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**Combating traveling for terrorist purposes - real life or just a fantasy?**

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## INTRODUCTION

In recent years, European countries have suffered many terrorist attacks. The increase in the number of attacks begun with the killings at the Charlie Hebdo magazine office in Paris on the 7<sup>th</sup> of January in 2015. In 2015, attacks resulted in total 151<sup>1</sup>, in 2016 142<sup>2</sup> and in 2017 68<sup>3</sup> fatalities. In 2017, a total of 205 foiled, failed and completed terrorist attacks were reported by nine EU Member States.<sup>4</sup>

Since terrorism is an international phenomenon, the ways to combat terrorism also have to be international. In its Resolution 2178 (2014)<sup>5</sup>, the UN Security Council expressed its concern over the growing threat posed by foreign terrorist fighters and required all Member States of the UN to ensure that offences related to this phenomenon are punishable under national law. The Council of Europe has, in this respect, adopted in 2015 the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.<sup>6</sup> Because of the rapid evolvement and growth of terrorist threat, the European Parliament and the Council of the European Union adopted directive 2017/541 (*hereinafter* directive 2017/541) on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. The directive aims to fight against the foreign terrorist fighters, who travel abroad for the purpose of terrorism.

Many European countries have experiences with combating terrorism. Some countries have brought criminal cases in terrorism charges to the court and therefore have valuable case law to present. In 2017 the vast majority of verdicts in the Member States concerned jihadist terrorism and the highest number of verdicts for jihadist terrorism were rendered in France, but Austria, Denmark, Estonia, Finland, Italy, Poland, Portugal and Sweden reported verdicts for jihadist

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<sup>1</sup> European Union Terrorism Situation and Trend Report (TE-SAT) 2016, page 10. Publicly available at: <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2016>

<sup>2</sup> European Union Terrorism Situation and Trend Report (TE-SAT) 2017, page 10. Publicly available at: <https://www.europol.europa.eu/activities-services/main-reports/eu-terrorism-situation-and-trend-report-te-sat-2017>

<sup>3</sup> European Union Terrorism Situation and Trend Report (TE-SAT) 2018, page 9. Publicly available at: <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-2018-tesat-2018>

<sup>4</sup> *Ibid.*

<sup>5</sup> United Nations Security Council Resolution 2178 (2014). Publicly available at: <http://unscr.com/en/resolutions/doc/2178>.

<sup>6</sup> Directive 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. ELT L 88, pages 6-21. Publicly available at: <http://data.europa.eu/eli/dir/2017/541/oj>

terrorism as well.<sup>7</sup> According to European Union Terrorism Situation and Trend Report of 2018 in 2017, Denmark and Estonia were the only two Member States that had convictions and no acquittals for terrorist offences. In criminal case nr 3-1-1-101-16 the Supreme Court of Estonia concluded a case in the charges of financing and support of act of terrorism and aiding to the terrorist organization and both of the accused were convicted in terrorist financing.<sup>8</sup>

The latest terrorist attack took place on 15<sup>th</sup> of March 2019 in New Zealand, which resulted in 49 fatalities. New Zealand's Prime Minister Jacinda Arden has said that the Australian citizen who committed the terrorist act had been in and out of the country, while also traveling the world.<sup>9</sup> The investigation has revealed that the terrorist visited many European countries before committing the terrorist offence, including Estonia and Latvia, where he stayed for about a week. There is a probability, that he already gathered knowledge and means in those European countries with the purpose to prepare for the commission of a terrorist offence. This argument is supported by the fact that the perpetrator had also written a manifest, which contained the historical facts about different countries he had visited. Preparatory acts taking place in other countries than the terrorist offence is committed, is rather a rule than exception. This is why terrorism by its nature is a cross-border crime and requires a strong coordinated response and cooperation within and between the Member States.

The purpose of this paper is to examine the measures of European Union and its Member States to combat traveling for the purpose of terrorism. The paper addresses different issues arising with the provision in general, gathering the evidence to prove the charge of traveling for terrorism and with international cooperation in order to gather and transfer such evidence. In order to address those problems, the paper consists of three chapters, the first of which examines the legislation of traveling for the purpose of terrorism and the problems, which the criminalization of such provisions may arouse. The second chapter examines the proof, which should be gathered in order to charge a person in the offence of traveling for the purpose of terrorism. The final chapter is dedicated to the judicial cooperation between the Member States in order to gather and transfer evidence of traveling for the purpose of terrorism.

