



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

Updated Report

Summary of Main Findings

January 2015

EUROJUST LIMITED - The distribution of this document is strictly limited to:

- The JHA Ministers;
- The EU Counter-Terrorism Coordinator (EU CTC);
- The National Correspondents for Eurojust for Terrorism Matters;
- The Head of Europol Counter-Terrorism Unit (CTU);
- Ministers and Secretaries of State dealing with terrorism matters;
- Staff and officials in public administrations dealing with terrorism matters;
- Officials of the Commission and the Council Secretariat dealing with terrorism matters;
- Members of the LIBE Committee of the European Parliament requesting access to this document;
- Designated staff and officials of the LIBE Secretariat of the European Parliament.

Please do not distribute to recipients other than those mentioned above.

Eurojust LIMITED documents must not be published on sites available from the Internet or web-based platforms.

Introduction

The updated report, “Foreign Fighters: Eurojust’s Views on the Phenomenon and the Criminal Justice Response”¹, has been produced pursuant to the requests of the EU CTC² and the Council of the EU³ and was presented to the JHA Council in December 2014. It highlights certain aspects of the criminal justice response to the phenomenon of foreign fighters in Syria, and since recently in Iraq, selected on the basis of their relevance to the mandate and powers of Eurojust. It seeks to identify challenges stemming from recent investigations and prosecutions of aspiring foreign fighters and returnees, recruiters and facilitators, and highlights some relevant national practices. The updated report also contains Eurojust’s reflections on the possible ways to enhance some mechanisms and tools with a view to reinforcing the effectiveness of the EU and national criminal policy response to the phenomenon.

The updated report focuses on findings identified in the analysis of the outcome of the tactical meeting, “Current Trends in the EU Counter-Terrorism Framework: Foreign Fighters in Syria - Judicial Cooperation with Third States”, hosted by Eurojust on 5 June 2014, the information shared with Eurojust by the competent authorities of the Member States, Norway and the USA as a follow-up to the meeting, as well as Eurojust’s own analysis of the criminal justice response to the phenomenon of foreign fighters. It is produced as an update of the report, “Foreign Fighters in Syria – A European perspective: Eurojust’s Insight into the Phenomenon and the Criminal Policy Response”⁴, which Eurojust presented to the EU CTC in November 2013 and to the JHA Council in December 2013.

The updated report is an essential element of the series of ongoing and future activities of Eurojust with a view to promoting a better understanding of the phenomenon of foreign fighters, fostering exchange of information and cooperation and contributing to the discussion of the ways to address the phenomenon in a more robust and efficient manner.

The present document contains a summary of the main findings of the updated report, “Foreign Fighters: Eurojust’s Views on the Phenomenon and the Criminal Justice Response”.

¹ Council document 16130/14 EU RESTRICTED of 26 November 2014.

² Council document 9280/1/14 REV 1 LIMITE of 27 May 2014, “Foreign fighters and returnees from a counter-terrorism perspective, in particular with regard to Syria: state of play and proposals for future work”.

³ Council document 14160/14 LIMITE of 13 October 2014, “Foreign fighters: follow-up on the Conclusions of the European Council of 30 August 2014”.

⁴ Council document 16878/13 EU RESTRICTED of 26 November 2013, hereinafter referred to as the “Eurojust Report of November 2013”.

National Responses to the Phenomenon of Foreign Fighters

The national policies adopted to counter the phenomenon of foreign fighters integrate diverse measures to prevent radicalisation and disrupt travel to participate in training and jihad, to re-integrate and, where necessary, to prosecute. Without being exhaustive, certain aspects of the national responses to the phenomenon of foreign fighters are highlighted below. A particular focus is placed on challenges faced by national authorities that decide to pursue prosecution of aspiring foreign fighters and returnees, as well as some established national practice. Policies and practices illustrating the complementary and reinforcing effect of the application of a multi-disciplinary response to the phenomenon of foreign fighters are also mentioned.

