by the US-based National Consortium for the Study of Terrorism and Responses to Terrorism. Data is only available for the period 1970-2016.

of these data is conducted in the following text, focusing on the 10 Member States⁴⁵ examined in this study.

For the most part, the **major types of terrorism threats facing these countries have shifted significantly in the last 15-20 years**. The political environments of these European countries after the Second World War and through the Cold War led, in several prominent cases, to the establishment of non-religious terrorist groups. Primarily, these groups had separatist or anti-capitalist objectives and operated in one Member State (see Box 3, below, for examples).

Box 3: Historic non-religious terror threats against EU Member States.

Historic non-religious terror threats against EU Member States

In **Belgium**, one of the most prominent non-religious terrorist groups was the left-wing, anti-capitalist outfit Cellules Communistes Combattantes (CCC), active solely in the 1980s. The CCC perpetrated 21 terrorist attacks in this decade targeting Belgian and international businesses (including notable organisations such as KB Bank, Bank of America, Motorola and Honeywell), as well as North Atlantic Treaty Organisation (NATO) pipelines and US military facilities⁴⁶. These attacks resulted in three fatalities and 15 injuries.

Many domestic terrorist groups have claimed responsibility for attacks in **Greece** since the early 1970s. One of the most prominent and most lethal groups, active primarily through the 1980s and 1990s, was the left-wing, anti-capitalist 17 November Revolutionary Organisation (N17). During 112 attacks, N17 caused 26 fatalities and 98 injuries. N17 was disbanded in 2002.

In the 1970s and 1980s, **Italy** was reportedly the target of over 1,300 terrorist attacks⁴⁷. One of the most renowned groups of the period was the Brigade Rosse (the Red Brigades). A left-wing paramilitary group, the Red Brigades contrived to conduct over 200 attacks over this period, including the infamous kidnapping and murder of former Christian Democrat Prime Minister, Aldo Moro.

Spain has a long history of terrorist violence, largely due to the Basque separatist and nationalist terrorist organisation Euskadi Ta Askatasuna (ETA). According to the Global Terrorism Database, maintained by the US-based National Consortium for the Study of Terrorism and Responses to Terrorism, ETA was responsible for 2,022 terrorist attacks from 1970 to 2010 (1,975 of which were conducted in Spain; and 1,922 of which were conducted after the Francoist dictatorship had ended). These attacks have resulted in 811 fatalities and 2,338 injuries. In 2011, ETA declared a ceasefire and, as of April 2017, disarmed indefinitely.

⁴⁵ As documented in section 1, the 10 Member States examined by the study are Belgium, France, Germany, Greece, Italy, the Netherlands, Poland, Spain, Sweden and the United Kingdom.

⁴⁶ For example: Euro terrorism in the 1980s. US and Western European military, political institutions became targets for new wave of terrorist attacks. The Christian Science Monitor [Archive], 25/01/1985. Accessed on 07/09/2017 at: <https://www.csmonitor.com/1985/0125/oscare.html>; 'The New Terror Network: Small Groups of Political Renegades Are Hitting NATO Targets in Western Europe', Newsweek, 11.02.1985 Accessed on 07/09/2017 at: <https://armthespiritforrevolutionaryresistance.wordpress.com/2017/03/16/cellules-communistes-combattantes/>.

⁴⁷ Global Terrorism Database, National Consortium for the Study of Terrorism and Responses to Terrorism (START), 1970-2016.

Primarily in the 1970s, 1980s and 1990s, the **United Kingdom** was extensively targeted by the Irish Republican Army (IRA). Although not entirely non-religious in its intentions, the IRA is primarily a separatist group influenced by the political and religious context of Northern Ireland and dedicated to Irish republicanism. The IRA conducted even more attacks than the ETA, with 2,611 attacks noted in the period between 1970 and 2016 (although only 14 have been conducted since 2000). Furthermore, the IRA was significantly more potent in its attacks, causing 1,755 fatalities and 3,615 injuries over that same period. After the Belfast / Good Friday Agreement, signed on 10 April 1998, the IRA began the process of disarming. By July 2005, the IRA had formally announced the end of its campaign.

Towards the end of the Cold War, however, a rise in Islamist terrorism was experienced across the EU. This **represented a shift from non-religious to faith-based terrorism, as well as from national-level to EU-wide and global terrorism**. This is evidenced by the Islamist sentiment behind the 9/11 attacks in the US, the 2005 London bombings and numerous recent terrorist attacks across France, Belgium, Germany, the UK and other Member States.

Although a large proportion of the non-religious terrorism affecting EU countries has subsided in recent decades, concerns have been raised in recent years with regard to both right- and left-wing terror organisations. In Germany, for instance, right-wing terrorism, such as that perpetrated by the National Socialist Underground (NSU), has received increased publicity in light of the court proceedings against Beate Zschärpe, the only surviving member of the NSU. Furthermore, left-wing terror organisations are considered to be ready to use violence⁴⁸, with Europol reporting increased left-wing and anarchist terrorist attacks in 2016 compared with 2015⁴⁹. A prominent example from 2017 is the violence at the G20 world leaders' summit in Hamburg, which seemed to have been partially orchestrated by organised pan-European left-wing groups. Although classified as terrorism by the authorities, it could also be considered as political violence or riots, illustrating, as detailed in section 2.2, the difficulty in distinguishing terrorism from other crimes.

This is not to say, however, that terrorism threats are prevalent across all Member States. In fact, there are notable examples of Member States with limited exposure to terrorism: **Poland** only experienced 36 terrorist attacks from 1970 to 2016 (31 of which occurred in the 1990s), and, over the same period, **Sweden** has only faced 118 terrorist attacks and the Netherlands 128.

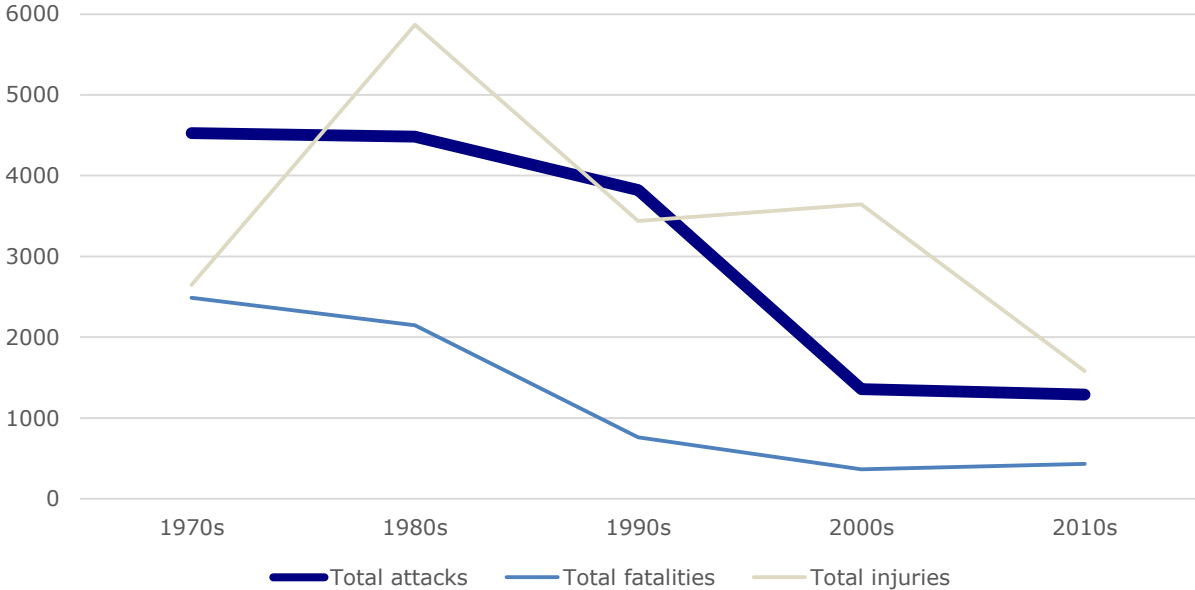
Alongside these general shifts, the **frequency of terrorist attacks, across the 10 Member States examined, has significantly reduced in recent decades**. Of the 15,484 terrorist attacks recorded in these Member States between 1970 and 2016, 83% were conducted prior to 2000. Furthermore, when viewed across all 10 Member States examined, the potency of terrorist attacks, considering the total numbers of individuals killed or injured, has also declined (see Figure 1). As a whole, the number of terrorist attacks across the EU Member States have also decreased over this time period. These data have been exported from the

⁴⁸ For example: G20 violence prompts calls for new curbs on anti-capitalist militants, 2017, available at: <https://www.theguardian.com/world/2017/jul/10/g20-violence-prompts-calls-for-new-curbs-on-anti-capitalist-militants>.

⁴⁹ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017.

Global Terrorism Database⁵⁰, unless explicitly stated, and, in many instances, analyse the data by decade, with the 2010s referring to the period 2010-2016.

Figure 1: Terrorist attacks, fatalities and injuries by decade: 1970-2016 in the 10 Member States examined in this study.



When regarded in light of the declining number of terrorist attacks, the data on potency tell a more complex story. With regard to fatalities, the period 2010-2016 has seen an increase in the number of fatalities per attack (33 for every 100 attacks), as compared with the 2000s (27) and the 1990s (20). However, this figure is not as high as in the 1970s (55 fatalities for every 100 attacks) and 1980s (48).

Regarding injuries per attack, the most potent decade was the 2000s, where 2.68 individuals were injured per attack. The period 2010-2016 is only the third most potent in this respect, with 1.23 injuries per attack. The terrorist attacks perpetrated in the 1970s only caused 0.58 injuries per attack – this is likely due to the relatively higher incidence of attacks targeting individuals, such as assassinations and kidnapping.

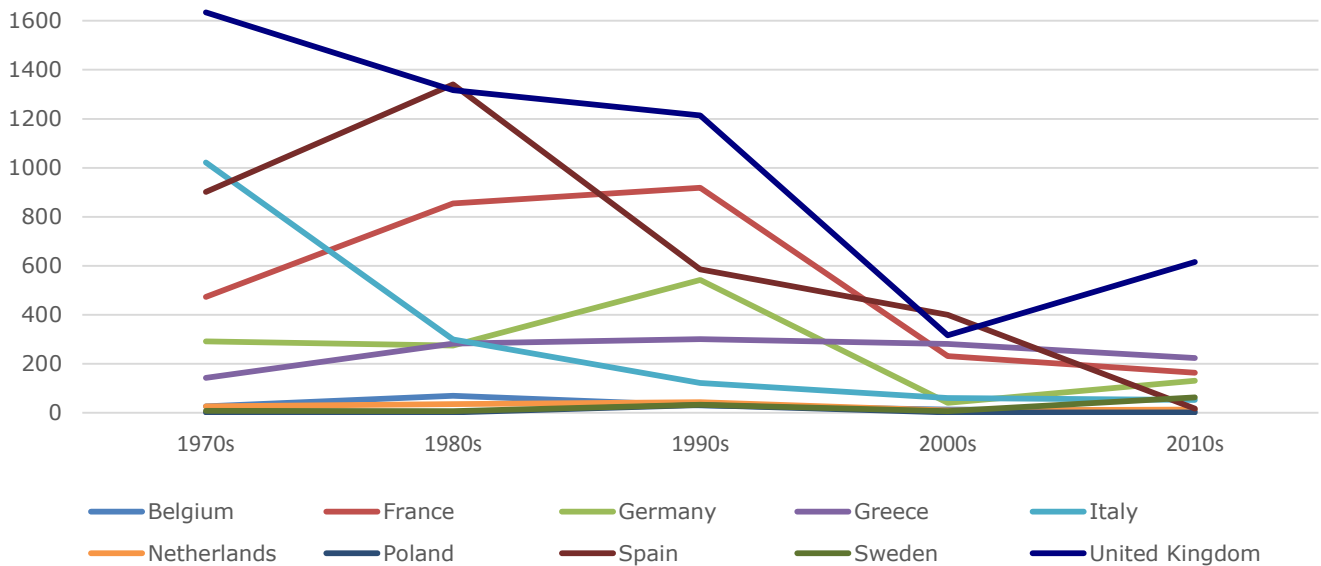
When disaggregated, these data illustrate differing trends with regard to the potency and frequency of terrorist attacks across the 10 Member States examined. In Belgium, France, Italy, Spain and the UK, for instance, the number of attacks has decreased significantly from the 1970s to the present period (2010-2016). Other Member States, such as Greece, the Netherlands and, to a lesser extent, Germany, have not experienced significant changes in frequency of attacks across the period 1970-2016 (see Figure 2, below).

Regarding those Member States that have seen a decline in the number of the attacks, some, most prominently Belgium and France, have experienced a clear increase in the potency of attacks. However, others, such as Italy, as well as the Netherlands, Poland and Greece, have experienced no such increase in attack potency. Germany represents a more complex example as the fatalities per attack were at their highest in the 2000s and 2010s, but the injuries per attack were at their highest in the 1980s (at around 279 injuries per 100 attacks) compared with 127 injuries per 100 attacks in the 2010s. As these data do not take into

⁵⁰ National Consortium for the Study of Terrorism and Responses to Terrorism (START), 2011. Global Terrorism Database [Data for the years 1970-2016 covering France, Belgium, Germany (including both East and West Germany prior to 1990), Greece, Italy, the Netherlands, Poland, Spain, Sweden and the United Kingdom]. Available at: <https://www.start.umd.edu/gtd/>.

account significant 2017 attacks, such as the Manchester, Westminster and London Bridge attacks in the UK and the August 2017 Catalonia attacks in Spain, no findings are reported on the potency trends in these Member States.

Figure 2: Number of terrorist attacks by country, by decade: 1970-2016.



In terms of attack methods, the most likely is a bombing or explosion. In fact, across the 10 Member States examined, 51% of the 15,484 terrorist attacks perpetrated in the period 1970-2016 were bombings or explosions. This method has, in fact, experienced a proportional increase; bombs or explosions were used in 47% of terrorist attacks in the period 2010-2016 and 62% in the 2000s, compared with 41% in the 1970s. The main changes in attack methods relate to: i) the steady, proportional decline in assassinations; ii) the gradual, proportional increase in attacks on facilities and infrastructure; and iii) the very recent proportional increase in armed assaults. These trends are illustrated in Box 4.

Box 4: Trends in terrorist attack methods: 1970-2016.

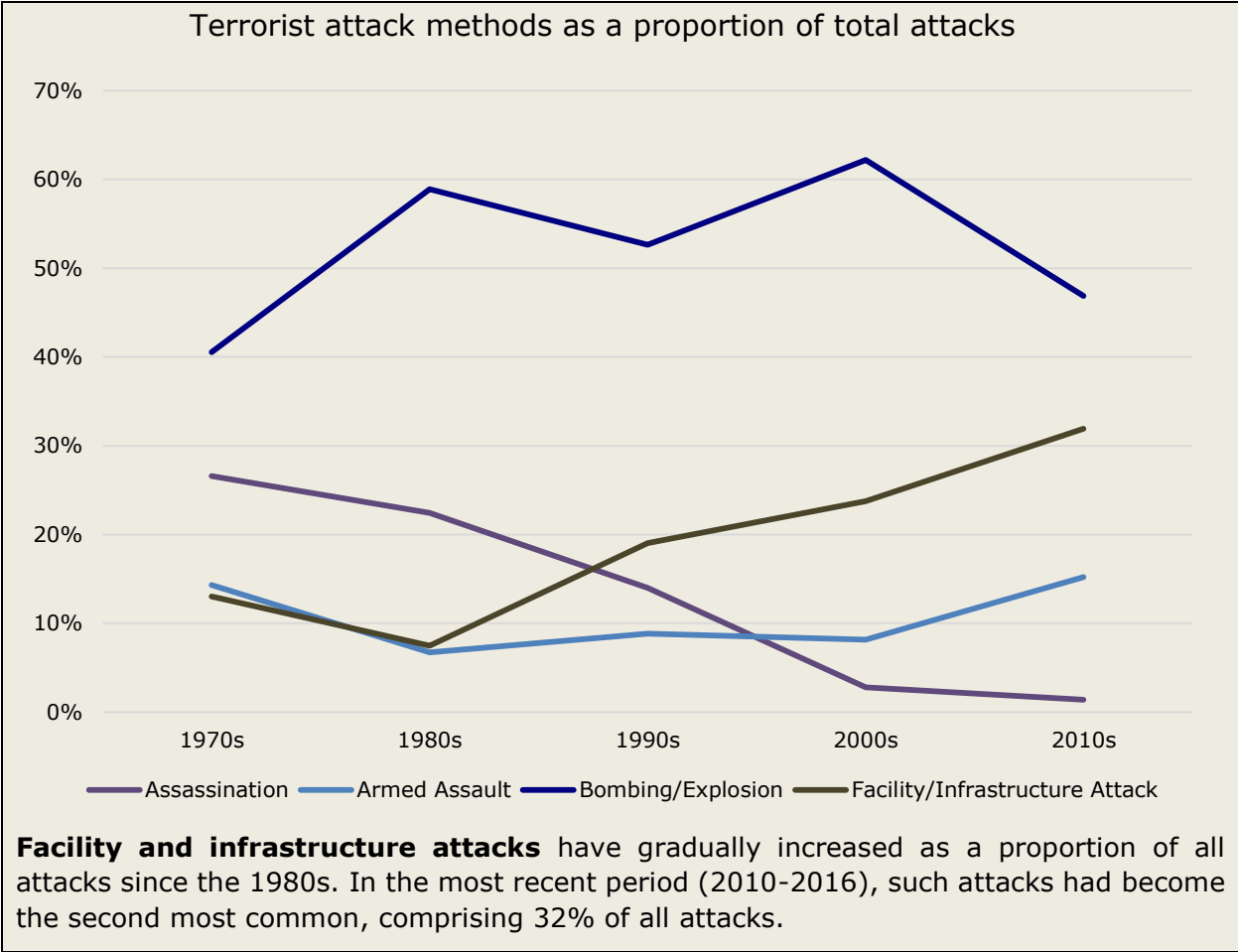
Terrorist attack methods: Trends 1970-2016

The below figure illustrates the changes in the use of four terrorist attack methods over the time period 1970-2016 as proportions of the total attacks conducted.

Assassinations have experienced a proportional decline from the 1970s to the present day. In fact, in the 1970s 27% of all terrorist attacks were assassinations. In the period 2010-2016, assassinations comprise only 1% of such attacks.

The proportion of **armed assaults** remained relatively low throughout the 1980s (7% of all attacks), in the 1990s (9%) and 2000s (8%), but, in the period 2010-2016, this figure has risen to 15%.

The trends in relation to **bombings and explosions** are documented in the above text.



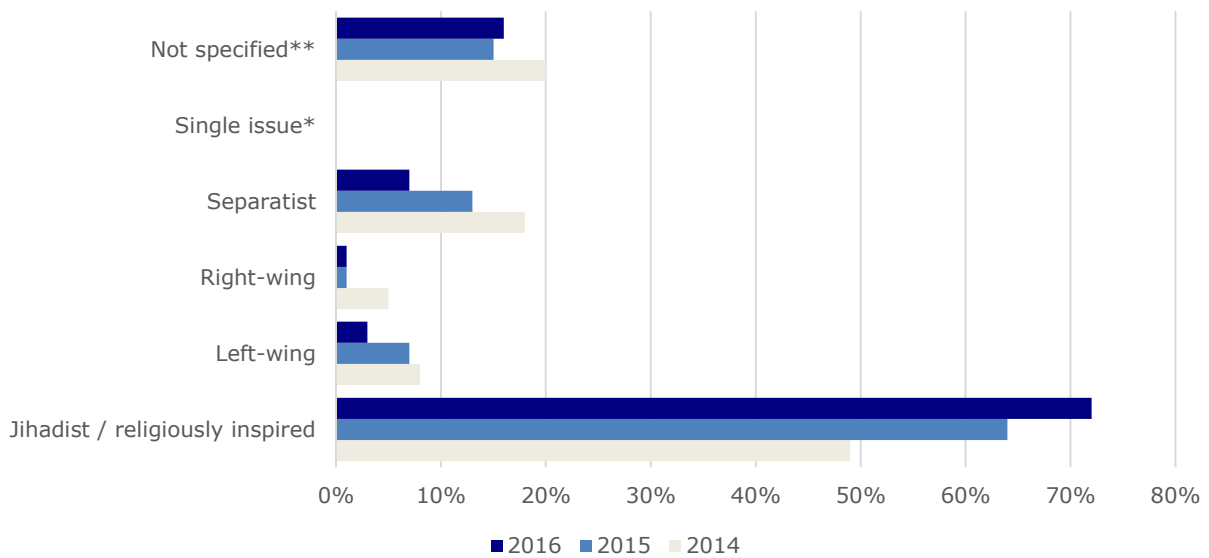
3.3. Combating terrorist threats

In addition to the above data available through the Global Terrorism Database, additional EU-level data is collected by Europol and Eurojust. The raw data are not publicly available but analyses of the most recent data are incorporated into Europol's annual EU Terrorism Situation and Trend Report (TE-SAT). As such, the statistics presented below are limited in scope to the most recent editions of TE-SAT and the years 2014-2016. Key data reported in these Europol/Eurojust publications includes the numbers of terrorism-related arrests and concluded court proceedings.

In terms of **arrests**, in all three years for which data has been analysed (i.e. 2014-2016), the most common type of terrorism for which arrests were made related to jihadist or religiously inspired terrorism.⁵¹ This figure increased from 337 arrests in 2014 to 671 in 2016. As can be seen in Figure 3, below, the proportion of arrests made across the three years that relate to jihadist or religiously inspired terrorism has also increased significantly, from 49% of arrests in 2014 to 64% in 2015 and 72% in 2016.

⁵¹ NB. The term 'jihadist' is used in 2016 and 2015, with the term 'religiously inspired' used in 2014. For this analysis, these selections have been grouped and the potential difference in these terms noted. Data for the UK does not differentiate between types of terrorism.

Figure 3: Arrests for terrorism-related crimes by type of terrorism: 2014-2016.⁵²

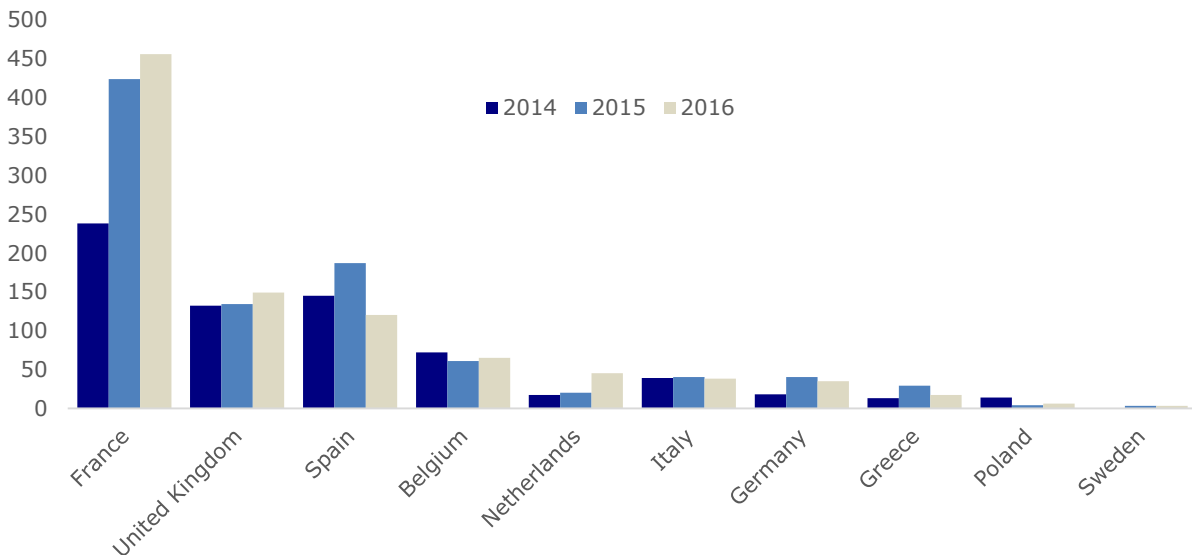


* Single issue is only an assigned type of terrorism in TE-SAT 2015 and 2016.

** The category 'Not specified' includes all arrests made in the UK.

Moreover, in all three years, France reported the most arrests for terrorism-related crimes, with Spain and the UK also making a large number of arrests (see Figure 4).

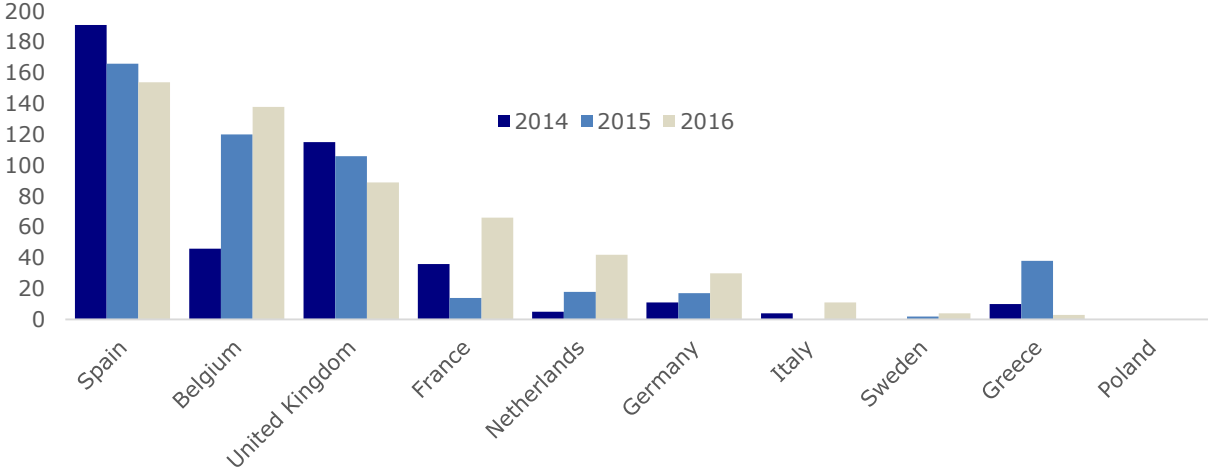
Figure 4: Arrests for terrorism-related crimes by country: 2014-2016.



Regarding court proceedings, the TE-SAT reports on the **number of individuals for which court proceedings on terrorism-related crimes have been concluded**. Data is available for all Member States examined, with the exception of Poland. As illustrated in Figure 5, below, and similar to the arrest trends above, Spain, Belgium and the UK report the highest numbers of concluded court proceedings. Furthermore, across the period 2014-2016, significant increases have been seen in Belgium, France, Germany and the Netherlands.

⁵² The 2016 and 2015 Europol TE-SAT reports use the term 'jihadist', while the term 'religiously inspired' is used in TE-SAT 2014. As such, both terms are recorded in the relevant figures in this section.

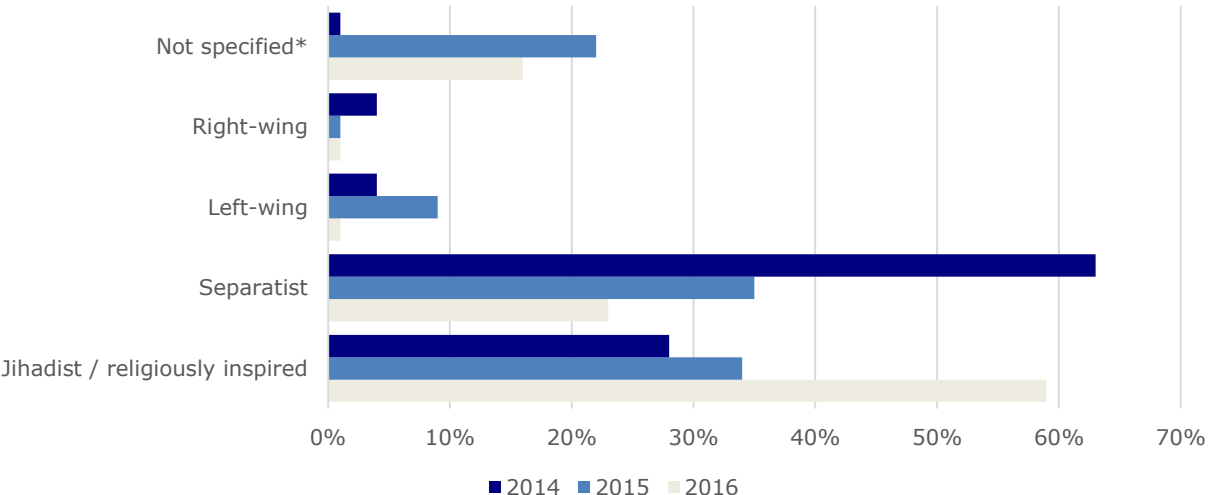
Figure 5: Concluded court proceedings for terrorism-related crimes by country: 2014-2016.



When analysing proceedings data by type of terrorism, across most Member States, the most common type is jihadist or religiously inspired terrorism.⁵³ Overall, 43% (574 of 1,347) of concluded court proceedings relate to jihadist or religiously inspired terrorism, increasing significantly from 87 in 2014 to 319 in 2016. However, in 2014, proceedings related to separatist terrorism were the most common – comprising 65% of cases. Such cases are declining, with 195 concluded in 2014 compared with only 123 in 2016.

In all Member States with available data, except Spain, jihadist or religiously inspired terrorism is the most common across the three years. In Spain, however, separatist terrorism is the most common subject of concluded terrorism proceedings. For instance, Europol’s 2017 TE-SAT reports that, in 2016, Spain delivered verdicts on 116 cases related to separatist terrorism compared with 38 related to jihadist terrorism.

Figure 6: Concluded court proceedings for terrorism-related crimes by type of terrorism: 2014-2016.



* The category 'Not specified' includes all arrests made in the UK.

⁵³ As highlighted above, TE-SAT 2015 and 2016 used the term 'jihadist', while TE-SAT 2014 uses the term 'religiously inspired'. For this analysis, these selections have been grouped and the potential difference in these terms noted. Data for the UK does not differentiate between types of terrorism.

Box 5: Available data on numbers of suspects of terrorism-related crimes.**Number of suspects: Available data**

Beyond these data, provided to Europol and Eurojust by national authorities, this study's country reports have collected data on the number of suspects of terrorism-related crimes, where available. These data are not readily available in most Member States examined, including Greece, Netherlands, Poland, Spain and Sweden.

However, indications are available in some Member States. For instance, in **Belgium**, Amnesty International has reported that 457 individuals were on the terrorism watch list of the *Organe de Coordination et d'Analyse de la Menace* (OCAM – Belgium's Threat Analysis Coordination Body) at the beginning of 2016.

Furthermore, journalists in France, Germany and the UK have reported on the existence of similar lists in those Member States. **French** authorities are reportedly monitoring around 15,000 individuals who are suspected of being radical Islamists.⁵⁴ In **Germany**, it has been reported that, at the beginning of 2017, the security agencies maintained a list of 548 Islamists that represent a potential danger to Germany⁵⁵, and after the March 2017 Manchester attacks, it was reported that the **UK** security services was monitoring a list of 3,500 Islamist extremists.⁵⁶

In conclusion, many key shifts in the profile and the threats of terrorism have been experienced in the EU in recent decades. First and foremost, the threat of terrorism has evolved from being almost solely driven by country-specific, non-religious types of terrorism to primarily Islamist influenced terrorism, with targets across the globe. This is evidenced by the high proportions of national level arrests and court proceedings that relate to jihadist or religiously inspired terrorism in the EU. However, although the number and impact of non-religious terrorism has reduced significantly, since the period 1970-1990 (mainly due to the decline in separatist attacks), it is not the case that terrorism following non-religious ideologies has disappeared, and concern around right- and left-wing terrorism, in particular, is growing.

It is notable that, in recent years, significant legislative and policy focus has been placed on tackling terrorism by governments across the globe – to a much greater extent than in previous decades. This crisis-driven approach to terrorism policy is evidenced by the fact that most Member States examined here did not have counter-terrorism legislation until after the 9/11 attacks in the US. It is, therefore, interesting to note that, in the period 1970-2016, the frequency of terrorist attacks has decreased and the overall potency of such attacks has also decreased. Although the relative potency of the terrorist attacks in the most recent time period (2010-2016) is higher than the equivalent figure in the 1990s and 2000s, it is not higher than the equivalent figure in the 1970s and 1980s.

Finally, in terms of attack methods, bombs and explosions are, throughout the examined time period, the most common method. However, the rise of Islamist terrorism has resulted

⁵⁴ '15,000 on French terror watch list report', *Politico*, 10.10.2016. Available at: <https://www.politico.eu/article/15000-on-french-terror-watchlist-report-radical-islamist/>.

⁵⁵ Germany Balances Liberty and Security in Face of Terror, 2017. Available at: <http://www.spiegel.de/international/germany/after-terror-attack-germany-examines-security-architecture-a-1128917.html>

⁵⁶ Home Office, UK Government, *Operation of police powers under the Terrorism Act 2000*, quarterly update to December 2016.

in a decline in assassinations, a proportional increase in attacks on facilities and infrastructure, and a recent proportional increase in armed assaults.

4. THE RIGHTS GRANTED TO SUSPECTS OF TERRORISM-RELATED CRIMES

Numerous Member States have been affected by domestic right-wing, left-wing or separatist terrorism throughout the second half of the 20th century, however, this did not lead to a dramatic alteration in legislation to address these threats on a pan-European level.⁵⁷ The terror attacks on 9/11 as well as the Madrid and London bombings in the early 2000s, were key turning points and prompted a wave of new legislative measures across many EU Member States responding to the perceived rising threat of jihadist terrorism.⁵⁸ Its radical and borderless nature has contributed to the perception that jihadist terrorism is a threat to the democratic values of the Western world. Furthermore, the ongoing wars in Syria and Iraq provided fertile grounds for radicalised foreign terrorist fighters (FTF) to join terrorist organisations, receive training, and potentially commit acts of terror upon return to their country of origin. As such, legislative measures across Member States to prevent potential FTFs leaving the EU, and legislation to prevent their return (by revoking their nationality) have been witnessed.

In addition, many of the changes that EU Member States have initiated to combat terrorism in recent years have focused on criminalising certain activities as terrorism-related crime. This has included, but was not limited to, providing financial assistance willingly or unintentionally to fund terrorism, inciting others to commit terrorist acts and, the penalisation of the perceived behaviour of preparing to commit a terrorist crime.⁵⁹ While the introduction of new substantive provisions to combat offences does not necessarily limit the rights granted to suspects of terrorism-related offences, it theoretically means that a much wider range of individuals will be suspected, accused and convicted of terrorism-related crimes. Since the scope of terrorism-related crimes has become much broader, more individuals will necessarily become, perhaps erroneously, the target of criminal investigations.

It is difficult to objectively measure whether these legislative actions have been effective at deterring radicalisation or decreasing the frequency of terrorist attacks, but it is clear that introduction of legislation with the aim of maintaining national security raises concerns on the compliance with the rights of those suspected of committing terrorist acts. This is especially true of restrictive administrative powers that EU Member States have embedded into their legislation. These measures do not require criminal convictions prior to their imposition and, instead, function as a form of pre-emptive criminal justice and a means of mitigating the risk of a potential terrorist attack.

The proliferation of such measures, that arguably infringe on civil liberties, demand close scrutiny. This chapter, therefore, firstly provides an overview of substantial criminal law provisions, introduced in relation to terrorism in the 10 Member States, under scrutiny. It then explains state powers in relation to terrorism suspects and the procedural rights of those suspects. In most countries, rights granted to suspects of terrorism-related crimes do not differ from suspects of other serious crimes. Nevertheless, there are some restrictions on the rights of terrorism-related crime suspects in some Member States.

⁵⁷ Joannin, P., *The European Union and the fight to counter terrorism European Issue No. 372*, Robert Schuman Foundation. 23/11/2015.

⁵⁸ Murphy, C., *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law*, Bloomsbury Publishing, 2012, p. 3.

⁵⁹ Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe*, 2017.

4.1. Criminalisation of terrorism-related offences

All studied Member States have transposed EU legislation in line with the Framework Decision of 13 June 2002. However, each state has implemented legislation with varying degrees of severity and with differing provision for safeguards to protect the rights of suspects of terrorism-related crimes. For example, harsher anti-terror legislation, such as the capability to initiate wiretapping of foreign nationals without judicial review has been implemented in Poland despite the fact that the Polish Ministry of Foreign Affairs states that “[it] is a country not directly threatened by terrorist attacks”, nor does it have a history of domestic or international terrorism.⁶⁰ The requirement for such a punitive provision is questionable when compared with countries such as Spain⁶¹ and Greece⁶² that have been combating domestic terrorism for decades but judicial authorisation is required before wiretapping can commence.

Directive 2017/541 on combating terrorism provides an overview of eight offences related to terrorist activities. Article 5 mentions that the “public provocation to commit a terrorist offence” shall be criminalised. This includes individuals that intentionally glorify terrorism or advocate for the commission of terrorism. Articles 6 to 8 mention that the recruitment for terrorism and the provision/receiving of terrorism training are punishable as criminal offences. Articles 9 to 11 criminalise the travelling or the facilitation of travelling for terrorist purposes and the financing of terrorism. Ultimately, Article 12 also mentions that aggravated theft, extortion, and drawing up or using false administrative documents for terrorist purposes shall be criminalised. As outlined below several Member States have adopted legislation criminalising some, or all, of these acts.

4.1.1. Criminalisation of travelling to conflict zones

Foreign terrorist fighters (FTF) pertaining to jihadist terrorism have been identified as one of the major threats to the security of Member States. With the aim of deterring radicalised individuals from leaving the country, EU countries have criminalised travelling to a conflict zone if an individual has the express intention of joining a terrorist organisation.⁶³ While the intention of the legislative measures has been the same, the manner in which the legislation has been introduced differs slightly in each country. For example, Germany has criminalised travelling abroad with the intent of receiving instructions for the commission of a serious crime.⁶⁴ Sweden’s Recruitment Act criminalises travelling to a country, other than the country of which the suspect is a citizen, with the purpose of committing or preparing terrorist crimes.⁶⁵ Sweden’s law did not provide a legal basis for the conviction of a man who was understood to be travelling to join terrorist group Jabhat al-Nusra, since there was not sufficient evidence to prove that the purpose of his trip was to commit terrorist acts.⁶⁶ Stricter laws that include the criminalisation of joining a terrorist group have been proposed in light of this case.⁶⁷ The Netherlands has criminalised joining a terrorist organisation abroad,

⁶⁰ Ministry of Foreign Affairs Republic of Poland, *Counter-Terrorism Activities of Poland*. Available at: http://www.msz.gov.pl/en/p/msz_en/foreign_policy/security_policy/international_terrorism/.

⁶¹ Expert interview.

⁶² Greek Law 3649/2008, Article 5, 3/3/2008, p. 4

⁶³ Ginkel, V. and Entenmaan, ‘The Foreign Fighters Phenomenon in the European Union. Profiles’, *Threats & Policies*, ICCT Research Paper, p. 64.

⁶⁴ Sections 89a and 89b of the German Criminal Code of the Amendment Act on the Prosecution of the Preparation of Serious Violent Offences Endangering the State.

⁶⁵ Swedish Law 2010/299 on public prosecution, recruitment and training in terrorist offences and other particularly serious crime, 29/04/2010.

⁶⁶ Swedish Court of Appeal, *Swedish Court of Appeal disqualifies in a destination of travel for terrorism purposes*. 09/12/2016. Available at: www.svea.se/Om-Svea-hovratt/Nyheter-fran-Svea-hovratt/Svea-hovratt-frikanner-i-ett-mal-om-resa-i-terrorismsyfte--/.

⁶⁷ Swedish Ministry of Justice, *Criminal proceedings against participation in armed conflict in support of a terrorist organization*. Available at: <http://www.regeringen.se/rattsdokument/statens-offentliga-utredningar/2016/06/sou-201640/>.

without clearly outlining the definition of 'joining'⁶⁸, while many defendants in Belgium have been convicted and sentenced for this offence *in absentia* having already travelled to conflict zones and joined terrorist organisations.⁶⁹

4.1.2. Criminalisation of incitement to commit terror

Multiple EU countries have introduced legislation to prevent the dissemination of messages that potentially lead to the radicalisation of citizens and residents even if an inciting action does not necessarily increase the risk that a terrorism-related event occurs.⁷⁰ Legislation that criminalises incitement to commit terror, sympathising with terrorists, or ridiculing victims of terror is commonplace in several states; however there exists the risk that such measures may curtail the right to freedom of expression. In 2012, the French Parliament adopted the Law Regarding Security and the Fight Against Terrorism, Law no 2012-1432 of 21 December 2012. The legislation increased the sanctions against persons who are "guilty of justification of or incitement to terrorism on the internet".⁷¹ Spain arguably has the most stringent laws, recently expanding its legislation to criminalise the "glorification", and "justification" of terrorism. In practice, this led to the arrest and four-day detention, although not the prosecution, of two puppeteers who made satirical jokes regarding the actions of al-Qaeda and ETA deemed capable of inciting terror.⁷² Spain has also adopted legislation that criminalises electronic "distribution or public dissemination of messages or slogans" which may have a negative effect on freedom of expression as it is not specifically defined what constitutes a message or slogan glorifying terrorism.⁷³ The Netherlands and Greece do not have specific laws that penalise the incitement of terrorist acts, but, rather, their incitement laws sufficiently cover the incitement to commit any felony including those related to acts of terror.

4.1.3. Criminalisation for preparatory offences

Several EU countries have criminalised the engagement or the facilitation of terrorist training. For example, 2015 amendments to the Spanish Penal Code criminalise the habitual self-training via the internet.⁷⁴ French Law included enabling the prosecution of persons who attended terrorist training camps outside France, despite the fact that no offence has been committed on French territory, and through the extension of asset-freezing to individuals accused of inciting terrorism.⁷⁵ All Member States have implemented legislation to prevent terrorist financing. Assets of those suspected of committing terrorism-related crimes can be frozen and criminalisation of the collection or the act of making available any assets or funds for the commission, preparation or participation of a terrorist offence is common place. EU Member States have also introduced legislation to prevent the possession, procurement and manufacturing of weapons for use by a terrorist organisation. In October 2009, the Polish Criminal Code was further amended in order to address the financing of terrorism-related activities, introducing for the first time, the offence of giving support to the perpetrator of a terrorist offence.

⁶⁸ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017.

⁶⁹ Ibid.

⁷⁰ Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe 2017*.

⁷¹ French Law no 2012-1432 of 21 December 2012.

⁷² Human Rights Watch, *Foreign Terrorist Fighter Laws Human Rights Rollbacks Under UN Security Council*, 2016.

⁷³ Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe, 2017*.

⁷⁴ Expert interview.

⁷⁵ French Law no 2012-1432 of 21 December 2012.

4.2. Rights granted to terror suspects

4.2.1. Defining a suspect in terrorism-related crimes

The fact that criminal justice is only a shared competence at EU-level means that a coherent definition of "suspect" or "terrorism suspect" does not exist under EU law. The Council of Europe defines a **suspect of terrorism as a person who has committed or who is alleged to have committed an offence set forth in the Convention on the Prevention of Terrorism**, thus to include individuals who are alleged to have committed the criminal offence of terrorism.⁷⁶ It is, therefore, important to understand how suspects are defined in EU Member States.

In most countries, a terrorist suspect is defined as such when it is reasonable to believe that a terrorism-related crime was committed or will be committed based on the information received or compiled regarding the individual. A terrorist crime in the Member States fulfils the purpose of causing, or threatening to cause, serious harm to a country, disrupting public order, or presenting a constitutional threat to the nation. As noted in section 4.1 above, the expansion of criminal legislation now permits Member States to treat individuals as suspects over a wider range of behaviours and actions related to terrorism.

The majority of Member States do not appear to have a formalised legal definition for suspects. Italy is an exception since it clearly outlines in its Criminal Code that an individual officially becomes an '*indagato*', or suspect, once the prosecution initiates a formal investigation.⁷⁷ Some Member States use distinct terminology to describe the status of an individual at different stages of 'suspicion' but these are not legally defined and the legal rights afforded to persons at each such stage are the same. For example, in Germany an individual is termed a '*Beschuldigte(r)*' ('suspect') during the investigation stage, during the pre-trial proceedings the term '*Angeschuldigte(r)*' ('defendant') is used while during the main proceedings, '*Angeklagte(r)*' is equivalent to 'accused'.⁷⁸ While some countries apply different definitions of suspects depending on the stage of the legal proceedings, no country provides a legal definition that is specific to suspects of terrorism-related crimes.

All of the above definitions refer to a situation where a person is suspected of *having committed* terrorism or a terrorism-related crime. However, one of the difficult issues relates to the rights of individuals suspected of *intending* to commit terrorism or terrorism-related crimes in *the future*. There are substantial differences between Member States in relation to this latter category of suspects. For example, in Germany there is a whole different body of law dealing with preventative measures called 'policing law'. No German policing law exists on a federal level, instead every *Land* has its own legislation on investigative measures to be applied in a preventative manner. Other countries do not strictly differentiate between criminal investigative law and crime prevention, which is justified by the fact that in practice prevention and investigation are often closely intertwined. France is an example for a country where a number of "exceptional" preventative techniques have been introduced through declaring a state of emergency following the November 2015 attacks.

There are variations between Member States with regard to who has the competence to declare an individual a suspect mainly due to differences between the legal framework on the interaction of police forces, security services, and public prosecutors in these states. In

⁷⁶ Council of Europe Convention on the Prevention of Terrorism. Article 15 - duty to investigate. Warsaw, 16.5.2005

⁷⁷ Ex art. 335 of the Italian Code of Criminal Procedure.

⁷⁸ The German criminal procedural law (StPO) refers to the different stages of the proceedings (investigation, pre-trial and main proceedings).

Spain⁷⁹ and Greece⁸⁰, the senior police officers who manage preliminary investigations have the competence to declare an individual a terror-suspect if there is a reasonable suspicion for doing so, before presenting a case for judicial investigation. This is likely due to the exposure to domestic terrorism these two countries experienced in the past presumably requiring pragmatic and efficient solutions that are more security, rather than rights, focused. Nevertheless, in most countries declaring someone as a suspect of terrorism-related crimes is the competence of the public prosecutor or investigating judge. In Germany, mainly the Federal Public Prosecutor General (Generalbundesanwalt) has the competence to declare that an individual is suspected of having committed terrorist crimes. Similarly, in the Netherlands, the Dutch security service collect information while the public prosecutor has the authority to order the arrest of a terror suspect. In Sweden, the burden of responsibility falls on the Swedish Secret Service to identify terror suspects whose cases are specifically prosecuted by the Prosecution Office for National Security.