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<sup>7</sup> See footnote 3, p 17.

<sup>8</sup> RKKKo 3-1-1-101-16. Publicly available in Estonian at: <https://www.riigikohus.ee/et/lahendid?asjaNr=3-1-1-101-16>.

<sup>9</sup> NBC News. New Zealand shooting suspect's past travels to Europe under investigation. Linda Givetash (16.03.2019). Publicly available at: <https://www.nbcnews.com/news/world/new-zealand-shooting-suspect-s-past-travels-europe-under-investigation-n984001>

## 1. Legal framework of traveling for the purpose of terrorism

As a result of a series of terrorist attacks in Europe in recent years, both the European Union (*hereinafter* the EU) and its Member States have enacted or revised legislation to respond to the terrorism threat. The latest legislation aims to fight against the phenomenon of foreign terrorist fighters. These measures refer largely to substantive and procedural criminal law, but they also include several administrative instruments.<sup>10</sup>

The first legal document, which stipulated the need to criminalize traveling for the purpose of terrorism, is resolution 2178 (2014) of United Nations Security Council, which was adopted on 24 September 2014.<sup>11</sup> In the resolution, the Security Council expressed particular concern that foreign terrorist fighters are being recruited and are joining different entities such as the Islamic State in Iraq. In article 6 (a) of the resolution Security Council decided that all States shall ensure that their domestic laws and regulations establish as a criminal offence traveling or attempting to travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training.

In 2015, an Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism was adopted, which is the first regional legal act, which stated the necessity to criminalize traveling for the purpose of terrorism.<sup>12</sup> In article 4 of the protocol it is stated, that each party shall adopt measures to establish traveling abroad for the purpose of terrorism as a criminal offence under its domestic law. Article 5 and 6 of the protocol provide that funding and organizing or otherwise facilitating traveling abroad for the purpose of terrorism shall also be punishable.

The latest legal act, which provides the necessity to criminalize traveling abroad for the purpose of terrorism is the directive 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

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<sup>10</sup> RomaTrE-Press no 1 (2019). Maria Stella Bonomi. Counter-terrorism legislation in Italy: the key role of administrative measures. Publicly available at: <http://193.205.139.95/ojs/index.php/law/article/view/1873>

<sup>11</sup> United Nations Security Council Resolution 2178 (2014). Publicly available at: [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2178%20%282014%29](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20%282014%29)

<sup>12</sup> Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism. Publicly available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/217>

and amending Council Decision 2005/671/JHA.<sup>13</sup> Article 9 (1) of directive obliges Member States to criminalize traveling for the purpose of terrorism.

Directive provides, that traveling shall be criminalized for the purpose of 1) committing or contributing to the commission of a terrorist offence, 2) the participation in the activities of a terrorist group with the knowledge of the fact that such participation will contribute to the criminal activities of such group, 3) providing training for terrorism, 4) receiving training for terrorism. Article 9 (2) provides that each Member State shall take the necessary measures to ensure that one of the following conducts is punishable as a criminal offence when committed intentionally: 1) traveling to that Member State for the purpose of a) committing or contributing to the commission of a terrorist offence, 2) the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group 3) the providing or receiving of training for terrorism or 2) preparatory acts undertaken by a person entering that Member State with the intention to commit or contribute to the commission of a terrorist offence. According to point 16 of the directive the attempt to travel for the purpose of terrorism shall also be punishable.

It is important to point out, that according to the directive, traveling for the purpose of terrorism shall be punishable only when traveling to a country other than Member State. Originally, the Commission's proposal covered traveling to third countries and intra-EU travel, as well as traveling into the EU to the territory of a Member State for terrorism purposes, whether the offender was a Member State national or resident or a third-country national. While this position was supported by the Parliament, the Council had reservations and wanted to limit the provision to outbound travel (outside the territory of the EU).<sup>14</sup>

Whereas the directive 2017/541 still limits traveling abroad, it restricts the right to freely move and reside within the territory of the Member States as guaranteed under Article 21(1) of the Treaty on the functioning of the European Union and Directive 2004/38/EC.<sup>15</sup> Directive 2004/38/EC allows measures restricting free movement on grounds of policy and public

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<sup>13</sup> Directive 2017/541. – ELT L 88. Publicly available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017L0541> pages 6-21.

<sup>14</sup> The return of foreign fighters to EU soil. Study: ex-post evaluation (May 2018). Publicly available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS\\_STU\(2018\)621811\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf) pages 7-8.