The Legal Framework

European States continue updating their legal frameworks to better address the evolving terrorist threat. In the period since the Eurojust Report of November 2013, new legislative developments relevant to the phenomenon of foreign fighters took place in the Czech Republic, France, the Netherlands and Norway. In France, a new law was adopted that, inter alia, establishes a new terrorism offence, "individual planning and/or preparation of a terrorist act", and sets up administrative arrangements that allow travel ban. In the Czech Republic, the amendments concerned the jurisdictional basis for crimes committed abroad. In the Netherlands, a legal provision concerning the financing of terrorism was introduced. In Norway, two new legal provisions criminalising passive participation in terrorist training and participation in a terrorist organisation were adopted. In addition, Belgium, Denmark and Finland have indicated to Eurojust that new legislative developments are expected in their national legal frameworks concerning foreign fighters.

The Criminal Justice Approach

Substantive and Procedural Legal Issues

The number of concluded cases concerning foreign fighters is significantly small compared to the estimated number of European fighters in Syria and Iraq. In some Member States it may not be possible to regard those who are about to leave for Syria as suspects. And yet, specific legal provisions exist in some national legal frameworks that can be applied to those who plan and leave for Syria to participate in training and jihad and to those who come back. As pointed out in the Eurojust Report of November 2013, the Member States have statutory regimes in place that allow terrorism-related crimes committed abroad to be punished, either on the basis of special statutory provisions stipulating terrorism and related offences as offences covered by extra-territorial criminal jurisdiction, or on the basis of the regular law provisions governing the applicability of national criminal law to offences committed abroad.

The decision to prosecute or apply administrative or other measures towards a suspected foreign fighter is complex and takes into consideration a number of factors, including the seriousness of the alleged conduct, the availability of sufficient evidence, the public interest to prosecute, etc. The returnees may be divided in different categories of risk (high, moderate and low) and decisions to arrest will be made on a case-by-case basis. If no sufficient evidence exists to prosecute, national authorities may prefer to place individuals under surveillance after their return, instead of detaining them; however, difficulties in deciding which returnees to monitor have been experienced. In addition, resource limitations may also apply.

Bearing in mind the specifics of the applicable legal provisions in each Member State and the particularities of each case, potential offences may include, *inter alia*, participation/support to a terrorist organisation, preparation to commit a terrorist act, providing/receiving terrorist training, financing of terrorism, recruitment for terrorism, kidnapping/hostage taking, (preparation to commit) murder, spreading of material with the purpose of inciting terrorism, possession of articles for terrorist purposes or information likely to be useful to a terrorist, hate speech and inciting violence, etc. Charges brought so far concern (suspected) offences committed in the Member States and in Syria. The concluded court cases feature successful prosecution of both aspiring fighters and returnees.

Evidence

Securing strong evidence in cases of suspected (planned) travel and participation in training and jihad may pose a particular challenge. National authorities face difficulties related to the gathering of evidence on activities that have taken place in the conflict zone, to the fact that no criminal investigations can be carried out in Syria and the impossibility to seek cooperation and legal assistance from functioning national authorities in Syria.

The use of Internet communication channels or multiple social media outlets makes monitoring of relevant communication and gathering evidence necessary to prove support to or participation in terrorist activities significantly more difficult. The interception of Voice over Internet Protocol (VoIP) communications (e.g. Skype, Viber, etc.) is problematic and seriously hinders relevant investigations. Major challenges are posed by restrictions on data retention and difficult cross-border cooperation with Internet service providers in Europe and beyond. Further complications arise due to the frequent use of anonymizers, proxy servers, Tor network, satellite links, foreign 3G networks, encryption, etc.

Challenges related to inadequacies in the instruments for international legal assistance in the context of a modern ICT environment have also been pointed out. Further difficulties arise from the fact that in some cases the legal assistance process is initiated after data retention periods have expired.

In an effort to address these challenges, Member States have established cooperation with social media operators and providers of electronic communication services. The sharing of information and evidence among all relevant national authorities, as well as with competent authorities of other States, has emerged as an essential tool. In principle, international cooperation and coordination have been recognised as key factors in ensuring an effective response to the phenomenon. The optimal use of existing tools and mechanisms to cooperate and share information and evidence has resulted in a number of operational successes across Europe.