4.2.2. Different degrees of suspicion and the rights of terrorism suspects

As outlined in section 4.2.1, there are different "categories of suspects" in Member States ranging from concepts such as "persons of interest" to "suspects" and "defendants". The distinction between these different levels of suspicion is not laid down in legislation and in practice it is often blurred. Furthermore, section 4.2.2 has outlined the powers available to state authorities when persons are suspected of terrorism-related offences by differentiating between different criminal procedural and administrative measures. Based on the foregoing, the rights afforded to individuals in the context of terrorism-related crimes concerning the legislation and practices of the studied EU Member states can be broadly categorised into four subsections which depends on the degree of suspicion that the individual has aroused:

1. The rights afforded to every individual (*persons who are not under suspicion*);
2. The rights afforded to a "person of interest";
3. The rights afforded to an individual who has been subject to an administrative measure; and
4. The rights afforded to an individual where criminal proceedings have commenced.

The first category of persons can be defined as individuals that do not appear on the radar of police or intelligence services and the fundamental rights of the individuals ought not to be interfered with. This category of persons usually has full access to criminal justice rights as outlined under Title VI of the Charter of Fundamental Rights.

On the other end of the spectrum, the rights of individuals who are undergoing criminal proceedings are strengthened by provisions outlined in the Suspects' Rights Package, which is applicable to suspects of all crimes. Furthermore, the burden of proof falls upon the prosecution while the presumption of innocence is safeguarded and the high standard of admissible evidence ultimately contributes to the right to a fair trial and effective remedy.

The situation of "persons of interest" and "persons who are subject to administrative measures" is less clear. To begin with the first category, across the EU Member States there is no common definition of what constitutes a "person of interest", but it is mostly seen as an individual that has become known to police or security services, who in the process of investigation, may have their rights temporarily infringed such as the right to privacy and data protection. A "person of interest" may also be subject to special investigatory powers, such as long-term surveillance and wiretapping that in most Member States requires judicial approval. In practice, a "person of interest" may never become aware of the lawful

⁷⁹ Expert interview.

⁸⁰ Council of Europe, *Profiles on Counter-Terrorism Capacity: Greece*, Committee of Experts on Terrorism (CODEXTER), 2012.

infringement of their rights (i.e. right to privacy if secretly monitored). Member States vary on whether they inform an individual who has requested to know if their rights have been infringed, and this often depends on whether they are still deemed to pose a threat to national security or if the disclosure of information has the potential to jeopardise any on-going investigations.

Individuals may become inadvertently aware that they are / were a "person of interest" if they turn into "a person subject to administrative measures" meaning that they are restricted from participating in a desired activity (e.g. travel to another country, access assets, etc.) due to their presence on a blacklist / intelligence database. In this way, the rights of the individual, would have been curtailed even though they were never subject to criminal proceedings. Furthermore, complications are feasible if they cannot readily challenge the presence of their name on such a database due to a lack of transparency with which the intelligence services operate, as such few safeguards are offered.⁸¹

Those subject to administrative measures are "persons of interest" that are judged to pose a sufficient threat to national security thus warranting the imposition of a restrictive measure. It should be noted that these persons are not suspects by a legal standard because they are not necessarily accused of committing any crime, nor could these measures be perceived as punishments because, by definition, they have not conducted an act serious enough to be regarded as worthy of punishment via standard criminal proceedings. Instead, the administrative measures are preventative. Given that the status of these preventative measures does not adhere to the definition of punishment, individuals do not accrue the same rights as individuals that undergo procedures for punishment during criminal proceedings and lack the safeguards and redress mechanisms that the criminal court provides⁸². Furthermore, administrative measures are usually imposed based on intelligence gathered by security services. Since most Member States restrict access of data subjects to intelligence⁸³, an individual may not have sufficient information to mount an adequate defence.

In essence, it means that there appears to be a gap where fundamental rights and secondary legislation may not be fully accessible for those that have had administrative measures imposed upon them, as well as those who are "persons of interest", when compared to the rights of individuals in categories one and four outlined above. Given that there appears to be a trend across EU Member States for the use of administrative measures instead of pursuing criminal convictions, it may lead to the systematic erosion of the rights of individuals who now fall into a category of suspicion where there is a clear gap in human rights safeguards.⁸⁴

4.2.3. State powers in relation to suspects of terrorism-related crimes

Once individuals are considered to be a suspect of terrorism-related crimes, state authorities have multiple tools available to investigate them. The competence to investigate is shared between the prosecutor, the police and secret services. The majority of Member States ostensibly offer the same constitutional rights to terrorist suspects as they do to individuals that are suspected of committing or preparing to commit other serious criminal offences. However, in recent years, Member States have introduced investigative measures that can be used specifically when an individual is considered to be a suspect of a terrorism-related

⁸¹ Kadi I, C-402/05, op. cit. and C-415/05, op. cit. Kadi II, joined cases C-584/10, C-593/10, op. cit.

⁸² Boutin, B., 'Administrative Measures in Counter-Terrorism and the Protection of Human Rights', *Security and Human Rights*, Brill, Volume 27, Issue 1-2, pp. 128-147. Available at: <http://booksandjournals.brillonline.com/content/journals/10.1163/18750230-02701010>.

⁸³ The UK has a provision for access to sensitive information via a special advocate.

⁸⁴ Ojanen, T., *Administrative counter-terrorism measure – a strategy to circumvent human rights in the fight against terrorism? Secrecy, National Security and the Vindication of Constitutional Law*, Edward Elgar Publishing, 2013.

crime. Furthermore, there is an increasing trend to impose restrictive measures on individuals where evidence perhaps is not robust enough to initiate criminal procedures; or on individuals who are *anticipated* to commit terror that might be considered as penalisation of pre-crime, or thought-crime.

In 1996, France introduced a vague charge of “criminal association in relation to a terrorist undertaking”, which gave the national authorities the ability to take pre-emptive action before a crime had been committed. The vast majority of individuals convicted of terrorism-related crimes in France have been detained and prosecuted under this charge.⁸⁵ The following outlines examples of the investigative powers that Member States can exercise with regard to suspects of terrorism-related crimes:

Surveillance and wiretapping

All Member States have the power to instigate surveillance measures on individuals suspected of committing terrorist acts. Member States differ regarding who has the competence to authorise a surveillance order, varying between police, security services, public prosecutors, and ministers. Furthermore, the requirement for judicial review is not uniform across the Member States, the absence of which could lead to the abuse of power and the infringement of an individual’s right to privacy and data protection.

In the wake of the recent terror attacks in France, the country is currently under a State of Emergency (see Box 6) which has granted authorities greater powers to use invasive investigative measures to monitor individuals. France can enforce individual monitoring measures to be taken against anyone who authorities have reason to believe their behaviour constitutes a “particularly serious” threat or who has engaged in regular contact with individuals or organisations with terrorist intent, or who adheres to views that incite terrorism⁸⁶.

In Spain⁸⁷, the Minister of Interior and the Secretary of State of Interior have the authority to request the use of wiretapping, while in Greece⁸⁸ the public prosecutor executes the order. In both countries, these measures require approval by a competent judge. In Spain, wiretapping is reported to be used sparingly and only ordered under exceptional circumstances.⁸⁹ In Italy, an application to instigate wiretapping measures is submitted by the head of Security and Intelligence Services and authorisation is granted by the territorially competent Head of the Prosecution’s Office.⁹⁰ Belgium introduced Law of 20 July 2015⁹¹, which expanded the list of serious crimes for which phone tapping, and many other invasive investigative measures, can be used. The list of such crimes is documented in Article 90ter of the Belgian Criminal Procedural Code and was amended to include all terrorism-related crimes.

In 2016, Poland introduced the right for the Head of the Internal Security Services to initiate secret surveillance of anyone suspected of terrorism-related crimes, for up to three months, without prior authorisation of the Courts. This provision for secret surveillance deviates from the Article 71 of the Polish Criminal definition of a suspect that “a person shall be considered a suspect if the order has been made about presenting the charges to the person or the

⁸⁵ French Law No. 96-647 of 22 July 1996. *Loi tendant à renforcer la répression du terrorisme et des atteintes aux personnes dépositaires de l'autorité publique ou chargées d'une mission de service public et comportant des dispositions relatives à la police judiciaire.*

⁸⁶ French Law No. 2014-1353 of 13 November 2014.

⁸⁷ Expert interview.

⁸⁸ In exceptionally urgent cases an investigation may be ordered directly by the public prosecutor or the investigating judge, and the authorisation of the action can be obtained from a competent judicial council immediately after within a time limit of three days.

⁸⁹ Expert interview.

⁹⁰ Article 226 of Italian Code of Criminal Procedure.

⁹¹ Loi visant à renforcer la lutte contre le terrorisme. Belgian Law of 20 July 2015.

charges have been presented to the person directly", as the new legislation contains no mechanism for notifying the suspect at a relevant point regarding their placement on a surveillance list.⁹²

Stop and search

Member States have also permitted their law enforcement agencies to search persons' homes and vehicles if they are suspected of having committed a terrorist crime, or if there is a suspicion that they will commit a crime.

According to the 2000 UK Terrorism Act, the police have powers to stop and search suspects of terrorism without reasonable suspicion. This differs from the use of stop and search powers regarding suspects of crimes not related to terrorism as, for example, the use of stop and search of individuals who are suspected of carrying illegal goods requires reasonable suspicion.⁹³ Police also have the authority to stop, search and hold individuals at ports, airports and international railway stations for up to six hours, obtain DNA samples and fingerprints, with no requirement for prior knowledge or suspicion, a practice which was exercised 19,355 times between 2015 and 2016.⁹⁴

French legislation allows for visits and seizures to be conducted in places frequented by individuals who have engaged in regular contact with individuals or organisations with terrorist intent or who adhere to views that incite terrorism.⁹⁵ Given the current state of emergency in France, no prior judicial approval is required. France's emergency measures have lapsed and become entrenched in law since 1 November which will continue to grant police and ministers, rather than the judiciary, powers to perform searches and track individuals with electronic devices. Bénédicte Jeannerod, France's Director of Human Rights Watch, has described it as "normalisation of emergency powers".⁹⁶ The Constitutional Court has declared the practice of copying data from an electronic device during house searches without prior judicial authorization as unconstitutional.⁹⁷

Maintenance of counter-terrorism databases

Poland has introduced legislation permitting that data of those that "could be connected to incidents of a terrorist nature" to be maintained in a database. However, the legislation does not include a provision stipulating that suspects have to be informed about their placement on the list, even if disclosure of the information will not affect on-going security operations. Suspects, therefore, have no recourse to challenge their placement on the list nor can they appeal to be removed from it, creating concerns regarding an individual's right to privacy. Similarly, Belgium made amendments to its law in 2016 to provide for the establishment of common databases aimed at the prevention of terrorism. However, these are exempt from general data protection safeguards where again individuals are not able to verify their presence on these databases.⁹⁸ This is in contrast to Germany, which in 2014 amended its counter-terrorism database laws to ensure that, while its 38 different agencies could exchange data on terror suspects, there is a limitation on how the data can be stored and how agencies can access it.⁹⁹ In contrast, in 2016 the French Parliament introduced

⁹² Office of the Polish Ombudsman's letter to President of the Polish Republic, 20.06.2016.

⁹³ Walker, C., *Blackstone's Guide to the Anti-Terrorism Legislation*, Blackstone Press, Third edition, 2014.

⁹⁴ UK Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain*, financial year ending 31 March 2016.

⁹⁵ Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe*, 2017.

⁹⁶ 'France approves tough new anti-terror laws', *BBC News*, 4/10/2017. Available at: <http://www.bbc.co.uk/news/world-europe-41493707>.

⁹⁷ 'French Constitutional Council Rejects Data Copy during House Raids', *La Quadrature Du Net*, 19.02.2016. Available at: <https://www.laquadrature.net/en/constitutional-council-rejects-data-copy-house-searches>.

⁹⁸ See Belgium country report.

⁹⁹ See Germany country report.

amendments to the 2015 Intelligence Act, which allowed for individuals "identified as a threat", but also associated individuals "likely to be related to a threat", to have their electronic metadata analysed by the intelligence services.¹⁰⁰

Telecommunications

While not explicitly counter-terrorism laws, it is reasonable to assume that changes to legislation regarding the way telecommunication companies handle data and interact with national law enforcement agencies have been made with the premise of maintaining national security. These legislative changes have the potential to disproportionately interfere with data protection laws. German law requires telecommunication service providers to verify the identity of customers purchasing prepaid cards. In 2016, Poland introduced legislation that requires registration for the purchase of prepaid phones.¹⁰¹ In 2016, Belgium adopted the Data Retention Act which obliges telecommunications companies to retain all metadata concerning their customers' communications for 12 months, and to provide the data to law enforcement agencies conducting criminal investigations.¹⁰² When viewed in combination with the above legislative measures, it is possible to envisage how recent changes to telecommunications legislature may infringe on the rights to privacy and data protection of terror suspects.

Sweden limits the use of surveillance on individuals to crimes that have the potential to carry a sentence of over two years and where there is a "reasonable suspicion" that a crime has been committed.¹⁰³ In the Netherlands, the Minister for the Interior and Kingdom Relations and the Minister of Defence can approve surveillance measures, although this is not subject to judicial review, and current recommendations for the advisory board for Dutch security services can be overruled.¹⁰⁴

Box 6: France's State of Emergency.

The three categories of counter-terrorism legislation impacting rights of suspects

Immediately following the November 2015 terrorist attacks in Paris, the French government introduced a State of Emergency, which has now been renewed on six occasions since it was enacted before it expired on 1 November 2017. New legislation was passed in 2016 to incorporate many of the key measures, currently permitted as part of the State of Emergency, into permanent legislation, which has caused significant concern among civil liberties groups, such as Human Rights Watch, regarding the proportionality of the new legislation.¹⁰⁵

The State of Emergency allows the police to monitor phone and online communications, impose house arrest, conduct home, vehicle, luggage and computer searches without a warrant, ban public gatherings, and

¹⁰⁰ Loi n° 2015-912 du 24 juillet 2015 relative au renseignement.

¹⁰¹ Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe*, 2017.

¹⁰² The Act of 29 May 2016 amended the Electronic Communication Act of 13 June 2005.

¹⁰³ This action is supervised by the Swedish Commission on Security and Integrity Protection, a body where the chair and vice chair are, or have been, a permanent judge or have other equivalent legal experience, and the remaining members (maximum of 10) are appointed from the Swedish parliament.

¹⁰⁴ The Netherlands is proposing an amendment to the Dutch Intelligence and Security Act of 2002 which, if enacted, would allow security services to intercept electronic communications in "case-specific" situations. At present, the amendment contains no specification for requirement of "reasonable suspicion".

¹⁰⁵ Human Rights Watch, *France: Don't 'Normalize' Emergency Powers*, 27.06.2017. Available at <https://www.hrw.org/news/2017/06/27/france-dont-normalize-emergency-powers>.

detain suspects without charge for up to 96 hours, and close places of worship, all without judicial approval.

The proportionality of the approach with regard to the infringement on civil liberties has been criticised, as, reportedly, 6,000 searches and indiscriminate detentions have yielded only 21 arrests.¹⁰⁶

Administrative measures

The use of administrative measures has become a significant counter-terrorism tool in some Member States in their efforts to maintain national security. Their increasing prevalence, despite their inherently repressive nature, is likely due to the perception that the imposition of such measures is proactive and preventative, thus protecting the population from the threat of terrorism.

These measures take place before a crime is committed meaning the degree of suspicion required is lower than that necessary for court proceedings. Instead, only the *indication* that one may have links to a terrorist group or individual is necessary for the imposition of a measure.¹⁰⁷ As the degree of suspicion required for an administrative measure is decreased, so too the burden of proof required for the application of an administrative measure decreases, having the effect of eroding the presumption of innocence. There is also an argument to be made that the decreased burden of proof required by these administrative measures creates an 'inequality of arms' in a procedural setting of individual vs. a public authority with greater access to information, thus distorting the right to a fair trial.¹⁰⁸ Finally, these measures are often imposed by administrative authorities who are permitted discretion for broad interpretation of events without the requirement of a prior judicial review. Taken together these factors can have the effect of diminishing the rights afforded to suspects of terrorism-related crimes.

The nature of these administrative measures varies from Member State to Member State: such measures include prohibition from leaving the country, the revocation of travel documents, restriction from specified locations within countries or cities, restriction from contact with specified people, a duty to report to the police where appropriate, the provision of having one's location electronically monitored to ensure compliance and the revocation of an individual's nationality. The Netherlands, UK, France, Belgium, Germany and Italy have all introduced provisions in law for the use of administrative measures in terrorism-related cases to varying degrees.

Asset freezing

This preventative and proactive approach originated in Resolution 1267(1999) of the UN Security Council Sanctions Committee, which aims to deny individuals and groups that support terrorism availability of "economic resources...for so long as they remain subject to the sanctions measure". The European Council Regulation 881/2002 imposed "...restrictive measures directed against certain persons and entities associated with Usama bin Laden, the

¹⁰⁶ Plenel, E., 'When freedom is silenced the state of emergency incorporated into French law'. According to François Sureau "there have been 6,000 administrative searches for 41 indictments. Of the 41 indictments, 20 were indictments for the apology of terrorism, that is to say crimes of the intellectual order. During these 6,000 searches, you sometimes destroyed peoples' lives, you interfered with their individual freedoms in a brutal way for an extremely poor result". Mediapart, 03.10.2017. Available at: <http://www.tlaxcala-int.org/article.asp?reference=21765>.

¹⁰⁷ For example, in the Netherlands, there is a clear difference between 'suspicion' and 'indication'.

¹⁰⁸ Ojanen, T., 'Administrative counter-terrorism measure – a strategy to circumvent human rights in the fight against terrorism? In *Secrecy, National Security and the Vindication of Constitutional Law*. Edited by David Cole, Federico Fabbrini and Arianna Vidaschi, Edward Elgar Publishing, 2013.

Al-Qaida network and the Taliban..." which extended the freeze of funds and other financial resources in respect of the Taliban of Afghanistan.¹⁰⁹ Such measures are very much in line with the four pillars of the EU's counter-terrorism strategy, "prevent, protect, pursuit, response".

Revocation of travel documents

Some Member States have criminalised travelling to conflict zones to join terrorist organisations as a means of preventing FTFs returning to their country of origin with the intention of committing terrorism-related crimes. In addition, Member States have also adopted legislation that gives them administrative powers to revoke the travel documents of individuals, with the aim of preventing the departure of radicalised individuals and the return of FTFs.¹¹⁰ The burden of proof required to enact administrative measures is lower compared to the requirements of criminal proceedings, and often there is no oversight or judicial review, consolidating the power in the hands of the executive.

Germany, the UK, the Netherlands, France and Belgium¹¹¹ have introduced administrative powers to revoke travel documents of persons suspected of having joined a terrorist organisation abroad.¹¹² Countries have provisions for automatic appeals as a safeguard, but the prosecution may have access to sensitive information gathered by security services that the defence cannot be made aware of, skewering the process in favour of the prosecution and obscuring the right of an individual to fair trial as a consequence. Revocation of travel documents in Italy is exceptional in that decisions are subject to judicial review.¹¹³

Revocation of citizenship

Some Member States have also introduced legislation that permits the revocation of citizenship, again, an administrative measure often without supervisory or judicial oversight, but instead with provisions for means to appeal. Member States are bound not to leave a person stateless and so primarily applies to dual-national citizens.¹¹⁴ In practice, the power to revoke of citizenship in the Netherlands has only been possible since 2016 and has not been employed on a large scale. The Netherlands has resorted to the measure on four occasions,¹¹⁵ while the UK stripped the nationality of 33 individuals due to them being suspected of terrorism-related activity between 2010 and 2015.¹¹⁶ The UK offers a statutory right to appeal by judicial review, and the provision of a special advocate that represents the defendant who has access to information that is kept secret for security purposes. In March 2017, the European Court of Human Rights ruled that the revocation of British citizenship from a dual-national Sudanese-Briton was lawful in a matter that was escalated after the man had had his appeal rejected in UK courts.¹¹⁷ Belgium allows for citizenship stripping after

¹⁰⁹ Council Regulation (EC) No 881/2002.

¹¹⁰ Human Rights Watch, *Foreign Terrorist Fighter: Laws Human Rights Rollbacks Under UN Security Council*, 2016.

¹¹¹ Belgium Laws of 24 February 2017 and 5 March 2017 passed authorising the deportation of legal residents on suspicion of engaging in terrorist activities.

¹¹² Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe 2017*.

¹¹³ Executive Decree n. 7 of 18 February 2015.

¹¹⁴ However, the UK permits revocation of naturalised British citizens that are not dual nationals if they have acted in a way which is seriously prejudicial to the vital interests of the UK and there are reasonable grounds for believing that the person is able to acquire another nationality.

¹¹⁵ 'Afpakwet is rechtsstatelijk zwak gefundeerd', *NRC Handelsblad*, 14/09/2017. Available at: <https://www.nrc.nl/nieuws/2017/09/14/dubbel-paspoort-afpakwet-is-rechtsstatelijk-zwak-gefundeerd-12997181-a1573424>.

¹¹⁶ The Bureau of Investigative Journalism, *Theresa May deprived 33 individuals of British citizenship in 2015*, 21.06.2016. Available at: <https://www.thebureauinvestigates.com/stories/2016-06-21/citizenship-stripping-new-figures-reveal-theresa-may-has-deprived-33-individuals-of-british-citizenship>.

¹¹⁷ Human Rights Europe, *Court: UK right to deprive suspected Al-Shabaab terrorist of his citizenship*, 09.03.2017. Available at: <http://www.humanrightseurope.org/2017/03/court-uk-right-to-deprive-suspected-terrorist-of-his-citizenship/>.

judicial review. Recently, a proposed bill to allow administrative revocation of citizenship was rejected in Sweden.¹¹⁸

Restriction of movement

Some Member States have the administrative powers to restrict the movement of individuals that they suspect will commit terrorism-related crimes or are associated with a terrorist organisation. By definition, there is no requirement for a criminal offence to have taken place, and thus the burden of evidence required to enact such administrative measures is lower than proceeding with criminal prosecution. Such measures have the potential to infringe on the rights of terrorist suspects, especially when there is no judicial oversight. For example, in the Netherlands, the Minister of Security and Justice has the power to restrict the freedom of movement of an individual suspected of being associated with acts of terrorism with no requirement for judicial authorisation.¹¹⁹ The measures include prohibition from leaving the Schengen area; restriction from specified locations in the Netherlands; restriction from contact with specified people; a duty to report to the police when instructed to; and the provision of having one's location electronically monitored (i.e. via electronic tagging) to ensure compliance. Conditions are subject to review every six months, but could theoretically be extended indefinitely.

Similar measures exist in the UK, although seldom used. They are known as Terrorism Prevention and Investigation Measures (TPims), and include the potential for subjects to be relocated up to 200 miles away from their normal residence for one year, with the possibility of extension to the two-year maximum if there is suspicion of further terrorism activity. UK judicial approval is required to impose the measures, and full automatic review and rights to appeal are granted to individuals.¹²⁰ In France, suspects can also appeal against similarly imposed measures but authorities are not required to share detailed information regarding the allegations against those subjected to the orders.¹²¹

Arrest of terrorist suspects

Some Member States have extended the time suspects of terrorism-related crimes can be remanded in police custody before being charged. The length of time varies depending on the Member State, and is supposed to ensure that material evidence is not disrupted or tampered with while the authorities conduct their post-arrest investigations. This extension of time in police custody, coupled with the length of time Member States are permitted to detain suspects before the trial, can perhaps be viewed upon as a legal means to impose extreme restrictive or preventative measures on terrorist suspects.

Some Member States such as Sweden¹²² and the Netherlands explicitly state that arresting terror suspects requires a lower degree of suspicion. More specifically, 'reasonable suspicion' rather than 'probable cause' is sufficient to arrest individuals for terrorism-related crimes. Polish law allows for police to arrest individuals based on the "probability" that they were going to commit or had committed a terrorist act.¹²³

¹¹⁸ *Swedish MPs reject stripping terror convicts of nationality*, 11/02/2017. Available at: <http://www.worldbulletin.net/africa/169322/swedish-mps-reject-stripping-terror-convicts-of-nationality>.

¹¹⁹ Law of February 10, 2017, on Interim Rules on the Imposition of Restraints on Persons Constituting a Threat to National Security or Intending to Join Terrorist Groups and on the Revocation and Withdrawal of Decisions at Serious Risk of Facilitating Terrorist Activities (Interim Act on Counterterrorism Administrative Measures).

¹²⁰ Terrorism Prevention and Investigation Measures Act (2016).

¹²¹ Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe*, 2017.

¹²² Act on Criminal Responsibility for Terrorist Offences (2003:148).

¹²³ 'Poland's anti-Terror Law', *Human Rights First*. Available at: <https://www.humanrightsfirst.org/sites/default/files/Poland-Anti-Terror-Law-Brief.pdf>.

Magistrates in the Netherlands and in the UK are permitted to maintain terror suspects in police custody for a maximum of 14 days with judicial permission. In the UK, other criminal offences require a charge within 24 hours. In Sweden, the status of police custody is reviewed every 14 days by a judiciary but there is the provision for it to be extended indefinitely.¹²⁴ In 2016, Poland created a new classification of 'terror suspect' that permits pre-trial detention of up to 14 days instead of the usual 48 hours.¹²⁵ France recently extended the length of time terror suspects can be held in custody from the usual 48 hours to 96 hours.¹²⁶ Belgium is currently considering a proposal to amend the Constitution to extend the maximum duration of detention prior to being charged from 24 hours for up to 72 hours for terrorism-related crimes.¹²⁷

Most Member States grant the same rights to terror suspects in detention as they do to suspects of other serious criminal offences. Spain is an exception in that it has legal provisions that specifically permit the curtailment of civil liberties after the arrest of a suspect for a terrorism-related crime through what is known as *incommunicado* detention (see Box 7). Judicial authority is required, but if granted, suspects may be detained *incommunicado* without charge for up to five days.¹²⁸ *Incommunicado* detention is said to be routinely used to interrogate terrorist suspects.¹²⁹

France recently introduced a measure that allows suspects of terror offences to be held in pre-trial detention for up to four years, instead of the usual maximum of three years.¹³⁰ Spain permits pre-trial detention for up to four years during which time potentially useful information to the defence remains secret for 30 days, which can be consecutively renewed for the duration of the four-year period.¹³¹

Access to a lawyer

Provisions for access to a lawyer are formulated differently across EU countries. The Suspects' Rights Package states that access to legal aid / counsel should be given at the earliest appropriate stage of the criminal proceedings through a legal counsel. Spain's *incommunicado* detention restricts terrorist suspect access to a lawyer of their choice and furthermore, individuals that have experienced *incommunicado* detention have asserted that there was no opportunity to privately communicate with them.¹³² In France, a terror suspect in custody has the right of access to a lawyer but only after the initial period of custody is over. Belgian law states that a lawyer should be present from the first interrogation in terrorist cases. Germany still retains, in its legislature, the power to deny terrorist suspects access to a lawyer of their choice if this endangers the Federal Republic of Germany – a provision included due to the threat of the Red Army Faction (RAF) in the 1970s.¹³³ In contrast, the Netherlands require attorneys to be present during police questioning of

¹²⁴ Traspaderne, T-B. and Roos, D, *Isolated before trial: Pre-trial detention in Sweden*, in Fairtrials.org <https://www.fairtrials.org/isolated-before-trial-pre-trial-detention-in-sweden/7/03/2016>

¹²⁵ Human Rights First, *Poland's anti-Terror Law*. *op. cit.*

¹²⁶ United States Department of State. Country Reports: France. Available at: <https://www.state.gov/p/eur/ci/fr/>

¹²⁷ Renard, T. 'The Counterterrorism Yearbook 2017: Europe'. In Australian Strategic Policy Institute, 6/04/2017. Available at: <https://www.aspistrategist.org.au/counterterrorism-yearbook-2017-europe/>.

¹²⁸ According to Article 520 bis (1) of the Code of Criminal Procedure normal maximum 72-hour limit may be extended for a further 48 hours in cases regarding terrorist suspects, so long as the extension is requested within the first 48 hours of detention and approved by a competent judge within the following 24 hours. A 2003 amendment allowed judges to designate five further days of *incommunicado* status.

¹²⁹ Expert interview.

¹³⁰ Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe*, 2017.

¹³¹ 'Pre-trial Detention Comparative Research', *Fair Trials International*, 2011.

¹³² ARGITUZ, AEN, Ekimen Elkartea, GAC, Jaiki-Hadi, OME, OSALDE, Departamento de Psicología Social (UPV/EHU) "Incommunicado detention and torture: Assessments using the Istanbul protocol", 2016. Available at: http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/ESP/INT_CAT_CSS_ESP_20098_S.pdf, p. 24.

¹³³ StPO, para. 137 and ff.

suspects if a minor is involved or if the alleged offence carries a prison sentence of six years or more.

Box 7: Spain's Incommunicado Detention.

Incommunicado detentions limit some of the rights usually permitted to non-terrorist suspects. Terror suspects subject to *incommunicado* detention do not have the right to notify a third person of their choice regarding their arrest, receive or send correspondence or communications, and they are denied visitation rights. Furthermore, they are denied choice of a lawyer but rather, a legal aid attorney is designated to them; and they are prohibited from communicating with the with the legal aid attorney in private. They do, however, maintain the right to understand the basis of their arrest and their rights; the right to free access to an interpreter if so required; the right to remain silent as to not incriminate themselves; the right to medical examination by a state-appointed doctor; and the right to have their consulate notified in the case foreign nationals.

4.3. Summary of findings

The findings suggest that Member States have not only sought to criminalise further actions related to terrorist activity, but they have also introduced numerous restrictive administrative powers that aim to pre-empt and penalise behaviour related to terrorism. In doing so, they are slowly eroding the rights and freedoms of those that fall under the ever-increasing umbrella of suspicion with regard to terrorism-related crimes.

"Prevention" is one of the four pillars of EU counter-terrorism strategy and it is clear why Member States have focused heavily on the "prevention" of terrorist-activity; however the point of criminalisation seems to be receding further and further away from an actual terrorist attack. This is perhaps best exemplified by anti-terror incitement laws that need not be a provocative statement calling for the execution of a specific attack. Experts from several Member States bemoaned that it has become increasingly unclear if, and when, a terrorism-related crime had been committed. The same is true for the imposition of preventative measures where an indication that an individual is indirectly associated with another individual suspected is sufficient for the imposition of an administrative measure.

The restrictive measures do not require an individual to be suspected of having committed a terrorism-related crime, often judicial approval is not required, the right to appeal with full access to information is often not apparent, while decision-making powers are consolidated in the hands of an administrative authority and in the absence of effective independent oversight. This fails to ensure that the rights of suspects are protected, and is contrary to the presumption of innocence that is the foundation of criminal justice. While safeguards of suspects' rights can be subject to failure and poor design, some States have developed substantial safeguards and independent oversight in the use of administrative measures that require a high standard of evidence before they can be imposed, and special advocates that can be appointed on behalf of the suspect in order to challenge sensitive information. While in theory, this kind of embedded oversight could be considered a good way to ensure the protection of individuals subject to administrative measures the system has also been criticised.¹³⁴

¹³⁴ Murphy, C., *Counter-Terrorism and the Culture of Legality: The Case of Special Advocates*, King's Law Journal, 2015.

While there are occasions where administrative measures may provide a sensible alternative to prosecution, safeguards and procedural rights afforded to individuals that undergo criminal proceedings under the Suspects' Rights Package are lost in individuals that fall into the category of suspicion that is deemed to warrant the imposition of an administrative measure, where perhaps there is insufficient evidence to take cases to court. Safeguards to protect the rights of terror suspects do exist but not in regard to all measures. For example, in the UK, robust redress mechanisms are in place to protect human rights after the revocation of nationality, but the law also permits indiscriminate searches with no requirement for suspicion.

The lack of access to effective remedies in some Member States, for example in incidents of revocation of travel documents in the Netherlands, means the EU should consider this closely in the development of future legislation to ensure integrity of Europe's justice system is maintained. In this regard, it may be useful for EU to consult more closely with human rights organisations when developing new legislation to ensure that fundamental rights are freedoms are fully considered.

While the EU has continually introduced legislation that has sought to criminalise a greater number of acts in an attempt to equip Member States with more powers to effectively combat terrorism, it would appear that the duty to ensure that Member States maintain as high a regard for fundamental rights of individuals has not been approached with the same vigour. Continued assessment and evaluation of the number of individuals that are being subject to administrative measures across MS, as a basis for research into the effectiveness of the measures at preventing terrorist attacks, may be useful.

There is a normalisation of exceptional circumstances that grants Member States the authority to use exceptional powers even if analysis demonstrates that the threat of terrorist activity is low. For example, The *Commission nationale consultative des droits de l'homme* (CNCDH) of France has criticised the new legislation for the incorporation of contentious aspects of the State of Emergency, as leading to the situation where despite the State of Emergency ending in November, the authorities will still have extraordinary police powers, highlighting that the State of Emergency should be exceptional rather than the norm. UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, stated that "the normalization of emergency powers has grave consequences for the integrity of rights protection in France, both within and beyond the context of counter-terrorism".¹³⁵

¹³⁵ United Nations. Office of the High Commissioner for Human Rights, *Two UN rights experts urge France to bring its draft counter-terrorism law in compliance with its international human rights obligations*. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22165&LangID=E>.

5. INFORMATION SHARING TOOLS AMONG EU MEMBER STATES

This section summarises the formal and informal information sharing tools that exist at the international and EU level and provides a short overview of the laws and practices in the 10 Member States scrutinised in this study. Publicly available sources on information sharing practices are extremely limited, a significant challenge also noted by academic experts in this field¹³⁶ including the study experts. This limited publicly available information sharing at the EU, bilateral and national level is due to a historical division of competences with intelligent services being relatively lightly regulated against the more heavily regulated actions of the police.¹³⁷

While there is substantial legislation governing police powers and behaviour at the national level across Member States, there are relatively few legislative measures at the national and EU level governing national police powers and behaviour in international and EU level cooperation. This is despite the fact that, in the EU, terrorism is one of the crimes mentioned as justifying police and justice cooperation measures.¹³⁸ Article 83 in the Treaty on the Functioning of the European Union (TFEU) under Title V refers specifically to terrorism as a serious crime and describes how the EU's efforts to combat terrorism fall under police and judicial cooperation in criminal matters. Counter-terrorism is also comprised in the competences of some EU agencies, such as Europol and Eurojust as explained in Section 5.1 below.

There is significant institutional complexity that characterises the information exchange landscape in the EU. Information on terrorism related suspects is shared internally within Member States between intelligence agencies and police, internationally by Member States with third countries, regionally among a select group of Member States and third countries, bilaterally between countries, both between Member States and between third countries, as well as at the EU level. Furthermore, the information exchanged on terrorism related suspects occurs through both formal and informal information exchange mechanisms. Additionally, information exchange through these mechanisms occurs through multiple national agencies of Member States. This institutional complexity in information exchange is illustrated in the table below.

Table 3: Three dimensions of information exchange.

Levels of government on which information exchange takes place	Forms of information exchange mechanisms	Agencies with the competence for information exchange
<ul style="list-style-type: none"> Intra-national information exchange (between regional and federal level and inter-regional exchange) 	<ul style="list-style-type: none"> Informal information exchange based trust relationship between individuals / agencies 	<ul style="list-style-type: none"> National police and border control authorities (both regional and federal level, if applicable)
<ul style="list-style-type: none"> Bilateral information exchange (between EU countries or EU and non-EU countries) 	<ul style="list-style-type: none"> Formal information exchange based on EU / international legislation (e.g. information exchange via Europol) 	<ul style="list-style-type: none"> Internal intelligence agencies (both regional and federal level, if applicable)

¹³⁶ As mentioned in an expert interview and confirmed by the study experts in the expert workshop.

¹³⁷ As mentioned by the study experts in the workshop.

¹³⁸ Hufnagel, S., *Counter-terrorism policing and security arrangements*, Handbook of Law & Terrorism, 2015, p. 179.

<ul style="list-style-type: none"> Regional information exchange (e.g. Benelux, countries or G6) 		<ul style="list-style-type: none"> External intelligence agencies (both regional and federal level, if applicable)
<ul style="list-style-type: none"> EU level information exchange (through EU-level bodies) 		
<ul style="list-style-type: none"> International level information exchange (through international bodies such as INTERPOL) 		

The rights granted to individuals pose a further level of complexity because, under each type of information exchange, there may be differences in regard to the following aspects (as shown in the table). These differences have implications on how rights of terror suspects are protected while guaranteeing effectiveness and efficiency.

Table 4: Information exchange and rights of suspects.

Three differences on information exchange and implications on suspect rights
Oversight of the different information exchange mechanisms
Transparency of the information exchange mechanisms
The category of the personal information exchanged <ul style="list-style-type: none"> Intelligence Evidence

Bearing in mind this complexity, the following sections discuss the different information sharing tools used by Member States at EU and international level and their efficiency.

5.1. Formal and informal EU information sharing mechanisms

The EU encompasses a multitude of bilateral, multilateral and EU level formal and informal organisations and structures for counter-terrorism information exchange mechanisms.¹³⁹ Many actors in the EU context deal with terrorism on different levels (e.g. The European Council defines overarching strategies on terrorism; the Commission has proposed legislation on terrorism that was subsequently enacted by the European Parliament; and the Counter-Terrorism Coordinator coordinating The European Council's work on terrorism). This section is, however, focused on operational actors that collect or process data on terrorism and may have an impact on the first two objectives (i.e. rights of suspects of terrorism-related crimes and exchange of information on terrorism-related crimes). The formal arrangements are institutionalised and operational cooperation mechanisms, information exchange through formal inter-governmental agencies, in contrast to the informal structures, which are often networks that are semi-institutionalised and semi-operational¹⁴⁰, including through liaison officers and bilateral intelligence cooperation. These formal EU cooperation mechanisms are geared to facilitate information and intelligence analysis and exchange. A non-exhaustive list

¹³⁹ Ibid.

¹⁴⁰ Ibid.

of important formal and informal information sharing mechanisms has been illustrated in the table below.

Table 5: Informal and formal information exchange mechanisms.

Formal information exchange mechanisms	Informal information exchange mechanisms
<ul style="list-style-type: none"> • Europol • Eurojust • The European Task Force of Chiefs of Police (EPCTF) • The Situation Centre (SitCen) 	<ul style="list-style-type: none"> • The Counter Terrorism Group (CTG) • The Police Working Group on Terrorism (PWGT) • Group of Six (G6)

5.1.1. Formal information exchange

At the international level, the most prominent organisation for information sharing and cross-border law enforcement in terrorism related cases is INTERPOL. This is through the use of its I-24/7 global police communications system, which enables investigators to access the range of INTERPOL's criminal databases, including those on suspected criminals and on suspected foreign terrorist fighters, as well as through the use of INTERPOL notices requesting cooperation or alerting police in Member countries to exchange information. One example on the success of INTERPOL's rapid information sharing is that of three individuals investigated in Spain on terrorism-related charges. They were arrested in Bulgaria at a border crossing with Turkey and were believed to be heading to Syria to join insurgents there, only hours after INTERPOL issued an alert.¹⁴¹

At EU level, the formal cooperation mechanisms based on binding legal agreements are Eurojust and Europol. Both institutions are aimed at facilitating information and intelligence analysis and exchange. In respect to terrorism:

- **Eurojust** is in charge of coordinating investigations and prosecutions between the competent authorities in the Member States and the cooperation between the competent authorities of the Member States. In regard to terrorism, Eurojust may ask the competent authorities in Member States to: investigate or prosecute specific acts; coordinate with one another; accept that one country is better placed to prosecute than another; set up a Joint Investigation Team; and / or provide Eurojust with information necessary to carry out its tasks. In carrying out these tasks Eurojust is supported by a national correspondent for Eurojust for terrorism matters.¹⁴²
- **Europol** is the European Union Agency for Law Enforcement Cooperation formed in 1998 to facilitate cooperation between competent authorities of EU Member States. As discussed above, the ECTC was set up to address the rise of Jihadist terrorism and the risk of returning foreign fighters. It focuses on facilitating the exchange of intelligence and expertise on terrorism financing (through the Terrorist Finance Tracking Programme and the Financial Intelligence Unit) and international cooperation among counter-terrorism authorities.

Following final approval from the European Parliament on 5 October 2017, The European Public Prosecutors Office (EPPO), first envisioned in the Lisbon Treaty which offered the legal basis for the establishment of the EPPO (Article 86, TFEU), will begin operations in 2018. The EPPO will coordinate law enforcement efforts with Europol, Eurojust and the European anti-fraud office OLAF. As OLAF, Eurojust and Europol do not have the mandate to conduct criminal investigations, the EPPO was created to fill this institutional gap. The current

¹⁴¹ INTERPOL, *Foreign terrorist fights (fighters)*. Available at: <https://www.interpol.int/Crime-areas/Terrorism/Foreign-terrorist-fighters>.

¹⁴² Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

legislation refers to the EPPO's role in the protection and prosecution of offences against the EU budget and financial interest of the EU, combining European and national law-enforcement efforts in a "unified, seamless and efficient approach to counter EU-frauds".¹⁴³ However, as expressed by Giovanni Kessler, head of the EU anti-fraud office Olaf¹⁴⁴, European Parliament President Antonio Tajani and previously endorsed by French President Emmanuel Macron and European Commission President Jean-Claude Juncker¹⁴⁵, there is scope for the expansion of the EPPO's competences to include other transnational offences including terrorism-related offences.

Europol takes the more prominent role for Member States' national authorities¹⁴⁶. The Europol operations network connects law enforcement agencies in all Member States as well as a number of non-EU countries and third parties. The Europol Information System (EIS) is the agencies central criminal information and intelligence database, and contains information on suspected and convicted individuals including lists of foreign terrorist fighters shared by national counter-terrorism units.

In addition, a tool was added to Europol's Secure Information Exchange Network Application (SIENA) to facilitate restricted content on counter-terrorism, enabling information exchange between counter-terrorism units connected to the platform. The European Counter Terrorism Centre (ECTC) was established in January 2016 in response to the increased terrorism risk from returned foreign fighters from conflict zones, as a hub to exchange information, conduct analysis and coordinate operational support. Despite its recent introduction, and due substantially to the increase in risk of cross-border terrorism as was evidenced by the November 2015 Paris attacks, Europol reported holding 10 times the information on individuals in its database in January 2016 as compared to January 2015. The importance of Europol to counter-terrorism information exchange among Member States has significantly increased since January 2015, with the agency reported supporting 127 counter-terrorism operations in 2016, an almost 50% increase from 2015.¹⁴⁷

Europol Director Rob Wainwright

"The opening of Europol's ECTC was a major milestone in the fight against terrorism. After one year, we can see that the services of the ECTC are being used by the EU Member States and we recognise a marked increase in information sharing. Nevertheless, the attacks in the last few months have shown that information sharing and cooperation needs to increase even more."¹⁴⁸

While these formal arrangements are frequently used by national authorities, in practice, intelligence officials have frequently stated that the most efficient structures for information sharing and cooperation regarding terrorism cases at the international level, is the "deployment of International Liaison Officers (ILOs) to INTERPOL and, at the EU level, the Police Working Group on Terrorism".¹⁴⁹ This could be partially due to the limited formal

¹⁴³ Draft European Parliament Resolution on the draft Council regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO) (09941/2017 – C8-0229/2017 – 2013/0255(APP)).

¹⁴⁴ 'EU prosecutor likely to expand powers', *EUobserver*, 2017. Available at: <https://euobserver.com/justice/122285>

¹⁴⁵ Euractiv, *European Union to get a single public prosecutor*, 2017. Available at: <https://www.euractiv.com/section/justice-home-affairs/news/european-union-to-get-a-single-public-prosecutor/>

¹⁴⁶ Hufnagel, S., *Counter-terrorism* op. cit.

¹⁴⁷ Europol, *Information sharing on counter-terrorism in the EU has reached an all-time high*. Available at: <https://www.europol.europa.eu/newsroom/news/information-sharing-counter-terrorism-in-eu-has-reached-all-time-high>.

¹⁴⁸ Europol, *Information sharing on counter terrorism in the EU has reached an all-time high*. Available at: <https://www.europol.europa.eu/newsroom/news/information-sharing-counter-terrorism-in-eu-has-reached-all-time-high>.

¹⁴⁹ Den Boer, M., Hillebrand, C., Nölke, A., 'Legitimacy under Pressure: The European Web of Counter-Terrorism Networks', *JCMS*, 2008, volume 46, number 1, pp. 101-124.

competence of INTERPOL regarding counter-terrorism, which is in contrast to the explicit role of Europol in "organised crime, terrorism and other forms of serious crime".¹⁵⁰ While Europol remains the main formal information sharing and police cooperation organisation within the European Union for Member States, when information exchange or police cooperation is required with countries outside of the EU, as is frequently the case with the global nature of modern terrorism, INTERPOL is the organisation that fulfils that role for Member States. INTERPOL and Europol have signed agreements and launched a roadmap to identify areas of cooperation between the agencies including terrorism, and have liaison representatives working at their respective headquarters as well as a number of joint activities implemented to facilitate and simplify the exchange of operation and strategic information to combat terrorism. Additionally, in 2011 the agencies established a network connection between the two agencies to enable the secure exchange of information between the organisations.

In addition to information exchange via Europol, in 2012 the Commission adopted the Communication to the Council and the European Parliament on "Strengthening law enforcement cooperation in the EU: The European Information Exchange Model (EIXM)". The EIXM examined the EU information exchange landscape and provided recommendations to improve the efficiency and application of existing EU cooperation instruments. The key legal instruments of the EIXM are the Prüm Decision, which introduced procedures for Member States granting each other access to DNA analysis files, automated fingerprint identification systems and vehicle registration data, and the Swedish Initiative. These provide a common legal framework for information exchange between Member States, aiming to ensure information exchanges are not subject to stricter procedures than information exchanges at the national level and form another aspect of the EU legislative framework.

