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from: EU Counter-Terrorism Coordinator
to: Council
Subject: Judicial dimension of the fight against terrorism – Recommendations for action

1. Background

A conference was held in Brussels on 1 and 2 July 2010 on the judicial dimension of the fight against terrorism. The conference brought to a close a series of five meetings held in the framework of a high-level training project on the fight against terrorism and the judicial response to that category of crime. This initiative, which was co-financed by the European Union and coordinated by the French National School for the Judiciary (FR), with the technical support of the CTC, was developed in close partnership with the Federal Ministry of Justice (DE), the National School of Judiciary and Public Prosecution (PL), the Studiecentrum Rechtspleging – SSR (NL) and the public prosecutor of the Audiencia Nacional (ES). The closing conference also had the support of the Judicial Training Institute (BE). The aim of the project was to develop mutual knowledge of judicial systems, to create a network of European magistrates who handle terrorist cases, and to share best practices.

The five meetings covered the following themes: judicial organisation, in Paris on 18 and 19 December 2008; special investigation techniques, in Trier on 15 and 16 October 2009; terrorist financing, in Warsaw on 15 and 16 December 2009; rights of defence, in Amsterdam on 25 and 26 January 2010; and judicial cooperation between the Member States, in Madrid on 15 and 16 February 2010.

The Brussels conference summarised the main elements of the earlier meetings and set the themes they had addressed in the broader context of international cooperation and Union policy. On the basis of those discussions, the CTC drew up a number of recommendations to submit to the Council, identifying those areas where progress could be made either in improving national and European legislation on the fight against terrorism, or in making existing mechanisms work more effectively.

2. Proposed recommendations

First theme: judicial organisation

The fight against terrorism demands a highly targeted judicial response. The MS have put different arrangements in place to provide the best possible expertise and optimum effectiveness. In some MS competence for prosecuting terrorist offences is centralised, and/or cases are heard before special courts. In others, the concern to treat terrorism like any other form of crime has resulted in a refusal to have these offences dealt with by special courts or magistrates. These differences in approach can sometimes make communication and coordination between law-enforcement authorities less effective.

Moreover, the overriding need to prevent terrorist attacks from occurring has led the EU and its MS to take action upstream, on the one hand by criminalising behaviour that precedes, prepares or leads to terrorist acts, and on the other hand by improving the interface between intelligence, police investigations and prosecution and sentencing, while safeguarding individual rights and rights of defence.

Recommended action

- Compensate for the lack of specialisation in those MS which choose not to centralise by offering prosecutors and magistrates dealing with terrorist cases the assistance of the European Judicial Training Network and of the Eurojust National Coordination System where the contact points for terrorism have a seat;
- Catalogue operating methods between intelligence services and players in the judicial sphere and identify good practice, taking account of their respective areas of specialisation.

Second theme: special investigation techniques and terrorist financing

The terrorism phenomenon is now so specialised that it can often be detected only with relatively sophisticated investigative techniques, such as the use of undercover agents or informers, interception of telecommunications, investigating IT systems, the use of tracking devices and other recording equipment placed underneath or inside vehicles moving within the territory of several Member States, or analysing financial transaction flows. These investigative methods require particular skills and qualifications that are not always available everywhere.

The conditions for their use remain largely disparate, which makes cooperation more haphazard in cross-border situations. The relevant mutual assistance or mutual recognition instruments are also fragmentary and have lacunae. The proposal for a European Investigation Order seeks to resolve this problem.

The collaboration of the private sector is invaluable, and needs to take place in accordance with the relevant EU legislation so as to ensure, inter alia, that personal data are adequately protected throughout the European Union.

Recommended action

- Firstly, work to improve mutual awareness of good practices and draw up model agreements, and then establish a common judicial framework for certain investigative techniques such as the use of undercover agents and informers, or online searches, and spell out the rules to be observed in the case of surveillance and undercover operations that continue across borders;
- Strengthen cooperation between MS so as to provide appropriate protection to witnesses and others cooperating with judicial action;
- Reinforce the MS' technical capacity and training in the investigation of computer-based media by establishing a centre of excellence at Europol, and support this effort with EU funding;
- Instruct the CARIN network to promote more effective use of the instruments governing cooperation on the detection of assets, freezing, seizure and return, by compiling a handbook on the use of these measures;
- Utilise the results of the 5th mutual evaluation round to develop a training course in financial investigations;
- Establish a framework of appropriate administrative measures for implementing a preventive freeze on assets pursuant to Article 75 TFEU;
- Develop the partnership with the private sector, notably by improving the FIUs' system of feedback from banks in relation to the financing of terrorism.
- Develop a European terrorist finance tracking programme (EU=TFTP).