Financial Investigations

Financial investigations assume a growing significance in cases related to (planned) travel and participation in training and jihad in Syria. In addition to self-radicalised and self-financed travellers, a number of investigations have been conducted into facilitation, financing or other support provided by others to those who leave. In some Member States a financial investigation is carried out in every terrorism-related case. If necessary, expertise from specialised prosecutors dealing with money laundering and other financial offences will be sought.

The Multi-disciplinary Approach

The efficiency of the national responses to the phenomenon of foreign fighters can only be enhanced by the application of a comprehensive approach integrating a wide range of multi-disciplinary policies, mechanisms and tools. While prosecution will only be pursued in some cases, in others administrative

or other measures will be applied to prevent radicalisation and disrupt travel of foreign fighters and to deal with returnees.

Preventing and Combating of Radicalisation

Preventing and combating of radicalisation and disruption of travel are among the priorities of national authorities in their efforts to address the phenomenon of foreign fighters in an efficient and comprehensive manner. Various policies, programmes and initiatives have been put in place to confront the root causes of radicalisation and ensure a solid response to its diverse aspects.

Several European States have adopted strategies, action plans, or programmes that place a special focus on the prevention of radicalisation and the recruitment into terrorist groups. In addition to the dialogue that authorities may have with those suspected of planning to travel to Syria, particular attention is given also to the dialogue with families, friends, and local community members. Member States have set up counselling services, centres for assistance and national help lines to enable families and friends to report situations of concern and seek assistance and advice. Exit programmes to help people out of their extreme way of living have also been implemented. Furthermore, national authorities invest in building trusted partnerships with religious leaders and key persons in the Muslim communities in order to foster robust and persuasive counter-narratives. The importance of building local communities' resilience towards radicalisation and extremism has also been recognised as key, especially in the cases where radicalisation is empowered by peer pressure. Prevention and deradicalisation projects targeting persons serving prison sentences have been launched as well.

Administrative and Other Measures to Address (Planned) Travel and Return

In an attempt to successfully target (planned) travel to Syria and possibly other battlefields, the Member States have adopted a series of administrative and other measures that are applied towards both aspiring foreign fighters and returnees. They include, *inter alia*, the following:

- Travel ban and blocking/withdrawal of passports;
- Expulsion, deportation and prevention of re-entry;
- Freezing of funds and cancellation of social benefit payments;
- Other measures, such as the removal of those who have left for Syria from the public registers of their former place of residence in the Member States, dissolution of associations or groups that engage in conduct with the goal of committing terrorist acts, etc.

Inter-agency Cooperation

Inter-agency cooperation has emerged as a matter of capital importance with regard to building successful strategies in addressing the challenges posed by the phenomenon of foreign fighters. Close cooperation among intelligence services, police, prosecution services and other relevant bodies has been enhanced by the establishment of special *fora*, platforms and bodies to exchange information, seek expertise and identify the most efficient way to proceed.

Further Reflections and Discussion Points

The Adequacy of the EU Legal Framework on Combating Terrorism

Most Member States have adopted legislative measures in accordance with the provisions of Framework Decision 2002/475/JHA on combating terrorism, as amended by Framework Decision 2008/919/JHA of 28 November 2008 (hereinafter these two framework decisions taken as a whole are referred to as “the FD on terrorism”). Assessing whether the provisions of the FD on terrorism proved to be sufficient and effective in relation to the prosecution and conviction of foreign fighters is difficult, as the number of trials and convictions in the Member States in this area remains small.

Eurojust has consulted the national correspondents for terrorism matters on this issue. While this consultation shows that many respondents consider the provisions of the FD on terrorism sufficient, several issues should also be taken into consideration when assessing its adequacy. For instance, the fact that a number of Member States have already adopted, are in the process of adopting or are considering adopting legislation that introduces terrorist offences that go beyond those included in the FD on terrorism, demonstrates that these Member States have already domestically identified the need to expand the list of terrorist offences included in the FD on terrorism and have domestically addressed the increased threat posed by foreign fighters. Furthermore, the fact that only some Member States have done so shows a lack of common criminal justice approach at EU level, as the legislation of some Member States lags behind. The differences in criminalisation in the various Member States without common minimum standards risk creating prosecution gaps.