With regard to the legislative safeguards of individuals' rights in the exchange of information at the EU level, the recently adopted Data Protection Directive for the police and criminal justice sectors (Directive (EU) 2016/680) sets out the framework for data protection in the European Union in relation to data exchange in relation to criminal matters. However, it will probably have a rather limited role in governing the information exchange with regard to suspects of terrorism-related offences since the Directive applies only to police and judicial authorities and not to national intelligence agencies. Given the greater role of national intelligence agencies in activities concerning the prevention of terrorism-related offences, the role of the Directive in governing information sharing of suspects of terror-related offences will likely be rather limited. Similarly, due to the independent data protection regimes that govern Eurojust and Europol, the Directive does not cover information sharing through these formal EU level mechanisms.

5.1.2. Informal information exchange

While Member States and the European institutions have typically expressed a preference for formal arrangements for internal security governance within Member States and at the EU level, within counter-terrorism national intelligence and police agencies there is "abundant usage of informal, horizontal, more networked types of governance, such as secret communities or ad hoc investigations".¹⁵¹

There are a variety of informal EU-level policing and security cooperation mechanisms involved in the fight against terrorism. Important informal initiatives include the Counter Terrorism Group (CTG), the Police Working Group on Terrorism (PWGT) and the G6 (the Group of Six is the unofficial group of interior ministers of the six EU member states with the largest populations: Germany, France, United Kingdom, Italy, Spain and Poland). Those

¹⁵⁰ Article 3 of the Council Decision of 6 April 2009 establishing the European Police Office (Europol).

¹⁵¹ Den Boer, M., Hillebrand, C., Nölke, A., 'Legitimacy under Pressure: The European Web of Counter-Terrorism Networks', *JCMS*, 2008, volume 46, number 1, pp. 101-124.

initiatives allow for the participation of non-EU countries, a potential reason behind the informality of the groups, and have formed under a variety of agreed structures¹⁵². These mechanisms are not based on international treaties or binding legislation but can be categorised as police practice that has evolved over time.¹⁵³

Despite their informal structures and non-binding nature, "literature and practitioners themselves have regarded them as particularly effective".¹⁵⁴ Additionally, with regard to information sharing on best practices in terror legislation and procedure, there is a working group on violent Islamist extremism known as the 5 + 5, which brings together defence ministers or their designees from five European countries (Spain, Portugal, France, Italy, and Malta) and five Maghreb countries (Mauritania, Morocco, Algeria, Tunisia, and Libya) and has the mission of exchanging information and discussing the operational implications of the threat from violent Islamist extremists in Europe. Similarly, there is the Global Counterterrorism Forum, working party on Terrorism and other events and outputs of the Council of Europe and the OSCE. Spain, Portugal, France and Morocco participate in the G-4, which has an operational objective of freely exchanging tactics and intelligence on counter-terrorism and organised crime / illegal immigration.¹⁵⁵

5.2. Information exchange tools at Member State level

While these formal inter-governmental organisations and networks act independently, they are not wholly independent of the Member States that form them, and are "highly active in the field of information and intelligence analysis and exchange".¹⁵⁶

As previously discussed, information exchange at the Member State level is categorised by the substantial use of informal mechanisms including the use of liaison officers and bilateral intelligence co-operation. Furthermore, there has been a significant increase in information exchange between domestic actors within Member States through the concept of specifically created counter-terrorism 'fusion centres', or coordination units, that centralise terrorism-related information and intelligence from all relevant national stakeholders, to create and maintain coordinated databases. These coordination units have promulgated across the EU and many Member States have created fusion centres including the Belgian Coordination Unit for Threat Analysis (CUTA) and the UK's Joint Terrorism Analysis Centre (JTAC). In addition to facilitating information exchange within Member States, these fusion centres facilitate bilateral information exchange among Member States and between Member States and third countries. Furthermore, these fusion centres formally cooperate through the Madrid Group, a network of European fusion centre officials, following its establishment in 2008. The group was formally known as the Committee of Counter-Terrorism Coordination Centres (CCCAT), and facilitates information exchange among these centres in the EU and in third countries.

With regard to legislative safeguards of individuals' rights in the exchange of information at the Member State level, there are no clear and accessible guidelines or framework that govern how security services share information with other EU Member States. The existence of legislation at the Member State level for information sharing varies according to the Member State. The legislation surrounding information exchange mechanisms details data protection concerns that impose limits on the information that can be transferred, who it can be transferred to, what it can be transferred for and for how long it can be held. With regard to the protection of suspects' rights in information exchange between Member States,

¹⁵² Hufnagel, S., *Counter-terrorism*, op. cit.

¹⁵³ *ibid.*

¹⁵⁴ E.g. Den Boer, M., Hillebrand C. and Nölke A., 'Legitimacy under Pressure: The European Web of Counter-Terrorism Networks', *Journal of Common Market Studies*, Vol. 46. 2008, pp. 101, 102.

¹⁵⁵ United States Department of State, *Country Reports on Terrorism 2015: Europe Overview*. Available at: <https://www.state.gov/j/ct/rls/crt/2015/257516.htm>.

¹⁵⁶ Den Boer, M., Hillebrand, C. and Nölke, A., op. cit.

Sweden's Police Data Act (2010:361) holds provision for the transfer of Swedish residents personal data to third countries stating that, "if compatible with Swedish interests, personal data may be submitted to INTERPOL or Europol, or to a police authority or public prosecutor's office, foreign intelligence or security services in a state that is connected to INTERPOL, based on the need for that authority to prevent, detect, investigate or the prosecution of criminal offences".¹⁵⁷ There are no provisions in Spanish legislation for international police cooperation in the area of counter-terrorism or for safeguards of information exchange. The scope, therefore, of the information on individuals exchanged by Spanish authorities, with respect to the rights of suspects, depends on the receiving country and their national legislation. Under Belgian legislation, its Threat Analysis Co-ordination Body database, which covers terrorism threats including coverage of suspects of terrorism-related crimes, is exempt from general data protection safeguards.¹⁵⁸

With regard to the legislation that underpins the exchange of information between domestic actors and with other Member States, in Germany, the exchange of information via intelligence agencies is regulated by the 'Bundesverfassungsschutzgesetz'. When domestic intelligence agencies exchange information with agencies in other Member States, conditions as determined by German legislation apply. However, there is no German legislation that governs the exchange of data between foreign intelligence agencies. While difficult to quantify, the lack of oversight means that foreign intelligence services can make use of this loophole. For instance, one expert discussed the possibility that German authorities request foreign intelligence services of other EU countries to investigate an individual in Germany and to then exchange this information with the German authorities and vice versa in order to bypass legal constraints. While mentioning this as a possibility, the expert mentioned that there is no evidence for this.

The number and importance of informal information sharing and cooperation mechanisms highlights the EU's history of the simultaneous formalisation of mechanisms and institutions with limited terrorism-related competences as well as the proliferation of informal mechanisms. The continued creation of these informal networks implies that these "were and are still needed to promote effective information exchange in the area of counter-terrorism policing rather than purely relying on formal measures".¹⁵⁹

5.3. Conclusion

Despite the significant increase in the information available for exchange by Member States' counter-terrorism organisations through Europol's ECTC and its relevant databases, the increased use of this information by relevant national authorities in the current context of the high risk of returning foreign fighters facing Europe and the improved co-operation with INTERPOL, a preference for informal information exchange mechanisms still exists among police and security services. As highlighted by Rob Wainwright, Director of Europol in 2016, "we have to work much more together in the cross-border way. And that includes sharing intelligence as well as understanding the need to pass new European laws".¹⁶⁰

Within these informal mechanisms, bilateral intelligence cooperation and bilateral liaison officers are an important source of information exchange between Member States. However, there is little publicly available information on the scale and scope of the information shared through these mechanisms, particularly with regard to operational information sharing on

¹⁵⁷ Polisdatlag (2010:361). Available at: <https://lagen.nu/2010:361>.

¹⁵⁸ Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe*, 2017, p. 29.

¹⁵⁹ Hufnagel, S., op. cit.

¹⁶⁰ 'There's "remarkable" dysfunction in Europe's counter-terror systems', *Public Radio International*. Available at: <https://www.pri.org/stories/2016-10-18/theres-remarkable-dysfunction-europes-counterterror-systems>.

suspects or subjects of interest, and there is significant variety in the strength and utility of these informal mechanisms across Member States. The issue of trust between security services and police authorities in one Member State and those in another Member State still forms a key determinant in the decision behind the use of formal or informal mechanisms, and therefore, in the strength and utility of these bilateral relationships.

There are significant gaps in the judicial oversight of these informal information exchange mechanisms and of the publicly available information to assess the utility and effectiveness of these mechanisms as well as in assessing their respect of the rights of individuals with regard to privacy and data protection as laid out in the EU's Charter of Fundamental Rights and data protection legislation. However, as evidenced by the preference of security services and police authorities for informal mechanisms over formal mechanisms, they form an effective and key part of the information exchange landscape at the EU level.

6. CONCLUSIONS AND RECOMMENDATIONS

The study pursued three core objectives. The first objective, aimed to identify the relevant national and EU legal provisions applicable to persons suspected of terrorism-related crimes and how EU Member States apply them in practice. The analysis accounts mainly for new and / or modified Member States' legislation on terrorism-related crimes and focuses on the content of the term 'suspect' both in a legal and a practical sense. The second objective was to provide an overview of existing laws and practices on how information exchange is executed between Member States, through Europol or other information-sharing channels on suspects of terrorist-related activities. The third objective was to formulate recommendations based on the findings of the first two objectives.

The key findings of all sections are summarised below and recommendations are provided. The recommendations for further action consider both gaps and problems encountered and successes or good practices identified.

Key findings and recommendations

EU legislation

The **competence on addressing terrorism is divided between Member States and the EU**. On the one hand, Article 3 (2) TEU establishes that the Union shall offer its citizens an area of freedom, security and justice by preventing and combating crime and TFEU specifies that the EU has competence in the field of criminal law. On the other hand, Article 4 (2) TEU stipulates that the Union shall respect the essential functions of its Member States, which include safeguarding national security. National security in particular remains the sole responsibility of each Member State. When framing terrorism, therefore, as a matter of national security, Member States do have the competence to act outside the scope of EU law.

Furthermore, the **EU legal framework on terror suspects is a patchwork of different pieces of secondary legislation** including legislation that is either directly targeted to the fight of terrorism or legislation that addresses crime and suspects in general terms. The core legislation on key secondary law instrument is Directive (EU) 2017/541 on combating terrorism replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. The Directive was adopted early 2017 and has to be transposed by Member States by 8 September 2018. The Directive defines terrorism in a broad manner and criminalises terrorism-related activities. It also criminalises terrorism and related crimes. Apart from the Directive, several other instruments are relevant in the fight against terrorism, including, among others, the Council Regulations implementing the UN asset freezing regime,¹⁶¹ and the EU-US Terrorist Financing Tracking Regime. The rights of terror suspects in turn are mostly covered by the Suspects' Rights Package, which includes several Directives aiming to provide greater clarity on procedural rights of suspects of crime.

Recommendation 1

Given the broad definition of terrorism and Member States' discretion to implement Directive 2017/541, there may be a case for Member States to continue exchanging views on how the definition of terrorism is implemented in national law and interpreted in practice. This could contribute to the development of best practices and make it clearer under

¹⁶¹ Council Regulation (EC) No 337/2000 of 14 February 2000 (OJ 200 L 43, at 1), which was repealed by Council Regulation (EC) No 467/2001 of 6 March 2001 (OJ 2001 L 67, at 1). On 27 May 2002, the Council adopted Council Regulation No 881/2002, which repealed Council Regulation (EC) No 467/2001 (OJ 2002 L 139, at 9).

which circumstances individuals would be considered to be a suspect of terrorism rather than other forms of serious crime.

The key trends and types of terrorism

There is a changing pattern of terrorism in many European Union countries. In the 1970s and 1980s most Member State authorities were mostly concerned about terrorism from left-wing / anarchist, right-wing and separatist groups. In recent years, the previous forms of terrorism do still exist but Member States have become more concerned about the threat deriving from jihadist terrorism.

The increasing concern deriving from jihadist terrorism is illustrated by statistics on a high number of suspects, criminal proceedings and arrests in regard to jihadist terrorism as compared to a relatively small number in other forms of terrorism such as left-wing, right-wing and separatist terrorism. While acknowledging the shift from the previously mentioned types of terrorism to jihadist terrorism, it is interesting to note that the number of causalities linked to terrorism in general seems to be on the decline.

The data analysed in the framework of this study suggests that in the period 1970-2016, the frequency of terrorist attacks has decreased and the overall potency of such attacks has also decreased. Although the relative potency of the terrorist attacks in the most recent time period (2010-2016) is higher than the equivalent figure in the 1990s and 2000s, it is not higher than the equivalent figure in the 1970s and 1980s. Section 3 also outlines that bombs and explosions remain the most common method of attacks while there is a shift from targeted assassinations to attacks on facilities and infrastructure, and a recent increase in armed assaults can also be noted.

Recommendation 2

Data on arrests, court proceedings and convictions used in this report derive mainly from Europol's Terrorism Situation and Trend Report. However, data and statistics on the nature and frequency of terrorism mainly stem from the Global Terrorism Database, which is led by the US-based National Consortium for the Study of Terrorism and Responses to Terrorism. There may be a case for introducing a similarly comprehensive database specifically for EU countries in order to adequately analyse the evolution and current state of terrorism in the EU. This would help to analyse contemporary terrorism in its historic context and would provide a more solid foundation for political decisions on which measures have been efficient in fighting terrorism and which have not.

The rights granted to suspects of terrorism-related crimes

A key finding of the study was that there are many categories of suspects not always covered by the same legal framework. At the same time, the majority of Member States do not appear to have a formalised legal definition for 'suspects' in general. In some countries, different words are used in practice, which reflect the different stages of the criminal procedure. For example, in Germany different terms are used for a suspect during the investigation stage, during the pre-trial proceedings, and the main proceedings.¹⁶² The report found that rights granted to different categories of 'suspects' should be the same under national criminal

¹⁶² The German criminal procedural law (StPO) refers to the different stages of the proceedings (investigation, pre-trial and main proceedings).

procedure law. However, this does not include suspects that are suspected of *intending* to commit terrorism or terrorism-related crimes in *the future*. There are substantial differences between Member States in relation to this latter category of suspects.

Based on the different categories of suspects, the report found that there are different categories of rights.

1. The rights afforded to every individual (persons who are not under suspicion);
2. The rights afforded to a "person of interest";
3. The rights afforded to an individual who has been subject to an administrative measure; and
4. The rights afforded to an individual where criminal proceedings have commenced.

The first category of persons usually has full access to criminal justice rights as outlined under Title VI of the Charter of Fundamental Rights. In addition, the rights of persons in Category 4 are clearly outlined by national legislation and strengthened by provisions outlined in the Suspects' Rights Package. There are, however, divergences between Member States in regard to Category 2 and 3 and suspects under those categories often do not accrue the same rights as individuals under Categories 1 and 4. Most notably, measures adopted against Category 2 and 3 suspects are not always subject to judicial review before being deployed. Furthermore, no judicial oversight exists during or after the measure has been effective. Individuals will not always be informed about a measure (not even after the investigation is over) and do not have access to judicial remedies or redress.

Recommendation 3

There is a tendency of Member States to deal with terror suspects outside the criminal procedural law. There may, therefore, be a case for calling upon Member States to provide more clarity on the different categories of suspects and which legal framework /rights is linked to each category and ensure that fundamental rights as mentioned in Title VI of the Charter are ensured for all suspects of crime.

Recommendation 4

The Suspects' Rights Package does not define a 'suspect' of crime. Most EU Member States, investigated under the framework of this study, do not provide a definition of the term either in their criminal legislation. It has, however, been shown that in practice, there are different categories of suspects. This includes 'persons of interest' or 'indication', which mainly cover suspects which have not yet committed a crime such as terrorism but who are suspected of planning to commit a crime or who support the planning of a crime. These categories of suspects are usually not covered by criminal procedure laws in Member States but rather regulated by a different body of law such as the law applicable for policing and intelligence services. This deprives those suspects of crime of several safeguards such as the right to access a lawyer, right to remedy and redress. There may be a case, therefore, for updating the Suspects' Rights Package to include that the notion of 'suspects' shall be understood broadly.

Information exchange tools at EU and Member State level

The study found that there are many different information exchange tools at different governmental levels (e.g. international, EU and national), which is further complicated by the

co-existence of informal and formal data exchange mechanisms and by the fact that many agencies at Member State level have overlapping competences (e.g. different types of intelligence services and police authorities).

While some of the interviews conducted in the framework of this study have suggested that many law enforcement officials prefer bilateral information exchange mechanisms,¹⁶³ there is very little publicly available information on formal and – even more so – on informal information exchange practices and their efficiency. In addition, national authorities are extremely cautious in providing information via interviews. While a certain level of secrecy is necessary to ensure the efficiency and effectiveness of law enforcement operations, the absence of information on the legal basis and use of data sharing mechanisms results in a situation where academic articles and reports by civil society organisations provide the only source of information.

The key finding in relation to information exchange tools, therefore, is that transparency is currently absent leading to a situation where no well-informed conclusions can be drawn on the nature and effectiveness of information sharing tools on EU and national level.

Recommendation 5

There is a need for greater transparency. More specifically, Member States shall collect and publish data regarding the mechanisms and legal basis used to share information between Member States at the EU level and bilaterally. Furthermore, data shall be collected and published on the effectiveness and efficiency of these tools (e.g. how many prosecutions and convictions have taken place thanks to data received from other countries).

Recommendation 6

Once more information and statistics have been made available, follow-up research will be necessary to clarify important outstanding questions such as:

- When individuals are surveilled, when and how is this information shared with other Member States?
- What is the legal basis for informal information sharing practices and is there a way to formalise informal information sharing practices?
- What oversight measures exist in regard to the different channels of information sharing?
- How efficient are information exchange mechanisms?
- What categories of data are exchanged of individuals and under which circumstances?
- Where is data held once it has been transferred to another country? How is data used?
- Do individuals have the right to know about the information shared with other Member States? When are individuals legally obliged to be informed?

¹⁶³ This view has also been shared by academics researching this field.

APPENDIX 1: EU COUNTRY REPORTS

Country reports have been developed for the following 10 EU Member States: France, Germany, Greece, Italy, the Netherlands, Poland, Spain, Sweden and the United Kingdom. These 10 Member States were selected in consultation with the study experts and the European Parliament. The selection was based on a range of criteria, including the maturity of the legal framework, debate and practices, and geography. The following table lists the 10 Member States and the rationale for their selection.

Box 8: Overview of the areas to be covered by the country reports.

Each country report will examine the legal framework and practices for suspects of terrorism-related crimes based on the following key areas:

- i Introduction and background
- ii Overview of anti-terror legislation
- iii Statistics on terrorism-related crimes
- iv Case law
- v Conclusions and recommendations

6.1. Belgium

Introduction and background

Belgium's experience of terrorism has shifted in the last 50 years, driven and shaped by the global conflicts of greatest relevance to the EU and its Member States.

Through the political and military tensions of the Cold War, for example, numerous violent terrorist activities were committed in Belgium by groups opposed to global capitalism. Prominent examples are presented in the text box below.

Box 9: Examples of secular terrorist groups active in Belgium.

Prominent secular terrorist groups in Belgium: 1970s and 1980s

The **New Armenian Resistance (NAR)** were the first such terrorist organisation to conduct attacks on Belgian soil. Considered a key ally of the Armenian Secret Army for the Liberation of Armenia (ASALA), NAR enacted attacks against Turkish interests in Belgium¹⁶⁴ to avenge the early 20th century genocide of Armenians in the Ottoman Empire which is not acknowledged by the Turkish government¹⁶⁵. The attacks occurred from the late 1970s to the early 1990s¹⁶⁶.

The **Cellules Communistes Combattantes**, an anti-capitalist outfit active in the 1980s, perpetrated numerous attacks on Belgian and international businesses (including notable organisations such as KB Bank, Bank of America, Motorola and Honeywell), as well as North Atlantic Treaty Organisation (NATO) pipelines and US military facilities¹⁶⁷.

Towards the end of the Cold War, the rise of faith-based terrorism began. At first, although implemented by groups with Islamist sentiment, this emerging strand of political violence was fiercely rooted in the political environment of the Cold War.¹⁶⁸

However, in the 1990s, at the end of the Cold War, Islamist terrorism took over as the prominent ideology driving terrorism in Belgium. In this period, Belgium began its continuing grapple with foreign fighter recruitment and terrorism. At first, Belgium was a transit country for Islamist groups such as the *Groupe Islamique Armé* (GIA – Armed Islamic Group) and the *Groupe Islamique Combattant Marocain* (GICM – Moroccan Islamic Combatant Group).¹⁶⁹ Although the number of attacks was limited throughout the 1990s and 2000s, a

¹⁶⁴ Global Terrorism Database [New Armenian Resistance], *National Consortium for the Study of Terrorism and Responses to Terrorism (START)*, 2011, op. cit.

¹⁶⁵ Centre Français de Recherche sur le Renseignement, Matthijs, H. and Zahid, F., *Islamist Terrorism in Europe: The Case of Belgium*. *Tribune Libre* No.30, 2013.

¹⁶⁶ *Ibid.*

¹⁶⁷ See for example: The Christian Science Monitor [Archive], *Euroterrorism in the 1980s. US and Western European military, political institutions become targets for new wave of terrorist attacks*, 25 January 1985. Accessed on 07.09.2017 at: <https://www.csmonitor.com/1985/0125/oscare.html>; Newsweek, *The New Terror Network: Small Groups of Political Renegades Are Hitting NATO Targets in Western Europe*, 11 February 1985. Accessed on 07.09.2017. Available at: <https://armthespiritforrevolutionaryresistance.wordpress.com/2017/03/16/cellules-communistes-combattantes/>.

¹⁶⁸ *A brief history of terrorism in Belgium*, H., Comment, *The Italian Insider*, 23 September 2015. Accessed on 07.09.2017. Available at: <http://www.italianinsider.it/?q=node/3238>.

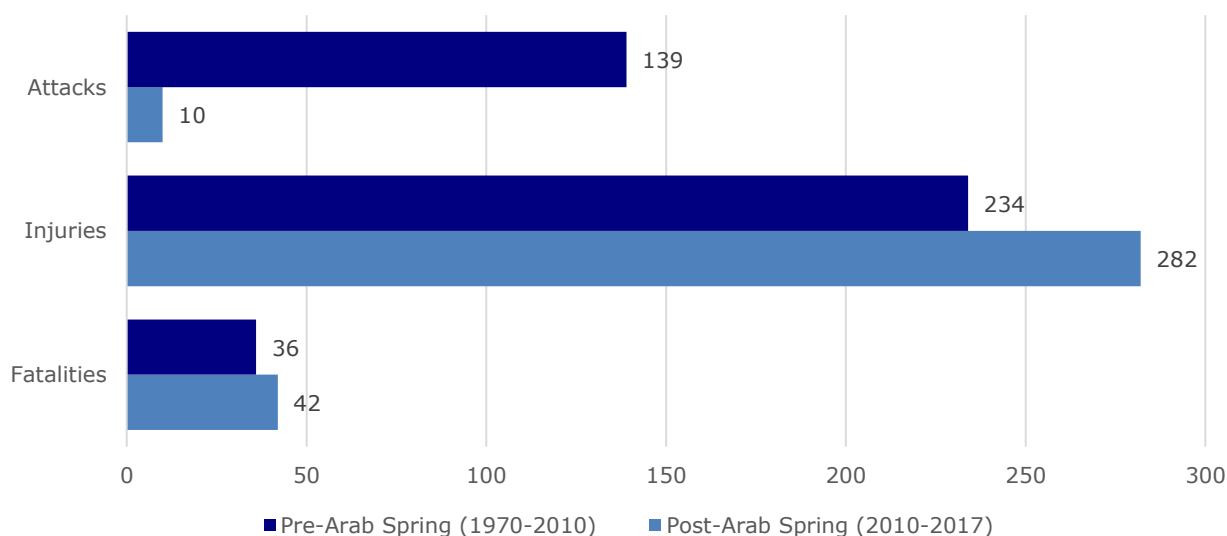
¹⁶⁹ CTC Sentinel, Van Ostaeyen, P., *Belgian Radical Networks and the Road to the Brussels Attacks*, June 2016, p.7. See also Le Soir, Borloo, J-P, *Condamné vendredi à Bruxelles, le Français allié au GIA avait déjà pris sept ans à Paris Neuf ans de prison pour le terroriste Melouk*, 19.05.1999.

cluster of key Islamist recruitment figureheads was located in Belgium. Such individuals included Malika el-Aroud¹⁷⁰ and Bassam al-Ayachi.¹⁷¹

Since 2010, and the Arab Spring, Islamist terrorists have intensified relations with Belgium. The country reportedly has the highest number of foreign fighters per capita of all Western countries – with at least 451 individuals travelling or attempting to travel to Syria and Iraq¹⁷². As such, Islamist networks located in Belgium have made significant contributions to recent terrorist attacks in Belgium and France. Although the frequency of attacks is not at the level of previous decades, the number of deaths and injuries caused by these attacks has increased significantly (see Figure 7 below¹⁷³).

As can be seen in Figure 7, below, there have been more fatalities and injuries as a result of terrorist activities in the six years since the Arab Spring than there were in the preceding 40 years. The potency of these terrorist attacks is further demonstrated by the comparatively small number of attacks conducted since 2010 (only 10), compared with the preceding years (139).

Figure 7: Terrorist attacks in Belgium: Number and resulting injuries / fatalities, pre- and post-Arab Spring.¹⁷⁴



¹⁷⁰ Malika el-Aroud is the Belgian-Moroccan widow of Abdessatar Dahmane, one of the suicide bombers that assassinated Ahmad Shah Massoud. El-Aroud ran the jihadi website Minbar SOS and, along with her second husband, Moez Garsallaoui, she was convicted of recruiting Belgian and French extremists to join al-Qaida.

¹⁷¹ Bassam al-Ayachi is a French-Syrian cleric whose Centre Islamique Belge was linked to several terrorism cases. See: CTC Sentinel, Van Ostaeyen, P. *Belgian Radical Networks and the Road to the Brussels Attacks*, June 2016.

¹⁷² CTC Sentinel, Van Ostaeyen, P. *Belgian Radical Networks and the Road to the Brussels Attacks*, June 2016.

¹⁷³ Global Terrorism Database, *National Consortium for the Study of Terrorism and Responses to Terrorism (START)*, Last accessed on 07.09.2017 at: <https://www.start.umd.edu/gtd/>.

¹⁷⁴ The dataset used in the development of this table belongs to the Global Terrorism Database. However, it includes one additional data point related to the attempted stabbing of two soldiers in Brussels on 25 August 2017.

The most prominent attacks in this recent period of potency are detailed in the box below.

Box 10: Most prominent terrorist attacks in Belgium: 2010-2017.

Most prominent terrorist attacks in Belgium: 2010-2017.

Brussels, 22 March 2016: Islamic State of Iraq and Syria (ISIS) suicide bombers targeted Maalbeek metro station, in central Brussels, and Brussels Airport, Zaventem. It is reported by the Global Terrorism Database that 35 people were killed, including three perpetrators, and a further 270 were injured. Furthermore, a third, undetonated, bomb was discovered during a search of the airport. The perpetrators were members of a terrorist cell, which was also involved in the November 2015 Paris attacks (see the French country report for further details).

Charleroi, 6 August 2016 and Brussels, 5 October 2016: ISIS claimed responsibility for knife attacks on police officers in Charleroi and Brussels. Five officers were assaulted, two in Charleroi and three in Brussels, but none died. The Charleroi attacker was shot at the scene and the Brussels attacker was imprisoned.

Brussels, 20 June 2017: a failed bombing attempt by a lone wolf Islamist, Oussama Zariouh, occurred at Brussels Central train station.

Brussels, 25 August 2017: two soldiers were attacked, and slightly wounded, by a man of Somali descent with a machete. The attacker was shot dead at the scene.

The remainder of this country report reviews Belgium's terrorism-related legislation and the provisions related to suspects of terrorism-related crimes before presenting key terrorism-related statistics. Finally, this country report presents the information exchange mechanisms used by Belgian authorities to share data on suspects of terrorism-related crimes.

Overview of anti-terror legislation in Belgium

Prior to December 2003, Belgium had no specific terrorism-related legislation. As such, terrorism-related crimes were treated in legislation equally as organised crime. Between 2003 and 2015, Belgium introduced legislation specifically relating to terrorism and implementing the 2002 and 2008 EU Framework Decisions. However, in 2015 and 2016, significant legislative amendments occurred, in particular to the Belgian Criminal Code (*Code Pénal*) and the Criminal Procedural Code (*Code d'instruction Criminelle*).

Introduced on 19 December 2003¹⁷⁵, Belgium's criminal law regime implemented specific provisions relating to terrorism. These provisions, under the auspices of the Terrorism Offences Law¹⁷⁶, transposed the EU Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism¹⁷⁷ into Belgian law. The 2003 law introduced a new *Title I ter – terrorist offences* into Book II of the Belgian Criminal Code (Articles 137-141)¹⁷⁸. A 2014 Council of

¹⁷⁵ Loi du 19 décembre 2003 relative aux infractions terroristes. Number: 2003009963.

¹⁷⁶ Ibid.

¹⁷⁷ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

¹⁷⁸ Council of Europe, *Profiles on Counter-Terrorism Capacity: Belgium*, Committee of Experts on Terrorism (CODEXTER), 2014.

Europe report describes and translates the definition of a terrorist offence (Art. 137) as follows¹⁷⁹:

"An offence which 'by its nature or context may cause serious harm to a country or an international organisation' and which is 'committed intentionally with the aim of seriously intimidating a population or unduly forcing public authorities or an international organisation to take or refrain from taking certain actions or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.'"

These legislative amendments were not developed further until the introduction of the law of 18 February 2013¹⁸⁰, which transposed EU Framework Decision 2008/919/JHA. This update to the Criminal Code introduced three new offences, namely: i) public provocation to commit a terrorist offence; ii) recruitment for terrorism; and iii) training for terrorism. It also aligned Belgian law with the Council of Europe Convention on the Prevention of Terrorism.¹⁸¹

In contrast to the limited development of terrorism-related legislation over these years, and in response to the rising potency of Islamist terrorist attacks in central Europe, 2015 and 2016 brought significant policy and legislative changes in Belgium. In January 2015, the federal government announced a 12-point action plan against terrorism, which it began to implement immediately.¹⁸² A June 2015 governmental report highlighted the full implementation of the first tranche of the action plan and the law of 20 July 2015 (*Law Terro I*)¹⁸³ introduced a new Article to the Belgian Criminal Code, which targets those travelling from and into Belgium for terrorist purposes, and implements Operational Paragraph 6 of the UN Security Council Resolution 2178 (2014).¹⁸⁴ Furthermore, this law expands the list of crimes for which phone tapping and other investigative measures are eligible to include all terrorism-related crimes, and relaxes the rules on the cancellation of Belgian nationality in cases of terrorism-related crimes.

2016 saw several additional legislative developments:¹⁸⁵

- **Law of 27 April 2016 (*Law Terro II*)¹⁸⁶:** permits law enforcement to conduct searches and arrests between 9pm and 5am when in relation to terrorist offences. Beyond these changes, *Law Terro II* also stipulated the creation of common databases for terrorism investigations.
- **Laws of 3 August 2016 (*Law Terro III*)¹⁸⁷ and 14 December 2016¹⁸⁸:** extend the Criminal Code in relation to the incitement and the recruitment to travel to or from Belgium for terrorist purposes and extended the Belgian extraterritorial jurisdiction in relation to terrorism.¹⁸⁹ Furthermore, *Law Terro III* explicitly states that terrorism matters are the competence of the Federal Public Prosecutor's Office and relaxes the rules on ordering provisional custody in cases of terrorism-related crimes. The law of

¹⁷⁹ Council of Europe, *Profiles on Counter-Terrorism Capacity: Belgium*, Committee of Experts on Terrorism (CODEXTER), 2014.

¹⁸⁰ Loi du 18 février 2013 modifiant le livre II, titre I ter du Code pénal. Number: 2013009097.

¹⁸¹ Council of Europe, *Convention on the Prevention of Terrorism*, Warsaw, 16.V.2005.

¹⁸² United States Department of State, *Country Reports on Terrorism 2015 – Belgium*, 2016.

¹⁸³ Loi du 20 juillet 2015 visant à renforcer la lutte contre le terrorisme. Number: 2015009385.

¹⁸⁴ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2016, p.55.

¹⁸⁵ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017.

¹⁸⁶ Loi du 27 avril 2016 relative à des mesures complémentaires en matière de lutte contre le terrorisme. Number: 2016009200.

¹⁸⁷ Loi du 3 Aout 2016 portant des dispositions diverses en matière de lutte contre le terrorisme (III). Number: 2016009405.

¹⁸⁸ Loi du 14 décembre 2016 modifiant le Code Pénal en ce qui concerne la répression du terrorisme. Number: 2016009600.

¹⁸⁹ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017, p.57.

14 December 2016 also extends the text in the article related to membership of terrorist organisations to include those who 'should have known'.

Furthermore, an 18-measure action plan was announced by the federal government in November 2016¹⁹⁰ and, in early 2017, amendments to the Aliens Law were reportedly passed authorising the deportation of legal residents on suspicion of engaging in terrorist activities.¹⁹¹

Suspects of terrorism-related crimes

This section details the legislative definition of suspects of terrorism-related crimes and how the determination of an individual as a suspect occurs. Subsequently, the investigative powers available to the Belgian authorities and the rights of such suspects are presented.

Defining suspects of terrorism-related crimes

Suspects of terrorism-related crimes are identified and qualified as such in accordance with ordinary Belgian criminal procedural law, meaning that a prosecutor has to initiate proceedings.¹⁹² In the pre-trial, investigative phase, there are three distinct definitions of a suspect:

- i) Individuals that are subject to a criminal investigation – such a determination is made by the public prosecutor based on '**presumptions of crime**' and input from relevant law enforcement and intelligence services;
- ii) Individuals that are formally charged at the beginning of, or during, an investigation – such a determination is: i) explicit on a '**serious indication of guilt**' (Art. 61bis (i), Criminal Procedural Code); or ii) implicit when a judicial investigation is started in relation to a specific individual (Art. 61bis (ii), Criminal Procedural Code); and
- iii) Individuals that are indicted at the end of an investigation in cases referred to the highest Belgian criminal court by the chamber of indictment.

Competences related to terrorism-related crimes are separated across a number of entities. Primarily, however, terrorism investigations are the competence of the federal public prosecutor (Art. 144ter, §1, °2 Judicial Code, as amended by *Law Terro III* of 3 August 2016). As in normal criminal procedure in Belgium, such investigations may be passed on to an investigative judge in cases where specific, invasive investigative measures are required.

State powers and rights available to suspects

Belgian authorities have the right to use legally prescribed investigative methods, which may restrict the fundamental rights of suspects, specifically in relation to the terrorist offences detailed in the Criminal Code. These include:

- Telephone tapping (Article 90ter §2 of the Criminal Procedural Code)
- Proactive investigations (Article 28bis §2 of the Criminal Procedural Code)
- Undercover investigative measures (i.e. infiltration – Article 47octies §1 of the Criminal Procedural Code)

¹⁹⁰ Strijd tegen terrorisme – maatregelen. Plenaire zitting Kamer – 19 November 2015.

¹⁹¹ See Counter Extremism Project, *Belgium: Extremism & Counter-Extremism*. 2017; and also: Schreuer, M., *Belgium's New Deportation Law Raises Red Flag with Civil Rights Groups*, published 11 March 2017, New York Times.

¹⁹² Council of Europe, *Profiles on Counter-Terrorism Capacity: Belgium*. Committee of Experts on Terrorism (CODEXTER), 2014.

- Observation measures (described in Article 47sexies and permitted for such offences by Article 56bis of the Criminal Procedural Code)

Additionally, special witness protection measures, specifically implementable in cases of terrorism-related crimes, are included in Article 86bis §2 and Article 104 §2 of the Criminal Procedural Code.

A key amendment, introduced by the Law of 20 July 2015¹⁹³ as mentioned above, is the expansion of the list of serious crimes for which phone tapping, and many other invasive investigative measures, can be used. The list of such crimes is documented in Article 90ter of the Belgian Criminal Procedural Code and has been amended to include all terrorism-related crimes. This amendment is key as, although the article in which it is stipulated relates specifically to phone tapping, it is referred to across the Criminal Procedural Code and is applicable to a wide range of other investigative measures, including: conducting proactive investigations (Art. 28bis), demanding bank details (Art. 46quater), conducting premises searches (Art. 46quinquies), and special investigative methods such as observation and infiltration (Art. 47ter). It also has important implications for testimony of anonymous witnesses (Art. 86bis), tracing and localisation of electronic communications (Art. 88bis), and the protection of witnesses at risk (Art. 102).

Further amendments of relevance include:

- **Removal of time restrictions on house searches** in terrorism-related cases. Prior to the law of 27 April 2016¹⁹⁴, house searches could not be conducted between the hours of 9pm and 5am;
- Exemptions to normal criminal procedure such that **arrests of suspects of terrorism-related crimes can be conducted at night in non-public locations** (e.g. houses etc.);
- **Provisional custody safeguards have been relaxed in cases of terrorism-related crimes.** Under normal criminal procedure, for cases where the sentence is less than 15 years, provisional custody (when an individual has been formally charged but not convicted) may only be required if one of four additional requirements is met. These additional requirements relate to the risk of: i) recidivism; ii) flight; iii) misappropriation; and iv) collusion. In cases of terrorism-related crimes, however, such additional requirements are now only necessary where the sentence is less than five years.

Additionally, proposals to extend the period for which suspects can be held under administrative arrest from 24 hours to 72 hours, which would necessitate constitutional change, have been developed and voted on by Parliament. However, this proposal did not achieve the two-thirds majority required for a change to the Belgian constitution.

Many of these measures, including newly implemented measures, have drawn criticisms from civil society organisations, such as Human Rights Watch and Amnesty International.

A 2016 Human Rights Watch report, for instance, indicated that at least six of the Belgian government's newly adopted laws and regulations on terrorism-related crimes threaten fundamental rights.¹⁹⁵ This report highlights concerns over: i) the stripping of Belgian citizenship from dual nationals; ii) the "vague language"¹⁹⁶ used in the amendment to the

¹⁹³ 20 Juillet 2015 – Loi visant à renforcer la lutte contre le terrorisme. Number: 2015009385.

¹⁹⁴ Loi du 27 avril 2016 relative à des mesures complémentaires en matière de lutte contre le terrorisme. Number: 2016009200.

¹⁹⁵ Human Rights Watch, *Grounds for Concern: Belgium's Counterterrorism Responses to the Paris and Brussels Attacks*, 2016.

¹⁹⁶ Human Rights Watch, *Grounds for Concern: Belgium's Counterterrorism Responses to the Paris and Brussels Attacks*, 2016.

Criminal Code that criminalises leaving Belgium 'with terrorist intent'; iii) the measure permitting the seizure of passports and national identity cards without prior judicial review; iv) the Data Retention Act introduced on 29 May 2016; v) provisions that reduce the evidentiary requirements for pre-trial detention of terrorism suspects; and vi) the further criminalisation of incitement of terrorism, which could "stifle freedom of expression".

With regard to the **rights of suspects in such cases**, it is important to note that they have all the rights afforded to them by the EU Charter of Fundamental Rights (subject to the restriction of those rights via the above investigative powers). In addition, all types of suspects (as defined above) have additional rights, including the right to access the investigative file, the right to request additional investigative acts and the right to clear the file of procedural errors. Furthermore, the generic *Salduz law* was extended in November 2016¹⁹⁷ to provide the right to counsel to not only persons who have been arrested but also to individuals, not arrested, that are questioned on suspicion of having committed an offence that could lead to imprisonment.

In addition, those individuals formally charged have indirect access to certain **redress mechanisms** against the state powers relayed above. As a rule, there is no possibility to directly challenge a specific investigative act. However, irregularities can be checked by investigative courts (namely, the chamber of council and the chamber of indictment), as set out in the *Antigoon* case-law.¹⁹⁸ For example, in the case of provisional custody, it is not possible to appeal against an arrest warrant but the *chambre du conseil* (chamber of council) is required to review every arrest warrant and decision for provisional custody. The chamber of council is also required to review this decision on a monthly basis. It is possible for those formally charged to appeal the decision of the chamber of council regarding the warrant and a decision to maintain provisional custody. Such an appeal is heard before the *chambre des mises* (chamber of indictments).¹⁹⁹

Beyond this specific right to appeal, these two chambers play an important **oversight role**, as they are required to monitor the regularity of the investigative procedure. This role includes general supervision of the investigative judge, *ex-post* control over the regularity of the use of special investigative measures.

Exchanging information on terror suspects

Belgium has implemented a range of measures to coordinate and improve information exchange on suspects of terrorism-related crimes among Belgian authorities and with international partners.

The primary measure was the 2006 establishment of the Organe de Coordination et d'Analyse de la Menace (OCAM) – i.e. Belgium's Coordination Unit for Threat Analysis. OCAM seeks to triangulate terrorism-related intelligence data from all relevant stakeholders (including security, law enforcement and social preventative sources) under the roof of one organisation to enable improved analysis of such intelligence. The law of 10 July 2006²⁰⁰, which established OCAM, also stipulated that the new organisation would develop a database for terrorism threats, including coverage of suspects²⁰¹. At the beginning of 2016, this list was reported by journalists to consist of 457 individuals.²⁰² The legal basis for OCAM's work was initially

¹⁹⁷ Loi du 21 novembre 2016 relative à certains droits des personnes soumises à un interrogatoire. Number: 2016009565.

¹⁹⁸ Court of Cassation, 14 October 2003, AR P.03.0762.N.

¹⁹⁹ Loi du 20 juillet 1990 relative à la détention préventive, art. 21-22 and 30-31. Number: 1990099963.

²⁰⁰ Loi du 10 juillet 2006 relative à l'analyse de la menace. Number: 2006009570.

²⁰¹ Ibid.

²⁰² Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe*, 2017.

complemented by the Royal Decree of 28 November 2006 – related to its tasks and organisational structure – and the Royal Decree of 23 January 2007 – related to its personnel.

More recently, the Royal Decree of 21 July 2016 established an additional 'dynamic' database related specifically to foreign terrorist fighters (FTF). Also included in this dynamic database are home-grown terrorist fighters and hate preachers.

In relation to the above definitions of suspects in Belgian legislation, the common and dynamic databases maintained by OCAM are not dependent upon judicial qualification of an individual and cover a larger group than those individuals subject to investigations.

OCAM relies on its partnerships with relevant Belgian stakeholders to collect and share information, as follows:

- **Submission of information to OCAM:** Liaison officers from partner agencies (such as law enforcement and intelligence agencies) work within OCAM. Through these liaison officers, partner agencies are obliged to transfer the information from their databases to OCAM.
- **Extraction and sharing of information:** As reported by a representative of OCAM²⁰³, the information in OCAM's databases belongs to the partner agencies. OCAM is simply in place to enrich the information submitted by ensuring each partner agency has access to the fullest information set possible on each individual. As such, when a partner agency submits information on an individual, and OCAM has additional information on that individual, it is obliged to notify the partner agency of the additional information. Furthermore, all partner agencies have full direct access to the common databases on priority groups (i.e. foreign terrorist fighters, home-grown terrorist fighters and hate preachers). The dynamic database, however, has levels of access. Some partner agencies, such as police forces and intelligence agencies, have full, direct access to the dynamic database; whereas other partner agencies only have "hit/no hit" access. In addition, OCAM produces regular threat assessments for its partner agencies, as well as ad-hoc strategic briefings. In fact, it is reported that OCAM produces more than 1,500 threat assessments per year.

A representative of OCAM²⁰⁴ reported that its work is conducted with consideration for the potential consequences of an individual being included in their databases. As such, there are a number of measures in place to safeguard the inclusion of individuals in the databases, as well as the subsequent extraction and use of the information. For instance, strict criteria, developed by OCAM in collaboration with partner agencies and its political authorities, are in place to determine whether individuals can be added to OCAM's databases. Additionally: i) the sharing of information with other EU Member States or third countries is subject to certain rules and requires permission from OCAM; ii) oversight is conducted across two parliamentary committees, Comité P (Standing Police Monitoring Committee) and Comité I (the Intelligence and Security Services); iii) the transfer of information between partner agencies and OCAM, where necessary, is conducted over secure, encrypted networks; and iv) rules pertaining to classified information are in place such that those receiving such information must be entitled to do so dependent on the information's classification level.

Information sharing also occurs at the level of local administrations. Such information sharing is conducted through Local Integrated Security Cells, which include representatives of the

²⁰³ Interview with a representative of the Organe de Coordination et d'Analyse de la Menace (OCAM).

²⁰⁴ Ibid.

police, the respective mayor, municipal social services and other relevant institutions and services.²⁰⁵

Concerns have been raised over all mechanisms for information sharing and compilation. A 2017 report by Amnesty International, for instance, notes that this new database and OCAM's entries are exempt from general data protection safeguards.²⁰⁶ It follows that individuals are not able to verify their presence on these databases; they are also not able to request access to this information or request it be corrected. Moreover, Amnesty raises concern over the hasty process by which the new database was established and highlights that both the Council of State and the Privacy Commission noted fundamental issues with the database.²⁰⁷

With regard to information sharing and cooperation between Belgium and other Member States, Article 8 of the OCAM law clearly states the organisation's responsibility for specific international relations with foreign counterparts. Regarding OCAM specifically, its main information sharing and cooperation mechanisms include: multilateral cooperation through the Madrid Group, which comprises the 'fusion centres'²⁰⁸ from EU Member States, the US and Australia, among others; and bilateral relationships with other nation states and, in particular, its neighbouring countries (such as Denmark, France, Germany, the Netherlands, Spain, the UK) and the US.²⁰⁹

OCAM's partner agencies also use multilateral mechanisms, including (non-exhaustive):

- **Law enforcement** share information multilaterally through the Europol Counter-Terrorism Centre and INTERPOL, in addition to general information sharing systems such as the Schengen Information System;
- **Intelligence and security services** have the Club de Berne and the Counter Terrorist Group (CTG); and
- **Public prosecutors** have the possibility of establishing Joint Investigation Teams (JITs) in terrorism cases with a cross-border component.