<sup>15</sup> Proposal for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism. Explanatory Memorandum. Publicly available at: <https://eur-lex.europa.eu/legal-content/EN-ET/TXT/?uri=CELEX:52015PC0625&fromTab=ALL&from=ET>

security, including the prevention of crime.<sup>16</sup> Criminalizing traveling for that purpose is important to address the threats posed by foreign terrorist fighters and will provide investigators and prosecutors with the necessary tools to effectively detect the different purposes and activities that foreign terrorist fighters pursue.<sup>17</sup> Unlike the additional protocol, the directive states that traveling for the purpose of terrorism shall be criminalized irrespective of the fact whether the State of destination is passenger's country of residence or of nationality. Because of that, the directive also limits the right to travel to a person's homeland when it is done for the purpose of preparation or commission of a terrorist offence.

Article 28 of the directive stipulates that Member States shall enforce the laws, regulations and administrative provisions necessary to comply with the directive by 8 September 2018. As of that date, 22 of total 28 Member States have criminalized traveling for the purpose of terrorism in their national legislation. Estonia adopted traveling for terrorist purposes in Penal Code on 4<sup>th</sup> of January 2019 and it came into force on 14<sup>th</sup> of January 2019. Estonia criminalized traveling for terrorist purposes in § 237<sup>5</sup> of the Penal Code, which sets out as a criminal offence entry into the Republic of Estonia or travel to another country for the purposes of committing a crime provided for in § 237 (acts of terrorism) or 237<sup>1</sup> (terrorist organization) of this Code or for the purposes or organization or receipt of training provided for in § 237<sup>2</sup> (preparation of and incitement to acts of terrorism of) this code.

According to the explanatory memorandum, the objective elements necessary to constitute this offence require one of two alternative deeds to be executed: entering to the Republic of Estonia or traveling to another country with the aforementioned purpose. The subjective elements necessary to constitute offence require deliberate intent to commit an act set out in the penal code § 237, 237<sup>1</sup> or § 237<sup>2</sup>. Unlike the directive, Estonian penal code does not limit traveling for the purpose of terrorism only to country other than Member State. Since the directive sets out the minimum requirements, Estonian regulation covers more preparatory acts of terrorism than the directive 2017/541.

The criminalization of traveling for terrorism purposes raises some concerns that have not been entirely dealt with in the final text of the directive. In March 2016, the European Economic and Social Committee (EESC) adopted its opinion on the proposed directive as part of its opinion

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<sup>16</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. Publicly available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0038&rid=5>

<sup>17</sup> See footnote 15.

on the European agenda on security. The Committee found the definition of travel for terrorism in the proposal to be extremely unclear and warned against using vague terminology – together with the difficulty of establishing terrorist intent, which bears the risk of creating a conflict between security and human rights.<sup>18</sup> Aforementioned aspects do not only apply to the directive, but since Member States have implemented the regulation to their domestic legislation based on the directive, these issues transfer to national laws as well.

Traditionally in substantive criminal law, criminal responsibility begins with the commission of attempt. In addition to attempt international and European legislation, as well as most domestic substantive criminal laws, allow to expand the scope of punishable criminal offences and criminalize preliminary actions. Criminal responsibility is usually predated in case of offences, which are dangerous to the public. The need to predate criminal responsibility comes from the fact that the potential consequences of these offences express danger to general public. In order to prevent the commission of these criminal offences, the criminal responsibility is expanded and it is possible to respond with criminal proceedings to the actions, which are carried out even before starting to commit the main deed itself.

Expanding the criminal responsibility has been widely used in all international and regional legislation of terrorism. In addition to the obligation of criminalizing traveling for the purpose of terrorism, the directive 2017/541 also stipulates that the Member States shall criminalize public provocation to commit a terrorist offence, recruitment for terrorism, providing and receiving training for terrorism, terrorist financing etc. All of these previously mentioned acts are specified as preparatory acts of terrorism. Traveling for the purpose of terrorism can be seen as one of the preparatory acts of terrorism, when it is carried out in order to commit a terrorist offence. On the other hand, directive 2017/541 provides, that the Member States shall also provide as a criminal offence traveling for the purpose of preparing for terrorist offence.