Third theme: rights of defence

The EU has resolved to deploy legal means against terrorism, considering terrorism not as a war or a clash of civilisations but as a criminal activity like any other. This approach means of course that rights of defence have to be fully respected, which implies giving very careful consideration to the specific rules governing, for example, the collection of evidence.

Greater transparency and more consistency between the arrangements applying in this area in the various MS should boost mutual trust, provide clearer evidence that procedures are fair, strengthen mutual recognition and thereby help make the EU MS' common legal response to terrorism more effective.

Recommended action

- Establish an overview of the practices of the various Member States as regards the checking and protecting of (intelligence) sources, particularly in cross-border proceedings, whilst safeguarding the rights of defence, especially the principle of an adversarial process;
- Implement as soon as possible the roadmap on protection of suspects in criminal proceedings, as provided for in the Stockholm Programme.

Fourth theme: judicial cooperation

An MS which is the target of terrorism is often unable to respond on its own, and the attack or threat to which it is subject also concerns and affects the EU as a whole, as regards both its aims and the reality on the ground.

Investigations and inquiries in this area therefore require intensive collaboration between MS and optimum use of Eurojust and of the mutual assistance instruments in force. This specific category of crime also calls for further work on these rules to make them more flexible and more efficient in practice, and for the existing arsenal to be supplemented and further developed.

Recommended action

- Lay down the principle that evidence obtained in the context of a joint investigation team in one Member State, in accordance with the procedural requirements of that Member State, is to be regarded as equivalent to evidence properly obtained in the Member State of the proceedings as to substance;

- Consider extending this principle to transfers of proceedings;
- Taking terrorism as a pilot case, promote a mechanism for the settlement of conflicts of jurisdiction: strengthen the mechanisms laid down in the Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, specifically for the area of terrorism;
- Increase the use of joint investigation teams and their EU funding via Eurojust;
- Adopt measures by which Europol and Eurojust should always be involved in joint investigation teams concerning terrorist cases.

Fifth theme: international perspective

As regards terrorism, practically any conspiracy or participation in a terrorist offence has an international dimension.

While each MS has developed its own relations with third countries, based on historic links or geographical, political or economic circumstances, a coordinated approach should nevertheless be encouraged within the EU, building on these special relationships and in collaboration with Eurojust. Agreeing on ways of working with third countries, on methods of cooperation such as joint investigation teams, and on conditions for the acceptance and evaluation of evidence obtained abroad, for instance, would help to ensure greater visibility, achieve greater consistency and build generally more effective and fruitful cooperation between the EU and its partners.

Recommended action

- Make more systematic use of the Eurojust channel in cases which extend outside the European Union;
- Intensify EU assistance programmes for third countries confronted with terrorism, to strengthen their judicial mechanisms;
- Take advantage of the existence of liaison magistrates between third countries and MS and, on the basis of those experiences, extend this network and establish Eurojust liaison magistrates in third countries with which more intense cooperation is desirable;

- Start to draw up cooperation agreements with those third countries most often involved in terrorist cases under investigation in the EU, in particular to determine the legal framework for the exchange of information, arrangements for any technical assistance, and the conditions under which joint investigation teams might be established;
- Lay down basic criteria for the acceptance of evidence gathered in a non-Member State.

Sixth theme: strategy for EU prosecutions and criminal policy

In Framework Decisions 2002/475/JHA and 2008/919/JHA, the EU deemed it necessary to require MS to define as criminal offences certain types of behaviour relating to terrorism. The COSI has embarked on an analysis of the nature and characteristics of the terrorist threat that continues to afflict the EU.

In this context we need to question whether the criminal offences provided for in these instruments match the nature of terrorism today and its current trends, linked inter alia to the expansion of the Internet.

Furthermore, the real impact of these Framework Decisions on the ground has not yet been properly assessed and warrants examination and discussion.

Recommended action

- Increase judicial input in the composition of COSI, by the participation of Eurojust and the Consultative Forum of Prosecutors General/Directors of Prosecution;
- Evaluate the impact of the 2002 and 2008 Framework Decisions on terrorism: carry out systematic and in-depth monitoring of national case-law, based in particular on Eurojust's analysis (the Terrorism Convictions Monitor).