Belgium, as all other EU Member States, is also a member of the inter-governmental Financial Action Task Force (FATF), which places a priority focus on identifying and preventing financing of terrorism, among other crimes.²¹⁰

In terms of bilateral information sharing and cooperation, it is not known the extent to which these are used, or the relationships that exist. However, a representative of OCAM noted that the use of bilateral versus multilateral fora often depends on the Member State with which Belgium is sharing information – some simply prefer bilateral mechanisms.²¹¹

Statistics on Terrorism in Belgium

Number of attacks

The Global Terrorism Database,²¹² operated by the National Consortium for the Study of Terrorism and Responses to Terrorism, has recorded 148 terrorist attacks since 1970. The number of terrorist attacks peaked in the 1980s and has decreased each decade since.

²⁰⁵ Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe* 2017.

²⁰⁶ *Ibid.* p.29.

²⁰⁷ *Ibid.*

²⁰⁸ Fusion centres, including OCAM, are organisations that have been established to facilitate the sharing and analysis of terrorism threat information. Another example includes the UK's Joint Terrorism Analysis Centre.

²⁰⁹ Interview with a representative of the Organe de Coordination et d'Analyse de la Menace (OCAM).

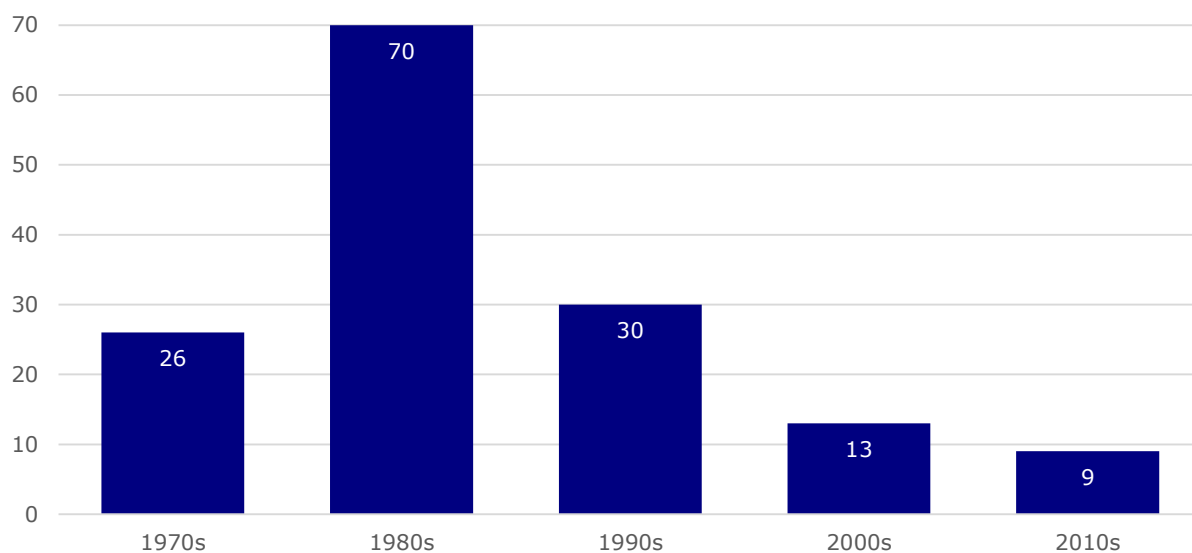
²¹⁰ Financial Action Task-Force website. Available at: <http://www.fatf-qafi.org/>.

²¹¹ Interview with a representative of the Organe de Coordination et d'Analyse de la Menace (OCAM).

²¹² All data presented in this section 'Statistics on Terrorism in Belgium' have been extracted from the following source, unless cited otherwise: Global Terrorism Database, *National Consortium for the Study of Terrorism and Responses to Terrorism (START)*, Available at: <https://www.start.umd.edu/qtd/>.

However, the number of deaths and injuries caused by these attacks has increased significantly, primarily in the most recent decade (as shown by Figure 7, above).

Figure 8: Number of attacks per decade: Belgium, 1970-2016.



Number of suspects

No precise data exist on number of suspects of terrorism-related crimes in Belgium. However, it is widely reported that Belgian law enforcement authorities have faced significant challenges monitoring terror suspects through its national terrorism database, as well as with its communications with law enforcement agencies in other countries.²¹³

Furthermore, Belgium is widely regarded as having the highest number of foreign fighters per capita of EU countries.²¹⁴

Number of arrests

According to Europol's 2017 EU Terrorism Situation and Trend Report²¹⁵, 65 terrorism-related arrests were made by Belgian authorities in 2016. This represents a slight increase from the 61 arrests made in 2015 but is lower than the 72 arrests made in 2014. 62 of these were arrested for Islamist terrorism in Belgium in 2016.

Number of proceedings and convictions

Belgium reported 138 concluded court proceedings in 2016, all related to Islamist terrorism. 127 were convicted, nine were acquitted and two cases were annulled due to the *ne bis in idem* principle. This number represents an increase on the 120 concluded in 2015, and significantly more than the 46 concluded in 2014.

Furthermore, in 2016, Brussels Criminal Court sentenced 15 men from the Verviers cell – a group of Islamist terrorists based in Verviers with ties to individuals involved in the November 2015 Paris terrorist attacks – to incarceration for up to 15 years for membership in a terrorist

²¹³ See Counter Extremism Project, Belgium: Extremism and Counter-Extremism, 2016. Last accessed on 07.09.2017. Available at: https://www.counterextremism.com/sites/default/files/country_pdf/BE-03232017.pdf; and Heath, R., Sheftalovich, Z. and Spillane, C., *Belgium's 12 worst terror misses, mistakes and misunderstandings*. Published by Politico, 30.03.2016. Available at: <http://www.politico.eu/article/the-dirty-dozen-12-mistakes-that-condemned-brussels-to-terror-attacks-isil/>.

²¹⁴ Counter Extremism Project, Belgium: Extremism and Counter-Extremism. 2016. Available at: https://www.counterextremism.com/sites/default/files/country_pdf/BE-03232017.pdf; Europol (2017) *TE-SAT: European Union Terrorism Situation and Trend Report*.

²¹⁵ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017.

organisation and planning of terrorist attacks.²¹⁶ Another trend is that many defendants in Belgium have been sentenced in absentia.²¹⁷ The average sentence (excluding non-prison penalties) for terrorism-related crimes, as reported by Belgian authorities to Eurojust, is five years.²¹⁸ However, this figure is not disaggregated by type of crime.

Case law in Belgium

Expert stakeholders reported that case law in Belgium is not publicly available in many instances. As such, and particularly with regard to terrorism-related case law, it is not possible to report on significant developments in this regard. One development of relevance relates to the participation of women in the activities of terrorist groups. Belgian authorities have concluded that the departure of a woman to a conflict zone with the intention of marrying a terrorist is not necessarily a material act of participation in any terrorism-related activities conducted by the individual or associated group. However, the key is said to lie in the establishment of whether the women share the ideology of the terrorist group, taking into consideration the level of radicalisation, her willingness to join a terrorist group and the extent to which she acted with knowledge of the terrorism-related activities.²¹⁹

Conclusions and recommendations

Since 2015, Belgium has taken significant steps to reinforce its body of counter-terrorism legislation, citing the rising potency of jihadi terrorism in Western Europe, and Belgium in particular, as the primary motivation. In particular, these amendments: i) extend the list of terrorism-related crimes; ii) increase the investigative powers available to the state in relation to terrorism-related crimes; and iii) increase the ability of Belgian authorities to collect, process and share information and intelligence on terrorism. One of the most important implications of these amendments is that the fundamental rights of suspects of terrorism-related crimes can be much further restricted under Belgian legislation than previously. Furthermore, these restrictions have been introduced without any amendments to the existing oversight and redress mechanisms; although, the extension of the Salduz law has introduced additional safeguards for suspects.

As such, many of the measures implemented have received criticism from NGOs for their fundamental rights implications. Human Rights Watch, for instance, criticised, among other things: the "vague language"²²⁰ used in the amendment to the Criminal Code that criminalises leaving Belgium 'with terrorist intent'; and the powers to strip Belgian citizenship from individuals with dual nationality. With regard to information exchange, Amnesty International has commented that individuals entered into OCAM's databases are exempt from general data protection safeguards, such as the right to request or correct information.²²¹

It is important, therefore, to work to ensure the balance between the rights of the suspect and the expansion of state powers.

²¹⁶ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Eurojust, *Foreign Terrorist Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response: Fourth Eurojust Report*, November 2016.

²²⁰ Human Rights Watch, *Grounds for Concern: Belgium's Counterterrorism Responses to the Paris and Brussels Attacks*, 2016.

²²¹ Amnesty International, 2017, op. cit.

6.2. France

Introduction and background

France has been a significant and consistent target of international terrorist attacks throughout the 20th and 21st century, the frequency of which has again, after a period of substantial decline, significantly increased in recent years.

In the 1950s and the 1960s, France experienced terrorist incidents linked to the Algerian war, including what was the deadliest terrorist attack in modern French history until the November 2015 Paris attacks. The attack, in June 1961, by the Organisation armée secrète (OAS), a militant organisation, which opposed Algeria's independence from France, on a Strasbourg – Paris train killed 28 people and injured over 100.

Throughout the 1970s and 1980s, France was subject to a constant series of terrorist incidents linked to conflicts in the Middle East, particularly focusing on attacks by the Palestinian nationalist organisation (PFLP), Carlos the Jackal, Abu Nidal Organisation and the Armenian nationalist organization (ASALA). The 1990s saw a reduction in the frequency and scale of terrorist attacks, with the notable exceptions of the 1995 and 1996 Paris Métro and RER bombings, both attributed to the Algerian paramilitary organisation, the Armed Islamic Group.²²²

While France, similar to other Western European Member States, experienced jihadist terrorist incidents inspired by Al-Qaeda's 9/11 attack on the U.S. and the subsequent war on terror, between 1996 and 2012, these incidences were without casualties and France suffered just four deadly terrorist incidences during this period, all linked to Basque, Breton and Corsican nationalists.

Following the outbreak of civil war in Syria in 2012, the landscape of terrorism in France was drastically transformed. With up to 5,000 Europeans²²³ travelling to fight with the Islamic State and other jihadist groups active in Syria, and up to 1,200 of these being French nationals, major challenges have arisen regarding the return of these foreign fighters to France and by those radicalised at home by the Islamic State and other jihadist groups.

The January 2015 Île-de-France attacks, focused mainly around a mass shooting at the headquarters of the satirical magazine *Charlie Hebdo* and a kosher market in Paris, which killed 17 and injured 22 others, making it the deadliest terror attack in France since 1961.

In response to a series of terror attacks in and around Paris in November 2015, responsibility of which was claimed by the Islamic State, which became the deadliest terrorist attack in French history with 130 dead and 368 injured, emergency rule was imposed by then-President François Hollande. While this was set to expire in July 2016, it has been repeatedly extended due to further terrorist incidences and after its sixth renewal expired in November 2017.

A wave of new legislation was enacted in 2016 to incorporate many of the State of Emergency's key measures into permanent legislation, which has caused significant concern among civil liberties groups regarding the proportionality of the new legislation and its infringement of the rights of individuals.

²²² Ministry for Europe and Foreign Affairs, *Terrorism*. Available at: <http://www.diplomatie.gouv.fr/en/french-foreign-policy/defence-security/terrorism/>.

²²³ Ibid.

Overview of anti-terror legislation in France

Similar to other Western European nations, France has progressively and reactively adopted specific anti-terrorism legislation in response to each wave of attacks, introducing key legislation in 1986 on action against terrorism, in 2001 following the 9/11 attacks and, after the Madrid and London bombings in 2004 and 2005 respectively, in 2006 on action against terrorism.²²⁴ While French anti-terrorism law additionally draws upon civil and administrative law, criminal law forms the main legal weapon used by the French authorities against terrorism.²²⁵

During the 1960s, President De Gaulle created a quasi-military court, *la Cour de Sûreté de l'Etat* (the State Security Court), in order to try cases of national security. This court comprised three civilian judges and two military officers and trials were conducted in secret with no right of appeal for suspects. This was abolished in 1981 and the current system, rooted in the criminal justice system, developed in response to the renewed terrorism threat in the 1980s.

In the French legal system a terrorist act is defined as:

- A crime or lesser indictable offence defined as such in the Criminal Code. The French Criminal Code lists these terrorist offences in Article 421-1 to 421-6.
- When these crimes and offences are connected with an individual or collective operation aimed at seriously disturbing public order by intimidation or terror, which is the distinguishing feature of terrorism.

These crimes include violence against the person, kidnapping, hijacking, money laundering, offences using firearms and explosives and property crimes and these are autonomous offences where the maximum penalties for these offences are higher when committed with a terrorist intent. Additionally, the French Criminal Code also criminalises specific terrorist offences including the membership and direction of a terrorist organisation, abetting terrorist attacks, incitement of terrorism and financing a terrorism enterprise.

Terrorist offences are subject to specific procedural rules, which include the centralisation of the investigation, the prosecution and the trial within a single jurisdiction, the Paris regional court, which is comprised of specialist members of the judiciary with competence for all of France.

French Criminal Code Article 421-1 to 421-6 Specific terrorist offences

- Conspiracy for the purpose of committing terrorist offences;
- Funding of a terrorist operation. Provision is also made for administrative freezing of the assets and, as an additional penalty, confiscation of all or part of the assets of terrorist offenders;
- Failure to account for resources on the part of any person habitually in contact with one or more persons engaging in terrorist acts;
- Direction and organisation of a criminal association for the purpose of preparing terrorist acts;

²²⁴, 'Terrorism', *France Diplomatie*. Available at: <http://www.diplomatie.gouv.fr/en/french-foreign-policy/defence-security/terrorism/>.

²²⁵ Council of Europe, *France, Profiles on Counter-Terrorist Capacity*. Available at: <https://rm.coe.int/1680641029>.

- Direct incitement to, and justification of, terrorism, which are punishable offences under Section 24 of the Act of 29 July 1881 on freedom of the press;
- Concealment of the authors of a terrorist act; and
- Instigation of a terrorist act by various means (pressure, threats, offer of gifts, etc.), even where such incitement is not acted upon

The cornerstone of French anti-terrorism legislation is the Law of 9 September 1986 on actions against terrorism, which has been amended and updated at regular intervals since its introduction. Following the 11 September attacks, the Acts of 15 November 2001, 18 March 2003, 9 March 2004, 23 January 2006 and 21 December 2012 have reinforced the basic legislation and procedural regulations introduced in the original 1986 anti-terrorism legislation.

The 1986 Law on the fight against terrorism, (Law 86-1020 of 9 September 1986), "outlined the judicial authorities tasked with dealing with terrorism crimes, the special judiciary powers available to them and the procedural rules these authorities must follow".²²⁶ The law outlined the centralisation of serious terrorism-related felonies in the Court of Assizes, as well as the exceptional nature of these trials through the introduction of trial by panels of professional judges in lieu of a jury, with the Constitutional Court ruling that the intention of the legislation to "thwart the effect of pressure or threats that could affect the serenity of the trial court" was justified and that the Court of Assizes presents the "necessary guarantees of independence and impartiality".²²⁷ Additionally, the legislation created a "specialist corps of investigating judges and prosecutors"²²⁸ in Paris and extended maximum police custody to 96 hours in terrorism-related cases.

Introduced in the Law on the suppression of terrorism 96-647 of 22 July 1996, was the widely defined offence of "criminal association in relation to a terrorist undertaking"²²⁹. The inclusion of this offence in French legislation enabled the French national authorities to take preventative action with regard to potential future terrorism offences. Prior to the introduction of the State of Emergency, the majority of suspects of terrorism-related offences in France, who have been detained and prosecuted, have been detained and prosecuted under this offence. This definition has enabled the prosecution of a broad group of individuals, including individuals who have travelled to Syria to fight for the Islamic State as well as the administrators of jihadist websites, under this charge.

Four major pieces of legislation were introduced in the years succeeding the 9/11 attacks and are described in the table below.

Law 2001-1062 of 15 November 2001 on everyday security, was introduced in direct response to the 11 September attack and introduced reforms to the existing anti-terrorist legislation and procedural rules. This law introduced a series of measures to combat the financing of terrorism and measures to regulate the use of telecommunications data by national authorities in counter-terrorism.

²²⁶ Centre for Conflict, *Security and Terrorism. Summary of domestic legislation France*. Available at: <https://www.nottingham.ac.uk/hrlc/documents/publications/cthr/country-profile-france.pdf>

²²⁷ Décision n° 86-213 DC du 3 septembre 1986

²²⁸ Human Rights Watch, *Pre-empting Justice. Counterterrorism Laws and Procedures in France*. Available at: https://www.hrw.org/sites/default/files/reports/france0708_1.pdf

²²⁹ Loi n. 96-647 du 22 juillet 1996 tendant à renforcer la répression du terrorisme et des atteintes aux personnes dépositaires de l'autorité publique ou chargées d'une mission de service public et comportant des dispositions relatives à la police judiciaire (law of 1996 as amended in 2001).

Law No. 2003-239 of 18 March 2003 on internal security introduced modifications to the Law 2001-1062 of 15 November 2001 on everyday security and detailed the production of an evaluation report to the Parliament on the implementation of counter-terror instruments.

Law No. 2004-204 of 9 March 2004 on adapting the judicial response to new forms of criminality introduced modifications to the Code of Criminal Procedures regarding the jurisdiction of the Paris judicial investigation authorities and further enhanced the competencies of enforcement judges in this area.

Law No. 2006-64 of 23 January 2006 relating to the fight against terrorism and laying down various provisions relating to security and border controls was introduced in response to the 11 March 2004 Madrid train bombings and the July 7, 2005 London bombings. While previously the charge of criminal association in relation to a terrorist undertaking was a minor felony tried in the Criminal Court (Tribunal correctionnel) and punishable by up to 10 years in prison, the 2006 law categorised this offence as a serious felony which would be punishable by up to 20 years in prison contingent on the basis that the criminal association in question, was "formed with the intent of preparing attacks on life and physical integrity, as well as abduction, unlawful detention, and hijacking of planes, vessels, or any other means of transport".²³⁰ In addition, the available punishment for individuals who constituted a leader of a criminal association, with the intent outlined above, was increased from 20 to 30 years in prison. Similarly, the law increased the maximum period of detention in police custody of suspects in terrorism cases from four days (96 hours) to six days (144 hours). As well as changes to terrorism penalties, the law amended different dispositions.²³¹

Despite French legislation against terrorism offences existing and being repeatedly used to prosecute terrorists over the last few decades, much of the current law on terrorism offences is recent and stems from the 2012 Law Regarding Security and the Fight Against Terrorism, and the Law No. 2014-1353 of 13 November 2014 Law Strengthening Provisions Regarding the Fight Against Terrorism.²³²

In 2012, the French Parliament adopted the Law Regarding Security and the Fight Against Terrorism, Law no 2012-1432 of 21 December 2012. The legislation increased the sanctions against persons who are "guilty of justification of or incitement to terrorism on the internet",²³³ introducing provisions for the prosecution in French courts, of terrorist acts committed in other countries by French nationals or individuals habitually residing in France. This included enabling the prosecution of persons who attended terrorist training camps outside France, despite the fact that no offence has been committed on French territory, and through the extension of asset-freezing to individuals accused of inciting terrorism.

In 2014, the Law No. 2014-1353 of 13 November 2014 Strengthening Provisions on the Fight Against Terrorism introduced four key measures. Firstly, to establish protection perimeters to ensure security at events or in particularly vulnerable places. Secondly, to allow the closure of places of worship where words used incite terrorist acts. Thirdly, it introduced individual monitoring measures to be taken against any individual of whom there is serious reason to

²³⁰ Human Rights Watch, *Pre-empting Justice. Counterterrorism Laws and Procedures in France*. Available at: https://www.hrw.org/sites/default/files/reports/france0708_1.pdf.

²³¹ National Assembly, *Law Commission Information Report on the implementation of Law No. 2006-64 of 23 January 2006*, 5 February 2008.

²³² Library of Congress, *Terrorism in France*. Available at: <https://blogs.loc.gov/law/2015/01/falqs-terrorism-in-france/>

²³³ Law no 2012-1432 of 21 December 2012.

believe their behavior constitutes a "particularly serious" threat and who has engaged in regular contact with individuals or organisations with terrorist intent or whom adhere to views that incite terrorism. Lastly, the legislation allowed for visits and seizures to be conducted in places frequented by individuals who have engaged in regular contact with individuals or organisations with terrorist intent or whom adhere to views that incite terrorism. Additionally, the law introduced measures to transpose the Passenger Name Record Directive into French legislation.

Immediately following the November 2015 terrorist attacks in Paris, the French government introduced a State of Emergency. This State of Emergency was renewed six times after it was enacted and expired on 1 November 2017. It allowed the police to "impose wiretaps, put people under house arrest, carry out home and computer searches, ban public gatherings, and close places of worship without first seeking approval from a judge".²³⁴ Since President Macron's election in May 2017, and following the Manchester terrorist attack on 22 May 2017, the government requested the parliament to extend the State of Emergency to 1 November 2017 following a security meeting where senior officials "studied the implications of this new terrorist attack on measures of protection to ensure the security of our compatriots".²³⁵ In this address, President Macron also asked his government to prepare draft legislation to reinforce security measures permanently beyond the State of Emergency. Similarly, Prime Minister Édouard Philippe confirmed that the government would seek to ensure that almost all the main elements of emergency law would now become part of the French Criminal Code. A rush to pass new legislation in June and July 2016 further confirmed the government's aim to incorporate some of the key powers employed in the State of Emergency permanently into French law.²³⁶

The State of Emergency granted extensive additional powers to the French national authorities as illustrated in the table below.

The State of Emergency in France

Legislation that extended the State of Emergency expanded the national authority's ability to:

- Monitor phone and online communications
- Perform warrantless searches
- Exploit digital media found during these searches and
- Detain suspects without charge for up to 96 hours, among other measures²³⁷.
- Maximum sentences for the crime of conspiracy to commit a terrorist act increased from 10 years to 20 to 30 years.
- A 3 June law on terrorism and organised crime increased fines and jail time for not sharing encryption methods used in the furtherance of such activity.
- Visiting violent extremist websites with frequency can now result in a two-year prison term.²³⁸

²³⁴ Viscusi, G., French Terror Threat Allows Macron to Keep Extreme Police Powers. Available at: <https://www.bloomberg.com/news/articles/2017-06-20/french-terror-threat-allows-macron-to-keep-extreme-police-powers>.

²³⁵ 'Macron seeks to extend State of Emergency to November', Al Jazeera, Available at: <http://www.aljazeera.com/news/2017/05/macron-seeks-extend-state-emergency-november-170524082717781.html>

²³⁶ Amnesty International, 2017, op. cit.

²³⁷ United States Department of State, *Country Reports: France*. Available at: <https://www.state.gov/j/ct/rls/crt/2016/272231.htm>.

²³⁸ Ibid.

Defining a suspect of terrorism-related crimes

Article 421-1 of the Criminal Code lists a string of ordinary offences, which only constitute terrorist acts when "they are intentionally connected with an individual or collective enterprise whose purpose is to seriously disturb public order through intimidation or terror".²³⁹ With regard to existing case law in France, a "minimum of planning and preparation is required for the offence".²⁴⁰ It is in large part easier for the French authorities to provide specialised rules due to the codified system used in France²⁴¹ as compared to Common Law Member States due to their reliance on case law.

The French Criminal Code relies on a broad definition of a terrorist offence, including the "association of wrongdoers" offence first introduced in the 1986 Law on the fight against terrorism, which "allows it to cast a wide net and imprison a broad range of suspects".²⁴²

A suspect's status remains pre-charge until all appeals have been exhausted, which inflates the number of suspects, reducing its comparability to suspects in other Member States where suspects who have appeared before a court are no longer categorised as pre-charge.

The initial competence to declare someone as a terror suspect lies with the public prosecutor who will categorise the facts surrounding the suspected offence and may classify the act as a terrorist crime. However, neither the investigating magistrate nor the court are bound by that classification.

Police and intelligence services have the authority to declare someone a suspect of terrorism and terrorism-related activity including conspiracy to commit a terrorist offence in order to proactively act to prevent an attack taking place.

State powers and rights available to suspects

France presents an interesting case study in the powers authorities have with respect to suspects of terrorism due to the current State of Emergency it is under. While this is a temporary measure, it was renewed six times and expired on 1 November 2017 and as described above, the government's intention is to incorporate the majority of the emergency measures into new counter-terrorism legislation. It is important to analyse the current rights of suspects under this State of Emergency without the assumption that the rights of suspects of terrorism will be less restricted once it is repealed.

Authorities have the right for assigned residence administrative orders. These typically include:

- A night curfew of up to 12 hours in a house (in practice it is usually 9-10 hours), which is either the person's residence or a residence in a specific area;
- A ban on travel outside a specific municipal area; and
- The requirement to report to a police station, typically twice daily.²⁴³

Regarding the powers granted to authorities through the State of Emergency, several substantial increases occurred. Authorisation for house searches without prior judicial approval was introduced. Similarly, the authorities were granted enhanced powers to process personal data. However, the Constitutional Court declared the practice of the copying of data

²³⁹ Article 421-1, French Criminal Code.

²⁴⁰ Steiner, E., *Legislating Against Terrorism – The French Approach. Summary of a meeting of the International Law Discussion Group at Chatham House on 8th December, 2005.* Available at <https://www.chathamhouse.org/sites/files/chathamhouse/public/.../ilp081205.doc>

²⁴¹ Ibid.

²⁴² United States, Department of State. *Country Reports: France*, op. cit.

²⁴³ Amnesty International, 2017, op. cit.

from an electronic device during house searches without prior judicial authorisation, as the police authorities had been conducting, unconstitutional.

The various extensions of the State of Emergency introduced expanding restrictions on freedom of expression and assembly. The authorities are now expressly permitted to ban public demonstrations, through asserting that the authorities are not in a position to ensure public order and security. In addition, French police are now permitted to search the luggage and vehicles of individuals without a judicial warrant.

In a law adopted on 3 June 2016, Law n°2016-731, which reinforces the fight against organised crime, terrorism and their financing and which improves efficiency and guarantees of criminal procedure, several new counter-terrorism measures were introduced, including the possibility to subject individuals who returned from areas where "terrorist groups" operated and where they had travelled to with the purpose of joining them, to an administrative control measure. Stronger police powers, with prior authorisation by prosecutorial authorities, to conduct identity checks and searches in the context of investigating terrorism-related offences under French law were introduced. Additionally, it incorporated the possibility for judicial authorities to authorise house searches at any time, including at night, with the purpose of investigating terrorism-related offences.

In July 2016, parliament introduced amendments to the 2015 Intelligence Act, which allowed for not only individuals "identified as a threat", but a person or anyone in the entourage of a person "likely to be related to a threat", to have their electronic metadata analysed by the intelligence services.

In addition, parliament amended criminal and administrative laws, strengthening existing permanent counter-terror powers and measures on top of those introduced by the State of Emergency. This included the extension of the maximum period a person can be subjected to an administrative regime, a ban from French territory of foreigners convicted for a terrorism-related offence as well as an increase in the maximum period of pre-trial detention for children aged 16 and older.

Regarding police custody for all terrorist offences, police custody may be extended to six days from the previous four days, which is in further contrast to the two days detention period for non-terrorism-related offences, if there is a serious danger that acts of terrorism are imminent in France or abroad, or if the requirements of international cooperation regarding the suspect make it essential. However, the extension of up to 48 hours above the two days must be authorised by the examining magistrate.

Regarding access to legal assistance, a terror suspect in custody has the right of access to a lawyer after 72 hours detention. This is in contrast to criminal cases, where access to a lawyer is currently granted from the start of the detention. The introduction of new measures in 2011²⁴⁴, stated that "the principle henceforth that authorities operated under was that legal assistance may not therefore be deferred, and that a person suspected of terrorism is immediately entitled to legal assistance, save in exceptional cases for compelling reasons relating to the particular circumstances of the investigation, or to facilitate the gathering or conservation of evidence, or to prevent any possible bodily harm".

Another controversial measure is that suspects of terror offences may be held in pre-trial detention after having been charged for up to four years in terrorist cases. Usually suspects can be held for up to two or three years without trial depending on the seriousness of the offence. The European Court of Human Rights has condemned France for these time periods

²⁴⁴ Law 2011-392 of 14 April 2011 on Police Custody was enacted following a decision of the Constitutional Court on 30 July 2010 that certain provisions of the Criminal Code governing police custody were unconstitutional. The law introduced a precise definition of police custody and its objectives.

in both terrorist and non-terrorist cases such as E.C.H.R., (Grand Chamber), 04.07.2006, Ramirez Sanchez v. France (no 59450/00).

There is a right of appeal against the classification of a terrorist act at any stage of the process and suspects are considered pre-charge until all available appeals have been exhausted. Similarly, people subject to control measures have the right to appeal through the administrative court system and then before the Council of State.

However, as reported by Amnesty International, the courts have tended to show "strong deference to the arguments for assigned residence orders put forward by the Ministry of Interior on the basis of information collected by the intelligence services, without inquiring sufficiently about the provenance of the information and without requiring authorities to share detailed information regarding the allegations against those subjected to the orders"²⁴⁵.

In October 2017, France's lower house of parliament approved new anti-terrorism legislation, the Law Strengthening Homeland Security and the Fight Against Terrorism, by 415 votes to 127 with its provisions to take effect after the State of Emergency expired on 1 November 2017. This new legislation incorporates a number of the exceptional police powers of the State of Emergency into permanent legislation. The legislation includes the incorporation of the extraordinary search powers of police, the confinement of individuals in assigned residences, the closure of places of worship, enabling police to declare security perimeters in places deemed at risk, which further increases their powers to stop and search within these areas.

Exchanging information on terror suspects

One of the most controversial tools used by intelligence and law enforcement authorities in France is a database commonly known as the "Fiche S". In practice, the Ministry of Interior holds a database of people of interest (*Fichier des personnes recherchées*)²⁴⁶ divided in 21 categories on the basis of the reason why they are of interest. The "Fiche S" in the database relates to individuals wanted because of reasons of safety of the State (*sûreté de l'État*). Fiches S are usually created and updated on the basis of information collected by the *Direction Générale de la Sécurité Intérieure* (DGSI). The basis for inclusion in the database is not clearly defined meaning that Fiches S exist of accused, condemned people as well and some who have never been formally accused of suspected of any crime. While the exact number of existing Fiches S is unknown, former Prime Minister Manuel Valls claimed in 2015 that over 20,000 people were subject of a Fiche S.²⁴⁷

The status of people subjected to *Fiches S* is a subject of debate in France, with some politicians having called for the incarceration of anyone subject to fiches S, a proposal which was criticised by the anti-terrorist prosecutor François Molins as well as the former Prime Minister Bernard Cazeneuve. While a number of people accused or having been convicted of terrorist activities (such as Mehdi Nemouche, Mohammed Merah, the Kouachi brothers), other individuals on the database include researchers such as Romain Caillet, a historian and academic specialising in jihadi movements.

In addition to the Fiche S, and in response to the 13 November attacks in 2015, the then Interior Minister, Bernard Cazeneuve, renewed the commitment to successfully push for the establishment of French and European Passenger Name Record databases (PNR) for travellers, in order to facilitate improved EU-wide information sharing and Schengen-wide

²⁴⁵ Amnesty International, 2017, op. cit.

²⁴⁶ Officially created by the Arrêté du 15 mai 1996, but widely accepted to have existed in one form or another since 1969 see Pierre Breteau, "Attentats du 13 novembre : qu'est-ce qu'une « fiche S » ?", Le Monde, November 2015.

²⁴⁷ '20.000 personnes font l'objet d'une fiche S en France' *Le Figaro.fr*, 2015. Available at: <http://www.lefigaro.fr/flash-actu/2015/11/24/97001-20151124FILWWW00383-valls-20000-fiches-s.php>.

border security.²⁴⁸ While the European Passenger Name Record Databases are currently only used for select flights originating from higher-threat countries, France aimed to have full PNR information coverage by the deadline of the Directive on 25 May 2018.

As evidenced by recent terrorist attacks with nationals from multiple Member States, French counter-terrorism legislation depends on structures at the European level. Intelligence sharing has not been able to keep up with the changed terrorism environment, including the impact of the increased level of freedom of movement and the Schengen zone.

Statistics on terrorism in France

Number of attacks

Since 2000, France has been the victim of 33 terrorist incidents, 11 of which were deadly. The frequency of terrorist incidents increased substantially in 2014 and France experienced significant loss of life in multiple terrorist incidents across two years, 2015 and 2016.

Number of suspects

As of 2016, French authorities are monitoring approximately 15,000 individuals who are suspected of being radical jihadists, including up to 2,000 children.²⁴⁹ These individuals are listed on a secret database created in March 2015 by a confidential decree and is managed by the Counter-Terrorism Coordination Unit.

Approximately 4,000 were categorised under the highest risk of carrying out an attack and subject to surveillance by the General Directorate for Internal Security. A similar proportion were categorised as being of lower risk and are under surveillance by the Central Territorial Intelligence, with the remaining individuals under surveillance by local police²⁵⁰.

Number of arrests

During the first month of the introduction of emergency powers in 2015, the French police arrested 360 individuals and completed 2,700 searches without warrants.²⁵¹ During 2016, Paris's police and counter-terrorism forces arrested more than 400 terror suspects, claiming to have foiled 17 terrorist plots in the process²⁵².

The rise in the frequency of incidents and anti-terror legislation has resulted in a rise of arrests for terrorism offences and France is the single Member State where the overall numbers of arrests "continue to increase: from 238 in 2014, to 424 in 2015 and to 456 in 2016".²⁵³

Number of proceedings

The total number of verdicts pronounced for terrorism-related offences by French authorities in 2016 was 587.²⁵⁴

Number of convictions

²⁴⁸ US State Department, *Country reports on Terrorism, 2015*. Available at: <https://fr.usembassy.gov/country-reports-terrorism-2015/>.

²⁴⁹ '15,000 on French terror watch list: report', *Politico*. Available at: <https://www.politico.eu/article/15000-on-french-terror-watchlist-report-radical-islamist/>

²⁵⁰ Ibid.

²⁵¹ 'Anti-terror laws are challenging the founding principles of the French Republic', *The independent*, Available at: <http://www.independent.co.uk/voices/frances-anti-terror-laws-are-challenging-the-countrys-governing-principles-a6834776.html>

²⁵² *The Counter Extremism Project., France: Extremism and Counter-Extremism*. Available at: <https://www.counterextremism.com/countries/france>.

²⁵³ Europol, *European Union Terrorism Situation and Trend Report, 2017*.

²⁵⁴ Ibid.

French authorities reported convictions of 36 individuals for terrorist offences in 2014, 14 in 2015 and 66 in 2015. In addition, French courts convicted 385 individuals for terrorism offence throughout 2015, of which a third of these convictions were against minors.²⁵⁵

Case law in France

Since 1986 all judicial proceedings relating to terrorism have been centralised and must be heard in the Paris courts. This centralisation has assisted in creating a section of prosecutors and investigating magistrates with greater expertise of terrorist offences and networks, improving the coordination between the various intelligence and police services and the French government.

The State of Emergency in France produced night searches, assigned residences and detentions that have infringed on suspects' rights to privacy, movement, expression, association and civil liberty. This is evidenced by the fact that between November 2015 to December 2016, 4,292 house searches had been conducted, and 612 people had been assigned to forced residency.²⁵⁶ Significantly, after two years of the State of Emergency and over 4,000 house searches, approximately 40 criminal cases have been opened against individuals, approximately 20 of these individuals have been charged with the offence relating to the glorification of terrorism. A 2016 Amnesty International report concluded that "France's search powers and application of administrative control measures such as assigned residence were not only disproportionate, but also discriminatory and had a profound and lasting impact on many people, including children".²⁵⁷ However, of the roughly 5,000 searches undertaken as part of the State of Emergency to date, approximately 4,000 were undertaken in the first three months, and therefore the frequency of these searches has dramatically decreased since March 2016.

The broad definitions upon which French counter-terrorism legislation is based and the subsequent imposition of the State of Emergency has been criticised by civil society organisations for enabling waves of arrests and indiscriminate detention by police authorities. Similarly, the use of the State of Emergency measures by police authorities to break up, detain or cancel protests and leaders of organisations against the governments proposed labour laws highlights the significant risk of abuse by authorities of these extraordinary police powers. "Emergency laws intended to protect the French people from the threat of terrorism are instead being used to restrict their rights to protest peacefully".²⁵⁸

Conclusions and recommendations

The extraordinary powers accorded to police from the State of Emergency, the significant number of administrative measures used by national authorities during it and the small number of individuals subsequently charged following the use of these administrative measures highlights a disproportionate legislative framework that exists in France. The fact that new legislation passed by France's parliament and likely to be introduced in November 2017, incorporates many of the contentious elements of the State of Emergency adds further impetus to those concerns. The *Commission nationale consultative des droits de l'homme*

²⁵⁵ Minister of Justice, SG/SDSE, Exploitation statistique du système d'information décisionnel.

²⁵⁶ Dominique Raimbourg and Jean-Frédéric Poisson, "Report tabled [in the National Assembly] in accordance with article 145 of the Regulation on behalf of the Legal Committee regarding parliamentary control on the state of emergency (*Rapport d'information déposé en application de l'article 145 du Règlement, par la commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur le contrôle parlementaire de l'état d'urgence*)", 6 December 2016 Available at <http://www.assemblee-nationale.fr/14/rapinfo/i4281.asp>. House searches were not included in the third phase of the State of Emergency but were reintroduced in the July 2016 renewal.

²⁵⁷ Amnesty International, 2017, op. cit.

²⁵⁸ Ibid.

(CNCDH) criticises the new legislation for the incorporation of these contentious aspects of the State of Emergency, as leading to the situation where despite it ending in November, the authorities will still have extraordinary police powers, highlighting that it should be exceptional rather than the norm.

The State of Emergency, which will be incorporated into permanent legislation with the new Law Strengthening Homeland Security and the Fight Against Terrorism, entailed deterioration in the level of judicial oversight of France's counter-terrorism measures. As highlighted by CNCDH there is no ex ante judicial oversight in the new legislation, only an ex post oversight by an administrative judge, noting particular criticism by human rights institutions of the "notes blanches", administrative notes which are not signed or dated but which are used by judges. Similarly, the *Union Nationale de la Magistrature* highlights that despite the aim of the law to fight terrorism, there is very little or no judicial oversight of the use of this legislation. Furthermore, the *Union Nationale de la Magistrature* states that according to the rule of law principle any measure going against individual freedoms must be authorised by a criminal judge, who must exercise a control of the execution of the curtailment of liberty, which is not the case under the new law.

CNCDH notes that the new legislation increases the possibility of searches in a 10km perimeter around ports, train stations, airports and frontiers (Article 10), which leads to the situation where approximately half of the population of the entire country can be spot checked, and will lead to an increase in the number of discriminatory checks due to the association the measures creates between migration and terrorism.

6.3. Germany²⁵⁹

Introduction and background

After World War II, the country passed, for the first time, an emergency law in 1967 enabling the federal government to take action in crises ranging from natural disasters to internal conflicts.²⁶⁰ The emergency law regulated the extent to which fundamental freedoms, such as the right to privacy, can be limited in emergency situations. A decade later, the violent attacks carried out by the leftist Red Army Faction (RAF) for the first time justified these emergency measures. While the comprehensive surveillance measures under the "G-10 law"²⁶¹ were controversial, in the famous case of *Klass and others v. Germany* the European Court of Human Rights held that the law includes sufficient safeguards guaranteeing that the law cannot lead to an abuse of powers.²⁶² At the same time the ECtHR noted that the "(...) danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate."²⁶³

By the end of the 70s, left-wing terrorism came mostly to an end and with it, Germany's exposure to terrorism. Thus, the necessity of strict anti-terror laws ceased to exist. Germans, therefore, tended to prefer a 'weak state' where security agencies and the state apparatus in general had limited competences. Only the attacks of a Palestinian terror organisation during the 1972 Munich Olympic Games temporarily changed this and led to the introduction of a special police unit in charge of dealing with serious crime such as terrorism. After 9/11, jihadist terrorism became a global concern. Particularly, since a large proportion of the 9/11 attacks had been planned in Germany, the federal government became aware of the borderless nature of jihadist terrorism and as a result passed multiple new security laws. For example, the membership in and support of a foreign terrorist organisation became a prosecutable offence and religious organisations were no longer exempted from being banned.²⁶⁴ Furthermore, competences of secret services were extended, deportation laws were amended and an anti-terror database was introduced.²⁶⁵

Recently, the threat of jihadist terrorism has become a real rather than an abstract concern in Germany. With the temporary opening of borders, not only genuine asylum-seekers but also terrorists were able to enter the country planning and committing attacks. For example, in 2016 an unaccompanied minor from Afghanistan sought asylum in Germany and later committed an attack on a regional train in Bavaria.²⁶⁶ At the same time, radicalisation of German citizens poses a threat from within Germany. The incident with most fatalities was an attack on the Berlin Christmas market in December 2016 when 12 persons were killed. In addition, several incidents happened on a smaller scale such as the recent stabbing in

²⁵⁹ The report on Germany was written with valuable inputs from: Dr. Benjamin Rusteberg, University of Freiburg; Prof. Dr. Heinrich Wolff, University of Bayreuth; Prof. Dr. Christoph Gusy, University of Bielefeld; Dr. Nikolas Gazeas, University of Cologne.

²⁶⁰ *Siebzigstes Gesetz zur Ergänzung des Grundgesetzes ["Notstandsgesetze"]* vom 24. Juni 1968. (Emergency law).

²⁶¹ *Gesetz zur Beschränkung des Brief-, Post- und des Fernmeldegeheimnisses* (Law on Restrictions on the Secrecy of Mail, Post and Telecommunications).

²⁶² *Klass and others v. Germany* judgment of 6 September 1978, Series A no.28.

²⁶³ *Ibid*, para. 49.

²⁶⁴ *Antiterrorgesetz* of 2001 adopted shortly after the 9/11 attacks (also called: *Sicherheitspaket I* or Anti-terrorism law I).

²⁶⁵ *Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfungsgesetz)*, of 9 January 2002 (also called: *Sicherheitspaket II* or Anti-terrorism law II).

²⁶⁶ The circumstances of the case can be retrieved from: <http://www.spiegel.de/panorama/justiz/bei-wuerzburg-mann-attackiert-reisende-im-zug-mehrere-schwerverletzte-a-1103596.html> which refers to statements made by the Bavarian Minister of Interior Joachim Herrman.

Hamburg²⁶⁷ or the stabbing in a train in Bavaria.²⁶⁸ Interestingly, in many of these cases the boundary between terrorism and mental disorder was not always clear cut. Given the recent increase of jihadist terrorism in Germany, many laws have already been passed or are currently under discussion (see section 2 below).

Overview of anti-terror legislation in Germany

Contemporary concerns on terrorism mainly focus on jihadist terrorism. While there has been some political debate on right²⁶⁹ - and left²⁷⁰-wing terrorism, most of the legislative initiatives in recent years have been adopted as a response to jihadist terrorism. In the following an overview of the legislative framework on terrorism and recent changes is outlined.

The *Strafgesetzbuch* (German Criminal Code) contains specific provisions concerning the definition and criminal nature of terrorist organisations. This ensures that founding, membership, and support of terrorist organisations can be prosecuted.²⁷¹ There are also a range of specific acts addressing terrorist acts which were adopted after 9/11 and which have been updated in response to the threats posed by jihadist terrorism. However, the changes passed all concern penal law (i.e. new forms of crimes have been created) and the methods of police and intelligence, and their cooperation.

In 2015 the *Gesetz zur Verlängerung der Befristung von Vorschriften nach den Terrorismusbekämpfungsgesetzen* (law on the extension of the expiration of rules according to counter-terrorism laws) of 3 December 2015 entered into force.²⁷² The law updates and renews the *Terrorismusbekämpfungsgesetz* (anti-terror law) that entered into force in 2002 as a reaction to the 9/11 attacks. The 2002 law included a sunset clause and was subsequently amended in 2007 and equipped with another sunset clause. It was again renewed in 2012 and subsequently updated in 2015. The current law will expire in 2021. The purpose of the anti-terror law is to amend and update multiple other legislative acts leading to around 23 changes. In essence, the act extended the competences of the bodies in charge of fighting terrorism (such as the *Bundeskriminalamt* (Federal Criminal Agency) and the *Bundesnachrichtendienst* (Federal Intelligence Agency)) and had particular implications on the way these agencies can process personal data of terror suspects. The amendments in 2015 further extended these competences by granting intelligence and police agencies a broader mandate for processing data.

In addition to the *Terrorismusbekämpfungsgesetz* of 2015 (anti-terrorism law), other recent legislative changes include:

- In June 2015, Sections 89a and 89b of the German Criminal Code were amended by the Amendment law on the Prosecution of the Preparation of Serious Violent Offences

²⁶⁷ 'Man stabs shopper to death and injures six others in Hamburg shop', *The Guardian*, 2017. Available at: <https://www.theguardian.com/world/2017/jul/28/man-stabs-shopper-hamburg-supermarket-barmbek>.

²⁶⁸ 'Germany axe attack: Assault on train in Würzburg injures HK family', *BBC*, 2016. Available at: <http://www.bbc.co.uk/news/world-europe-36827725>.

²⁶⁹ For example, especially in recent years, right-wing terrorism is on the rise (see: DW, 'Germany's ever-growing right-wing extremist scene becomes more violent'. Available at: <http://www.dw.com/en/germanys-ever-growing-right-wing-extremist-scene-becomes-more-violent/a-37262596>) and has been more closely monitored after the discovery of the right-wing terror-cell NSU (NSU Watch, *The NSU Complex: Racist Murder, Neo-Nazi Terror and State Collusion in the Federal Republic*, 2016. Available at: <https://www.nsu-watch.info/2016/07/the-nsu-complex-racist-murder-neo-nazi-terror-and-state-collusion-in-the-federal-republic/>.)

²⁷⁰ 'German minister compares anti-G20 protesters to Islamist terrorists', *Reuters*, 2017. Available at: <http://www.reuters.com/article/us-g20-germany-minister-idUSKBN19V1Z2>.

²⁷¹ Section 129a, *Strafgesetzbuch* (Criminal Code).

²⁷² *Gesetz zur Verlängerung der Befristung von Vorschriften nach den Terrorismusbekämpfungsgesetzen vom 3. Dezember 2015*, *Bundesgesetzblatt Teil I*, 2015, Nr. 49 vom 09.12.2015, S. 2161 (Law on the Extension of the anti-terrorism laws).