Member States will also need to consider whether the FD on terrorism needs to be amended in view of complying with the provisions of United Nation Security Council Resolution (UNSCR) 2178(2014). Furthermore, Eurojust's casework and Eurojust's strategic and tactical meetings on terrorism show that Member States face major difficulties in the prosecution of foreign fighters due to obstacles encountered in proving the existence of a “terrorist group”. In addition, the FD on terrorism does not specifically address the situation where foreign fighters travel to Syria (or Iraq) on their own to participate in terrorist activities and are not part of a “terrorist group”.

In light of the above, Eurojust recommends a reflection on the revision of the legal framework for combating terrorism to address the evolving threat posed by foreign fighters and to ensure a common reference for investigations and prosecutions. To this end, consideration could be given to the following:

- a) Expanding the list of terrorist offences, provided in the FD on terrorism, to include types of conduct that have been (or are in the process of being) criminalised in a number of Member States in response to the foreign fighters threat, as well as those listed in UNSCR 2178(2014);
- b) Addressing the problems encountered in relation to the proof of existence of a “terrorist group”;
- c) Assessing whether the FD on terrorism adequately responds to situations where self-motivated foreign fighters travel on their own to conflict zones and are not part of a “terrorist group”.

While respecting the Member States' wish to guarantee an effective and quick judicial response to the foreign fighter phenomenon through implementing UNSCR 2178(2014) on a nationally based approach, adapting the EU minimum standards on combating terrorism to bring them in line with the legislation adopted in a number of Member States would send a strong political message, would

provide a common minimum denominator for addressing the foreign fighter phenomenon and would allow a thorough comparison of experiences and informed decisions on the way forward.

International Humanitarian Law and Foreign Fighters

The motivations, the actions on the ground and the type of groups joined by European foreign fighters vary significantly, especially as regards the conflict in Syria, making an assessment on a case-by-case basis a necessity. Whether foreign fighters fall into the category of war criminals or ordinary criminals, and whether this distinction is actually relevant, would differ according to the circumstances of each individual case and would also differ from one Member State to another, depending on their legal systems.

Eurojust highlighted in issue 19 of its Terrorism Convictions Monitor (TCM), published in May 2014, that Member States may encounter difficulties when prosecuting foreign fighters, and in particular returnees, due to the complex issue of qualifying and proving their participation in the activities of certain groups involved in the armed conflict in Syria as terrorist activities. Reference to international humanitarian law (IHL) has been made by defence lawyers in some trials involving foreign fighters so far. The pending trials will further demonstrate whether the issue of IHL as a defence in a terrorist charge gains importance, and, if so, how national courts and, possibly even international bodies, will deal with the issue.

Eurojust will continue to compile and analyse the information concerning trials and convictions of foreign fighters. Eurojust also recommends further reflection and analysis at EU level to establish if foreign fighters can be held criminally responsible in all Member States, and, if so, for which offences. This analysis could consider the availability at EU level of legal mechanisms for prosecuting returnees for committing a crime under IHL, such as war crimes or crimes against humanity.

Internet-based Evidence in Cases of Foreign Fighters

The use of the Internet for terrorist purposes creates an additional burden for investigations and prosecutions of foreign fighters. Both gathering electronic evidence from other jurisdictions and ensuring its admissibility in court are issues that may hinder successful prosecutions. In the course of the past five years, Eurojust has gathered and analysed such challenges, including:

- a) Absence of legislation for lawful interceptions of VoIP in some Member States, as well as lack of common standards at EU level for this type of interception;
- b) Wording of Article 21 of the Budapest Convention (“interception of content data”) which leaves unclear for some Member States whether it includes VoIP systems;
- c) Communications originating from public Internet access points (for example Internet Cafes) which make it difficult to identify IP addresses;
- d) Lack of comprehensive national legislations to cover relevant Internet-related activities with terrorist purposes (e.g. setting up, hosting and administration of a website with terrorism-related material);
- e) Lack of proper trainings for judges and prosecutors of the virtual world;
- f) Significant differences amongst national laws, particularly in relation to the period of retention of data, which can create difficulties in gathering evidence and judicial cooperation;
- g) Problems regarding the freezing of a personal account on a social network (e.g. Facebook) when the Internet Service Provider (ISP) is located in a different jurisdiction;
- h) Delays in the execution of letters rogatory;

- i) Different approaches in the Member States regarding trans-border access to data, in particular in obtaining data stored in a server located in a different Member State.