When traveling for the purpose of terrorism is committed in order to commit a terrorist offence, then the deed can be temporally and spatially close to the terrorist offence and the criminal intervention is necessary to prevent the crime, which is potentially carried out in the near future. But when a person is traveling for the purpose of preparing for terrorist act, for example in order to receive training for terrorism, then the terrorist act may occur months or even years after the commission of the preparatory act. Thus, with the regulation of traveling for terrorism in order

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<sup>18</sup> See footnote 14, page 8.

to commit preparatory acts for terrorism the criminal responsibility is predated even further. It also has to be considered, that traveling to the destination may be direct or by transiting other States en route.<sup>19</sup> Therefore, the time between starting to travel for the purpose of terrorism and the actual terrorist offence may amount to months or even years.

The European Court of Human Rights has stated in the judgement of the *Sunday Times v. The United Kingdom*, that a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>20</sup> The problem with predating criminal responsibility is that preparatory acts may involve socially adequate behaviour and therefore it might not be clear, which acts are unlawful and which are not. In the context of traveling for the purpose of terrorism, acts, which constitute an offence, are also seemingly harmless and externally the danger might be imperceptible. When criminalizing preparatory acts, the offender does not need to cause an effect, but simply increase the risk of its occurrence.<sup>21</sup> This has been criticized, because the construction of behaviour of mere abstract endangerment as criminal offenses drive substantive criminal law into the delicate realm of preventing the commission of crimes and punishing the offender for causing abstract danger.<sup>22</sup>

In case of traveling for the purpose of terrorism the criminal behaviour simply means that a perpetrator uses a plane, train, ship or other means of transport to travel to destination country in order to prepare for or commit a terrorist offence. This means, that the commission of an offence of traveling for the purpose of terrorism usually appears harmless in the outside world. To commit an offence, a person has to perform the deed of traveling, but terrorist intent may not manifest in the outside world. When the law regulates acts, which are seemingly socially adequate and neutral as a criminal wrong, such as traveling abroad, then the burden of proof is in the subjective circumstances of an offence, most importantly in the matter of intent. This in turn may lead to dismissal of charges of terrorism because evidence is considered insufficient for prosecution.

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<sup>19</sup> See footnote 15.

<sup>20</sup> *Sunday Times v The United Kingdom*, p 49.

<sup>21</sup> Wörner, L. Expanding Criminal Laws by Predating Criminal Responsibility – Punishing Planning and Organizing Terrorist Attacks as a Means to Optimize Effectiveness of Fighting Against Terrorism. – *German Law Journal*. Vol 13 No 09, 2012, page 1045.

<sup>22</sup> See footnote 21, page 1046.

There is no substantial case law to support how to consider terrorist intent to be proven. Sweden implemented traveling for terrorist purposes as a criminal offence in 2010. On December 9, 2016, the Svea Court of Appeals in Sweden dismissed a charge of terrorism travel against a Swedish national, reaffirming a lower court decision to clear the defendant of that charge on grounds of insufficient evidence.<sup>23</sup> The Court found that the accused planned to join the terrorist group, but also determined that there was insufficient evidence presented to show that he also intended to commit terrorist crimes.<sup>24</sup> In case of traveling for the purpose of terrorism the problem of insufficient evidence may occur widely, because of the majority in burden of proof is set on the intent. This means, that the regulation of traveling for the purpose of terrorism may become only a preventive norm in criminal law, which occurrence is difficult to prove in court.

On the other hand, since the methods terrorist groups use to prepare for terrorist acts develop rapidly, it is of vital importance to detect their actions early on. Predating the criminal responsibility helps to prevent the terrorist activities, which have the potential to lead to the commission of terrorist acts. Europol has also emphasized that although only a small contingent of returning fighters might be committed to carrying out attacks in the EU, individuals who have traveled to conflict zones will continue to pose a heightened threat to all EU Member States.<sup>25</sup> In addition to contacts, returning fighters may have gained combat and operational experience – and consequently be capable of more impactful or multiple attacks – and are likely to serve as role models to like-minded young people.<sup>26</sup>

It has to be considered that terrorism cannot be combated with classic tools of criminal law. The consequences of terrorist attacks are so extensive that it is unthinkable to only respond to already committed offences. Because of that, it is essential to impose criminal responsibility before the commission of a terrorist offence. In order to prevent the contradiction with the principle of definiteness, the Member States should set out the deeds, which constitute an offence as clearly as possible in national laws. This means that the Member States shall stipulate traveling for the purpose of terrorism as an offence so it would be clear for the third person, which behaviour constitutes a criminal offence and which does not.