Endangering the State.²⁷³ The purpose of the amendment is to implement UN Security Council Resolution 2178 (2014) by criminalising travelling abroad with the intent of receiving instructions for the commission of a serious violent act. In addition, a new Section 89c was introduced in the German Criminal Code, which criminalises the collection or the act of making available any assets for the commission of a terrorist offence.

- In 2014 the *Gesetz zur Änderung des Antiterrordateigesetzes* (Law to Amend the counter-terrorism database and other laws of 18 December 2014)²⁷⁴ was adopted. The purpose of the law was to amend the anti-terror database, established in 2006. The database shall ensure that 38 different agencies can exchange data about terror suspects. However, it was partially ruled unconstitutional in 2013 and was revised in 2014. Core changes include the limitation of which data can be stored in the database and how agencies can access the data.
- In 2015 the *Gesetz zur Änderung des Personalausweisgesetzes zur Einführung eines Ersatz-Personalausweises und zur Änderung des Passgesetzes* (Law to Amend the Law on Identity Cards and to Introduce a Substitute Identity Card and to Amend the Passport Act of 20 June 2015) was adopted.²⁷⁵ This law aims to prevent travel of radicalised people (especially in connection with jihadist terrorism) to terrorist training camps. To do so, the law allows relevant authorities to withdraw identity cards or passports of terror suspects and introduces a replacement identity card.
- In 2016, the *Gesetz zum besseren Informationsaustausch bei der Bekämpfung des internationalen Terrorismus* (Law on Improving Information Exchange to Combat International Terrorism) was implemented.²⁷⁶ The aim of the law is to provide intelligence agencies and the federal police further competences to exchange data with foreign intelligence agencies. In essence, the law regulates that the BfV can exchange common 'files' with foreign intelligence in order to investigate transnational criminal organisations. The law was adopted against the background of an increasing risk of German citizens travelling to Syria and Iraq in order to participate in war and return to Germany to execute terrorist attacks. It also accounts for the fact that an increasing number of adolescents became radicalised by lowering the age limit rendering the law applicable. The law also requires telecommunication service providers to verify the identity of customers purchasing pre-paid cards. Furthermore, it allows the use of data held in the Visa Information System (VIS) to verify whether certain travel patterns are linked to terrorism and its financing.

In summary, Germany regulates terrorism in a piece-meal fashion. While terrorist organisations are defined and deemed illegal in the German Criminal Code, several single acts have been adopted to criminalise certain activities as terrorist acts and to extend competences of investigative authorities to process and share data on terror suspects. In contrast, none of these laws change the rights of terror-suspects at the investigative stage or during proceedings as they are all equivalent to the rights of suspects of other crimes.

²⁷³ Gesetz zur Änderung der Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten – GVVG-ÄndG (Law on the change of investigating the preparation of serious crimes).

²⁷⁴ *Gesetz zur Änderung des Antiterrordateigesetzes und anderer Gesetze* vom 18, [Dezember 2014], Bundesgesetzblatt Teil I 2014, Nr. 62 vom 29.12.2014, S. 2318 (Law on the change of the law on the anti-terrorism database).

²⁷⁵ *Gesetz zur Änderung des Personalausweisgesetzes zur Einführung eines Ersatz-Personalausweises und zur Änderung des Passgesetzes* von 20, [Juni 2015], Bundesgesetzblatt Teil I, 2015, Nr. 24 vom 29.06.2015, S. 970. (Law on the change to the identity card law).

²⁷⁶ *Gesetz zum besseren Informationsaustausch bei der Bekämpfung des internationalen Terrorismus* (Law on better exchange of information to fight international terrorism).

Figure 9: Overview of German anti-terrorism legislation.

German anti-terrorism legislation

- Gesetz zur Änderung der Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten (Act on the Prosecution of the Preparation of Serious Violent Offences Endangering the State).²⁷⁷
- Gesetz zur Änderung des Antiterrordateigesetzes und anderer Gesetze (Act to Amend the counter-terrorism database and other laws of 18 December 2014).²⁷⁸
- Gesetz zur Änderung des Personalausweisgesetzes zur Einführung eines Ersatz-Personalausweises und zur Änderung des Passgesetzes (Act to Amend the Act on Identity Cards and to Introduce a Substitute Identity Card and to Amend the Passport Act of 20 June 2015).²⁷⁹
- Gesetz zum besseren Informationsaustausch bei der Bekämpfung des internationalen Terrorismus (Act on Improving Information Exchange to Combat International Terrorism has been signed).²⁸⁰

Defining a suspect of terrorism-related crimes

German law does not lay down a specific definition for terror suspects and thus a suspect of terrorism will be treated in the same way as a suspect of any other crime. The StPO (German criminal procedural act) implicitly refers to three different stages of suspicion. During the investigation stage the term "Beschuldigte(r)" is used which can be considered to be equivalent to 'suspect'. During the pre-trial proceedings, the term "Angeschuldigte(r)" is used which can be translated as 'defendant' and ultimately in the main proceedings the term "Angeklagte(r)" is used which equalises 'accused'.²⁸¹ While the law refers to these different terms, there is no formal definition of the meaning of these concepts and the rights available to all different statuses are equivalent.²⁸²

Apart from the StPO (German criminal procedural Code) which regulates persons who are suspected of having committed a terrorism-related crime, each *Land* in Germany has an individual police law which allows police authorities to declare someone as 'suspect' in a preventative manner. This means that no evidence suggests that a crime has already been committed but that a crime will or may be committed in the future. According to the policing laws in the *Länder*, each regional police authority has investigative techniques at its disposal, which are similar to those mentioned in the StPO (German criminal procedural act). Some of those techniques need to be approved by a judicial authority. This mainly depends on the level of intrusiveness of the measure. For example, according to the Bavarian police law,

²⁷⁷ Gesetz zur Änderung der Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten – GVVG-ÄndG (Law on the change of investigating the preparation of serious crimes).

²⁷⁸ Gesetz zur Änderung des Antiterrordateigesetzes und anderer Gesetze vom 18, [Dezember 2014], Bundesgesetzblatt Teil I 2014, Nr. 62 vom 29.12.2014, S. 2318 (Law on the change of the law on the anti-terrorism database).

²⁷⁹ Gesetz zur Änderung des Personalausweisgesetzes zur Einführung eines Ersatz-Personalausweises und zur Änderung des Passgesetzes von 20, [Juni 2015], Bundesgesetzblatt Teil I, 2015, Nr. 24 vom 29.06.2015, S. 970 (Law on the change to the identity card law).

²⁸⁰ Gesetz zum besseren Informationsaustausch bei der Bekämpfung des internationalen Terrorismus. (Law on better exchange of information to fight international terrorism).

²⁸¹ The German criminal procedural law (StPO) refers to the different stages of the proceedings (investigation, pre-trial and main proceedings).

²⁸² Interview with German anti-terror law expert.

'suspects' can be provided with electric tags on a preventative manner if approved by a judge.²⁸³

In practice, someone is suspected of being a terrorist in two ways. Firstly, if they have committed terrorism-related crimes in the past or are suspected of having being involved in such a crime. Secondly, if they are in contact with terrorist organisations either in Germany or abroad. It is also considered suspicious if a person joins or supports terrorist organisations, which can in some situations be a crime in itself.²⁸⁴

Germany's counter-terror efforts need to be seen in the context of the federal structure implying a division of competences between the *Länder* and the state. In terrorism cases, the Generalbundesanwalt (GBA) (Federal Public Prosecutor General)²⁸⁵ has the sole responsibility to declare someone as a 'suspect of terrorism-related crimes' under the StPO. Recently, the GBA's competences have been extended further to guarantee its competences in terrorism-related crimes.²⁸⁶ After the GBA takes the decision to start investigative proceedings against a terror suspect, the police and intelligence authorities may start investigations.

In regard to the police, the Bundeskriminalamt (Federal Criminal Police Office) and the Bundespolizei (Federal Police) are in charge of fighting terrorism on the federal level. Both institutions have an equivalent body on the *Länder* level (Landeskriminalämter (state criminal police office) and Landespolizeien (state police)). Additionally, there are three intelligence institutions in Germany: (i) the Bundesnachrichtendienst (federal foreign intelligence body); (ii) the Militärische Abschirmdienst (MAD, Military Counter-Intelligence Service); and (iii) the Verfassungsschutz (BfV) (internal federal intelligence agency and its equivalents) in the *Länder* (Landesämter für Verfassungsschutz (LfV, state intelligence agencies)). To coordinate the efforts of these federal and regional different bodies the "Gemeinsame Terrorismusabwehrzentrum" (GTAZ) was established in 2004. GTAZ does not have investigative competences but merely supports the other institutions to cooperate and communicate.²⁸⁷

State powers and rights available to suspects

There are no separate procedures in Germany for investigating persons suspected of having committed terrorist offences. The only limitation to procedural rights that exist stem from the times of the RAF. Since those provisions were very specific to the problems of terrorism conducted by the RAF and do not have any practical application anymore there are ongoing discussions to remove those provisions.²⁸⁸ All of those exceptions refer to the limitations of access to a lawyer if this endangers the Federal Republic of Germany.²⁸⁹

Almost all provisions of the Strafgesetzbuch (Criminal Code) and the regional police laws apply to the same extent to person suspected of terrorism and other crimes. Furthermore, there are no different rights for suspects and for the accused. Terror suspects enjoy the same rights as all other suspects during investigation, interrogation, in the main hearing and

²⁸³ Bayern bringt elektronische Fußfessel of den Weg, Handelsblatt, 2017. Available at: <http://www.handelsblatt.com/my/politik/deutschland/anti-terror-kampf-bayern-bringt-elektronische-fussfessel-auf-den-weg/19423630.html?ticket=ST-1207441-dJnAplTX0qDQnrSyJtf5-ap2>.

²⁸⁴ Interview with German expert.

²⁸⁵ Generalbundesanwalt (Federal Public Prosecutor).

²⁸⁶ Gerichtsverfassungsgesetz (GVG), para. 120 (2). (German Code on the constitution of courts).

²⁸⁷ Terrorismusabwehr in Deutschland, Deutscher Bundestag, 2016. Available at: <https://www.bundestag.de/blob/425178/d987ac59bf943a8ee975efa79d0ae050/wd-3-099-16-pdf-data.pdf>.

²⁸⁸ Interview with expert.

²⁸⁹ StPO, para. 137ff. (Criminal Procedural law).

regarding the possibility to submit appeals against court rulings.²⁹⁰ According to the StPO, among the measures on the investigative stage are:

- Wiretapping;
- Surveillance (of electronic equipment and physical surveillance);
- Undercover investigations; and
- Search and seizure;

Someone can also be suspected of potentially intending to carry out terror offences in the future. In this case, the measures pointed out above can also be taken on a preventative level under the regional police laws. Furthermore, suspects of terrorism-related crimes in a preventative sense can also be subject to a travel ban, and can be deported. In addition, there is also the option to subject a suspect to preventive detention. However, there are very strict limitations.²⁹¹

In principle, in Germany there are strong *ex ante* and *ex post* safeguards to protect the rights of suspects of crimes. On the one hand, most investigative measures need to be approved by a judicial authority before being deployed. On the other hand, *ex post*, once the court proceedings begin, the accused will have to be informed about the way evidence was collected about him/her and the legality of all investigative measures taken are then reviewed by judges once court proceedings start. This is particularly important because in contrast to many other countries, in Germany all types of evidence are permissible in court. In case investigations do not lead to an indictment, the suspects need to be notified about the investigative measures taken against them once it does not harm the investigation anymore. An expert mentioned that this is taken very seriously in practice and there are very few cases in which exceptions to notification are permissible.

Exchanging information on terror suspects

Information sharing tools exist on multiple levels. On the police level, the federal police office (BKA) is in charge of exchanging data with third countries, which is regulated by the *Bundeskriminalamtsgesetzes* (BKAG, federal criminal agency law). In 2006 the newly introduced Article 73 provided the BKA the competence to fight dangers deriving from international terrorism through measures such as surveillance of telecommunication data, surveillance of persons, online searches, and grid investigation. This competence was previously exclusively held by the *Länder*. The law was challenged on multiple occasions in front of the German constitutional court due to concerns of the wide-ranging competences of the BKAG. In 2016, the Court consolidated all previous judgments and held that some of the provisions are unconstitutional but that the essence of the law can be maintained if minor amendments are made.²⁹²

In practice, information is more often exchanged via intelligence agencies rather than via the BKA. The exchange of information via intelligence agencies is regulated by the '*Bundesverfassungsschutzgesetz*' (Federal Constitutional Protection Act), which was amended in 2017. Those amendments mainly concern the extension of surveillance measures on minors given the increasing terror threat of adolescent terrorists. Academic experts have argued that those amendments are unconstitutional.

²⁹⁰ Interview with anti-terror expert.

²⁹¹ Interview with German police law expert.

²⁹² Rusteberg, B., *Die Entscheidung des Bundesverfassungsgerichts zum Bundeskriminalamtsgesetz- Eine Zwischenbilanz des allgemeinen Sicherheitsrechts*. Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, 2017, pp. 24-35.

On the one hand, the 'Bundesverfassungsschutzgesetz' (Federal Constitutional Protection Act) regulates instances where domestic intelligence agencies exchange data among each other. Most prominently, the law regulates that regular meetings are held where the intelligence agencies of all *Länder* discuss the current situation in regard to "Gefährder" (persons of interest) in "Abwehrzentren" (defence centres). For example, in the case of Amis Anri who committed an attack in Berlin in 2016, the agencies did indeed discuss him as a person of interest but they made wrong assumptions about the potential of him planning and carrying out an attack. On the other hand, the 'Bundesverfassungsschutzgesetz' (Federal Constitutional Protection Act) regulates the information exchange between domestic intelligence services and the police. This is more problematic because of data protection concerns (e.g. because police services have a much broader reach and competences). However, in general when there is a terror threat there is usually no problem of exchanging data between police and intelligence services.²⁹³

In regard to the exchange of information in general, the Antiterrordateigesetz (law on anti-terrorism database) is also worth mentioning. The law stipulates the establishment of a sort of "telephone book" which does not include any specific information but only provides details about which agency has information about what. The Bundesverfassungsgericht (Constitutional Court) has in principle ruled that the law is proportionate but required minor amendments to its substance. However, fundamental rights organisations and academic experts have criticised the law for disproportionately interfering with the rights to data protection and privacy.

When domestic intelligence agencies exchange information with other countries similar rules apply but there are no rules when foreign intelligence agencies exchange data with German intelligence agencies. There is, therefore, the suspicion that foreign intelligence services make use of this loophole. For instance, Germany asks the French foreign intelligence service to investigate a person of interest in Germany and then exchange it with each other and vice versa.

The rights granted to the suspects depends heavily on whether suspects know about the fact that they have been investigated. In Germany, the right to notification is strict and a judge has to confirm exceptions where notification is not allowed. Even experts disagree what counts as a valid exception and what not. For instance, no notification is necessary if lives could be endangered, if ongoing investigations or related investigations could be impeded or if a *Verbindungsmann* (secret investigator) will be endangered. Intelligence services have reported to the German parliament that in 50% of the cases notification is not provided to individuals.²⁹⁴

²⁹³ As confirmed by an expert.

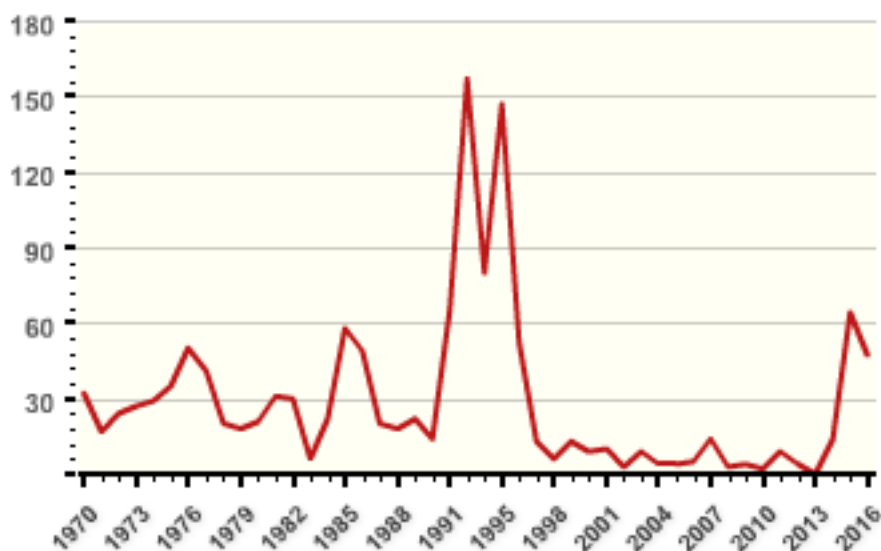
²⁹⁴ Berichte vom parlamentarischen Kontrollgremium (Reports from the parliamentary oversight body).

Statistics on terrorism in Germany

Number of attacks

In 2016, four jihadist terror attacks have been carried out in Germany and one in relation to a non-specified form of terrorism.

Figure 10: Number of terrorist attacks in Germany.²⁹⁵



Number of suspects

In the beginning of 2017, German security agencies listed 548 Islamists as representing a potential danger, of which around 270 are residing in Germany. Of these 80 are currently already imprisoned and just over 50 of those thought to be a danger are rejected asylum-seekers who could be deported. An additional category of Islamists thought to be less dangerous is known as "relevant persons." This group includes almost 50 rejected asylum-seekers who are eligible for deportation.²⁹⁶

Number of arrests

At the same time, 25 persons were arrested in relation to jihadi terrorism whereas one arrest took place in relation to left-wing terrorism, five arrests in relation to right-wing terrorism and four arrests in relation to separatist movements.²⁹⁷

Number of investigations approved by the prosecutor

In 2015 the general prosecutor confirmed that 136 court proceedings were running against 199 accused terrorists. In the previous year there were only 42 court proceedings against 80 accused terrorists. In 2013, only five proceedings against eight accused terrorists were taking place showing that both the number of proceedings and accused is rising.²⁹⁸

²⁹⁵ Global Terrorism Database.

²⁹⁶ 'Germany balances liberty and security in face of terror', *Spiegel online*, 2017. Available at: <http://www.spiegel.de/international/germany/after-terror-attack-germany-examines-security-architecture-a-1128917.html>.

²⁹⁷ 'European Union Terrorism Situation and Trend Report', *Europol*, 2017. Available at: https://www.europol.europa.eu/tesat/2017/ANNEX_3.html.

²⁹⁸ *Süddeutsche Zeitung*, *Die wichtigsten Dschihadisten-Prozesse in Deutschland*, 2016. Available at: <http://www.sueddeutsche.de/politik/justiz-die-wichtigsten-islamisten-prozesse-in-deutschland-1.2826000>.

Number of convictions

According to Eurojust data, in 2015, 17 persons were convicted of an offence related to terrorism. In the following year the number increased to 30 convicted of a crime related to terrorism. The majority were convicted for jihadi terrorism (e.g. in 2016 only two of the 30 convictions related to separatist terrorism and none related to left- or right-wing terrorism).²⁹⁹

Figure 11: Overview of the terrorism-related offences in Germany.

Offence	Year ending December 2015	Year ending December 2016	Year ending December 2017
Number of suspects	N/A	N/A	140
Number of arrests	40	35	N/A
Number of investigations	136	N/A	N/A
Number of convictions	17	30	N/A

Case law in Germany

As mentioned in the introduction, Germany was exposed to left-wing terrorism in the 1970s and 1980s, which was very different in nature than the terrorism experienced today (i.e. cross-border jihadist terrorism). This new form of terrorism is fundamentally different and has not extensively come to court. People have been convicted for assistance or preparation of terror offences. There have also been some proceedings on travel bans and terrorist financing. However, all of these proceedings (and investigations) took place under the regular criminal statutes with nearly no specific challenges or problems.³⁰⁰

According to a German anti-terror expert, the difficulties do not lie in respecting the rights of terror suspects since their rights are the same as for other suspects of crime. Instead difficulties rather relate to more practical issues such as getting testimonies from abroad in case the suspects have travelled abroad and the collection of evidence (particularly since telephone calls are often taking place in foreign languages).³⁰¹

Conclusions and recommendations

None of the interviewees had a particular view on how to improve the current situation in Germany or how the situation could be addressed on the EU level. Most development in Germany in recent years concerns legislation criminalising certain behaviours as terrorism-related crimes such as joining terrorist organisations, being trained for terrorism purposes and the glorification of terrorism. In addition, administrative laws have been adopted such as the Passport Law enabling authorities to stop individuals travelling to conflict zones. While these laws have potentially led to an increase of the number of persons being suspected of terrorism-related crimes, experts have not experienced terror suspects being treated differently compared to other suspects of other serious crimes when being investigated.

However, there are some concerns that legislation on exchanging information between Member States is not sufficiently transparent in regard to the oversight mechanisms in place and rights granted to suspects. It has been shown that information sharing is very complex since many different agencies are involved in the exchange of information and all those agencies have different competences and are subject to different legislative frameworks. In particular, intelligence agencies (unlike police agencies) are granted a wide scope for investigating suspects or 'persons of interest' without sufficient oversight on the competences

²⁹⁹ Europol, *European Union Terrorism Situation and Trend Report*, 2017, Annex 3, op. cit.

³⁰⁰ Interview with German expert.

³⁰¹ Interview with German expert.

of intelligence agencies and without sufficient transparency on what oversight mechanisms exist. There could, therefore, be a case of clearer transparency on how intelligence agencies exchange information. At the same time, it needs to be borne in mind that not all of the activities of intelligence agencies can be made fully transparent because this could hamper their ability to effectively and efficiently fulfil their mandate.

6.4. Greece

Introduction and background

Terrorism first arose in Greece arguably in response to the repressive policies of the military dictatorship between 1967 and 1974, but was not perceived as a serious threat or political priority, until the 1990s.³⁰² Since then, numerous domestic terrorist groups have claimed responsibility for attacks with the November 17 (N17) terrorist organisation being the most lethal. N17's revolutionary ideology often bordered on anarchy and it directed actions against former military officials, the U.S. and their agents due to their perceived imperialist motives, businessmen, and New Democracy politicians (Greece's foremost right-wing party). By the time it was disbanded in 2002, N17 had been responsible for over 100 acts of violence and 23 assassinations.³⁰³

In the period immediately following the fall of the military dictatorship, Greece stripped away much of its military, security and intelligence capabilities to reduce their powers, and enhance civil protections in their new parliamentary democracy. These reforms arguably weakened Greece's security, which was exploited in 1976 when the Popular Front for the Liberation of Palestine hijacked an Air France plane as it departed Athens.³⁰⁴ In 1989, a New Democracy MP, Pavlos Bakoyiannis, was assassinated by N17, representing the first member of parliament to be killed by terrorists.

Law 2928/2001 included defining a terror organisation for the first time; extending the time to lawfully question suspects; approving the use of broader interrogation methods; and increasing the severity of punishments for terrorism-related crimes. These new legal tools have been described as the catalyst for the arrest and prosecution of N17's leader, Alexandros Giotopoulos, several of its members, and the eventual dismantling of the group in 2003.

More recently other extreme leftist groups including the Revolutionary Popular Struggle (ELA), Revolutionary Struggle (EA), Sect of Revolutionaries (SE), and the anarchist Conspiracy of Fire Cells have committed terrorist attacks in Greece; the latter claimed responsibility for an attack in March 2017 that targeted the International Monetary Fund and left one person injured. These and other left-wing terror groups are still operational and increased their activities during the Greek debt crisis.³⁰⁵ Furthermore, there has been an increase in right-wing extremist groups that have expressed resentment towards the influx of immigrants and refugees that Greece has accommodated during the European migrant crisis.³⁰⁶

Although not necessarily a target for Islamist terror itself, Greece's proximity to the Middle East and its porous maritime borders mean that it is a gate to Europe for jihadist terrorists pretending to be refugees. However, it appears that the country's home-grown, ultranationalist and anarchist groups are the principal ongoing threat to Greece's security and political stability. In January 2017, Greece arrested EA leader, Panagiota (Pola) Roupa, marking an important milestone in their counter-terrorism efforts.

³⁰² Karyotis, G., *Securitization of Greek Terrorism and Arrest of the 'Revolutionary Organization November 17. Cooperation and Conflict*, 1 November 2007.

³⁰³ Global Terrorism Database, op. cit.

³⁰⁴ Borgeas, A, 'The Evolution of Greece's Security Legislation and Policy', *Journal of International and Comparative Law*, 14.04.2016.

³⁰⁵ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017.

³⁰⁶ Council of Europe, *Profiles on Counter-Terrorism Capacity: Greece*. Committee of Experts on Terrorism (CODEXTER), 2012.

Overview of anti-terror legislation in Greece

The Greek Criminal Code codifies the terrorism statute under Article 187A. The Greek Constitution subjects its citizens to international law concerning terrorism laws in Articles 28(1), 28(2), and 28(3) of the Greek Constitution.

Law 2928/2001 amended the Criminal Code and criminal procedure. It criminalised the participation in and the formation of a terrorist organisation, as well as criminalising the threat or preparation of a terrorist act. The law also replaced jurors in terrorism-related cases with a three-judge panel.³⁰⁷

Prior to the 2004 Olympic Games, parliament passed the anti-terrorism law 3251/2004 "European Arrest Warrant and Confrontation of Terrorism".³⁰⁸ This amended the earlier anti-terrorism law 2928/2001 in part by specifically defining terrorism as "an act committed in such a way or to such an extent or under such circumstances that it could seriously damage a country or an international organization, and is aimed at inducing fear among the population or forcing illegally any public authority or international organization to proceed to an act or to refrain proceeding to it or to seriously harm or destroy the fundamental constitutional, political or economic structure of a country or an international organization".³⁰⁹ Moreover, law 3251/2004 sanctioned lone terrorists; increased the statute of limitations on terrorism-related crimes from 20 to 30 years; increased prison terms for terrorist leaders; and heavily sanctioned those who threaten or prepare to commit a terrorist crime.

In 2010 Greece further modified the earlier law 3251/2004 for more actionable counter-terrorism significance. Law 3875/2010 modified Article 187A of the Greek Criminal Code, stating that serious threat to cause terror, shall be punished with imprisonment of at least two years. Further, that acceding to a terrorist organisation, defined as "a structured group with a continuous activity, consisting of three or more persons acting jointly and with the purpose of committing [a terrorist offence]". It made "possession, procurement and manufacturing" of weapons to serve the objectives of the terrorist organisation punishable by incarceration of up to 10 years. It provided that the provision or management of "tangible or intangible assets" to a terrorist organisation or an individual terrorist is also punishable by 10 years' incarceration. Ten years' incarceration is also the penalty for whoever "provides substantial information, with knowledge of such information being used in the future, to facilitate or support the commission by a terrorist organization or an individual terrorist". These modifications have helped to enhance Greece's legal tools against terrorism.

There is no specific law for the incitement of a terrorism-related crime, instead, Articles 184 and 185 of the Greek Criminal Code serves to penalise public incitement to commit a terror offence, in addition to the public glorification, in any way, of an offence that has been committed, thus endangering public order.

Figure 12: Overview of Greek anti-terrorism legislation.

Greek anti-terrorism legislation

- Law 2928/2001 – Modification of provisions of the Criminal Code and the Code of Criminal Procedure and other provisions for the citizens' protection from criminal acts of criminal organisations

³⁰⁷ Hellenic Foundation for European and Foreign Policy (ELIAMEP), Anagnostou, D. and Skleparis, D, *Trends in radicalisation that may lead to violence*, July 2015.

³⁰⁸ Council of Europe, *Profiles on Counter-Terrorism Capacity: Greece. Committee of Experts on Terrorism CODEXTER*, 2014.

³⁰⁹ Borgeas, A., 'The Evolution of Greece's Security Legislation and Policy', *Journal of International and Comparative Law*, 14 April 2016.

- Law 3251/2004 – European Arrest Warrant and Confrontation of Terrorism
- Law 3691/2008 – Prevention and suppression of money laundering and terrorist financing and other provisions
- Law 3875/2010 – Ratification and Implementation of the United Nations Convention against Transnational Organised Crime and related provisions
- Law 4285/2014 – Criminalises public incitement of violence or hate speech

Defining a suspect of terrorism-related crimes

The term 'suspect' is not directly defined by the Greek legislator. However, the term is understood to mean, and is applied to, an individual who has been accused of a criminal offence in a complaint filed by another person; an individual accused for the commission of a criminal offence during (or at any point of) the 'preliminary examination'³¹⁰; an individual accused of a criminal offence during (or at any point of) the 'police preliminary criminal' investigation.³¹¹ A terrorism-related suspect is one which can be categorised by the above frameworks that is suspected of committing a terrorism-related crime outlined in Article 187A.³¹²

State powers and rights available to suspects

The competent agency for the prevention and suppression of terrorism is the Hellenic Police, having jurisdiction throughout the Greek territory, as well as the public prosecutor, who approves, supervises and assists the work of the competent police authorities and investigating magistrates. The Greek criminal provisions against terrorism are applied to any terrorist action committed within the Greek territory, including by foreign citizens, as well as to terrorist actions committed abroad, by either Greek or foreign citizens, irrespective of the laws applicable in the place where the terrorist action was committed.³¹³

The rights afforded to suspects of terrorism-related crimes are the same as those afforded to those suspected of committing crimes not related to terrorism. As outlined in Article 31 (2) of the Greek Criminal Code, suspects have the right to an attorney and are ensured the right to private communication (a measure from a recent Statute 4478/2017 as a means to comply with directive 2013/48/EU); the right to remain in silence; and the right to suggest the examination of certain witnesses and the right to provide evidence to rebut the accusations. There is also the right to have access to the case-file, but for in exceptional cases where competent authorities can deny access when it would seriously endanger the life or fundamental rights of another person, or when the denial is absolutely necessary to serve an important public interest, such as national security. These exceptional cases are only permitted if it does not infringe the right of the suspect to fair trial as outlined in Article 101 (3). In practice, the measure is seldom used.³¹⁴

As outlined in Article 253A of the Criminal Code, special investigating acts are permitted for terrorism-related offences and other serious offences, such as covert police operations, the lifting of privacy, and the surveillance of activities that occur outside a residence and the use of personal data residence on the condition that a judicial council has reviewed and approved

³¹⁰ The prosecutor requests a 'preliminary examination' in order to assess whether there is sufficient evidence to file charges; the investigating officers carry out investigating acts in response to these requests.

³¹¹ Defined as such in certain cases of emergency (outlined in Article 243(2)) where investigating officers can perform investigatory acts necessary to determine whether an individual has committed a crime without requiring the permission of the Prosecutor, whom they must inform as soon as possible.

³¹² Expert Interview.

³¹³ Ibid.

³¹⁴ Ibid.

the order that was executed by a competent public prosecutor. In Greece, these practices are reported to being used more frequently.³¹⁵ In exceptionally urgent cases an investigation may be ordered directly by the public prosecutor or the investigating judge, and the authorisation of the action can be obtained from a competent judicial council immediately or within a time limit of three days. Evidence gathered may only be used for the specific purposes outlined by the judicial council, to confirm perpetration of a crime or the arrest of perpetrators.³¹⁶

The legal limit for pre-trial detention is 18 months³¹⁷ but in some cases, including terrorism-related cases, detention is extended.³¹⁸ Detainees have the ability to challenge the lawfulness of their detention before a Greek court and before the European Court of Human Rights (ECHR) after exhaustion of domestic appeals. The law permits denial of a jury trial in cases of terrorism and the 3-Member Court of Appeal (without the participation of jurors) is the competent court for terror offences under Article 187A.

Exchanging information on terror suspects

Greece has signed and ratified the European Convention on Mutual Assistance in Criminal Matters and its first additional protocol and the European Convention on Extradition. The operation of joint investigative teams (with the participation of members from other Member States of the European Union) in the Greek territory for the investigation of terrorist actions is possible due to Law 3663/2008, "European Judicial Cooperation Unit (EUROJUST), Joint Investigative Teams and other provisions".

The activity of the Greek National Intelligence Service (EYP-NIS) is governed by Law 3649/2008. It has the mission "to seek, collect, process and notify to competent authorities information" in the process of "preventing and dealing with activities of terrorist organizations and other organized crime groups".³¹⁹ In compliance with Law 3115/2003, which governs data privacy, the EYP-NIS is permitted to instigate surveillance on individuals by order of the public prosecutor³²⁰ which must be submitted within 24 hours and subsequently approved by the public prosecutor for the Court of Appeal. However, in matters of national security, only the approval of the supervising public prosecutor is required to approve an order from the NIS Director General. Despite this, Greece has been reported to have mechanisms for exchanging intelligence from the United States, Britain, France and others".³²¹

Statistics on terrorism in Greece

Number of attacks

There were six failed, foiled and completed attacks in Greece in 2016, all attributable to left-wing terrorism. This represents a slight increase from 2015, where four attacks took place, two attributed to left-wing terrorism and two to right-wing.

³¹⁵ Expert interview.

³¹⁶ Ibid.

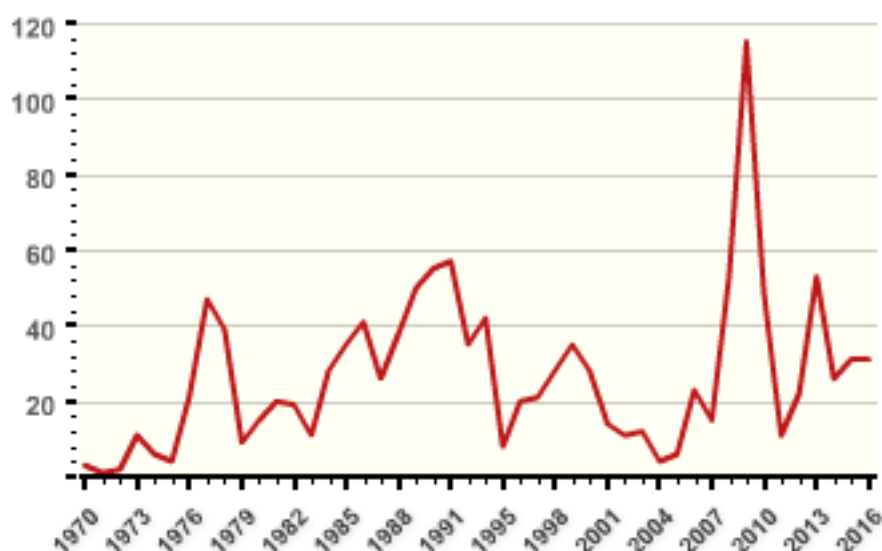
³¹⁷ Kalmthout et al., *Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*, 2009, p.451-453

³¹⁸ Expert interview.

³¹⁹ Law 3649/2008 Article 2.

³²⁰ Law 3649/2008 Article 5 - A public prosecutor shall be posted to the NIS by decision of the Supreme Judicial Council for a period of up to three years. The official shall check the legality of special operational actions of the NIS relating to human rights and shall have any other powers assigned thereto by the provisions hereof.

³²¹ Anthee Carassava, 'Greece intelligence on alert for traveling Islamist militants', *Los Angeles Times*, September 2014. Available at: <http://www.latimes.com/world/europe/la-fg-greece-jihadists-20140909-story.html>.

Figure 13: Number of terrorist attacks in Greece³²²**Number of arrests**

There were 29 arrests made in Greece in 2015 for terror offences. Sixteen were for left-wing terrorists, five for right-wing terrorists and eight were unspecified arrests. The total number of arrests decreased in 2016 to 17, 15 of which were for offences related to jihadist terrorism, one related to left-wing terrorism and one was unspecified. The large increase in jihadist terrorism arrests relative to no court proceedings or convictions could arguably be due to recent targeting of jihadist terrorism-suspects.

Number of proceedings

The number of individuals subject to court proceedings fell dramatically from 40 in 2015 to only three in 2016. All of the court proceedings in both years were for left-wing terror offences.

Number of convictions

There were 25 convictions in 2015, and only three in 2016.

Figure 14: Overview of the terrorism-related offences in Greece.

Offence	Year ending December 2015 ³²³	Year ending December 2016 ³²⁴
Number of arrests	29	17
Number of court proceedings	40*	3
Number of convictions	25	3

*In Greece, two individuals were tried twice for different offences. The verdicts pronounced in the different court proceedings were counted separately when analysing the data on verdicts.

³²² Global Terrorism Database, op. cit.

³²³ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2016.

³²⁴ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017.

Conclusions and recommendations

In contrast to other EU Member States, which have introduced new legislative measures in response to several terrorist attacks in the regions, Greece has not passed any 'crisis-driven' legislation to combat this threat. There is the provision that the right to access the case file can be infringed in criminal proceedings for terrorism-related crimes, if disclosure is deemed to be a risk to national security. In practice, this is rarely used and the right to a fair trial is guaranteed. Greek legislation does not permit the use of surveillance measures or covert operations without prior approval from a supervising public prosecutor. In this way Greece maintains an appropriate safeguard that helps to ensure that the rights of individuals are protected. Furthermore, Greece has not introduced legislation that allows for the use of administrative measures against individuals that are suspected of having committed terrorism-related crimes, relying upon the integrity of the criminal procedures.

6.5. Italy

Introduction and background

The Italian legal system has put up a fight against terrorism since the end of the 1960s. Alongside extremists' political terrorism, and "Mafia-type" organised crime – which the Italian authorities had to address first – the jihadist terrorism phenomenon has recently developed at international level and has also started to be of concern in Italy. Its evolution and development into a transnational issue required a new counter-terrorism approach in Italy. Since the terrorist attacks of 9/11, Italian legislation has followed two main pathways in regard to criminal law: a number of reforms criminalised preliminary actions and broadened the scope of punishable criminal offences. Additionally, in line with general international counter terrorism reforms (including EU measures), new economic measures against international terrorist organisations have been added to the strategy. In regard to procedural law, the legislative reform programme has mainly focused on the coordination of investigative activities (e.g. the extension of the competences of the Direzione Nazionale Antimafia to include terrorism-related crimes). Moreover, legislative reform has provided increased protection to victims of terrorism. Furthermore, a prevention strategy was adopted (i.e. the legal provisions allowing preventive wiretapping and the power to carrying out investigative interviews). The following table provides an overview of all relevant legislation.

Overview of anti-terror legislation in Italy

Figure 15: Overview of Italian anti-terrorism legislation.

Italy Terrorism Legislation
<p>a) Urgent measures against international terrorism:</p> <ul style="list-style-type: none"> • Executive Decree n. 374 of 18 October 2001, subsequently passed as Law n. 438 of 15 December 2001, "Disposizioni urgenti per contrastare il terrorismo internazionale" (urgent measures against international terrorism); • Executive Decree n. 144 of 27 July 2005, subsequently passed as Law n. 155 of 31 July 2005, "Misure urgenti per il contrasto del terrorismo internazionale" (urgent measures against international terrorism); • Executive Decree n. 249 of 29 December 2007, "Misure urgenti in materia di espulsioni e di allontanamenti per terrorismo e per motivi imperativi di pubblica sicurezza" (urgent measures regarding expulsion and deportation); • Law n. 85 of 30 June 2009, "Adesione della Repubblica italiana al Trattato concluso il 27 maggio 2005 tra il Regno del Belgio, la Repubblica federale di Germania, il Regno di Spagna, la Repubblica francese, il Granducato di Lussemburgo, il Regno dei Paesi Bassi e la Repubblica d'Austria, relativo all'approfondimento della cooperazione transfrontaliera, in particolare allo scopo di contrastare il terrorismo, la criminalità transfrontaliera e la migrazione illegale (Trattato di Prüm). Istituzione della banca dati nazionale del DNA e del laboratorio centrale per la banca dati nazionale del DNA. Delega al Governo per l'istituzione dei ruoli tecnici del Corpo di polizia penitenziaria. Modifiche al codice di procedura penale in materia di accertamenti tecnici idonei ad incidere sulla libertà personale" (accession to the Prüm Treaty – creation of the national DNA database); • Executive Decree n. 7 of 18 February 2015, subsequently passed as Law n. 43 of 17 April 2015, "Misure urgenti per il contrasto del terrorismo, anche di matrice internazionale, nonché proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione

e partecipazione alle iniziative delle Organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione" (urgent measures against international terrorism – extension of the powers of the Direzione Nazionale Antimafia to terrorism-related crimes);

- Law n. 153 of 28 July 2016, "Norme per il contrasto al terrorismo, nonché ratifica ed esecuzione: a) della Convenzione del Consiglio d'Europa per la prevenzione del terrorismo, fatta a Varsavia il 16 maggio 2005; b) della Convenzione internazionale per la soppressione di atti di terrorismo nucleare, fatta a New York il 14 settembre 2005; c) del Protocollo di Emendamento alla Convenzione europea per la repressione del terrorismo, fatto a Strasburgo il 15 maggio 2003; d) della Convenzione del Consiglio d'Europa sul riciclaggio, la ricerca, il sequestro e la confisca dei proventi di reato e sul finanziamento del terrorismo, fatta a Varsavia il 16 maggio 2005; e) del Protocollo addizionale alla Convenzione del Consiglio d'Europa per la prevenzione del terrorismo, fatto a Riga il 22 ottobre 2015" (provisions against terrorism – ratification of some international conventions on the prevention of terrorism); and
- Legislative Decree n. 108 of 21 June 2017, "Norme di attuazione della direttiva 2014/41/UE del Parlamento europeo e del Consiglio, del 3 aprile 2014, relativa all'ordine europeo di indagine penale" (transposition of Directive 2014/41/EU on the European Investigation Order in criminal matters);

b) Anti-terrorist financing measures:

- Executive Decree n. 369 of 12 October 2001, subsequently passed as Law n. 431 of 14 December 2001, "Misure urgenti per reprimere e contrastare il finanziamento del terrorismo internazionale" (urgent measures for the suppression of financing terrorism);
- Legislative Decree n. 109 of 22 June 2007, "Misure per prevenire, contrastare e reprimere il finanziamento del terrorismo e l'attività dei Paesi che minacciano la pace e la sicurezza internazionale, in attuazione della direttiva 2005/60/CE" (transposition of Directive 2005/60/EC on the prevention of and the use of the financial system for the purpose of money laundering and terrorist financing);
- Legislative Decree n. 231 of 21 November 2007, "Attuazione della direttiva 2005/60/CE concernente la prevenzione dell'utilizzo del sistema finanziario a scopo di riciclaggio dei proventi di attività criminose e di finanziamento del terrorismo nonché della direttiva 2006/70/CE che ne reca misure di esecuzione" (transposition of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing – transposition of Directive 2006/70/EC laying down implementing measures for Directive 2005/60/EC);
- Legislative Decree n. 54 of 11 May 2009, Modifiche ed integrazioni al decreto legislativo 22 giugno 2007, n. 109, recante attuazione della direttiva 2005/60/CE, concernente misure per prevenire, contrastare e reprimere il finanziamento al terrorismo e l'attività di Paesi che minacciano la pace e la sicurezza internazionale (amendments to the Legislative Decree n. 109 of 22 June 2007);
- Legislative Decree n. 151 of 25 September 2009, "Disposizioni integrative e correttive del decreto legislativo 21 novembre 2007, n. 231, recante attuazione della direttiva 2005/60/CE concernente la prevenzione dell'utilizzo del sistema finanziario a scopo di riciclaggio dei proventi di attività criminose e di finanziamento del terrorismo, nonché della direttiva 2006/70/CE che reca misure di esecuzione" (amendments to the Legislative Decree n. 231 of 21 November 2007);

- Legislative Decree n. 159 of 6 September 2011 "Codice delle leggi antimafia e delle misure di prevenzione, nonché nuove disposizioni in materia di documentazione antimafia, a norma degli articoli 1 e 2 della legge 13 agosto 2010, n. 136", (prevention measures);
- Legislative Decree n. 35 of 15 February 2016, "Attuazione della decisione quadro 2003/577/GAI del Consiglio, del 22 luglio 2003, relativa all'esecuzione nell'Unione europea dei provvedimenti di blocco dei beni o di sequestro probatorio" (transposition of the Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence);
- Legislative Decree n. 202 of 29 October 2016, "Attuazione della direttiva 2014/42/UE relativa al congelamento e alla confisca dei beni strumentali e dei proventi da reato nell'Unione europea" (transposition of Directive 2014/42/EU on the freezing and confiscation of proceeds of crime in European Union); and
- Legislative Decree n. 90 of 25 May 2017, "Attuazione della direttiva (UE) 2015/849 relativa alla prevenzione dell'uso del sistema finanziario a scopo di riciclaggio dei proventi di attività criminose e di finanziamento del terrorismo e recante modifica delle direttive 2005/60/CE e 2006/70/CE e attuazione del regolamento (UE) n. 2015/847 riguardante i dati informativi che accompagnano i trasferimenti di fondi e che abroga il regolamento (CE) n. 1781/2006" (transposition of Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing);

c) Rights, support and protection of victims of terrorism:

- Executive Decree n. 13 of 4 February 2003, subsequently passed as Law n. 56 of 2 April 2003, "Disposizioni urgenti in favore delle vittime del terrorismo e della criminalità organizzata" (urgent measures for victims of terrorism);
- Law n. 206 of 3 August 2004, "Nuove norme in favore delle vittime del terrorismo e delle stragi di tale matrice" (measures for victims of terrorism); and
- Decree of the President of the Republic n. 181 of 30 October 2009, "Regolamento recante i criteri medico-legali per l'accertamento e la determinazione dell'invalidità e del danno biologico e morale a carico delle vittime del terrorismo e delle stragi di tale matrice, a norma dell'articolo 6 della legge 3 agosto 2004, n. 206" (measures for victims of terrorism).

Defining a suspect of a terrorism-related crime

In order to understand the term "suspect of a terrorism-related crime" it is necessary to clarify the meaning of 'suspect' under Italian law. In the official Italian version of the most recent EU legislative acts, the term "suspect" has been translated as "*indagato*"³²⁵. Previously, several interpretative issues had been caused by the literal translation of 'suspect' as "*sospettato*"³²⁶. This was a result of the lack of an explicit legal definition of the term "*sospettato*" in domestic law.

First of all, the translation of 'suspect' as '*indagato*' is helpful because in Italian criminal proceedings (including terrorism-related proceedings) an individual is a 'suspect' after the prosecution decides to formally open an investigation against him/her.³²⁷ Subsequently, when the prosecutor determines that there is reasonable ground to proceed with a formal

³²⁵ See Directive 2017/541/EU.

³²⁶ See Council Framework Decision on Combating Terrorism 2002/475/JHA, art. 9 para. 3.