Eurojust is of the opinion that coordination at EU level in addressing the legal challenges in the gathering and admissibility of e-evidence in terrorism cases would be beneficial. In this respect, Eurojust recommends exchanges of experience among the Member States, including the collection and dissemination of best practice and challenges encountered by national judicial authorities in using the information extracted from the Internet as evidence in terrorism cases. Eurojust also recommends that awareness and training sessions on the use of the Internet for terrorist purposes should continue to be organised for prosecutors and judges.

Other Points of Reflection on the Role of Judicial Authorities in Cases of Foreign Fighters

European Arrest Warrants (EAWs) are essential to the arrest and surrender of foreign fighters. The issuance of EAWs is likely to remain problematic as the issuing Member State must have in place a legal framework that incriminates a certain form of conduct of the foreign fighter, and sufficient evidence to prosecute. In case of return of foreign fighters to a third State, their detection depends upon border checks against international databases, such as INTERPOL's. Their extradition, however, may not be possible in the absence of a legal basis. In addition, even if possible, extradition proceedings are by nature lengthier than EAW proceedings.

Joint Investigation Teams (JITs) are valuable tools that facilitate legal assistance in criminal matters. JITs present a number of advantages compared to traditional forms of international law enforcement and judicial cooperation, including sharing of information and requesting investigative measures without the need for formal requests. JITs allow team members to be present during coercive measures and to coordinate efforts on the spot. However, practical experience with JITs in terrorism cases remains limited. Eurojust encourages national authorities to consider making use of JITs in cases of foreign fighters and to request support from Eurojust in their setting up and financing.

Financial investigations of foreign fighters constitute another aspect that needs to be prioritised. Eurojust recommends that consideration is given to conducting financial investigations in all terrorism cases, including those of foreign fighters, to counter terrorism financing. In case of limited experience at national level in conducting financial investigations in terrorism cases, Eurojust could offer its expertise and assistance, *inter alia*, in accordance with its role in the implementation of the EU-US Terrorist Finance Tracking Program (TFTP) Agreement.

Further Role of Eurojust

Continued Promotion of the Added Value of Seeking Eurojust's Assistance in Ongoing Investigations and Prosecutions

The systematic involvement of Eurojust in ongoing investigations and prosecutions will allow for enhanced judicial cooperation and coordination. Eurojust shall prioritise the use of coordination meetings and coordination centres in foreign fighter cases, as they have proved to be efficient tools to achieve better operational results. Eurojust shall also prioritise the support to JITs, offering legal advice and expertise before and after a JIT is established, and financing certain JIT activities. Eurojust's role could be of particular importance in view of the possibilities to establish JITs with non-Member States. Eurojust's assistance in solving issues related to Internet-based evidence and financial investigations could help build successful prosecution cases, both through Eurojust's involvement in concrete investigations and prosecutions and through awareness-raising activities. Agreements concluded with non-Member States and international bodies, as well as the active network of Eurojust Contact Points, could also facilitate cooperation in ongoing investigations and prosecutions.

Systematic Monitoring and Analysis of the Criminal Justice Response to the Phenomenon of Foreign Fighters

Eurojust will continue to collect and analyse relevant judgments of aspiring foreign fighters and returnees. The analysis of jurisprudence experience is intended to contribute to building a better understanding of the phenomenon and study some reoccurring issues, particularities of the phenomenon and national criminal justice responses. Eurojust also seeks to promote best practice and experience and thus improve investigation and prosecution cases. Eurojust will also continue to collect information concerning the legal framework applicable to the phenomenon of foreign fighters.