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<sup>23</sup> Elin Hofverberg (11.01.2017). Library of congress. Publicly available at: <http://www.loc.gov/law/foreign-news/article/sweden-court-rejects-charge-of-terrorism-travel-government-proposes-tighter-legislation/>

<sup>24</sup> See footnote 23.

<sup>25</sup> See footnote 15.

<sup>26</sup> *Ibid.*

## 2. Evidence to support a charge of traveling for terrorist purposes

Proceedings against suspected terrorists are difficult mainly because of their foreign, political and religious implications.<sup>27</sup> Internal laws adopted by the government regulate criminal proceedings vastly. Each country has its own regulations and laws relating to material and procedural laws. In EU, many directives and regulations are adopted, which must be incorporated within Member States. The main objective is to harmonize the legislation across the EU. In criminal matters, the burden of proof relies solely on the prosecutor. The types of evidence admissible in court are regulated par excellence domestically, which means in order for evidence to be admissible, it must be gathered in accordance to the law. Each criminal case must be approached individually, taking into account the facts corresponding to the criminal matter. The aim of this section is to point out main types of evidence, which can be collected and used to attest committing a crime of traveling for terrorist purposes, as well as some problems regarding the matter.

When it comes down to conducting a criminal case against a person being charged with traveling for terrorist purposes, a wide variety of information can be collected and made admissible by the authorities. However, obtaining evidence can become a great ordeal, due to the internationality and cross-border characteristics of related crimes. Terrorism related crimes, being widely recognized and condemned acts of crime, are regulated by directive 2017/541. Article 20 states that the Member States must take the necessary measures to ensure that effective investigative tools, such as which are used in organized crime or other serious crime cases, are available to persons, units or services responsible for investigating or prosecuting the offenders.

The increased dependency on communication and data networks presents new challenges to law enforcement and prosecutorial authorities in combating the threat posed by terrorism. Terrorists have been among the first groups to exploit new technologies for criminal purposes. Computers and the Internet are rapidly becoming one of the key features of modern terrorism investigations, and both can be used in the commission of crime. They can also contain evidence of crime and can even be targets of crime.<sup>28</sup> The types of digital information usable as evidence,

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<sup>27</sup> Terrorism and evidence gathering: case studies from Germany. Available online: <https://law.siu.edu/common/documents/law-journal/articles-2017/fall2017/7%20-%20Lutz%20-%20sm.pdf>

<sup>28</sup> Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia. Available publicly at: [https://www.unodc.org/documents/terrorism/Publications/FTF%20SSEA/Foreign\\_Terrorist\\_Fighters\\_Asia\\_Ebook.pdf](https://www.unodc.org/documents/terrorism/Publications/FTF%20SSEA/Foreign_Terrorist_Fighters_Asia_Ebook.pdf)

varies heavily. For example, the information posted in social media, IP addresses used to enter a specific site or the metadata found in servers, could all possess power of evidence. However, the information must be relevant and verifiable. Terrorists are known to use encrypted communications, while not enabling high privacy settings, meaning that their personal details, posts and photographs may be openly available.<sup>29</sup>

Main evidence regarding traveling for terrorist purposes are digital evidence found in the Internet, databases of electronic communications providers or suspects personal computer, mobile device or any other source of digital media. Digital evidence is regarded as any kind of information, which is stored or transmitted via computer<sup>30</sup>, as well as other electronic devices. Since the vast digitalization of the modern society, the main traces the authorities want to be looking for are any possible digital imprints left by the suspect. Preceding might be social media posts, instant message chat histories and even a person's browsing history. The main problem with digital evidence left by the suspect is that the evidence may not be admissible in the form, which they were found in. Furthermore, many of the modern forms of communication might be arduous to trace or even untraceable. That means examination of all the devices found and data within, must be conducted and procedurally drafted up into an admissible type of evidence. That usually means drawing up an inspection report, which contains all the required data in a presentable manner. Digital evidence found in persons digital media may consist of pictures, videos etc., associating the accused to the crime. Furthermore, different calls for action might be detected in social media or internet forums.<sup>31</sup> The information found might also be latent, such as metadata or other hidden or encrypted data. The tools and the process of capturing digital evidence must be dependable and not contain any errors. That means experts must carry out the examination of data. Therefore, when handling digital evidence, they are exceptionally vulnerable to human error. Furthermore, digital evidence can be manipulated easily, sometimes even automatically without the user necessarily being aware that the data has been changed.<sup>32</sup>

Physical evidence, such as weapons, different insignia or documents, may indicate that the person has taken part or is intending to commit a terrorism related crime. Such evidence may be found by conducting a search in a person's whereabouts or any other place related to the

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<sup>29</sup> *Ibid.*

<sup>30</sup> E. Casey. Digital evidence and computer crime: Forensic Science, Computers, and the Internet, 3rd Edition. Academic Press, 2011, page 7.