³²⁷ Art. 335 Italian Code of Criminal Procedure (Codice di Procedura Penale) – hereinafter CPP.

charge under domestic criminal law, the prosecutor exercises the power to prosecute an individual in the public interest. This results in the initiation of the second phase of the proceedings, the preliminary hearing or the trial phase.³²⁸ At this stage, the 'suspect' becomes a 'defendant'.³²⁹ According to art. 61 of the Italian Code of Criminal Procedure (CPP), the defendant's rights are extended to the suspect.

According to art. 51 § 3-*quater* CPP, investigations for terrorism-related crimes, whether attempted or committed, are normally carried out by a highly qualified and specialised regional pool of prosecutors belonging to the Anti-Mafia District Directorate (Direzione Distrettuale Antimafia - hereinafter DDA). The National Anti-Mafia and Counter-terrorism Directorate (Direzione Nazionale Antimafia e Antiterrorismo - hereinafter DNA) is the institution in charge of coordinating and directing all investigative actions carried out by each individual DDA. The DNA was originally established as the Anti-Mafia National Directorate on 20 November 1991, by the Executive Decree n. 367 (subsequently passed as Law n. 8 of 20 January 1992), following the intensification of the fight against the Sicilian Mafia. Recently the DNA was reformed by a counter-terrorism legislative initiative.³³⁰ The DNA consists of a Head of Office ("Procuratore Nazionale Antimafia e Antiterrorismo"), assisted by two Deputy Head Prosecutors ("procuratori aggiunti"), and other prosecutors ("sostituti procuratori"). Coordination exists in gathering and sharing all relevant information collected among any single district division. The Head of Office can also exercise an own power of initiative to open investigations, as well as take over the responsibility of another investigation originally opened by a district division (the so called "potere di avocazione delle indagini"). In addition, the DNA plays a key role in the international judicial cooperation with Eurojust. This takes place through a dedicated internal department, which supports activities against transnational organised crime.

In regard to the second interpretative option (namely to translate 'suspect' as "sospettato"), given the lack of an explicit legal definition of the term "sospettato" under the Italian domestic law, a "sospettato" of terrorism-related crimes shall be defined on a case-by-case basis by the administrative or judicial authority in charge.

State powers and rights available to suspects

To start with, in regard to the "indagato" interpretation of 'suspect' (the individual subjected to an investigation already underway), there are some procedural tools, typically used in criminal cases against terrorism-related crimes, which are supposed to increase the prosecutions' powers. However, they can lead to a significant undermining of minimum procedural guarantees granted to the suspect.

- First of all, art. 335 § 3 CPP is aimed at keeping the investigation confidential, relieving the prosecutor from his / her duty to communicate any detail of the ongoing criminal investigation to the suspect of a terrorism-related crime. This significantly affects the suspect's right to information about the proceedings.
- Furthermore, art. 407 § 2, a) n. 4 CPP potentially affects the right to be tried without undue delay, as it extends the maximum period for the investigation.
- The use of precautionary criminal measures has the potential to massively affect individual freedoms; this is particularly alarming when applied to terrorism-related crimes. Article 275 § 3 2nd part CPP introduces a presumption of proportionality and adequacy of pre-trial detention, resulting in a greater use of pre-trial detention in the

³²⁸ Art. 112 Italian Constitution and articles 50, 408 CPP. See also 125 coordination provisions of the Italian Code of Criminal Procedure - hereinafter disp. att. CPP.

³²⁹ Art. 60 CPP.

³³⁰ Executive Decree n. 7 of 18 February 2015, subsequently passed as Law n. 43 of 17 April 2015.

course of terrorism-related crime proceedings³³¹. The suspect/accused could be entitled to file a claim for being subject to unlawful detention.³³²

In regard to the literal translation of suspect ('suspect' = sospettato), the analysis inevitably focuses on the particular system of preventive instruments aimed at fighting terrorism. This is the case of the so-called "preventative measures" ("misure di prevenzione"), which could be issued *ante* or *praeter delictum* either by the competent Administrative Authority or the Judicial Authority, depending on the specific situation at stake.

The key element of the Italian anti-terrorism law³³³ focuses on preparatory activity in regard to preventing terrorism-related crimes by individuals or groups.³³⁴

In these cases, several administrative measures may be used:

- The expulsion order to foreign nationals, which can be issued by the Ministry of Interior or by the Prefect *motu proprio*. That decision could be challenged / appealed before the Civil Court or, depending on the situation, before the Administrative Tribunal:³³⁵ the fact that the evaluation regarding the hazard profile of an individual is handled by an administrative authority instead of a judicial one reveals several critical issues in terms of standard.
- The special police supervision measure ("sorveglianza speciale di pubblica sicurezza"), essentially includes several restrictions of individual fundamental rights and freedoms.³³⁶ It requires issuance by a criminal judge, under an application, which could be filed by the Head of Police Administration (questore), the Head of Direzione Investigativa Antimafia (DIA), the Prosecutor or the Head of the DNA (Procuratore Nazionale Antimafia e Antiterrorismo). It can only be issued after the suspect has been granted the opportunity to be heard. The decision could be subject to appeal before the Court of Appeal and the Court of Cassation.³³⁷ In addition, the most recent legislation³³⁸ has increased the emergency power of the Head of the Police Administration (questore) allowing specific measures against those subjected to special police supervision ("sorveglianza speciale di pubblica sicurezza") including seizure of passport and of any other travel documents; and
- The financial prevention measures of freezing, seizure and confiscation of assets, aimed at hindering terrorist organisations to access their financial resources. This may

³³¹ Article 273 CPP sets out the conditions for the precautionary measures, namely the existence of serious indications of guilt (gravi indizi di colpevolezza) and Article 274 provides that precautionary measures may be ordered for the following reasons (esigenze cautelari): preventing interference with the course of justice, danger of absconding and preventing the possibility of re-offending. Normally, under Article 275 § 1 CPP, precautionary measures must be adapted, in each individual case, to the nature and degree of conditions set out in Article 274; in addition, they must be proportionate to the seriousness of the offence and to the sanction which is likely to be applied (art. 275 § 2 CPP) and pre-trial detention may be ordered only if all other precautionary measures appear to be inadequate (art. 275 § 3 1st part CPP).

³³² Article 314 ff. CPP.

³³³ After the most recent amendment by Legislative Decree n. 159 of 6 September 2011 and Executive Decree n. 7 of 18 February 2015.

³³⁴ Art. 4 Legislative Decree n. 159 of 6 September 2011.

³³⁵ Art. 13 Legislative Decree n. 286 of 25 July 1998.

³³⁶ In particular, the judicial authority can order dangerous people, who have not complied with an "oral notice" (avviso orale), to keep a lawful conduct; not to give cause of suspicion; not to associate with persons convicted for criminal offences or subjected to preventive or security measures; to return to their residence by a certain time in the evening or to not leave their residence before a certain time in the morning, except in case of necessity and after having given notice in due time to the authorities; not to own or carry fire arms; not to enter bars or night-clubs; not to take part in public meetings. If need be, this may be combined either with a prohibition on residence (divieto di soggiorno) in one or more given municipalities or provinces or, in the case of particularly dangerous persons, with an order for compulsory residence in a specified municipality (*obbligo del soggiorno in un determinato comune*). The violation of these provisions is an offence punishable with imprisonment.

³³⁷ Art. 6 ff. Legislative Decree n. 159 of 6 September 2011.

³³⁸ Executive Decree n. 7 of 18 February 2015.

affect personal belongings and assets whose original legitimate property / possession could not be adequately demonstrated by individuals or entities subjected to the prevention proceedings. In practice, the procedure and remedies available against such measures are essentially those of the special police supervision.³³⁹ In conclusion according to international obligations, all previously mentioned measures (especially the "freezing" order) must be addressed to individuals and entities listed by the UN Subsidiary Committee on Sanctions in the so-called "blacklists".

The use of those preventative measures might affect the minimum standard of procedural guarantees of suspects of terrorism-related crimes. The "threat profile" of some individuals might lead to the application of such restrictive measures, regardless of the opening of criminal proceedings against them and without ensuring the same standard of "defence" rights. In particular, a lot of critical points have arisen regarding the confidential nature of the blacklisting of individuals and entities.

For the sake of completeness, several investigative tools also need to be added to the overview of Italian counter-terrorism measures:

- First of all, the use of preventive wiretapping and communication control, according to Article 226 CPP: by the Head of Security and Intelligence Services (SISMI and SISDE), an authorisation to carry out wiretapping may be granted by the Head of the Prosecution's Office with the territorial jurisdiction only to gain information for the prevention of terrorism or subversive activities. The authorisation is valid for a maximum period of 40 days, which may be extended for an additional period of 20 days, by decree of the prosecutor, issued with a clear explanation of the reasons of the extension. Data collected through preventive investigatory activities cannot be used in criminal proceedings. Moreover, in order to safeguard the secrecy of the investigation, wiretapping and information gathered cannot be referred to in investigation reports.³⁴⁰ The use of these investigative tools appears even more crucial in the light of the significantly alarming role of social media and social networks in the preparatory and training activities of individuals by terrorist organisations (e.g. the case of the ISIL or Da'esh propaganda). It would be necessary to consider the potential inclusion of "Trojan horse" or "spyware" among the instruments under art. 226 disp. att. CPP. These programmes, could be covertly installed on any electronic devices (*personal computers, tablets, and smartphones*) so as to subject it to remote control. At the moment, the use of these instruments is not yet properly included in the domestic legal framework and no safeguards apply when law enforcement authorities use these techniques.³⁴¹
- Under the same legal framework regulating the wiretapping, the Security and Intelligence Services could be authorised to question prison inmates with the only aim of getting any information deemed to be helpful for prevention strategies relating to crime of national and international terrorism. The temporary use of this instrument, originally planned until 31 January 2017, has been extended until 31 January 2018 thanks to recent legislative amendments.³⁴²

The main concern in respect to the investigative measures is the lack of adequate procedural guarantees. The recent Executive Decree n. 7 of 18 February 2015 increases the Postal Police Unit's powers in enabling it to arrange and to update a sort of "blacklist" which includes

³³⁹ Art. 16 and ff. Legislative Decree n. 159 of 6 September 2011.

³⁴⁰ Intercepted material and all copies, extracts and summaries, which can be identified as the product of an interception must be securely destroyed as soon as no longer needed for the authorised purpose.

³⁴¹ The Government was delegated to intervene on the matter with the Law n. 103 of 23 June 2017.

³⁴² Art. 4 Executive Decree n. 144 of 27 July 2005, as amended by Executive Decree n. 7 of 18 February 2015 and by Executive Decree n. 244 of 30 December 2016.

websites allegedly used for preparatory and training activity for terrorism's purpose. This type of additional power has been added consistently across the whole Italian counter-terrorism system. Additionally, the judicial authority is able to ask the internet providers to block visitors' access to those websites on the blacklist.

Exchanging information on terror suspects

In Italy, there are five public security bodies that all have access to information on terror suspects: The State Police and the Carabinieri, who share the responsibility to maintain the general public security, the Financial Police (Guardia di Finanza), the Forest Rangers and the Penitentiary Police, who are special bodies, specialised in specific fields. Each of these five bodies depends on a different ministerial department (respectively, Ministry of the Interior, Ministry of Defence, Ministry of Economics and Finance, Ministry of the Environment and Ministry of Justice). The responsibility to coordinate all the information held by those bodies falls under the Ministry of the Interior.³⁴³ Moreover, in Italy there are three intelligence agencies that have the competence to share data on suspects of crime: The information for security Department (*Dipartimento delle informazioni per la sicurezza* (DIS)), the information and internal security Agency (*Agenzia informazioni e sicurezza interna* (AISI)), and the information and external security agency (*Agenzia informazioni e sicurezza esterna* (AISE))³⁴⁴.

In 2005, the Pisanu Decree (Legislative Decree n. 144 of 27 July 2005) was introduced and gave new powers to the police for the identification of terrorism suspects. These new powers included providing a residence permit as a reward for those providing information in terrorism investigations; expanding telephone tapping by nominating the heads of the information and security services as responsible for this task; extending the period for which telematics data can be kept; and expanding the power of the armed forces to identify and stop and hold people and transportation means.³⁴⁵ The arrest of suspects is also permitted for individuals suspected of preparing to commission terror acts. In 2015, the Executive Decree 7/2015 was reinforced and the Pisanu Decree added, as a preventive measure, the expulsion of "the foreigner" suspected of terrorism.³⁴⁶ This Decree also modified the criminal procedure code and criminal law code anti-Mafia codes and privacy laws, allowing, for example public security forces to get access to personal data of suspects. The right to break privacy laws for preventative measures is also granted by art. 53 of the Privacy Code, which states that under the decree of the Minister for Interior, public security bodies have access to all data.³⁴⁷

Specifically for the fight against terrorism and organised crime, a new organ was founded in 2004, the General Council for Combating Organised Crime, Anti-Mafia and the anti-terrorism Strategic Analysis Committee (Comitato di Analisi Strategica Antiterrorismo or C.A.S.A.). C.A.S.A is a permanent body chaired by the Director for Prevention of the Police that facilitates the exchange and evaluation of information on terror suspects between the five public security bodies and the intelligence agencies. On the national level, C.A.S.A. organises anti-terrorism activities managed by the State Police, the Carabinieri and the Financial Police (*Guardia di Finanza*), through coordinated controls, preventive action, further insights to identify financing of terrorism activities and constant monitoring of the web.

³⁴³ Savino, M., *L'assetto delle forze di polizia in Italia: I Problemi esistenti e le prospettive di riforma*, 2007. Available at: <http://www.irpa.eu/wp-content/uploads/2011/06/Savino-Forze-di-polizia.pdf>.

³⁴⁴ See: Italy's Intelligence System for the Security of the Republic. Available at: <http://www.sicurezzanazionale.gov.it/sisr.nsf/index.html>.

³⁴⁵ Decreto-legge 27 luglio 2005, n. 144 – so-called decreto Pisanu.

³⁴⁶ Norme antiterrorismo - Decreto Pisanu. Available at: http://www.disfor.unict.it/sites/default/files/documenti_sito/legge-pisanu%281%29.pdf.

³⁴⁷ Italian Personal Data Protection Code. Available at: <http://www.italtrade.com/personalDataProtectionCode.pdf>.

On the international level, C.A.S.A. represents Italy in the international fight against terrorism, participating at meetings with similar anti-terror organisations across EU countries to exchange information.³⁴⁸ The main goals of the cooperation between EU countries are to share information collected to fight and prevent terror activities, as well as to create a European Intelligence body ("European *Intelligence-led policy*").³⁴⁹

To guarantee the full integration of the Italian security system in the EU context, it has been argued that four measures still need to be implemented:

- 1) Create a structural link between the Italian intelligence database (managed by DIS) and the Europol analysis system. To achieve this, all intelligence databases should be centralised at the DIS.
- 2) Connect the database from the Centre of data elaboration (CED) with the Europol information system. This would allow sharing data from Italy to the EU and other countries
- 3) Create a DNA database (currently being developed)
- 4) Create the single "multi-functional" role of "Sharing Officer".³⁵⁰

Case law in Italy

With the aim of fully comprehending the *enforcement of law* in these matters, it is important to understand the case law of different Italian Courts:

- Regarding art. 275 § 3 CPP, the Italian Constitutional Court has ruled massively in this field, with the result of increasing the procedural guarantees of suspects. Until the entry into force of Law n. 47 of 16 April 2015, the provision contained two different orders of "presumptions" relating to different crimes, including terrorism-related crimes. On the one hand, it includes a "relative" presumption, relating to the conditions set out in Article 274 CPP stating that the element of "serious indications of guilt" (gravi indizi di colpevolezza) needs to be met. On the other hand, it includes an "absolute" presumption, relating to the adequacy and the proportionality of the measure chosen.³⁵¹ In 2010, the Court declared that the "absolute" presumption is unconstitutional for any crime other than organised crimes (i.e. it is not applicable if crimes are committed by single individuals only). The Court claimed that the absolute presumption undermines the individual freedom and can only be justified when there is a criminal associative link. The legislative amendment of 2015 implied that the "absolute presumption" is only applicable in cases of terrorism-related organised crimes. This means that in cases where terror suspects act alone, such crimes could be subjected to less restrictive precautionary measures.
- Regarding the financial prevention measures, the most controversial aspect involves the evaluation of the "threat profile" of the potential subject for public security. According to the Court of Cassation, the fact that a person can indeed be considered to be a threat to public security is the precondition for the application of prevention measures such as asset freezing. Practically, the danger level they pose remains essential, regardless of the time of its manifestation. However, the danger level they pose of the person must still be assessed at the time of the acquisition of the assets. What matters for confiscation is not so much the public danger in the future (as it

³⁴⁸ See Il Comitato di Analisi Strategica Antiterrorismo. Available at: <http://www.poliziaedemocrazia.it/live/index.php?domain=rubriche&action=articolo&idArticolo=2612>.

³⁴⁹ Comunicazione della Commissione, Migliorare l'accesso all'informazione da parte delle autorità incaricate del mantenimento dell'ordine pubblico e del rispetto della legge, 16 giugno 2004, COM(2004) 429 de.

³⁵⁰ Savino, M., *L'assetto delle forze di polizia in Italia: I Problemi esistenti e le prospettive di riforma*, 2007, op. cit.

³⁵¹ See relevant Constitutional Court rulings n. 265/2010, 231/2011, 213/2013, 232/2013, 48/2015 and 265/2010.

should be a true precautionary measure of *ante delictum*), but rather the existence of clues about past criminal activity of the potential subject.³⁵²

Statistics on terrorism in Italy

According to the statistics, acts of terrorism were most prevalent in 1970s and 1980s. Currently, Italy has not been subject to many jihadist terror attacks. The Italian authorities have become conscious of the increasing risks connected to the emerging phenomenon of lone wolves and self-starters, in part this is due to the experiences of so called "Years of Lead" (*gli Anni di piombo*), as well as in the fight against one of the most violent organised crime waves of all time. For that reason, the intelligence services, police and judicial authorities, have proactively improved their monitoring of individuals connected to those committing serious and violent crimes.

Figure 16: Number of terrorist attacks in Italy.³⁵³

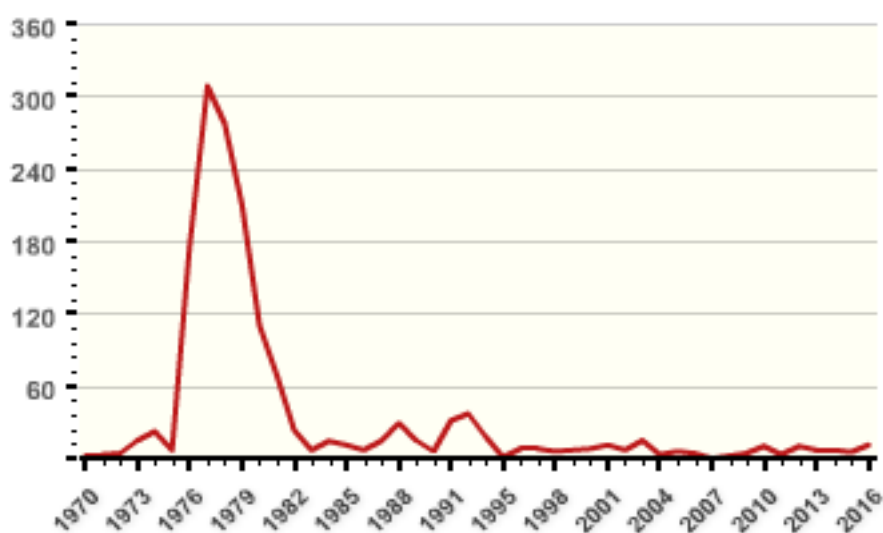


Figure 17: Overview of the terrorism-related offences in Italy.³⁵⁴

Offence	Year ending December 2015	Year ending December 2016
Number of arrests	40	38
Number of court proceedings	0	11
Number of convictions	0	6

Offence	July 2015 - June 2016	July 2016 - June 2017
Number of court proceedings ³⁵⁵	437	475

³⁵² Court of Cassation First section Ruling 4880 of 26 June 2014.

³⁵³ Global Terrorism Database, op. cit.

³⁵⁴ EUROPOL, *EU Terrorism situation and Trend Report*, 2016 & 2017. Available at :

<https://www.europol.europa.eu/activities-services/main-reports/eu-terrorism-situation-and-trend-report#fndtn-tabs-0-bottom-2>.

³⁵⁵ Direzione Nazionale Antimafia e Antiterrorismo.

Conclusions and recommendations

Italy's implementation of several EU measures, especially in the area of judicial cooperation³⁵⁶, makes Italy an increasingly reliable partner, both on the active and the passive side.

However, the Italian legal system, in an attempt to address terrorism-related crimes, is increasingly abandoning the idea of a criminal trial as the place of assessment of an offence. Both at the legislative and the jurisprudential level, a fusion of preventive and repressive measures can be observed. This limits the application of fundamental rights without any verification of proportionality between the objective of protecting and the sacrifice of individual safeguards.

The temptation to act on emotional responses has not spared the Italian legislation and a few instruments created in the past few years became a concern (such as the special police surveillance), with a substantially repressive content, imposed without minimum guarantees by a jurisdiction that is only apparent, as long as the prerequisites of their application can be freely and unilaterally traced by the intelligence services, police or prosecutors, without adversarial process. Moreover, the willingness to make current instruments work contributes to limit the activity of uncritically collecting a massive quantity of data. Moreover, giving up targeted intelligence gathering and underestimating the importance of the human factor in investigating activity leads to giving up on differentiated criminal policies that can guarantee security while respecting rights.

³⁵⁶ See, besides the regulatory measures already quoted in the text: Legislative Decree n. 29 of 15 February 2016 (implementation of Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings); Legislative Decree n. 31 of 15 February 2016 (implementation of **Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial**); Legislative Decree n. 34 of 15 February 2016 (implementation of Council Framework Decision 2002/465/JHA on joint investigation teams); Legislative Decree n. 35 of 15 February 2016 (implementation of Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence); Legislative Decree n. 36 of 15 February 2016 (implementation of Council Framework Decision 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention); Legislative Decree n. 37 of 15 February 2016 (implementation of Council Framework Decision 2005/214 JHA on the application of the principle of mutual recognition to financial penalties); Legislative Decree n. 38 of 15 February 2016 (implementation of Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions); Legislative Decree n. 184 of 15 September 2016 (implementation of Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty).

6.6. Netherlands

Introduction and background

Between 1970 and 1978, the Netherlands suffered numerous terrorist attacks related to the nationalist struggle of the Moluccan people and the establishment of an independent Republic of the South Moluccas (RMS). The Moluccan people arrived in the Netherlands from the southern islands of the former Dutch colony, now modern-day Indonesia, shortly after WWII, as their political situation gave them few options but to flee their Pacific homeland.³⁵⁷ They arrived on the premise that they would be in the Netherlands temporarily, and that Dutch authorities would champion the ideal of an independent RMS. When this failed to transpire, second-generation Moluccan youths who had generally failed to integrate, lived in poor conditions, had a low level of education and a high level of unemployment turned to armed terrorist attacks, perhaps dissatisfied after 25 years of no significant progress in their struggle for independence.³⁵⁸

In total, the Moluccan terrorists committed eight attacks that led to the deaths of 11 people, including 1975 and 1977 train hostage crises³⁵⁹. Despite this, by 1979, the government still had not introduced anti-terrorist laws nor had it proposed specific provisions for terrorist crimes in the Criminal Code, although there were efforts to improve intelligence gathering, address social issues and instigate quick-response militarised Special Assistance Units.

Like many other European states, it was the Islamist terrorist attacks of September 2001 in the United States and the Madrid bombings in March 2004 that sparked major changes in anti-terror legislation. Crimes of Terrorism Act (2004) expanded what constituted a terrorist crime, such as recruitment for terrorist causes, as well extending the penalties of crimes that are committed with terrorist intent.³⁶⁰

In November 2004, Dutch film director, Theo van Gogh was murdered by an Islamist terrorist; this represented the first Islamist terror attack in the Netherlands. In February 2016, in the Dutch city of Enschede, six individuals were arrested in connection to an arson attack on a mosque. The offenders were charged with attempted arson with terrorist intent, and the court later decided this was a terrorist attack. Four attackers were sentenced to prison terms of four years. The decision marked the first right-wing terrorist attack in the Netherlands and the first terrorist attack in 12 years.³⁶¹

In 2016 and 2017, the Dutch Parliament introduced multiple anti-terrorism legislative measures as part of their *Comprehensive Action Plan to Combat Jihadism*³⁶² which is now regarded as the major terrorist threat. These measures are centred around the systematic observation, monitoring and restriction of movement of potential terrorists; an expansion of powers of the authorities that arguably restricts civil liberties for the purpose of protecting national security.

³⁵⁷ Janse, R., 'Fighting terrorism in the Netherlands; a historical perspective', *Utrecht Law Review*, 19/07/2005.

³⁵⁸ Ibid. p.60.

³⁵⁹ Rasser, M, *The Dutch Response to Moluccan Terrorism, 1970–1978*. Studies in Conflict & Terrorism, 2015.

³⁶⁰ Bulletin of Acts and Decrees of the Kingdom of the Netherlands. Act of 24 June 2004 to amend and supplement the Penal Code and some other laws in connection with terrorist crimes (Crimes of Terrorism Act)

³⁶¹ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017.

³⁶² National Coordinator for Security and Counterterrorism, *The Netherlands comprehensive action programme to combat jihadism: Overview of measures and actions*. Available at <https://english.nctv.nl/organisation/counterterrorism/The-Netherlands-comprehensive-action-programme-to-combat-jihadism/index.aspx>.

Overview of anti-terror legislation in the Netherlands

As part of the *Comprehensive Action Plan to Combat Jihadism*³⁶³, provisions were inserted into Article 14 of the Dutch Nationality Act that permits the Minister of Justice to revoke the Dutch citizenship of a person older than 16 years who voluntarily enters the armed services of a state or organisation involved in combat against the Kingdom of the Netherlands. The Minister of Justice may also withdraw Dutch citizenship of a person if it appears that he has joined an organisation that is on a list of organisations participating in an international or national armed conflict that represents a threat to national security. Joining in this respect includes preparatory offences, such as training for terrorism, even if no act of terrorism has been committed.³⁶⁴ An Amendment Law inserted in Articles 22A-22C of the new section 7A, offers legal protection to those who have had their citizenship revoked under Article 14. It provides the opportunity to appeal with the District Court of The Hague, or the Joint Court of Justice if they reside within the Kingdom but outside of the Netherlands. The interested party is also entitled to the appointment of a legal representative.³⁶⁵ It should be noted that the revocation of Dutch citizenship can only apply to dual citizens.

The Dutch Parliament adopted the Interim Act on Counterterrorism Administrative Measures that will last from 1 March 2017 until 1 March 2022. Under this new law, the Minister of Security and Justice has the capacity to restrict the freedom of movement of an individual if their conduct can be related to terrorist activities or the support of such activities under the pretext of a threat to national security.³⁶⁶ Article 2 outlines requirements for the individual to regularly report to the police and prohibits them from being located in certain parts of The Netherlands, or being in contact with specific individuals. It also precludes, at the Minister's discretion, the individual from leaving the country when there is justifiable reason to assume that he or she may desire to leave the Schengen Area to join a terrorist organisation. Article 4 states that the restrictive measures may be imposed for a period "not longer than is strictly necessary for the protection of national security" but not exceeding six months. The Minister may extend this for a second period that would also have a six-month limit. The new law allows for the amendment or repeal of measures applied in light on new evidence. Article 7 states that prior to any measure being imposed or amended, the Minister must consult with the mayor of the municipality where the affected person is domiciled unless the urgency of the situation precludes such a possibility. Intentional acts that contravene the obligations or prohibitions imposed under the provisions of restriction of freedom of movement is punishable with imprisonment for up to a year or a fine of 8,200 EUR.

The third new law, also part of the Interim Act on Counterterrorism Administrative Measures, contains amendments to the Dutch Passport Act that allows provisions for the automatic expiry of passports and identity cards when a ban from leaving the country has been imposed by the Minister of Security and Justice. The objective is to prevent suspected persons from leaving the country and travelling to areas associated with Jihad. The new law also gives the Minister powers to refuse a request for a travel document where a ban has been imposed on the person concerned.³⁶⁷

³⁶³ Government of the Netherlands, *Senate has adopted laws from the Integral Approach Jihadism action programme*, 07.02.2017. Available at <https://www.government.nl/latest/news/2017/02/07/senate-has-adopted-laws-from-the-integral-approach-jihadism-action-programme>

³⁶⁴ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017.

³⁶⁵ Netherlands: Three New Laws Adopted to Further Counterterrorism Efforts, 2017, available at: <http://www.loc.gov/law/foreign-news/article/netherlands-three-new-laws-adopted-to-further-counterterrorism-efforts/>

³⁶⁶ National Coordinator for Security and Counterterrorism New powers for dealing with terrorism.

³⁶⁷ Kingdom Act of 10 February 2017 amending the Passport Act.

Overview of the Netherlands recent anti-terrorism legislation

- **Netherlands Nationality Act (2015)** – A 2017 amendment to the Dutch Nationality Act permits the withdrawal of Dutch citizenship in the interest of national security.
- **Interim Act on Counterterrorism Administrative Measures (2017)** – Interim rules on the imposition of restraints on persons constituting a threat to national security or intending to join terrorist groups.
- **Dutch Passport Act (1991)** – 2017 amendment to the Passport Act in connection with the law cancelling the travel documents of persons on who a ban is imposed.

Defining a suspect of terrorism-related crimes

The Public Prosecution Office obtains information by means of reports generated by security services such as the National Coordinator for Security and Counterterrorism (NCTV) and the General Intelligence and Security Service (AIVD). Article 38 (1) of the Intelligence and Security Services Act 2002 states that if during the processing of data by a service it appears that this data may also be of interest to the investigation and prosecution of criminal offences, the relevant minister or, on his behalf, the head of the service can communicate this to the appropriate member of the Public Prosecution Office. The contents of the information processed by the intelligence and security services can produce grounds for reasonable suspicion of guilt for use by the public prosecutor.

A public prosecutor or senior police officer may order the arrest of any person, other than those apprehended on the spot, for alleged crimes. Arrested persons have the right to be brought to judge within a day pending investigation. In terrorism-related cases, the examining magistrate may initially order detention for 14 days on the lesser charge of "reasonable suspicion" rather than "serious suspicion" required for other crimes. Suspects may consult an attorney of their choosing prior to initial police questioning. Attorneys must be present during police questioning of suspects if a minor is involved or if the alleged offence carries a prison sentence of six years or more.

State powers and rights available to suspects

As part of the newly adopted Interim Act on Counterterrorism Administrative Measures, the Minister of Security and Justice has the power to restrict the freedom of movement of persons that are suspected of being associated with acts of terrorism, or are suspected that they will or have returned from participating in armed conflict with an organisation that poses a threat to national security. Such individuals may not have passed the threshold required for the commencement of criminal proceedings but instead have preventative actions imposed upon them due to being considered a security risk. The measures include prohibition from leaving the Schengen area; the revocation of travel documents; restriction from specified locations in The Netherlands; restriction from contact with specified people; a duty to report to the police where appropriate; and the provision of having one's location electronically monitored to ensure compliance. There is no requirement for judicial authorisation, and instead power is consolidated in the hands of the executive, the Minister of Security and Justice.

The legislation does not require that the individual in question be charged with any crime, nor is there a requirement for there to be an involvement in a specific crime for the above measures to be enacted.³⁶⁸ For example, the *suspicion* that an individual is intending to join an organisation that poses a threat to national security may be viewed to be sufficient for

³⁶⁸ Expert Interview.

the confiscation and revocation of travel documents; in such cases the burden of evidence required is less than what would be required for the criminal conviction of joining a terrorist organisation.³⁶⁹ This measure to restrict movement of an individual lasts for a maximum of six months, however this six-month period can be extended indefinitely.

An affected individual is able to appeal against imposed measures directly to an administrative court, and an administrative judge is able to review any facts and circumstances that become relevant after the date of the order. However, this judicial review is only available on procedural grounds and not on substance, and only after the control measure has been applied. That is to say that the administrative court will assess whether the Minister had sufficient information to impose the measure, rather than whether the individual did indeed pose a risk to national security raising questions as to whether the principle of presumption of innocence is upheld.³⁷⁰ Furthermore, it presents an issue if the executive decision to issue a control is based on classified information from Dutch intelligence and security services that neither the affected individual nor their counsel is able to access. The European Convention on Human Rights states that an affected person must be able to have access to sufficient information in order to effectively challenge any given control measure. Amnesty International has suggested that the new procedures contravene the ECtHR ruling in *Klass and others v Germany* which observed that "an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and proper procedure".³⁷¹ There is no provision for independent judicial oversight, nor is there provision for the suspension of a control measure while an appeal is pending.

The 2016 Dutch Nationality Act states that an affected individual can be considered a threat to national security on the basis of government claims that they have joined a "terrorist organisation" from a Cabinet-determined list, while additionally there is no exact definition as to what constitutes "joining" a terrorist group.³⁷² The premise of the bill is to prevent the re-entry of foreign terrorist fighters into the Netherlands. Persons subject to the stripping of Dutch nationality may include minors (persons from/up to? 16 years old) who would not need to have been charged or previously convicted of terrorism-related crimes. No prior judicial authorisation would be required. Upon deprivation of nationality, the affected individual would be declared an "unwanted alien" and would be prohibited from re-entering the Netherlands, prevented from voting and prohibited from re-uniting with family members.

The affected individual is entitled to be notified of the stripping order but in practice that may be logistically difficult as the individual may be abroad / in a conflict zone. An appeal may be lodged and the individual may appoint a lawyer and select a family member to represent them in their absence. If no appeal is lodged, within the required timeframe, an automatic appeal at the District Court of The Hague commences, with legal counsel appointed by the court to represent the affected individual. An appeal of the District Court ruling could then be lodged at the Council of State.

The rights of these suspects to a fair trial may be compromised given the possibility of inequality of access to information; the potential for ineffective representation *in absentia* for those that wish to challenge the stripping of their Dutch citizenship; and no effect to the order while an appeal is ongoing. Furthermore, in a letter to the Dutch government, Council

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ *Klass and others v Germany*, European Court of Human Rights, Application no. 5029/71, Judgment of 6 September 1978, para 55.

of Europe Human Rights Commissioner Niels Muižnieks has said that as Moroccan and Turkish nationals make up approximately 50% of Dutch dual nationals, they are more 'likely to be, de facto, primarily affected by the bill than others,' thus, the new law may be discriminatory.

In theory, it would be possible to revoke the nationality of an individual using administrative measures while a criminal procedure related to a terrorist crime is ongoing. In this theoretical setting, the individual would have had action taken against them without (yet) being convicted of crime, raising the question of whether punishment is due. This is further highlighted when the individual, subject to administrative measures, is not guaranteed the same rights and mechanisms of recourse, as is guaranteed via criminal proceedings.

The Netherlands is currently proposing an overhaul of the Dutch Intelligence and Security Act of 2002. The new law, if enacted, would permit Dutch security services to intercept the electronic communications of individuals so long as they were "case-specific", however, this limitation is not clearly defined. Given the broadness of the provision, it raises questions of whether sufficient safeguards will be in place to prevent abuse, or even whether "reasonable suspicion" would be required to instigate surveillance measures. The risk is of arbitrary interpretation, measures applied in a discriminatory manner and disproportionate use of measures that infringe on privacy rights of suspected persons. Furthermore, it is not explicit that the oversight from the newly proposed Review Board, tasked with ensuring the lawfulness of the decisions made by the Minister for the Interior and Kingdom Relations or the Minister of Defence to approve of surveillance measures, will be independent. The current recommendations from Oversight Board for AVID can be overruled by the relevant Minister.³⁷³

Exchanging information on terror suspects

The Dutch government coordinates and freely shares information related to foreign terrorist fighters with INTERPOL and Europol. The NCTV analyses threats related to terrorism with the aim of protecting national security and are also responsible for collaborating with other EU member states regarding the sharing of information to tackle terrorism.³⁷⁴

Internal collaboration between NCTV, AVID, police forces and municipalities via the use of 'Counter-terrorism infobox'³⁷⁵ is regarded as being an effective mechanism employed in recent years to share information with respect to those deemed to have posed a potential threat to Dutch society.³⁷⁶ Article 59 of the Intelligence and Security Services Act 2002 governs the interaction between the Dutch intelligence agencies and the security services of other countries. Request for information can be granted if the information is to be used for its intended purpose, if these intentions do not conflict with the interests of the Dutch services and if it is conducted with the proper performance of duties. Any requested assistance requires that the relevant Minister has given approval.

Nevertheless, there are no clear and accessible guidelines or framework that governs how security services share information with other EU Member States. There is little transparency with regard to how collaboration and sharing of information with foreign intelligence and security agencies affects the rights of suspects of terrorism-related crimes.³⁷⁷

³⁷³ Amnesty International, *Netherlands report*, 2016/2017.

³⁷⁴ National Coordinator for Security and Counterterrorism, *NCTV Annual Plan*, 2016. Available at: https://english.nctv.nl/binaries/nctv-annual-plan2016-def_tcm32-84228.pdf.

³⁷⁵ CT infobox. National Coordinator for Security and Counterterrorism. Available at https://english.nctv.nl/topics_a_z/CT-Infobox/index.aspx.

³⁷⁶ Expert interview.

³⁷⁷ Amnesty International, 2017, op. cit. A draft law (in article 67) prohibits disclosure of personal data whose correctness cannot be reasonably determined or which were processed over 10 years ago if no new data have been processed with respect to the person in question since that time; exceptionally disclosures to eligible foreign intelligence and security services regarding personal data can be permitted.

Case law in the Netherlands

Article 23 of the Dutch Passport Act (1991) provides for the revocation of travel documents if it is reasonably suspected that an individual will perform acts that pose a threat to security of The Kingdom of the Netherlands.³⁷⁸ There is no specific mention of terrorism in the Act but it has been used as the primary mechanism to prevent those suspected of terrorism-related activity from travelling beyond the Schengen area³⁷⁹. The decision to revoke the passport is legally enforced by the mayor of the municipality where the suspect is located. However, the decision to place an individual on a list of suspects is ultimately decided by the Minister of Justice, based upon information received by the security services. Given this disconnection, the recourse to appeal, which is provided, can be complex and lengthy as cases are first heard by an independent commission before being advanced to court. For example, the appeal must first be directed to the office of the mayor, but there is no recourse to appeal one's name appearing on the list that the Minister of Justice and security has approved.³⁸⁰

Due to the complexity of recourse there is a tendency for individuals, who have had their travel documents revoked, to not challenge the decision preferring to see out the two-year limit of the measure before re-applying for documents. Temporary travel documents can be issued to those that wish to travel outside the Schengen area in the case of emergencies (i.e. death of a family member in a third country).³⁸¹ There is no judicial review for the above administrative measure, and the length of the appeal process is further complicated by the inability of suspects to gain full access to the information that has been used to impose the measure.

Interim Act on Counterterrorism Administrative Measures (2017), which permits the Minister of Security and Justice to restrict the movement of an individual and order the electronic monitoring of individuals without judicial review, have, in practice, been used on individuals that have been acquitted of criminal charges. Mounir E. had previously been acquitted due to lack of evidence that he had joined a terrorist organisation, but he was restricted from certain areas in Rotterdam during the marathon in 2017.³⁸² It could be argued that restrictive administrative measures can be used to circumvent the burden of evidence that is required in criminal law. The effect of this could potentially lead to the infringement of rights of suspects of terrorism-related crimes, as the safeguards that are in place in the criminal court setting are absent from Minister-imposed restrictive measures.

³⁷⁸ The Passport Act (1991).

³⁷⁹ Expert Interview.

³⁸⁰ Ibid.

³⁸¹ Ibid.

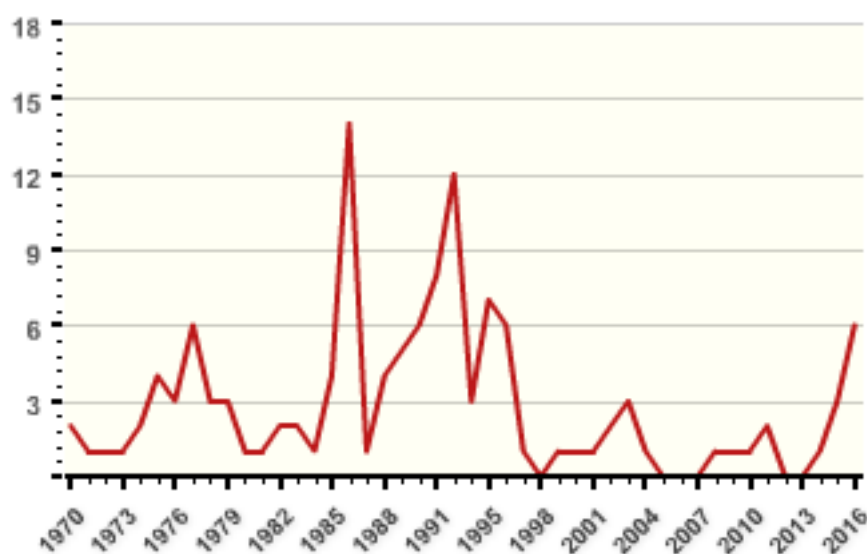
³⁸² Pieters, J., 'Acquitted terrorism suspect arrested before Rotterdam marathon', *NL Times*, 13.06.2017. Available at: <https://nltimes.nl/2017/06/13/acquitted-terrorism-suspect-arrested-rotterdam-marathon>.

Statistics on terrorism The Netherlands

Number of attacks

In 2016 there was only one failed, foiled, or completed terrorism attack in the Netherlands and this was attributed to right-wing terrorism.

Figure 18: Number of terrorist attacks in The Netherlands.³⁸³



Number of arrests

The Netherlands made 45 terrorism-related arrests in 2016. Thirty-six arrests were related to jihadist terrorism, six were related to right-wing terrorism, one to separatist movements whilst the remaining two arrests were unspecified. In 2015, all 20 terrorism-related arrests were attributed to jihadist terrorism.

Number of proceedings

The number of individuals in court proceedings for terrorist offences has been increasing year after year in the Netherlands. There were five, 18 and 42 terrorism-related concluded court proceedings for the years 2014, 2015, and 2016 respectively. Seventeen of the 18 2015 court proceedings were related to jihadist terrorism while 32 of the 42 court proceedings in 2016 were related to jihadist terrorism.

Number of convictions

Of the 18 court proceedings in 2015, there were 12 convictions. While the 42 court proceedings in 2016 led to 39 convictions.

Figure 19: Overview of the terrorism-related offences in The Netherlands.

Offence	Year ending December 2015	Year ending December 2016
Number of arrests	20	45
Number of court proceedings	18	42
Number of convictions	12	39

³⁸³ Global Terrorism Database, op. cit.

Conclusions and recommendations

The major feature of Netherlands recent anti-terror legislation has been the use of administrative measures. However, it has done so without implementing the necessary safeguards to ensure that fundamental and secondary human rights are secured, such as a fair opportunity to effectively challenge rulings by allowing bilateral access to information.

The new legislation can be described as too broad, in so much that it can be applied with too great a discretion by a politically-aligned administrative authority rather than a legally-trained independent judiciary. The Netherlands Institute for Human Rights has said of the measures that they "[do] not form a sufficiently clear and precise legal basis for the justification of the limitation of human rights".³⁸⁴ These administrative measures may be construed as a mechanism to by-pass stricter criminal proceedings that require a higher burden of evidence.

Furthermore, the recent amendment to the Netherlands Nationality Act permits the revocation of Dutch nationality if an individual is part of a terrorist group without the need for a criminal conviction. The provision for the revocation of citizenship already exists upon a conviction for a crime being committed highlighting the questionable value-add of the new administrative measures. The revocation of nationality also raises the important question of whether countries should take an international approach to tackling terrorism as opposed to simply 'export' high-threat individuals to third countries.

Furthermore, the inappropriate curtailing of rights that may discriminate against dual national Dutch citizens via administrative measures may have the effect of exacerbating issues, in what may be perceived as a stigmatising effect, further entrenching polarised communities and ultimately increasing the risk of radicalisation. In this way, administrative measures may infringe upon the right to non-discrimination.

Suspicion that a terrorism-related crime *may* occur based on the behaviour of the individual is sufficient to enforce restriction of freedom measures, which are imposed by an executive with no judicial oversight. The necessity of such a measure is questionable given there already exist sufficient provisions in criminal law to penalise those who have committed terrorist acts, preparing to commit acts or those that have joined a terrorist organisation. Furthermore, suspicion and imposition of measures based on information received / gathered by Dutch intelligence services effectively hands what should be judiciary powers to agencies that are fundamentally required to work with a level of secrecy. In so far as intelligence exchanged across borders may have been illegally obtained and / or by infringement to the rights of privacy, and given that the source of this information cannot be scrutinised as would be provided for during criminal proceedings, the increased use of administrative measures represents a risk to infringing upon the rights of terror-suspects.

³⁸⁴ NIHR report on Draft legislation, 20.09.2016.

6.7. Poland

Introduction and background

Following the erosion of the dominance of the Polish United Works' Party, which had held power since 1948, Poland began its transition to democracy with the Polish legislative election of 1989, producing a victory for the Solidarity party. Ten years later Poland joined NATO and in 2004, it became a full member of the European Union. In recent years the threat of a terrorist attack has remained at a relatively low level, with the main threat of acts of violence against civilians and paramilitary related activity coming from organised criminal groups or individuals with firearms or explosive devices, rather than terrorist organisations.³⁸⁵

In the wake of the 9/11 attacks, terrorism incidents linked to jihadist groups have become the most prominent source of terror incidents across the EU. Poland's membership of the European Union and the participation of its troops in the NATO/ISAF operation in Afghanistan have raised concerns over retaliatory threats from jihadist groups. Despite the Polish government's involvement in Afghanistan, the Ministry of Foreign Affairs states that "Poland is a country not directly threatened by terrorist attacks".³⁸⁶

The presence of domestic terrorist groups in Poland is relatively low.³⁸⁷ However, in recent years, with the evolution of the refugee crisis across Europe, armed right-wing and nationalist paramilitary movements have begun to develop, posing an increased domestic terror threat in Poland.³⁸⁸

Furthermore, access to the Internet has enabled terrorism-related ideology to spread. Poland's response to this threat has been the establishment of programmes such as a government computer emergency response team at the internal security agency. Developed in February 2008, its goal is to provide and build the capacity for the Polish public administration organisational units to protect against cyber threats.³⁸⁹

Overview of anti-terror legislation in Poland

Acts of a terrorist nature were originally addressed in the Criminal Code in the Law of 6 June 1997, under Article 258, which penalised the establishment, management and participation in an organised criminal group or association aimed at committing terrorist offences.