Enhancement of Targeted Cooperation with Third States

Eurojust will continue to explore and promote the possibilities for reinforcing the judicial cooperation in relation to the phenomenon of foreign fighters, in particular via the Norwegian and US liaison prosecutors – and in the future the Swiss liaison prosecutor – appointed to Eurojust, as well as via the Eurojust contact points in the Western Balkan countries and Turkey.

Potential Association of Eurojust with Europol's Focal Point TRAVELLERS

Eurojust considers that its association could bring concrete, practical benefits to the Member States and non-Member States that are currently part of the Focal Point. Eurojust's association could contribute to the enhancement of its effectiveness by stimulating and improving coordination of investigations and prosecutions and facilitating cooperation between the competent national authorities.

Further Discussion and Analysis of the Criminal Policy Aspects of the EU Response to the Phenomenon of Foreign Fighters

Eurojust is committed to providing input to further discussions at EU and international level on the ways to improve the criminal justice response to the phenomenon of foreign fighters. Eurojust will continue to use its regular tactical meetings on terrorism to encourage the exchange of information and insight into specific phenomena, terrorist organisations, *modus operandi*, etc., and promote best practice. In the framework of the annual strategic meetings on terrorism, counter-terrorism matters of interest and relevance to all Member States will be discussed to raise awareness and build shared understanding of emerging and evolving terrorist phenomena.

Conclusions

(1) The phenomenon of foreign fighters requires a common, comprehensive and cooperative approach. It is an EU rather than a national problem and can only be addressed efficiently by a common cooperative effort. National authorities need to consolidate efforts at both national and EU level to build a sustained response that is proactive and inclusive. Eurojust can assist by raising awareness and contributing to discussions on optimal strategies to reinforce a common approach, at the level of judicial cooperation and sharing of best practice amongst judicial authorities.

(2) The national legal frameworks for combating terrorism are continuously evolving, particularly by introducing new terrorist offences. However, a risk exists that the legislation of some Member States will lag behind and that the differences in criminalisation, without common minimum standards, will create prosecution gaps. Eurojust recommends that it should be assessed whether a revision of the FD on terrorism is required, in particular in view of UNSCR 2178(2014). Eurojust could assist by hosting a strategic meeting devoted to an assessment of EU legislation on combating terrorism.

(3) An efficient policy towards the phenomenon of foreign fighters requires a solid criminal justice response. Particular focus should be placed on investigations and prosecutions of those suspected of planning terrorist acts, recruitment, training, financing of terrorism, and incitement and public provocation to commit a terrorist offence. Eurojust's analysis of case law may further contribute to consolidating a common understanding of the complexity and dynamics of the phenomenon and identify reoccurring legal challenges and best practice.

(4) Coordination at EU level in addressing the legal challenges in the gathering and admissibility of e-evidence in terrorism cases would be beneficial. Eurojust recommends exchange of experience, including the collection and dissemination of best practice and challenges encountered by national judicial authorities in using the information extracted from the Internet as evidence in terrorism cases. A harmonised approach at EU level may be necessary to address technical difficulties and legal challenges in the gathering and admissibility of e-evidence. Eurojust also recommends that awareness and training sessions on the use of the Internet for terrorist purposes should continue to be organised for prosecutors and judges.

(5) The need to step up international judicial cooperation in cases of foreign fighters has become more evident. The systematic involvement of Eurojust in investigations and prosecutions would allow for enhanced judicial cooperation and coordination. The Member States could benefit from Eurojust's experience in counter-terrorism matters, and in particular in relation to foreign fighters, radicalisation and lone actors. In relevant cross-border investigations, the setting up of a JIT could also be considered. Eurojust will also continue to build and strengthen trusted partnerships with non-Member States, through both its operational and its strategic work.

(6) The efficiency of the response to the phenomenon of foreign fighters may be further reinforced by the application of a multi-disciplinary approach. The adoption of comprehensive and cohesive policies at national level ensuring the engagement of all relevant public and private stakeholders should be considered. At EU level, cooperation among the JHA agencies, and in particular among Eurojust, Europol and Frontex, is of particular added value, considering the complementarity of their mandates and powers, and should be enhanced.