Before 2004, terrorist offences could only be treated as an ordinary offence under existing felonies in the Criminal Code, with "no possibility of applying aggravated punishment to the perpetrator of a terrorist act".³⁹⁰

However, following Poland's accession to the EU in 2004, it was required to recognise and introduce the concept of terrorist offences into national legislation. The term "terrorism" initially appeared in Polish criminal law in 2004, with the introduction of the Law of 16 April 2004 on the amendment of the Criminal Code and some other statutes. The Polish legislator

³⁸⁵ Ministry of Foreign Affairs. Republic of Poland, *Countering cyber-terrorism*. Available at: http://www.mfa.gov.pl/en/foreign_policy/security_policy/international_terrorism/countering_cyber_terrorism.

³⁸⁶ Ministry of Foreign Affairs. Republic of Poland, *Counter-Terrorism Activities in Poland*. Available at: http://www.msz.gov.pl/en/p/msz_en/foreign_policy/security_policy/international_terrorism/

³⁸⁷ Council of Europe, *Profiles on Counter-Terrorist Capacity: Poland*, 2012. Available at: <https://rm.coe.int/168064101d>.

³⁸⁸ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2016. Available at: <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2016>

³⁸⁹ Ministry of Foreign Affairs. Republic of Poland, *Countering cyber-terrorism*.

Available at: http://www.mfa.gov.pl/en/foreign_policy/security_policy/international_terrorism/countering_cyber_terrorism.

³⁹⁰ Michalska-Warias, A. *Fighting terrorism in Polish Criminal Law – the influence of EU legislation*. Available at: http://repozytorium.uwb.edu.pl/jspui/bitstream/11320/2027/1/BSP_10_2011_Michalska-Warias.pdf

created a new group of terrorist offences in the Criminal Code, introducing a broad concept of a terrorist offence, expanding the list of offences under the Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA) that could be considered terrorist offences.

The amendment to the Criminal Code introduced, as required by Article 5 of the Framework Decision resulted in heavier custodial sentences for terrorist offences than for the same offences committed in the absence of the special terrorist intent through changes to Article 65 of the Criminal Code. In order to comply with Article 2 of the Framework Decision, introducing the concept of offences related to a terrorist group, the Polish legislator made changes to Article 258 of the Criminal Code.

In October 2009, the Criminal Code was further amended in order to address the financing of terrorism-related activities, introducing for the first time, the offence of giving support to the perpetrator of a terrorist offence. In November 2011, the Criminal Code was further amended to introduce Article 255a, which penalised those who would publicly present or disseminate instruction on committing terror offences.

Since the conservative Law and Justice Party took office in Poland following the 25 October 2015 election, the Polish government has implemented a series of counter-terror legislation. This has drawn criticism from the Polish Ombudsman as well as numerous civil society organisations for their potential for violation of the fundamental human rights of the population and therefore of non-conformity with the Polish Constitution.

In January 2016, the Polish legislator amended the Police Act of 6 April 1990, expanding the powers of surveillance, "to allow secret surveillance for three months, which could be extended up to a period of 18 months, based on a broad set of offences and without a requirement to consider proportionality".³⁹¹ Similarly, it enabled for metadata to be accessed directly by the police, without previously obtaining a court order, which included confidential information covered by professional privilege.

In preparation for the NATO summit in Poland in July 2016, the Ministry of Interior discussed the need to quickly adopt new counter-terrorism legislation in order to have procedures in place for the summit. In response, new counter-terrorism legislation was introduced in June 2016, the Law on anti-terrorist activities, which consolidated extensive new powers in the Internal Security Agency, while introducing no independent oversight mechanism of these new powers.

Defining a suspect of terrorism-related crimes

Prior to the introduction of the new counter-terrorism legislation in 2016, no classification existed for suspects of terrorism-related crimes beyond those of a suspect of any offence as defined in the Article 71 of the Polish Criminal Code which states that:

- A person shall be considered a **suspect** if the order has been made about presenting the charges to the person, or the charges have been presented to the person directly (without the order) in relation to interrogating him as a suspect.
- A person against whom an indictment has been filed, and also a person with respect to whom the state prosecutor conditionally discontinued proceedings, shall be considered an **accused**.
- Whenever the term "accused" is used generally in the present Code, such provisions shall apply to the suspect as well.³⁹²

³⁹¹ Amnesty International, *Amnesty International Report: Poland, 2016/2017*. Available at: <https://www.amnesty.org/en/countries/europe-and-central-asia/poland/report-poland/#endnote-3>

³⁹² Polish Code of Criminal Procedure.

The Criminal Code penalises individual terrorist acts on the basis of general criminal provisions. The amendments to Article 115 of the Polish Criminal Code in 2004 introduced the broad definition of a terrorist suspect as "someone suspected of committing an act intended to seriously intimidate many people [or to] compel the public authority of the Republic of Poland or of the other state or of the international organization to undertake or abandon specific actions [or to] to cause serious disturbance to the constitutional system or to the economy of the Republic of Poland, of the other state or international organization and a threat to commit such an act."³⁹³

This broad definition of who can be defined as a terrorist suspect was not amended by the new anti-terror legislation introduced in 2016. The potential of the broad definition of a terrorist suspect to lead to an encroachment upon individual's freedom of expression and peaceful assembly means that they may not be tailored effectively toward distinguishing between terror suspects and everyday citizens expressing their religious, political or ideological views. Moreover, any person who "could be connected with incidents of a terrorist nature" will be put on a list maintained by the Internal Security Agency.³⁹⁴

However, with the introduction of new counter-terrorism legislation in 2016, new provisions introduced the right of the Head of the Internal Security Services to initiate secret surveillance of anyone suspected of terrorism-related crimes, for up to up to three months, without prior authorisation of the Courts as well as a further reduction in the safeguards when suspects are not Polish citizens. This secret surveillance differed from the Article 71's classification that "a person shall be considered a suspect if the order has been made about presenting the charges to the person or the charges have been presented to the person directly", as the new legislation contains no provisions for notifying the suspect at a relevant point regarding their placement on a surveillance list.³⁹⁵ This legislation, therefore, expands the powers of the Internal Security Agency to declare someone a suspect while reducing the necessary evidence base for such suspicion through the removal of prosecutor oversight.

Counter-terrorism is addressed at three fundamental levels, strategical, operational and tactical. At the tactical level the prevention and combating of terror threats in Poland is carried out by various institutions in particular the Internal Security Agency, the police, the Border Guard and the Inspectoral General of Financial Information. At the operational level, it is the responsibility of the Counter Terrorism Centre functioning within the structures of the Internal Security Agency. Each of these institutions bear responsibility in conjunction with prosecutors in directly declaring someone as a terror suspect.³⁹⁶

State powers and rights available to suspects

The Polish government introduced further anti-terror legislation in 2016, which contains a number of controversial provisions concerning the rights of individuals. Despite objections from the Polish Ombudsman, the anti-terrorism bill was adopted by Parliament and afterwards signed into law by President Andrzej Duda. The four areas of the new legislation, most crucial to the impact on the observance of the rights and individual freedoms, was outlined by the Polish Ombudsman and is illustrated in the table below.

³⁹³ Act of 6 June 1997, Polish Criminal Code.

³⁹⁴ Interview with study expert.

³⁹⁵ Office of the Polish Ombudsman's letter to President of the Polish Republic, 20 June 2016.

³⁹⁶ Council of Europe. *Profiles on Counter-Terrorist Capacity: Poland*, 2012. Available at: <https://rm.coe.int/168064101d>.

Table 6: Appeal of the Polish Ombudsman to the President on the anti-terrorist law.³⁹⁷

Polish Ombudsman's appeal to the President of the Republic of Poland on the new counter-terror legislation 2016
<p>1) Grant of new ABW (Polish domestic intelligence agency) powers, without any control over its activities</p> <ul style="list-style-type: none"> • The head of the ABW is to keep a list of people suspected of terrorist activity. The person to whom this list is to be described is not precise since there are no procedures for reviewing the quality of data. • The head of the ABW may order a wiretap against a non-citizen if he or she is suspected of conducting terrorist activities. This is not subject to court review. If this issue is addressed in the context of other recently amended provisions, it can be concluded that the use of evidence obtained in the course of these activities will not be subject to any control.
<p>2) Disproportionate restrictions on human and civil rights and freedoms, in particular the right to privacy and the right to public assembly</p> <ul style="list-style-type: none"> • Substantial doubts arise with the provision of blocking the internet • Mass gatherings and events may be banned in the event of a third or fourth degree of alarm. The prohibition itself would not raise doubts, but it is unclear how and when the individual alert levels are introduced and what is a "terrorist event". • The head of the ABW gets access to all data collected in public registers and records without reviews.
<p>3) Special measures against aliens, including citizens of the European Union</p> <ul style="list-style-type: none"> • Although the Constitutional Tribunal allowed for the possibility of differentiating standards for citizens and non-citizens alien rights (eavesdropping, the possibility of downloading biometric data) should not be waived completely. The premises for which the service is taking action against these persons are based, in accordance with the law, mainly on suspicion and doubt. There is no procedure to verify the correctness of the action.
<p>4) Granting the right to use special weapons</p> <ul style="list-style-type: none"> • In its Article 23, the Law regulates the use of firearms to save lives of terrorist victims. The meaning of this provision can only be known by analysing the key concepts of the "terrorist event" or "anti-terrorist activity" which are not precise.

While the Ombudsman stresses that it is "the duty of the state to give the relevant powers to the services responsible for the fight against terrorism", it similarly highlights that this "cannot interfere with human rights and freedoms in a disproportionate way".³⁹⁸ The new anti-terror legislation poses a potential threat to the rights of terror suspects, consolidating and expanding the powers of the Agencja Bezpieczeństwa Wewnętrznego (ABW), Poland's Internal Security Agency (ISA), providing no mechanism for independent oversight of its

³⁹⁷ The Polish Ombudsman, *Appeal of the ROP to the President on the anti-terrorist law*. Available at: <https://www.rpo.gov.pl/pl/content/apel-rpo-do-prezydenta-w-sprawie-ustawy-antyterrorystycznej> .

³⁹⁸ Ibid.

activities with regard to terror suspects. The consolidation and expansion of powers, paired with little independent oversight is an environment conducive to potential abuses of power, as it pertains to limiting a suspect's rights. Furthermore, the ISA often works covertly and most operations are conducted entirely in secret, severely increasing the risk of abuses of power and thus abuses of a suspect's rights.

The expansion of surveillance powers brought about by the counter terrorism bill, coupled with the expansion of surveillance powers inherent in the Police Act 2016 poses a threat to the rights of suspects and possibly the civilian population as a whole. As laid out in Article 6 of the new legislation, the Head of the Internal Security Agency (ISA) shall maintain a register including information on the following groups of people:

Poland Law on anti-terrorist activities 2016³⁹⁹
<ol style="list-style-type: none"> 1) Persons involved in activities on behalf of terrorist organisations or organisations connected with terrorist activities or members of such organisations; 2) Wanted persons involved in terrorist activities or persons suspected of committing offences of a terrorist nature, with regard to whom an arrest or a search warrant has been issued or a wanted letter has been decided on, as well as persons who are wanted and subject to the European Arrest Warrant.; 3) Persons with regard to whom there is a justified suspicion that they may be involved in activities aimed at committing an offence of a terrorist nature, including persons who might present a threat to civil aviation 4) Persons participating in terrorist training or undertaking a journey with the aim to commit an offence of a terrorist nature.

Regarding the third category, persons with regard to whom there is a justified suspicion that they may be involved in activities aimed at committing an offence of a terrorist nature, including persons who might present a threat to civil aviation, there exists significant room for interpretation. Polish citizens who lost their passport overseas or individuals visiting an imam in prison could be included on the list under this category. The ISA, therefore, have significant room for interpretation for the inclusion of individuals on this list and individuals do not have the right to challenge their inclusion on the list, with substantial unintended consequences for these individuals. For example, a Polish citizen applying for a job may be rejected due to his inclusion on the list and only be made aware of his inclusion following this rejection, with no further right to redress. The Polish Ombudsman highlighted the need for some procedure and oversight or independent body governing an individual's inclusion in the list.

Citizens suspected of connection with incidents of terror could be placed on a list unknowingly and with no right of challenge. There are, therefore, concerns that an individual's right to privacy will be infringed in the course of police and ISA operations, with little or no recourse or remedy for those subjected to unlawful surveillance measures.⁴⁰⁰ The rights of the suspect may be jeopardised as there are no provisions for notifying the suspect at a relevant point regarding their placement on such a list, permitting challenges to placement on the list, or a process to get one's name removed from the list.⁴⁰¹

³⁹⁹ Law of 10 June 2016 on anti-terrorist activities and on the amendments to other acts.

⁴⁰⁰ 'Poland's Anti-Terror Law', Human Rights First, 2016. Available at: <https://www.humanrightsfirst.org/sites/default/files/Poland-Anti-Terror-Law-Brief.pdf>.

⁴⁰¹ Office of the Polish Ombudsman's letter to President of the Polish Republic, 20.06.2016.

Suspects' rights may be further limited by the new law's provision that extends pre-trial detention for the newly identified category of 'terror suspect' from a maximum of 48 hours to 14 days. Furthermore, the definition of what constitutes 'an act of terrorist nature' has become broader, and therefore increasing the authorities power and scope of interpretation of terrorism-related offences, forming a crucial aspect of the law's ability to limit the rights of both suspects and individuals in Poland as a whole. In a regulation that accompanies the law, information that can be used to determine if a person is a suspect appears to place added suspicion on Islam, Muslims and foreign nationals. For example, "information indicating the intent of a foreign national from a 'high risk' country coming to Poland for academic training or to study" is an example of information that can be used to determine whether a person is suspected of association with or involvement in an "act of a terrorist nature". In this case the suspects' rights may be limited through significant potential for discrimination along racial, ethical or religious grounds, with significant discretion for the ISA and no oversight of the ground upon which the suspicion is based. The suspects' rights may be further reduced through the deprivation of one's liberty for an extended and arguably unreasonable period of time.⁴⁰²

The new law could again limit suspects' rights through limiting freedom of expression. The bill gives the right for the director of the ISA to immediately block specific websites without prior judicial consent, and without the right to redress in the form of clarity from the ISA on content that was deemed of a terrorist nature. This granted authority presents a potential platform to suppress a suspect's freedom of expression, preceding judicial oversight. Coupled with the vague definition of terrorism-related activities, this provision further develops an environment conducive to abuses of power by Polish authorities.⁴⁰³

In contrast to the current situation, as traditionally the Polish Criminal Code did not specify specific rights to redress for terror offences, the rights and procedures of redress of suspects were the same as suspects of non-terrorism-related offences. However, with the introduction of the new legislation in 2016, suspects of terrorism-related offences, as deemed by the ISA, would not have any right to redress as the suspect may never know they were under surveillance or under what suspicion, in stark contrast to normal criminal procedure. Furthermore, the new legislation directly states that charges can be brought against suspects of terrorism-related offences without the need to inform suspects of the information gathered through surveillance on which the charge is based, and has introduced the ability to make charges based on secret surveillance.⁴⁰⁴

This view was supported by the Polish Ombudsman who, on its adoption, referred the new legislation to the Constitutional Tribunal stating its belief that nine clauses in the new legislation infringe the country's constitution, the European Union's Charter of Fundamental Rights and the European Convention on Human Rights. As of November 2017, the case was pending before the Tribunal. The Ombudsman argued that the new law violates the right to privacy and freedom of communication of individuals in Poland, that the provisions are significantly unclear on the grounds for surveillance on Polish citizens, for arresting individuals, banning demonstrations or websites, disconnecting citizens from the internet and on the grounds for the surveillance of foreign nationals in Poland. The new legislation introduced in 2016 was not consulted upon with human rights institutions, nor any measure to gauge the public opinion on such measures.

With regard to Article 10 in the new anti-terrorism legislation, concerning the possibility to collect biometric data from foreign nationals, the article assigns this competence to police,

⁴⁰² Amnesty International, Poland: *Counter-terrorism bill would give security service unchecked power*, 2016. Available at: <https://www.amnesty.org/en/documents/eur37/4263/2016/en/>.

⁴⁰³ *Ibid.*

⁴⁰⁴ Interview with experts.

ISA and border authorities. The conditions on which this provision are enacted rest upon when there is doubt about the identity of the individual in question, when there is suspicion that they crossed the border illegally, when there is suspicion the individual intends to stay illegally in Poland or if there is a suspicion of a link between the individual with the actions of a terrorist character. Given the broad definition of an action of a terrorist character, discussed above, there is significant scope for a broad interpretation of this by authorities, and no judicial oversight of the basis of this suspicion.

Exchanging information on terror suspects

There is extremely limited publicly available information with regard to information exchange mechanisms in use by Polish authorities. While it is the ISA that can initiate surveillance without the approval of a court, they may delegate this competence of the physical surveillance to the police and therefore information is exchanged on individual aspects.

However, given that the new legislation includes no oversight over the content of the ISA suspect and surveillance list, there is limited information available regarding the procedures involved in this information exchange. Similarly, as the list itself is secret, the ISA has discretion to exchange this information with other Member States that have greater evidence-based requirements for declaring individuals as suspects.

Statistics on terrorism in Poland

The statistics show that in recent years Poland has been relatively unaffected by acts of terror. The scarcity of terrorism-related activity in Poland is even more striking when viewed relative to its European counterparts.

Number of attacks

Of the 142 failed, foiled or completed attacks in EU Member States in 2016, not one of them was reported by Poland. In 2015, of the 211 attacks carried out only four took place in Poland.

Number of suspects, proceedings and convictions

Prior to the introduction of the recent legislation, due to the fact that suspects, proceedings, arrest and convictions were categorised under the normal Polish Criminal Code, statistics on individuals in these categories for terrorism-related offences were not reported.

However, with the introduction of the new legislation and its implications for the categorisation of individuals as suspects, a distinct group emerged that were specifically classified as suspects of terrorism-related offences outside of the Criminal Code by the ISA. The number of suspects under terrorism-related offences in Poland and those under surveillance by ISA is not publicly available. Despite numerous requests from civil society members, the ISA has refused to release information on the number of suspects, arrests, proceedings and convictions of terrorism-related suspects under the new legislation. The response to civil society members has been that this information is secret due to national security concerns. Following a motion from the Ombudsman and several civil society members, the administrative court refused the request to force the ISA to publicly release information on its actions under the new legislation⁴⁰⁵.

Number of arrests

Terrorism related arrests numbered 1077 and 1002 in Member States in 2015 and 2016 respectively. Europol reported that Poland made only four of these arrests in 2015 and six in

⁴⁰⁵ Interview with expert.

2016, equating to 0.4% and 0.6% of arrests in all Member States. Of these arrests, five were for suspects with jihadist motivation, and one was due to right-wing terrorism motivations.

However, as discussed above, there is limited visibility on the number of arrests under this new legislation introduced in 2016.

Case law in Poland

As there has not been a significant increase in proceedings since the introduction of the legislation and on investigation and consultation with experts, there is no case law for the practical application of the new legislative provisions introduced in 2016.

With regard to the tendency to discrimination enabled through the expanded definition of terrorism-related offences, considerable evidence exists for the intent, if not the successful use, of these policies for discrimination based on ethnic and religious grounds. This is evidenced by the multiple statements by the Polish Interior Ministry, Polish Prime Minister, Polish European Parliament deputy stating their belief in a link between tightening immigration policy towards Muslim refugees and reducing the risk terror attacks in Poland⁴⁰⁶.

Conclusions and recommendations

As described above, the new counter-terrorism legislation introduced in 2016 constitutes a significant risk to the infringement of the rights of individuals in Poland, both citizens and foreign nationals. Given the significant expansion of the state's powers coupled with limited oversight and right to redress, and the reality of the low terrorism threat in Poland, substantial questions have arisen over the proportionality of the new legislation.

Appeal of the Polish Ombudsman to the President on the anti-terrorist law⁴⁰⁷

"Although the bill was motivated by a good cause – setting regulations in order and boosting domestic security – [the document] lacks precision and detail, giving special services free rein and unchecked power."

The vague definition of acts of a terrorist nature used throughout the new legislation has created a significant lack of clarity for individuals and therefore substantial room for a broad interpretation by state authorities of terrorism-related offences. The reduction in oversight of state powers regarding terrorism-related offences presents an opportunity for potential abuse by national authorities.

As outlined by the Polish ombudsman, these new counter-terrorism laws contain clauses that infringe the country's constitution, the EU's Charter of Fundamental Rights and the European Convention on Human Rights, violating the right to privacy, the right to redress, the right to a fair trial and freedom of communication.

⁴⁰⁶"Polish PM draws link between London attack and EU migrant policy", *Reuters*. Available at: <https://uk.reuters.com/article/uk-europe-migrants-poland/polish-pm-draws-link-between-london-attack-and-eu-migrant-policy-idUKKBN16U0TC>

⁴⁰⁷ Appeal of the Polish Ombudsman to the President on the anti-terrorist law. VII.520.6.2016.

6.8. Spain

Introduction and background

Spain has a long history of terrorist violence, which has largely been due to the Basque nationalist movement and the separatist terrorist organisation, Euskadi Ta Askatasuna (ETA). From its inception in 1959 during the repressive Franco dictatorship, ETA have been responsible for the murder of over 800 civilians and security personnel, their objective being the greater independence of the Basque country.⁴⁰⁸ As a result of the country's historic struggle against domestic terror, Spain has incorporated anti-terrorism measures into the Spanish Criminal Code.⁴⁰⁹ In this way, it differs from some other EU Member States that rely on emergency counter-terrorism measures, and instead, individuals that breach the Criminal Code for terrorism-related crimes are subject to aggravated punishment.

Throughout its period of activity, ETA members and supporters have routinely accused Spanish authorities of abuse of its rights and torture.⁴¹⁰ Furthermore, there have been claims that certain convictions have been as a result of confessions obtained under duress when suspects were held, *incommunicado*, in detention centres without being charged.⁴¹¹ However, most of these have been proven to be unfounded.⁴¹²

ETA declared a ceasefire in 2011 and, as of April 2017, disarmed indefinitely, leaving jihadist terrorism as the main terrorist threat within the country, evidenced by the most recent attack in Barcelona that left 16 civilians dead and approximately 120 people injured. Before that, in 2004, Spain experienced one of the deadliest terrorist attacks in Europe as 10 bombs were detonated on trains that killed 191 people and wounded approximately 1,800 more. Al-Qaeda claimed responsibility for the attack although no direct link has been established.⁴¹³

Like other EU Member States, Spain has been challenged with increasing Islamist radicalisation over recent years evidenced by the consistent high number of annual terrorism-related arrests.⁴¹⁴ Barcelona and Madrid, as well as Spain's North African cities of Melilla and Ceuta, have been identified as hotspots for the fomentation of jihadist terrorist cells and represent a particular challenge in this context. In response, Spain has introduced new legislation to equip itself with anti- and counter-terror mechanisms to combat terrorism. Recently, Spain introduced Law 2/2015, that has expanded the definition of terrorism which Amnesty International have described as too vague, as to potentially infringe on human rights.⁴¹⁵

Overview of anti-terror legislation In Spain

Spain has not introduced specific "crisis-driven"⁴¹⁶ anti-terrorism legislation, unlike other Member States that have devised legislature for the introduction of "temporary" and / or

⁴⁰⁸ Factbox: Key facts about Basque separatist group ETA, 2011. Reuters Staff.

⁴⁰⁹ *Incommunicado: Spain's Struggle with Terrorism*, 2017, available at: https://www.academia.edu/6241153/Incommunicado_Spains_Struggle_with_Terrorism.

⁴¹⁰ *Incommunicado detention and torture: Assessments using the Istanbul protocol*. Olatz Barrenetxea Larrondo.

⁴¹¹ *Ibid.*

⁴¹² Saikia, J, Stepanova, E, *Terrorism: Patterns of Internationalization*, 2009.

⁴¹³ [Trial Opens in Madrid for Train Bombings That Killed](#), *The Associated Press*, 15 February 2007: "The cell was inspired by al-Qaida but had no direct links to it, nor did it receive financing from Osama bin Laden's terrorist organization, Spanish investigators say".

⁴¹⁴ *Spain 2016 Crime & Safety Report*, 2016, available at: <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=19045>.

⁴¹⁵ *Spain: New Counter-Terrorism Proposals Would Infringe Basic Human Rights*, 2015, available at: <http://www.amnesty.eu/en/news/press-releases/eu/human-rights-in-the-eu/human-rights-and-counter-terrorism/spain-new-counter-terrorism-proposals-would-infringe-basic-human-rights-0851/#.WaZ55pOGO8V>

⁴¹⁶ The European Union's Policies on Counter-Terrorism: The EU's counter-terrorism agenda has been to a large extent 'crisis-driven', (1) 9/11; (2) the Madrid and London bombings; (3) the Syrian civil war and rise of ISIL, the foreign (terrorist) fighters phenomenon, and the attacks on Charlie Hebdo, the Bataclan and Brussel/Zaventem; (4) the Nice and Berlin attacks.

"emergency" laws to give authorities greater power in their combat against jihadist terrorism. By virtue of Article 55(2) of the 1978 Spanish Constitution, the state has the capacity to pass Organic Laws in times of "emergency", that can suspend the rights of its citizens but to date this mechanism has not been utilised.

The Spanish Criminal Code classifies a terrorist / terrorist group as one that aims to cause serious disruption to public order; undermine constitutional order; engenders an intense feeling of fear in members of the population so that citizens are unable to exercise the fundamental rights inherent in their ordinary coexistence as members of society which is, particularly, caused by the use of the weapons in their possession and by the type of crimes they commit, as defined in the Criminal Code.

A fundamental difference in Spanish Criminal Procedure Code compared to other EU Member States is the possibility to apply *incommunicado* detentions, as provided by Articles 509, 520A and 527. These provisions mean that certain rights of suspects of terrorism-related crimes can be temporarily curtailed during *incommunicado* detention and, with judicial authorisation, the length of time terrorist suspects can be detained in police custody without charge can be extended by 48 hours, from 72 hours to 120 hours.

Overview of Spain's recent anti-terrorism legislation

- In accordance with the EU Framework Decisions, Spain has integrated the criminalisation of terrorism financing into their Criminal Code, Article 576. Money laundering and terrorist financing is also addressed in law 10/2010 and has been further amended by royal decree 423/2015.⁴¹⁷
- In 2015 Spain passed Organic Law 2/2015, which amended the Organic Law of 10/1995 of the Criminal Code on crimes relating to terrorism, which expanded legislation to include punishment for the "incitement", "glorification", and "justification" of terrorism.⁴¹⁸
- A new provision in Article 575 establishes as an offence any type of indoctrination or training for combat or military purposes that has the purpose of preparing an individual to commit any terrorism-related crime. Access to communication services with terrorist content is now regarded as a terrorist offence. The provision applies to those preparing to commit a terrorism-related crime by habitually accessing or acquiring content online for the purpose of, or suitable for, the promotion of membership in a terrorist group, or for cooperation with any such group or their goals.⁴¹⁹
- Article 578 (4) introduces the possibility for judges to order the destruction of books, files, documents, items or any other support used to commit terrorist offences, including the possibility to order the removal of the content accessible through electronic services including the internet.⁴²⁰

⁴¹⁷ The European Union's Policies on Counter-Terrorism Relevance, Coherence and Effectiveness, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU\(2017\)583124_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU(2017)583124_EN.pdf).

⁴¹⁸ Official State Gazette of Spain. Available at: <https://www.boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3440.pdf>

⁴¹⁹ Ibid.

⁴²⁰ 'Eurojust's Views on the Phenomenon and the Criminal Justice Response. Third Eurojust Report', *Foreign Terrorist Fighters*, October 2015.

Defining a suspect of terrorism-related crimes

In 2015 Spain amended its Criminal Procedure Code to include the terms "*investigado*" ("investigated" person) which refers to a suspect under investigation in an examining phase, and "*encausado*" (an accused person) within a criminal proceeding (once he or she has been indicted).⁴²¹ Previously the term "*imputado*" had been used to describe a person throughout the investigation. The logic behind the change was to strengthen the presumption of innocence that should accompany citizens during investigations. In this regard, a suspect of terrorism-related crimes is not specifically defined, but in practice, is suspected when plausible information from police and intelligence services is received that the individual has committed an offence.⁴²²

The National Police (Cuerpo Nacional de Policía) or the *Guardia Civil* are responsible for combating terrorism on a national and international level while additional competencies are granted to regional police authorities (Basque country and Catalonia) to investigate terrorist suspects. They can arrest and detain terrorist suspects *incommunicado* without charge for no longer than is "absolute necessary", for up to five days, if granted the authorisation by the competent judge.

The competency to judge whether a crime is considered a terrorist offence lies with the Audiencia Nacional, a court with jurisdiction over the entire national territory located in Madrid. It was established in 1977 before which time terrorist crimes were tried in military courts.⁴²³

State powers and rights available to suspects

Information of interest received from domestic and foreign intelligence bodies, or witness statements may be enough for the police to begin an investigation against an individual.⁴²⁴ The suspected individual may never become aware that he was under police investigation, and this may never reach the level of the judiciary unless special investigatory measures requiring judicial warrant are necessary. Such special investigatory measures include search and seizure, which requires authorisation by the competent judge. Exceptionally in cases of urgency, the Minister of Interior and the Secretary of State of Interior can order the wiretapping, which must be communicated immediately to a competent judge who has the authority to grant or deny the request.⁴²⁵

There are further restrictions on the rights of persons that are suspected to be members of armed groups, rebels or terrorists as set out by the Code of Criminal Procedure. According to Article 520 bis (1) the normal maximum 72-hour limit to pre-charge police custody (as outlined in Article 17 of the Constitution of 1978) may be extended for a further 48 hours in cases regarding terrorist suspects, so long as the extension is requested within the first 48 hours of detention and approved by a competent judge within the following 24 hours.

Incommunicado detention is a significant but controversial feature of Spain's counter-terror initiatives that allows authorities to detain terror suspects without charge for three to five days and limits some of the rights usually permitted to non-terrorist suspects. If authorised by the judge, terror suspects are temporarily deprived of their right to notify a third person of their choice regarding their arrest; prohibited from receiving or sending correspondence or communications; and they are denied visitation rights. Furthermore, they are denied

⁴²¹ Organic Law 13/2015 amending the Criminal Procedure Law to strengthen procedural guarantees and regulate technology-related investigation measures.

⁴²² Expert interview.

⁴²³ Sottiaux, S, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution. Human rights law in perspective*, Hart Publishing, 29.02.2008.

⁴²⁴ Expert interview.

⁴²⁵ Ibid.

choice of a lawyer but rather, a legal aid attorney is designated to them; and they are prohibited from communicating with the legal aid attorney in private. They do, however, maintain all other fundamental rights of suspects under detention: the right to understand the basis of their arrest and their rights; the right to free access to an interpreter if so required; the right to remain silent as to not incriminate themselves; the right to medical examination by a state-appointed doctor; and the right to have their consulate notified if they are a foreign national.

Detainees are permitted to challenge the *incommunicado* detention in court but secret proceedings mean that the defence does not always have access to the prosecutor's evidence at this initial stage, thus severely hampering the capacity for detainees to mount an adequate defence against the detention. If charged, pre-trial detention for up to two years, with possible extension for another maximum period of two years can be authorised and the investigating magistrate can request that information remain secret for 30 days, which can be consecutively renewed by periods of one month upon reasoned judicial decision, up to the duration of the four-year period.⁴²⁶

Judicial oversight is granted by the Audiencia Nacional, the only court that has competency in terrorist cases in Spain. Historically, police and Guardia Civil forces have been prosecuted and convicted for torture offences for treatment of suspected members of the terrorist group ETA, proving that there are mechanisms in place to safeguard the rights of suspects of terrorism-related crimes.⁴²⁷

Exchanging information on terror suspects

INTERPOL, Europol and Eurojust all provide mechanisms of information exchange for Spain. Spain is a founding member of the Global Counterterrorism Forum, and is also a member of the Council of Europe and the OSCE. Since 2004, Spain has been part of a working group on violent Islamist extremism known as the 5 + 5. The group brings together defence ministers or their designees from five European countries (Spain, Portugal, France, Italy, and Malta) and five Maghreb countries (Mauritania, Morocco, Algeria, Tunisia, and Libya) and has the mission of exchanging information and discussing security matters including operational implications on the threat from violent Islamist extremists in the Europe.⁴²⁸

Information sharing also occurs outside of formalised structures. The judiciary in Spain cooperate directly with their European counterparts to exchange information on open cases. There is also communication between police forces of different Member States and intelligence services. These informal routes of communication are deemed to be useful and permit the quick exchange of valuable information.⁴²⁹ There are no provisions in the Spanish legislation on international judicial exchange of information with regard to suspects of terrorism-related crimes, and no safeguard is foreseen.⁴³⁰ Data transferred, with respect to the rights of suspects, depends on the receiving country and their national legislation, trusting that the information will be used proportionately, and with integrity by the receiving official.⁴³¹ Exchange of letters rogatory and police information have proven to be "enormously

⁴²⁶ Expert Interview.

⁴²⁷ 'Spanish police jailed for torture of Basque ETA members'. Available at: <http://www.bbc.co.uk/news/world-europe-12096655>

⁴²⁸ Spanish Ministry of Foreign Affairs and Cooperation, *Spain and the Maghreb*. Available at: <http://www.exteriores.gob.es/Portal/en/PoliticaExteriorCooperacion/OrienteProximoMagreb/Paginas/EspElMagreb.aspx>.

⁴²⁹ Expert interview.

⁴³⁰ Ibid.

⁴³¹ Ibid.

effective" at enhancing the information at the intelligence level between Spain, other EU member states, and third-party countries.⁴³²

Case law in Spain

Rights International Spain⁴³³ and the UN Human Rights Committee⁴³⁴ have criticised *incommunicado* detention and have insisted that it be abolished. Such detentions have been described to facilitate degrading and inhuman conditions, and even torture in themselves due to their inherent secretive nature. There have been consistent claims of abuse and torture at the hands of the Spanish authorities by persons accused of terrorism and subject to *incommunicado* detention. The UN Special Rapporteur on Torture concluded in 2004 that the *incommunicado* detention system presented the "opportunity for torture or ill-treatment".⁴³⁵

Oihan Unai Ataun Rojo is a Spanish citizen arrested on 10 November 2008 by the police after he was accused of being a member of SEGI, a branch of ETA. He was held *incommunicado* for four days in the course of judicial investigations, and alleged that he was the subject of physical and psychological threats and violence. He claimed to have been struck in the head and face, asphyxiated several times with a plastic bag and obliged to do strenuous exercise in the course of questioning. While in police custody he was seen by doctors on several occasions, although these consultations were not conducted privately and he did not have the right to be examined by a doctor of his choice.

He appeared before the central investigating judge at the Audiencia Nacional on 14 November 2008 where he stated that he had been the subject of ill-treatment during his time in police custody. On 6 April 2009, Mr. Ataun Rojo again lodged a complaint to the investigating judge in Bilbao; where he requested that video evidence from the security cameras where he had been detained should be submitted to the court as evidence to support his claims. He further requested that the police officers involved should be identified and questioned. The judge considered that in view of the reports prepared by the forensic doctors and his statement, torture could not be established.

His case was submitted and reviewed by the European Court of Human Rights as Mr. Ataun Rojo had an arguable complaint, under Article 3 ECHR. The ECtHR ruled that Spanish authorities should have carried out an "in-depth and effective investigation capable of leading to the identification and punishment of those responsible" and in not doing so, violated Article 3. The ECtHR deemed that the failure of the investigating judge to grant the request for the submission to the court of security camera recordings, and failure to question any of the officers involved in the custody, deemed that "effective investigations that had been required in the light of the position of vulnerability of the applicant, who was being held in *incommunicado* detention, had not been conducted". Spain has been judged by the ECtHR to have ineffectively investigated allegation of torture on eight separate occasions.

The ECtHR stressed the importance of adopting the measures recommended by the Committee for the Prevention of Torture to improve the quality of forensic medical examinations of persons being held in *incommunicado* detention, and that given their particular vulnerability, appropriate judicial supervision measures to be taken, as provided for by the Code of Criminal Procedure, and for those provisions to be applied strictly, in order to prevent abuse and ensure detainees' physical safety. It also endorsed the

⁴³² Ibid.

⁴³³ Rights International Spain, *Aportaciones en atención al informe presentado por España dando respuesta a las cuestiones formuladas por el Comité contra la tortura en virtud del artículo 19*.

⁴³⁴ United Nations Human Rights Committee, *María Cruz Achabal Puertas v. Spain*, Communication No. 1945/2010, U.N. Doc. CCPR/C/107/D/1945/2010, 2013.

⁴³⁵ United Nations Report of the Special Rapporteur on the question of torture: Visit to Spain. 6 February 2004, E/CN.4/2004/56/Add.2.

recommendations of the CPT in respect to the very principle of detaining a person *incommunicado* in Spain.

There have been no cases of ill-treatment for *incommunicado* detention since 2014 but the legislative structures that permitted such complaints are still entrenched in law. Furthermore, with the increased focus on FTFs, it remains unseen how frequently *incommunicado* detentions may be used in the future.

In July 2017, The Supreme Court overturned the 15-year prison sentence of ETA member Iñigo Zapiroain Romano because the *Audiencia Nacional* refused to investigate allegations of torture after his arrest on terrorism charges in March 2011. During his initial trial Zapiroain's defence had requested that his client be given a psychological examination in accordance with the Istanbul Protocol. The ruling represented a leap forward in Spain's jurisprudence as it adhered to, for the first time, the line established by the ECtHR to *effectively investigate* claims of ill-treatment and torture. It demonstrates that there are judicial safeguards in place to protect the rights of individuals, but that historically they have not been exercised appropriately. While the rules have not changed after the judgment, there have been less ETA detained persons. Furthermore, there are not so many "false" accusations of ill-treatment.

In 2016 the *Audiencia Nacional* delivered 22 guilty verdicts against 25 people for glorifying terrorism offences. Most rulings involved the interception of messages published on social media.⁴³⁶ Amnesty international⁴³⁷ and Human Rights Watch⁴³⁸ have raised concerns that the "overly broad amendments" of 2015 to Spain's Criminal Code can be used to unduly restrict freedom of speech and expression. These fears were brought to light when in February 2016, the courts charged two puppeteers with "glorifying terrorism" after a show that referenced al-Qaeda and ETA. The puppeteers were jailed for four days and prevented from leaving the country pending trial. The pair faced three years in prison if convicted although the charges were eventually dismissed.⁴³⁹ Another case involved a Madrid-based musician who was sentenced to prison for a year following a series of tweets, including a joke offering to deliver King Juan Carlos a cake bomb as a gift.⁴⁴⁰

Statistics on terrorism in Spain

Number of attacks

A decrease in terrorist incidents in Spain was seen in 2016 compared to the previous year. In 2016 there were 10 failed, foiled and completed terror attacks, five of which were attributed to left-wing groups while the remaining five were linked to separatists. In 2015, there were 25 failed, foiled and completed terror attacks of which seven were linked to left-wing groups and 18 to separatist movements.

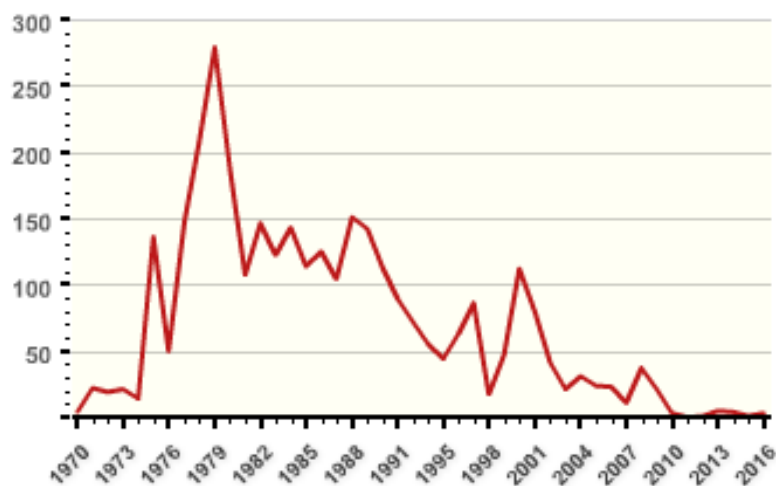
⁴³⁶ 'Amnesty International Report 2016/17', *The State of the World's Human Rights*, p.337.

⁴³⁷ Ibid. p. 337.

⁴³⁸ UN Human Rights Council, *Adoption of the outcome of the Universal Periodic Review of Spain*, 25.05.2015. Available at: <https://www.hrw.org/news/2015/06/25/un-human-rights-council-adoption-outcome-universal-periodic-review-spain>

⁴³⁹ Human Rights Watch, *Foreign Terrorist Fighter Laws, Human Rights Rollbacks Under UN Security Council Resolution 2178*, 2016.

⁴⁴⁰ López-Terra, F., 'Spain's freedom of speech repression is no joke', *The Independent*, 19 April 2017. Available at: <http://www.independent.co.uk/news/science/spain-s-freedom-of-speech-repression-is-no-joke-a7688341.html>.

Figure 20: Number of terrorist attacks in Spain.⁴⁴¹

Number of arrests

The number of terrorism-related arrests fell from 187 to 120 between 2015 and 2016. Arrests for jihadist terrorism fell from 75 to 69, left-wing terror arrests fell from 37 to 19 and separatist arrests fell from 75 to 31 between 2015 and 2016.

Number of proceedings

Spain has consistently had the highest number of concluded court proceedings for terrorist offences across the EU Member States. This is largely due to the cases brought against individuals associated with separatist movements. There were 191, 166 and 154 individuals in court proceedings in 2014, 2015 and 2016 respectively. In 2016, 74% of verdicts related to separatist movements. The number of court proceedings involving jihadist terrorism more than doubled from 13 to 38 between 2015 and 2016.

Number of convictions

Of the 154 terrorist proceedings in Spain in 2016, 134 cases led to convictions, representing a conviction rate of 85%. Spain's 15% acquittal rate is similar to the 11% EU average in 2016.

Figure 21: Overview of the terrorism-related offences in Spain.

Offence	Year ending December 2015 ⁴⁴²	Year ending December 2016 ⁴⁴³
Number of arrests	187	120
Number of court proceedings	166	154
Number of convictions	95	134

⁴⁴¹ Global Terrorism Database, op. cit.

⁴⁴² Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2016.

⁴⁴³ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017.

Conclusions and recommendations

Spanish *incommunicado* detention is seen as an exceptional measure to ensure the preservation of evidence, deemed to be crucial for the successful investigation of terrorism-related crimes. Safeguards are present that insists the judge that authorised the *incommunicado* detention, or the examining judge of the district, oversees the monitoring.

The limitations of suspects' rights via *incommunicado* detention during police custody is significant in comparison to other EU Member States. The effectiveness of *incommunicado* practices at facilitating the successful investigation of terrorism-related crimes, therefore, shall be assessed.

Spain has been criticised on numerous occasions for its failure to effectively investigate claims of torture. It is perhaps understandable that Spanish authorities have been reluctant to do so given that ETA members have historically made unfounded claims of ill-treatment. The recent overturning of Iñigo Zapiroain Romano's 15-year sentence because the Spanish authorities did not effectively investigate allegations of torture, is important to note because it demonstrates that there is an effective remedy if the state makes procedural errors, perhaps highlighting a strength in the Spanish justice system.

With regard to the exchange of information with EU member states, experts noted that informal communication methods to exchange information have been effective at combating terrorism. It does, however, raise concerns regarding data protection if information is not appropriately recorded. As such these informal routes do not guarantee that the rights of suspects are properly considered relying on trust from both parties that they have respected legislation. The EU might consider it appropriate to encourage these effective routes of information exchange while considering oversight mechanisms to ensure that the rights of terror suspects are not disproportionately infringed.

Finally, Spanish police and intelligence services require judicial authorisation prior to the use of special investigatory techniques unless in emergency circumstances where judicial authorisation must be sought immediately after the action. Spain has forgone the use of administrative measures as a means to prevent terrorist activity. Instead there is a reliance on action upon intelligence and punishment of individuals via the judiciary, which, being neutral and independent is an effective mechanism to ensure that the rights of suspects of terrorism-related crimes are safeguarded.

6.9. Sweden

Introduction and background

Sweden has been less exposed to terrorism compared to other Western European countries. The 1975 West Germany embassy siege in Stockholm by the Red Army Faction (RAF) was the first major terrorist incident after the end of the WWII. The aim was to force the release of other RAF members from a West German prison, and it resulted in the death of two embassy personnel and two perpetrators.

Triggered by the worldwide concern of international terrorism after events 9/11, the Swedish government approved the Act on Criminal Responsibility for Terrorist Crimes in 2003⁴⁴⁴. This new law implemented the UN Convention on the Suppression of the Financing of Terrorism, and adopted the 2001 EU Council Framework Decision on Combating Terrorism. Sweden signed and ratified the Council of Europe Convention on the Prevention of Terrorism, and for the first time terrorist acts were both defined and criminalised, punishable by up to life imprisonment.⁴⁴⁵

Sweden was not victim to another major terrorist incident until December 2010, when two bombs exploded in central Stockholm, injuring two civilians and killing the Iraqi-born Swede bomber.⁴⁴⁶ It was reported as the first ever Islamist terrorist act on Swedish soil. In April 2017 Rakhmat Akilov, a rejected asylum seeker of Uzbek origin, drove a stolen truck into pedestrians in a busy shopping street in central Stockholm, killing five people and seriously injuring 14 others. The assailant, admitted to the terror crimes and criminal proceedings are currently ongoing. The attack followed a trend of using vehicles as terrorist weapons witnessed in other major European cities. Swedish authorities have stated that Akilov had "expressed sympathy for extremist organizations, among them IS [Islamic State]".⁴⁴⁷

Similarly, as with other European countries, Sweden has gradually adopted anti-terrorism legislature in response to the Islamist terror threat and in line with EU legislation. Sweden has now ordered a systematic review of anti-terrorism legislation, which is to be reported in January 2019. The review will provide recommendations to clarify current legislation, and to improve the conditions for police and prosecutors to "achieve effective, efficient and transparent regulation that is consistent with the effective protection of fundamental rights and freedoms".⁴⁴⁸

Overview of anti-terror legislation in Sweden

As part of the 2003 Act on Criminal Responsibility for Terrorist Offences, Swedish law considers a terrorist offence an act that might seriously damage a state or an inter-governmental organisation, and that the intent of the act is to seriously intimidate a population or a group of population; unduly compel a public authority or an inter-governmental organisation to perform an act or abstain from acting; seriously destabilise or destroy fundamental political, constitutional, economic or social structures in a state or in an inter-governmental organisation.

⁴⁴⁴ Act on Criminal Responsibility for Terrorist Offences, available at <http://www.government.se/government-policy/judicial-system/act-on-criminal-responsibility-for-terrorist-offences-2003148/>.

⁴⁴⁵ Ramalingam, V., 'Impact of Counter-Terrorism on Communities: Sweden Background Report', *Open Society Foundations*. Available at: <https://www.scribd.com/document/109616192/Impact-of-Counter-Terrorism-on-Communities-Sweden-Background-Report>.

⁴⁴⁶ Nyberg, P., 'Explosions in Stockholm believed to be failed terrorist attack', *CNN*, 12 December 2010. Available at: <http://edition.cnn.com/2010/WORLD/europe/12/11/sweden.explosion/index.html?hpt=T1>.

⁴⁴⁷ Johnson, S. Pollard, N. Roos, R., 'Uzbek suspect in Swedish attack sympathized with Islamic State: police', *Reuters*, 9.04.2017. Available at: <https://www.reuters.com/article/us-sweden-attack/uzbek-suspect-in-swedish-attack-sympathized-with-islamic-state-police-idUSKBN17B089>.

⁴⁴⁸ Swedish Ministry of Justice, *Review of Criminal Law Legislation*.

In 2010, it became illegal to recruit or encourage people to commit terrorist crimes as part of the Act on Criminal Responsibility for Public Provocation, Recruitment and Training concerning Terrorist Offences and other Particularly Serious Crime. A person who, induces, publically urges or otherwise attempts to entice people to commit particularly serious crime shall be sentenced to imprisonment for at most two years. Furthermore, an individual who provides training or instruction be sentenced to imprisonment for at most two years, if the act has been committed with the knowledge that the instruction is intended to be used for particularly serious crime.

Section 6 covers the seriousness of the action. If the terrorist act is deemed to be gross, imprisonment for at least six months and at most six years shall be imposed. In assessing whether the crime is gross, particular consideration shall be given to whether it concerned particularly serious crime that entailed danger to the lives of a number of persons or to property of special importance, whether it was part of an activity carried out on a large scale or whether it otherwise was of a particularly dangerous nature. Contrastingly, Section 7 provides that criminal responsibility under the act shall not be imposed if it considered that there was an insignificant risk the action led to the perpetration of the crime.

The Recruitment Act has also introduced legislature that criminalises travelling to a country other than the country of which the suspect is a citizen, with the purpose of committing or preparing terrorist crime, punishable by up to two years in prison.⁴⁴⁹

The Act on Measures against Anti-Money Laundering and Terrorist Financing provides specific criminal provisions for terrorist financing. Those who collect, provide, or receive funds or other property in the knowledge that it is intended for a person or group of people who commit, attempt to commit, prepare, or participate in acts of terrorism are now subject to penalisation. Criminal liability focuses on the recipient of the financing and the individual's intent to prepare or commit terrorist acts. The proposed scale of penalties for ordinary offences is imprisonment for a maximum of two years, but can again be extended if the crime is deemed to be of an aggravated nature.

Figure 22: Overview of Sweden anti-terrorism legislation.

Sweden Terrorism Legislation
<ul style="list-style-type: none">• 2003 Act on Criminal Responsibility for Terrorist Offences• 2009 Act on Measures against Anti-Money Laundering and Terrorist Financing,• 2010 Act on Criminal Responsibility for Public Provocation, Recruitment and Training concerning Terrorist Offences and other Particularly Serious Crime• 2010 Act on Punishment for Public Enticement and Education Regarding Terrorist Crimes and Other Extraordinarily Serious Crimes

Defining a suspect of terrorism-related crimes

A suspect of terrorism-related crimes is defined as someone that has committed a crime with intentions outlined above from the 2003 Act on Criminal Responsibility for Terrorist Offences. The primary responsibility for combating terrorism lies with the Swedish Security Service (Säpo).⁴⁵⁰ The Swedish Prosecution Authority usually leads criminal investigations and

⁴⁴⁹ Sweden: Court Rejects Charge of Terrorism Travel; Government Proposes Tighter Legislation, LOC. 1/11/2017. Available at: <http://www.loc.gov/law/foreign-news/article/sweden-court-rejects-charge-of-terrorism-travel-government-proposes-tighter-legislation/>.

⁴⁵⁰ Swedish Security Service, *About the Security Service*. Available at: <http://www.sakerhetspolisen.se/en/swedish-security-service/about-us.html>.

decides whether to prosecute and plead in the courts. Terrorist cases investigated by the Swedish Security Service are processed by the Prosecution Office⁴⁵¹ for National Security.

State powers and rights available to suspects

In Sweden, persons who are suspected of, are being prosecuted for or have been convicted of terrorist crimes have the same protection and rights as persons who are suspected of, are being prosecuted for or have been convicted of other crimes.⁴⁵² Chapter 24 of the Swedish Code of Judicial Procedure governs the rules of detention. If there are grounds to arrest someone, that person may be arrested, by order of a prosecutor, until a court is able to examine the question of detention. Arrest and detention can be ordered when someone is suspected on "probable cause", however in terrorist cases only "reasonable suspicion" is required for detention. A detention order is issued by a court of law, at the request of a prosecutor.

The application of the Act on Criminal Responsibility for Terrorist Offences (2003:148) does not differ from that of other criminal legislation. Various bodies are tasked with the monitoring of authorities to ensure compliance with the law and that human rights are not violated. The Parliamentary Ombudsmen and the Chancellor of Justice supervise public authorities and courts respectively. The Swedish Commission on Security and Integrity Protection is tasked with supervising, the use of secret surveillance by law enforcement agencies and the processing of personal data by the police. Surveillance is only permissible if a person is reasonably suspected and if the offence can be assumed to be punishable by imprisonment for at least four years.⁴⁵³ At the individual's request, the Commission on Security and Integrity Protection can be requested to state whether an individual has been the subject of secret surveillance or subject to processing of personal data by the police, and whether this was done in accordance with the law.⁴⁵⁴

Exchanging information on terror suspects

Section 15 of the Police Data Act 2010 states that if compatible with Swedish interests, personal data may be submitted to INTERPOL or Europol, or to a police authority or public prosecutor's office, foreign intelligence or security services in a state that is connected to INTERPOL, on the need for that authority to prevent, detect, investigate or prosecute criminal offences.⁴⁵⁵

In May 2017, Sweden introduced a Law on International Police Cooperation which sets forth provisions on operational cooperation and the exchange of data with competent foreign authorities with which Sweden have entered a ratified agreement (i.e. EU countries in the Prüm Convention or that participate in VIS)⁴⁵⁶. The law is not explicitly used for terrorist crimes but given that one of the primary aims of the Prüm Convention was the development of cross-border cooperation to combat terrorism, its contents are relevant.

In the event that data is requested by a foreign authority, Swedish law enforcement may, on a case by case basis, set conditions that limit the ability to use data or evidence provided to another state or inter-governmental organisation, if required by the rights of individuals. Where competent Swedish authorities have received information or evidence

⁴⁵¹ It can also be the police authority that initially became aware of the suspect. Expert Interview.

⁴⁵² CCPR - UN Human Rights Committee, *Sweden - Consideration of reports submitted by State parties under article 40 of the Covenant pursuant to the optional reporting procedure*, 2015.

⁴⁵³ Council of Europe, *Profiles on Counter-Terrorism Capacity: Sweden*, Committee of Experts on Terrorism (CODEXTER), 2014.

⁴⁵⁴ CCPR - UN Human Rights Committee -Sweden, *Consideration of reports submitted by State parties under article 40 of the Covenant pursuant to the optional reporting procedure*, 2015.

⁴⁵⁵ Law on Police Data, 2010:361, available at: <https://lagen.nu/2010:361>.

⁴⁵⁶ Law on International Police Cooperation 2017:496, available at: <https://lagen.nu/2017:496>.

from another state to prevent, or detect criminal activity, investigate crime or maintain public order and safety, Swedish authorities shall comply with conditions that limit the ability to use the data or evidence, if the conditions apply due to an agreement with the other state or an inter-governmental organisation.⁴⁵⁷

In cooperation under the Prüm Convention, a foreign authority may be granted direct access to data in the Swedish registers of DNA and fingerprints that are under the regulation of Police Data Act (2010), to make an automatic comparison between their unidentified DNA profiles. For the purpose of preventing, or detecting criminal activity or investigating criminal offences, the same access is granted to a competent Swedish investigator to the extent that the other state allows it.⁴⁵⁸

At the request of competent authorities, the central access point may, through direct access, search data in VIS, if there are reasons for assuming that data in the system may significantly help investigate terrorist offences or other serious offences as fall within the definitions of Article 2 (1) of the VIS Council Decision. It is prohibited to transfer or make available to third countries or an international organisation any personal data retrieved from the VIS or another state, unless in urgent cases that are compatible with Swedish interests or where the state that entered the data permits its exchange.⁴⁵⁹

Although no specific supervisory measures are contained in the new law, Law (2013: 329) makes provisions for the protection of personal data in police and judicial cooperation in criminal matters within the European Union. However, the law does not apply in the context of processing personal data if national security is perceived to be at stake; no processing of personal data is made available or transmitted through information exchange in pursuant of the Prüm convention or VIS, creating an opportunity where the rights of terror-suspects could potentially be infringed upon.⁴⁶⁰

Sweden has established oversight mechanisms regarding the use of data that includes: the Central Security Log, inspections carried out by the National Police Board, ordinary supervision by the Data Inspection Board and the Swedish Commission on Security and Integrity Protection, as well as extraordinary supervision by the Parliamentary Ombudsman or the Chancellor of Justice.⁴⁶¹

Case law in Sweden

In Sweden, there have been no reports of human rights abuses in terrorism-related crimes.

In February 2017, a Swedish national was sentenced to six months' imprisonment for having "enticed funding" for the terrorist organisations Jabhat al-Nusra and the Islamic State. The sentence was handed down in accordance with the Act on Punishment for Public Enticement and Education Regarding Terrorist Crimes and Other Extraordinarily Serious Crimes and was the first case tried under the provision that criminalises solicitation to fund a terrorist organisation.⁴⁶²

⁴⁵⁷ Law on International Police Cooperation 2017:496. Available at: <https://lagen.nu/2017:496>.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

⁴⁶⁰ Law with certain provisions on the protection of personal data in police and judicial cooperation in criminal matters within the European Union 2013:329. Available at: <https://lagen.nu/2013:329>

⁴⁶¹ Council of Europe, Cannataci, J-A and Caruana, M, *Consultative committee of the convention for the protection of individuals with regard to automatic processing of personal data: Recommendation r (87) 15 – twenty-five years down the line.* ` 18 February 2014.

⁴⁶² LOC, *Sweden: Man Sentenced to Prison for Soliciting Funding of Terrorist Organizations.* 28/2/2017. Available at: <http://www.loc.gov/law/foreign-news/article/sweden-man-sentenced-to-prison-for-soliciting-funding-of-terrorist-organizations/>.

On March 30 2017, the Court of Appeal upheld the Gothenburg District Court sentence of Hassan Al-Mandlawi and Al Amin to life in prison for "the crime of terrorism through murder" after it ruled that the pair had taken part in the beheading of two people in Syria. It was the first time that foreign terrorist fighters were convicted in Sweden of crimes committed in Syria, and the first time individuals were convicted specifically for the crime of terrorism as opposed to the secondary charges of crimes against humanity and murder.

After the April 2017 terror attack in Stockholm centre, Rakhmat Akilov was apprehended on probable *cause*, the highest level of suspicion for a terror crime under Swedish law, for committing terrorist crimes through murder. The public prosecutor successfully requested that Akilov be remanded in custody during the preliminary investigation. He was granted access to a lawyer as he was entitled, but the Stockholm District Court denied his request to be defended by a lawyer who was a Sunni Muslim. His appointed lawyer has revealed that Rakhmat Akilov has confessed to a terrorist crime and intends to plead guilty, he remains detained and the prosecutor is still conducting the preliminary investigations. Throughout these preliminary investigations, which can last up to a year, Akilov has been held in isolation and all external communications have been closely monitored and regulated⁴⁶³.

Sweden has proposed stricter anti-terrorism travel laws after the failed conviction in 2016 of a man who the court deemed intended to join the terrorist group Jabhat al-Nusra but could not prove that "the purpose" of his travel was to commit terrorist acts as is required by the Recruitment Act. The proposed legislation would make the mere joining of a terror group sufficient grounds for prosecution for terrorist crimes.⁴⁶⁴

⁴⁶³ Aftonbladet, Rakhmat Akilov omhäktad – kan åtalas för fler brott, 31/8/2017. Available at: <http://www.aftonbladet.se/nyheter/a/42RGG/rakhmat-akilov-omhaktad--kan-atalas-for-fler-brott>.

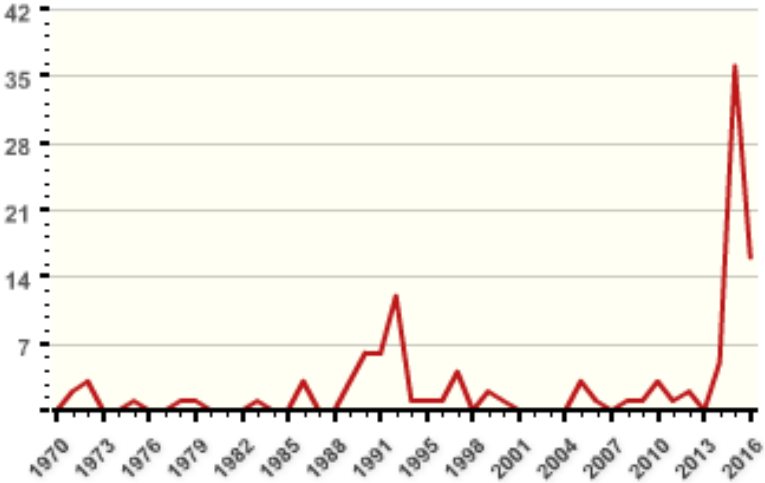
⁴⁶⁴ 'Sweden: Court Rejects Charge of Terrorism Travel; Government Proposes Tighter Legislation', *LOC*, 1.11. 2017. Available at: <http://www.loc.gov/law/foreign-news/article/sweden-court-rejects-charge-of-terrorism-travel-government-proposes-tighter-legislation/>.

Statistics on terrorism in Sweden

Number of attacks

There were no failed, foiled or completed terror attacks in Sweden in either 2015 or 2016.

Figure 23: Number of terrorist attacks in Sweden.⁴⁶⁵



Number of arrests

Sweden made three arrests for terror offences in 2015, and another three arrests in 2016. All but one were related to jihadist terrorism with one arrest in 2015 related to a separatist movement.

Number of proceedings

There were two concluded court proceedings in 2015 for terror offences, both of which related to jihadist terrorism. This number increased to four concluded court proceedings in 2016, again, all four were attributed to jihadist terror offences.

Number of convictions

In 2015, both terrorism-related prosecutions resulted in convictions. In 2016, three of the four prosecutions resulted in convictions.

Figure 24: Overview of the terrorism-related offences in 2015 and 2016.

Offence	Year ending December 2015 ⁴⁶⁶	Year ending December 2016 ⁴⁶⁷
Number of arrests	3	3
Number of court proceedings	2	4
Number of convictions	2	3

Conclusions and recommendations

Sweden has made very few arrests for terrorism-related crimes in recent years. Like other EU Member States Sweden has introduced legislation that has criminalised terrorist financing, travelling abroad to commit terrorist acts and public enticement to commit acts of terror. Sweden has not introduced legislation to permit the use of administrative measures and

⁴⁶⁵ Global Terrorism Database, op. cit.
⁴⁶⁶ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2016.
⁴⁶⁷ Europol, *TE-SAT: European Union Terrorism Situation and Trend Report*, 2017.

recently a proposed bill for administrative revocation of citizenship was rejected in Sweden⁴⁶⁸. This perhaps highlights an intention to maintain their efforts to combat within the bounds of criminal proceedings, where judiciary oversight and a high regard for the rights of suspects are guaranteed.

Sweden has established numerous oversight bodies that help to ensure that personal data of individuals is protected. For example, Commission on Security and Integrity Protection can be requested to state whether an individual has been subject to surveillance or has had their data processed by the police, and whether this was conducted in accordance with the law. Such provisions may help to ensure that the rights of terrorist suspects that do not reach a level of suspicion sufficient to undergo criminal proceedings remain protected. Such a level of transparency, across other EU member states, may be an effective method of limiting the possibility of infringement of terrorist suspects rights.

Sweden recently passed legislation named the Law on International Police Cooperation. The provisions permit that competent authorities from other EU jurisdictions may access evidence and personal data restricted to what is necessary and in accordance with personal data protection laws. However, in matters pertaining to national security personal data can be transmitted to other competent EU authorities in pursuant of the Prüm Convention. This sets out in law the permission for police and intelligence agencies in Sweden to share / exchange information in terrorism-related cases, and may lead to the limitations of suspects' rights in such instances.

⁴⁶⁸ *Swedish MPs reject stripping terror convicts of nationality*, 11.02.2017. Available at: <http://www.worldbulletin.net/africa/169322/swedish-mps-reject-stripping-terror-convicts-of-nationality>.

6.10. United Kingdom

Introduction and background

The nature of terrorism incidents in the UK has changed substantially over time. One of the most notable early instances of terrorism is the attempted destruction of the House of Lords, the second chamber of the UK Parliament, in the gunpowder plot of 1605 by Guy Fawkes and his associates.

Beginning in the late 1960s the UK experienced a sustained insurgency against the UK government by the Irish Republican Army (IRA) into the late 1990s. While the majority of the violence took place in the religious and political context of Northern Ireland, and was limited to Northern Ireland, the IRA also carried out acts of terror in England, most notably a truck bombing in Manchester in 1996, injuring 220 people causing £700 million in property damage and the 1984 Brighton hotel bombing targeting Prime Minister Margaret Thatcher at the annual Conservative party conference, which killed five individuals and injured 31. Since 1922 the Special Powers Act had been in force, allowing police to search without a warrant, arrest and imprison without trial, ban assemblies or parades, and any publications. Police authorities used this Act almost exclusively against nationalists in Northern Ireland.

Several attacks that occurred in the late 20th century were carried out by Middle Eastern terrorist groups in relation to the Arab-Israeli conflict. They included bombings of the Israeli embassy in 1972 and 1994 and the attempted assassination of the Israeli ambassador to the UK in 1982. Since 2000, and following the conclusion of the Good Friday Agreement in 1998 that brought an end to the sectarian conflict in Northern Ireland known as "The Troubles", the majority of terrorist incidents have been linked to jihadist extremism.

In the wake of the 9/11 attacks and the subsequent invasions of Afghanistan and Iraq, in which British soldiers took a leading role, jihadist terrorists linked to Al Qaeda conducted several terror attacks including the 7 July 2005 London bombings, which today, still constitutes the deadliest terrorist incident in the UK since the 1988 Lockerbie bombing.

With the outbreak of the Syrian civil war, attention has shifted to British nationals returning from Syria, who have been inspired by, trained or fought with terrorist organisations in the country, including the Islamic State. More than 850 UK citizens have travelled to fight for ISIL and other jihadi groups in Syria and Iraq, of whom about half have returned⁴⁶⁹ to the UK.

Despite the fact that terrorism incidents in the UK have shifted towards attacks by jihadist groups, it is important to note that between 2000 and 2015, 90 people have been killed in the UK in terrorist attacks, in stark contrast to the 1,094 deaths in the 15-year period before that, between 1985 and 1999, and the 2,211 deaths between 1970 and 1984.⁴⁷⁰

As outlined by the UK's MI5 Security Service, the majority of terrorist plots, in the UK, have been planned by British residents. There are several thousand individuals in the UK who support violent extremism or are engaged in Islamist extremist activity. Similarly, British nationals who have fought for extremist groups abroad continue to return to the UK and, therefore, increase the risk of future terror attacks⁴⁷¹. This risk of terrorist attacks by individuals inspired by groups involved in the Syrian civil war has been evident in the 2017 Manchester Arena bombings, which killed 22 and injured 250 making it the deadliest terror attack in the UK since the 7/7 London bombings, the 2017 Westminster attack, which killed

⁴⁶⁹ Global Terrorism database, op. cit.

⁴⁷⁰ House of Commons, *Islamic State: British Nationals Abroad; Written question - 3851*. Available at: <http://www.parliament.uk/written-questions-answers-statements/written-question/commons/2017-07-10/3851>

⁴⁷¹ International Terrorism, 2017, available at: <https://www.mi5.gov.uk/international-terrorism>.

six and injured 49 as well the June 2017 London Bridge attack, which killed eight and injured 48.

Overview of anti-terror legislation in the UK

Within UK legislation there are numerous Acts of Parliament and Regulations, rules and Orders which detail special counter-terrorism powers and offences and they are subject to regular review by the Independent Reviewer of Terrorism Legislation.

Figure 25: Overview of UK anti-terrorism legislation.

UK Terrorism Legislation
The Terrorism Act 2000
The Anti-terrorism, Crime and Security Act 2001
The Criminal Justice Act 2003
The Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2003
The Prevention of Terrorism Act 2005
The Terrorism Act 2006
The Terrorism (United Nations Measures) Order 2006
The Counter-Terrorism Act 2008
The Coroners and Justice Act 2009
The Terrorism (United Nations Measures) Order 2009
The Terrorist Asset-Freezing (Temporary Provisions) Act 2010
The Justice and Security Act 2013
Terrorism Prevention and Investigation Measures Act 2011
The Counter-Terrorism and Security Act 2015

The Prevention of Terrorism Act was devised to deal with terrorism offences arising from the conflict in Northern Ireland and originally defined terrorism as "The use of violence for political ends [including] the use of violence for the purpose of putting the public, or any section of the public, in fear."

From 2000 onwards, the British parliament has passed a series of updated Terrorism Acts, aimed at drafting legislation relevant to terrorism in general and not specifically focused on Northern Ireland. The legislation introduced since the first Terrorism Act 2000, has been significantly influenced by and created in response to the 9/11 attacks, the 7/7 bombings in London as well as the global War on Terror.

The string of new legislation has provided a definition of terrorism that enabled the establishment of new and distinct police powers and procedures beyond those related to ordinary crime.

The Terrorism Act 2000 (as amended in Terrorism Act 2006) - Section 1.

1. In this Act "terrorism" means the use or threat of action where-
 - a. The action falls within subsection (2);
 - b. The use or threat is designed to influence the government [or an international governmental organisation] or to intimidate the public or a section of the public; and
 - c. The use or threat is made for the purpose of advancing a political, religious, [racial] or ideological cause.
2. Action falls within this subsection if it-
 - a. Involves serious violence against a person;
 - b. Involves serious damage to property;

- c. Endangers a person's life, other than that of the person committing the action,
 - d. Creates a serious risk to the health or safety of the public or a section of the public: or
 - e. Is designed seriously to interfere with or seriously to disrupt an electronic system.
3. (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

Defining a suspect of terrorism-related crimes

As shown in the figure below, the Terrorism Act 2000 laid out an expanded definition of a terrorist against which Police constables must reasonably suspect individuals.

Terrorism Act 2000

"A terrorist is defined under section 40 of the Terrorism Act 2000 as any person who:

- Is a member of a proscribed terrorist organisation or incites support for such an organisation;
- Is involved with fundraising or money laundering for terrorism;
- Participates in or arranges weapons training;
- Directs a terrorist organisation;
- Possesses any article or collects any information for use in a terrorist act; or
- Incites terrorism overseas."⁴⁷²

The competence to declare someone as a terror suspect and to investigate falls on the Police, and border authorities. As explained in Sections 43 and 43A of the Terrorism Act 2000, police constables are authorised to stop and search any person who they reasonably suspect to be a terrorist, or any vehicle they reasonably believe is being used for terrorist purposes and its occupants. Similarly, Section 41 gives a police constable the power to arrest a person who they reasonably suspect to be a terrorist. While the level of discretion of police in declaring an individual a suspect varies according to the power that is being used by police, the police powers regarding terrorism suspects typically require a lower standard of evidential threshold. For instance, the power to stop suspects of terrorism at ports does state that this is unlawful to act based on prejudice or personal animosity but does not require the evidential base that is required for reasonable suspicion. Similarly, the police have powers to stop and search suspects of terrorism without reasonable suspicion. This differs from the use of stop and search powers regarding suspects of non-terrorism related offences as, for example, the use of stop and search of individuals, suspects of carrying illegal goods, requires reasonable suspicion. For individuals suspected of possessing a knife, if the area in which the individual is approached is considered by the police as susceptible to knife crime, the requirement of reasonable suspicion is removed. However, stop and search powers without reasonable suspicion have not been used by police since 2010.⁴⁷³

While there is no formal status of a suspect of terrorism-related offences in the UK, individuals under investigation by internal security services have been classified as "subjects of interest" who maintain all of their formal rights as individuals.

⁴⁷² House of Commons, *Terrorism in Great Britain: the statistics*, Briefing paper, Number 7613, 09.06.2016.

⁴⁷³ Walker, C., *Blackstone's Guide to the Anti-Terrorism Legislation*. Third edition, Blackstone Press, 2014.

State powers and rights available to suspects

The Terrorism Act 2000 superseded and repealed the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996. The Terrorism Act 2000 provides the police with wider powers of investigation by extending the time limit for which a person may be detained without charge beyond the normal limits under existing legislation, the Police and Criminal Evidence Act 1984 in England and Wales and the Criminal Procedure (Scotland) Act 1995. This maximum period of detention has been subject to considerable variation.⁴⁷⁴ In contrast to ordinary criminal law in the UK, where suspects had to be charged within 24 hours of detention or be released, Section 41 of the law provided police with the power to arrest and detain a person without charge for up to 48 hours if they are suspected of being a terrorist. This period was extended to 14 days by the Criminal Justice Act 2003 and subsequently to 28 days by the Terrorism Act 2006. This was later reduced again to 14 days as it was concluded that there were no routine requirements for 28 days detention.⁴⁷⁵

In addition to the extended detention available to police with regard to those suspected of terrorism-related offences, and as explained above, the Police have increased powers under the Terrorism Act 2000 to stop and search a suspect without the need for a reasonable suspicion of involvement in terrorist activities. However, these rules were tightened in 2012, to ensure that police can only carry out searches in designated places where they have reasonable grounds to believe an act of terrorism will take place.

Section 5 of the Terrorism Act 2006 laid out a specific offence to prepare, or help others prepare, for an act of terrorism. Police were then given the powers to arrest individuals who they suspect of planning a terrorist attack.

Terrorism Prevention and Investigation Measures (TPims) act as a form of house arrest, and apply to people who are deemed a threat but cannot be prosecuted or deported, should they be a foreign national. As a form of house arrest, suspects are required to live at home and stay there overnight and can be subject to electronic tagging. The use of mobile phones and the internet, while allowed, are subject to certain conditions. In 2015, additional provisions were included that granted the ability to relocate subjects up to 200 miles away from their normal residence. TPims are initially set for one year but can be extended to two and there is a possibility of remaining beyond the two-year maximum if there is suspicion of further terrorism activity.

As previously expanded upon, Schedule 7 of the Terrorism Act 2000 gave Police the power to stop, search and hold individuals at ports, airports and international railway stations. Individuals could initially be held for up to nine hours. Following a change in the guidelines however, individuals can be held for up to six hours. The police do not need prior knowledge or suspicion to use Schedule 7 and DNA samples and fingerprints may be taken without the need for any reasonable suspicion.

With the introduction of the 2015 Counter Terrorism and Security Act, Temporary Exclusion Orders (TEOs) were created. TEOs apply to British citizens suspected of involvement in terrorism-related activity abroad. The UK Home Secretary applies the order where they "reasonably suspect that the subject is or has been involved in terrorism-related activity while outside the UK". They are designed to stop terrorism-related suspects from re-entering the UK unless they turn themselves in at the UK border and can last for up to two years at a

⁴⁷⁴ House of Commons, *Terrorism in Great Britain: the statistics*, Briefing paper, Number 7613, 09.06.2016.

⁴⁷⁵ House of Commons, *Pre-Charge Detention in Terrorism Cases*. Available at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05634>.

time and can be subject to renewal. Breaches of TEOs could lead to a prison sentence for the individual in question.

Exchanging information on terror suspects

There is extremely limited publicly available information with regard to information exchange mechanisms in use by UK authorities. However, the UK authorities do make use of formal information exchange mechanisms through the formal structure of INTERPOL, Europol and most importantly The Five Eyes alliance (FVEY).

INTERPOL is the most longstanding mechanism used by the UK authorities. However, national police authorities and security services have highlighted problems surrounding their varying levels of trust in the authorities of the countries in question, in explaining the varied effect of the mechanism.⁴⁷⁶

While the issues regarding trust are significantly less pronounced in the use of Europol, the agency is relatively new to the field of terrorism and its greatest utility revolves around its use for smaller Member States, and therefore it is of limited use to the UK.⁴⁷⁷

Traditionally, bilateral information sharing mechanisms including the use of Liaison officers, formed the primary mechanism for information sharing to varying degrees of utility depending on the country in question.

However, the single most important information sharing mechanism for UK authorities is the FVEY, which forms the most extensive collaboration between security services in the world. As was revealed through documents leaked by Edward Snowden, the countries that form the FVEY (United Kingdom, United States, Australia, Canada and New Zealand) conducted surveillance of one another's citizens and collectively shared this information so as to circumvent domestic restrictions on surveillance of their own citizens.⁴⁷⁸

Case law in the UK

The police are afforded excess powers regarding suspects of terrorism-related offences as compared to their powers regarding suspects of the same offence of a non-terrorism related nature. However, there is a substantial variation in the application of these extended powers by police.

The use of the power for officers to question people entering or leaving the country at ports, airports, international rail stations and in border areas fell dramatically by 30% in 2016 to 19,355 compared to the 27,800 times it was used in 2015.

Powers to the police and security services	Number of enactments ⁴⁷⁹
Stop and search	<ul style="list-style-type: none"> The total number of stop and searches under the Terrorism Act carried out by all police forces across the U.K. is difficult to quantify as most police forces

⁴⁷⁶ Interview with independent expert.

⁴⁷⁷ *ibid.*

⁴⁷⁸ *ibid.*

⁴⁷⁹ Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending 31 March 2016*. Available at: <https://www.gov.uk/government/publications/operation-of-police-powers-under-the-terrorism-act-2000-financial-year-ending-march-2016/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stop-and-search-great-britain-financial-y>.

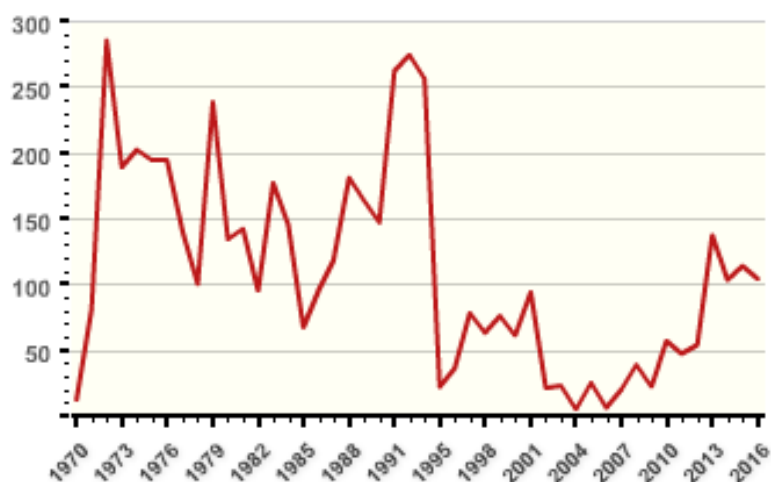
	<p>don't separate Section 43 from other types of stop and search.</p> <ul style="list-style-type: none"> One force that does hold the data is the London Metropolitan police, who cite 541 people who were searched under the Terrorism Act in the 12 months to March 2016, which constituted a rise of 32% on 2015.
14-day detention	<ul style="list-style-type: none"> In the year to March 2016, 46 people were detained under this measure, 25 of who were charged under the Terrorist Act. The longest any suspect was held for was 13 days, which happened three times during 2016.
Power to arrest suspects planning an attack	<ul style="list-style-type: none"> The maximum sentence for this offence is imprisonment for life. According to the Crown Protection Service, 25 people were convicted under Section 5 of the Terrorism act in the year ending September 2016, up from 11 in the previous 12 months.
Terrorism Prevent and Investigation Measures (TPims)	<ul style="list-style-type: none"> While this number has fluctuated since its introduction in 2011, as of November 2016, seven people were subjected to TPims, six of who were British citizens.
Temporary Exclusion Orders	<ul style="list-style-type: none"> As of May 2017, this measure had been used once by British authorities.
Port and border controls	<ul style="list-style-type: none"> A total of 23,717 people were stopped under the power in the year ending June 2016, a fall of 23% on the previous year. Despite fewer people being stopped at port and border controls, the number detained under the power has increased by 7% from June 2015 to June 2016, rising from 1,649 to 1,760.

Due to the fact that there is no specific offence for terrorism, many terrorism suspects are not put on trial for terrorism offences but rather for criminal offences such as murder, as opposed to terrorism murder, conspiracy, or with regard to bombings, under the Explosives Substances Act 1883.

Statistics on terrorism in the UK

Number of attacks

While the number of annual terrorist attacks in the UK has dropped significantly from its height during 'The Troubles', the recent reversal of this downward trend is in line with the rise of jihadist terrorism and especially with the beginning of the Syrian civil war and the return of British nationals from that region.

Figure 26: Number of terrorist attacks in the UK. ⁴⁸⁰

Number of suspects

There is no formal status of suspect of terrorism related offences. However, in 2015, MI5 boss Andrew Parker revealed that UK security services were monitoring more than 3,000 home-grown ,jihadist extremists who were suspected of supporting the Islamic State, Al-Qaeda or other related terrorist organisation and of being willing to carry out attacks on the UK. He said: "That is the highest number I can recall in my 32-year career, certainly the highest number since 9/11".

At the time of the Manchester bombing in May 2017, this had swelled to nearly 3,500⁴⁸¹ subjects of interest after the return of more UK nationals from fighting alongside the Islamic State.

Number of arrests

Despite the rise of attacks in 2016 and 2017, the number of arrests, stop and searches, and examinations of suspected terrorists at ports and airports dropped in 2016 compared to the numbers in 2015. However, at the same time, arrests for terrorism-related offences increased by 18% in the year ending March 2017 compared with the previous year.

Stop and Searches - Police and Criminal Evidence Act 1984, Section 2

While the police can stop and question an individual at any time, their authority to search depends on the situation.

A police officer has powers to stop and search if they have 'reasonable grounds' to suspect you are carrying:

- Illegal drugs
- A weapon
- Stolen property
- Something which could be used to commit a crime, such as a crowbar

⁴⁸⁰ Global Terrorism Database, *Country profile: United Kingdom*. Available at:

<https://www.start.umd.edu/gtd/search/Results.aspx?search=united+kingdom&sa.x=0&sa.y=0&sa=Search>.

⁴⁸¹ Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending 31 March 2017*. Available at: <https://www.gov.uk/government/publications/operation-of-police-powers-under-the-terrorism-act-2000-financial-year-ending-march-2017/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stop-and-search-great-britain-financial-y>.

A person can only be stopped and searched without reasonable grounds if it has been approved by a senior police officer. This can happen if it is suspected that:

- Serious violence could take place
- They are carrying a weapon or have used one
- They are in a specific location or area

Before being searched the police officer must tell the person:

- Their name and police station
- What they expect to find, for example drugs
- The reason they want to search, for example if it looks like the person is hiding something
- Why they are legally allowed to search
- That the person can have a record of the search and if this is not possible at the time, how they can get a copy

The authority's powers to search vary according to which Section and Act the search is under. Under Section 43 and 43A of the Terrorism Act, suspects can be stopped and searched anywhere, while suspects under Section 47A of the Terrorism Act can only be stopped and searched anywhere specified by an authorisation.

Suspects under Section 43 of the Terrorism Act can be searched for evidence that the person is a terrorist (as defined by Section 40 of the Terrorism Act). Section 43A and 47A refer to evidence that the vehicle in question is used for the purpose of terrorism or that the person is a terrorist.

The grounds for conducting the search under Section 43 and 43A is that the police authorities reasonably suspects that person to be a terrorist, or that the vehicle in question is being used for the purposed of terrorism.⁴⁸²

Number of proceedings

In line with the recent increase in the number of attacks planned and undertaken in the UK, the number of individuals proceeded against for terrorism offences has risen sharply. In the year ending December 2016, 62 trials were completed by the Crown Prosecution Service Counter Terrorism Division (CPS CTD). While, in the year ending December 2015, there were 56 persons proceeded against for terrorism offences in England and Wales, which is a substantial increase on the 38 persons proceeded against for terrorism offences in the year ending December 2014.

Number of convictions

The rate of convictions of persons proceeded against for terrorism offences in England and Wales has remained high, regardless of the absolute number of convictions. Of the 62 trials completed by the Crown Prosecution Service Counter Terrorism Division (CPS CTD) in 2016, 54, or 87%, of these led to a conviction. A similarly high conviction rate was found in 2015, where, of the 56 persons proceeded against, 49, or 87.5%, of these led to a conviction.

As a consequence of the higher number of persons convicted of terrorism offences, the number of persons in custody for these offences has also been rising. As of 31 March 2017, there were 183 persons in custody in the UK for terrorism-related offences, no increase from December 2016 but increased from 143 in December 2015.

Figure 27: Overview of the terrorism-related offences in the UK.

Offence	Year ending December 2015 ⁴⁸³	Year ending December 2016 ⁴⁸⁴
Number of arrests	282	260
Number of court proceedings	56	62
Number of convictions	49 (87.5%)	54 (87%)
Number of individuals in custody for terrorism related activity	143	183
Other police powers under the Terrorism Act 2000	<ul style="list-style-type: none"> • 520 stops and searches under section 43 of the Terrorism Act (TACT) 2000; • The number of examinations under Schedule 7 to TACT 2000 in Great Britain fell by 21% to 27,530 examinations. 	<ul style="list-style-type: none"> • 483 stops and searches under section 43 of the Terrorism Act (TACT) 2000; • There were 19,355 examinations carried out under Schedule 7 to TACT 2000, a fall of 30% compared with the previous year.

Conclusions and recommendations

The UK has a comprehensive set of terrorism legislation, of which several measures can severely impact and infringe the rights of individuals suspected of terrorism-related offences including the right to privacy, the right to due process and a fair trial and the right to remedy and redress. National authorities base the suspension of the right to privacy set out in Article 8 of the European Convention on Human Rights in such cases as under the exemption of national security.

While the UK has not, in response to the recent wave of terror attacks, dramatically increased the powers available to authorities through new legislation, this must be seen in the context of the long-term development of comprehensive counter-terrorism legislation that existed in the UK before 9/11, in contrast to Member States where little legislation existed before the event, such as Germany, and the periodic refinement and extension of this comprehensive legislation over a long period of time. The UK has been a world leader in counter-terrorism legislation, comprising the most comprehensive counter-terrorism legislation in the EU, in part due to its substantial history of modern terrorism by the IRA and the trend during this period has been the extension of offences, police powers and administrative measures.

However, while the UK contains the most comprehensive counter-terrorism legislation in the EU, significantly, it also contains some of the strongest safeguards, monitoring and independent oversight in the use of this legislation. While safeguards of suspects' rights can

⁴⁸³ Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, quarterly update to December 2015.*

⁴⁸⁴ Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, quarterly update to December 2016.*

be subject to failure and poor design, the UK has developed substantial safeguards and independent oversight in the use of administrative measures. For example, the use of TPims must be approved by the High Court, which demands a very high standard of evidence base. A special advocate is also appointed on behalf of the suspect, who has the right to see and to challenge the secret evidence against them. TPims have been subject to a series of legislation since 2005. It introduced additional safeguards to ensure a minimum level of disclosure to suspects of the evidence laid against them and any evidence that is crucial to the case must be disclosed to the suspects. Additionally, the exceptional nature of UK counter-terrorism legislation, as compared to legislation in the rest of the EU, is the length of detention following an arrest, which has not been frequently used and is subject to tight oversight by national authorities.

Additionally, as illustrated above, the UK authorities have made moderate use of the administrative measures enabled by new legislation, as evidenced by the fact that temporary exclusion orders have been used just once since their introduction and that just seven individuals were subject to TPims. The UK authorities have instead relied upon the use of criminal law due to the substantial list of offences that can be used by prosecutors, the high likelihood of successful prosecution even in preventative cases, the fact that the accused must be condemned in an open court and due to the likelihood of obtaining a longer sentence for the accused, if found guilty. Similarly, the most common charge in terrorism cases in the UK involves Section 5 of the Terrorism Act, the preparation of terrorist acts, due to the wide variety of activities it covers.

APPENDIX 2: LIST OF INTERVIEWS

In total, 72 interviews – on a national, EU and international level – were requested from academic experts, representatives of authorities and civil societies. Of those requests, 47 remained unanswered or were declined. The table below lists only the institutional affiliation of the stakeholders interviewed in the framework of the study. Almost all interviews were conducted via phone apart from a few, where the interviewees preferred to send the information by writing (as specified in the table below). Only the names of the interviewees that expressed their wish to be listed are mentioned below. Some stakeholders preferred to remain anonymous or did not explicitly consent to the publication of their names and are therefore only mentioned by way of their institutional affiliation.

Table 7: List of interviews

Country	Contacts	Date/Format
EU level		
	<ul style="list-style-type: none"> • Freedoms and Justice Department, European Union Agency for Fundamental Rights 	<ul style="list-style-type: none"> • 25.09.2017
	<ul style="list-style-type: none"> • A representative at Eurojust 	<ul style="list-style-type: none"> • 27.10.2017
	<ul style="list-style-type: none"> • European Commission, DG Migration and Home Affairs, Counter Terrorism Unit 	<ul style="list-style-type: none"> • 05.10.2017
Member States		
Belgium	<ul style="list-style-type: none"> • Coordination Unit for Threat Analysis 	<ul style="list-style-type: none"> • 19.10.2017
	<ul style="list-style-type: none"> • PhD researcher at the Institute for International Research on Criminal Policy (IRCP), Ghent University 	<ul style="list-style-type: none"> • 23.10.2017
France	<ul style="list-style-type: none"> • Commission nationale consultative des droits de l'homme 	<ul style="list-style-type: none"> • 16.10.2017
	<ul style="list-style-type: none"> • Journalist at Mediapart 	<ul style="list-style-type: none"> • 20.09.2017
	<ul style="list-style-type: none"> • l'union syndicale des magistrats 	<ul style="list-style-type: none"> • 17.10.2017
	<ul style="list-style-type: none"> • Professor in Public Law 	<ul style="list-style-type: none"> • 12.10.17
Germany	<ul style="list-style-type: none"> • Dr Benjamin Rusteberg, Researcher in Policing Law at University of Freiburg 	<ul style="list-style-type: none"> • 20.09.2017
	<ul style="list-style-type: none"> • Dr Nikolas Gazeas, Lawyer at a criminal law firm in Cologne 	<ul style="list-style-type: none"> • 22.08.2017

Country	Contacts	Date/Format
	<ul style="list-style-type: none"> Prof. Dr Christoph Gusy, Professor for Police Law at University of Bielefeld 	<ul style="list-style-type: none"> 29.08.2017 Written Response
	<ul style="list-style-type: none"> Prof. Dr Heinrich Wolff, Professor of Public Law at University of Heidelberg 	<ul style="list-style-type: none"> 04.09.2017
Greece	<ul style="list-style-type: none"> Associate Professor at University of Piraeus 	<ul style="list-style-type: none"> 24.10.2017
	<ul style="list-style-type: none"> Lawyer at Department of Criminal Law and Criminology, Aristotle University of Thessaloniki 	<ul style="list-style-type: none"> 16.10.2017 Written Response
Italy	<ul style="list-style-type: none"> Country report was written by study expert Benedetta Galgani, Criminal Law Professor 	<ul style="list-style-type: none"> N/A
Netherlands	<ul style="list-style-type: none"> Research Fellow at ICCT 	<ul style="list-style-type: none"> 04.10.2017
	<ul style="list-style-type: none"> Criminal lawyer, Prakken d'Oliveira 	<ul style="list-style-type: none"> 28.09.2017
Poland	<ul style="list-style-type: none"> Constitutional, International and European Law, Office of the Commissioner for Human Rights 	<ul style="list-style-type: none"> 12.10.2017
	<ul style="list-style-type: none"> Assistant Professor of International Public Law at the Faculty of Law and Administration, University of Lodz 	<ul style="list-style-type: none"> 12.10.2017
Spain	<ul style="list-style-type: none"> Judge at Audiencia Nacional 	<ul style="list-style-type: none"> 10.10.2017
	<ul style="list-style-type: none"> International cooperation department of the Judicial Council 	<ul style="list-style-type: none"> 16.09.2017 Written Response
Sweden	<ul style="list-style-type: none"> Swedish Prosecutor 	<ul style="list-style-type: none"> 27.10.2017
United Kingdom	<ul style="list-style-type: none"> Professor of Politics at University of Buckingham 	<ul style="list-style-type: none"> 19.09.2017

Country	Contacts	Date/Format
	<ul style="list-style-type: none">• Professor of Criminal Justice Studies at University of Leeds	<ul style="list-style-type: none">• 09.10.2017

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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), presents an overview of the legal and policy framework in the EU and 10 select EU Member States on persons suspected of terrorism-related crimes. The study analyses how Member States define suspects of terrorism-related crimes, what measures are available to state authorities to prevent and investigate such crimes and how information on suspects of terrorism-related crimes is exchanged between Member States. The comparative analysis between the 10 Member States subject to this study, in combination with the examination of relevant EU policy and legislation, leads to the development of key conclusions and recommendations.

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