<sup>31</sup> The Ultimate Weapon in the Fight Against Terrorism, Digital Intelligence. Available publicly at: <https://www.cellebrite.com/en/blog/the-ultimate-weapon-in-the-fight-against-terrorism-digital-intelligence/>

<sup>32</sup> See footnote 29, page 65

matter. When executing a search, priority objects seized as physical evidence, should be mobile devices, personal computers (and laptops) or other digital storage devices, such as external hard-drives. Much of this evidence is acquired when data or electronic devices are seized during investigations and secured for examination. Digital evidence can rapidly transit jurisdictional borders with ease, be easily altered, damaged or destroyed, as well as time sensitive. In all instances, the investigation and prosecution of cases involving digital evidence requires specialist criminal investigation skills, as well as the expertise, knowledge and experience to apply those skills in a virtual environment. Devices stated before may contain documents, pictures, videos or messages, which might store information about the suspect's prior activity or intentions. However, the information found analysing objects, must be formed as an evidence separately following the procedural requirements.

Many of the Penal Codes and Criminal Procedure acts, including Code of Criminal Procedure amended in Estonia, allow authorities to collect evidence using the instruments of surveillance activities. However, being the *ultima ratio* remedy and violating the fundamental rights, a set of rigorous rules must be followed in order for the information gathered to be an admissible in court. Currently, legal regulation in Estonia allows surveillance tools to be used in order to gather evidence in cases of terrorism related crimes. Main methods of surveillance tools are listed in the acts adopted by the Member States. However, surveillance tools may only be used within the territory of the country that the criminal procedure is being conducted in. So, when the nature of the crime is cross-border or the suspect lives or temporarily is inhabited in a foreign state, tools frankly become futile. Furthermore, the surveillance tools are beneficial only when preventing a crime. After the crime has already been committed, many of the instruments set out by the procedural laws become useless.

For certain cases, it is also allowed for Member States to exchange information and data collected with surveillance activities. Yet, this still does not mean that the collecting of evidence is made any easier. On the contrary, it might be much harder to turn data received by the Member State into an admissible form of evidence. The other ways of receiving evidence from Member States, include submitting a European Investigation Order. As a tool, this is incredibly useful, however the time span of which the target Member State can fulfil the regulation, is upwards of 4 months.

In addition, a written request to the companies, financial institutions or service providers, which can withhold vital information, can be made in order to collect evidence. When conducting a

criminal proceeding in regards to a person about to commit or having committed a traveling for purpose of committing a terrorist act, it is vital to gather evidence about person entering the Republic of Estonia or traveling to another country. In order for a person to travel using a plane, a ship or any other form of public transport, the tickets and the information regarding the purchase of the ticket, can be detected rather easily. Within the states of EU, Schengen Area is in action, which means that all the member states have officially abolished passport and all other types of border control at their mutual borders. On the 2<sup>nd</sup> of March 2017, Comité des Représentants Permanents (COREPER) submitted a proposal in order for the EU to incorporate a system, which records the entry and leaving the country concerning the border crossing from or to third party countries. This means, the border crossings between a Member State and a third-party country, must be recorded and preserved. However, the principle of territoriality must be followed, according to which the requisitions are obligatory only in that State, which the criminal case is being conducted in. By virtue, the companies such as Google or Facebook are not obligated to comply the requests submitted by the authorities of the Member States where the companies are not located.

Finally, in order to successfully prosecute a person in a crime of traveling for terrorist purposes, it must be within reasonable doubt, that the organization, which the person is tied to, must act with an objective of committing a terrorist act. This can mainly be proven by the nature of the organization based on the well-known facts or the previous acts or statements made by the group. The link and communication between the suspect and the leader(s) of the organization must be determined and proven as well as the fact that the aim of the organization is to commit an act of terrorism. Terrorism organizations tend to take pride in their actions, which means they usually boast about their acts and statements, often taking claim in the acts committed by their members. This eases the authority's burden of proof when tying an organization to its purpose. However, it might be hard to draw a line between connecting a specific act with activity of a terrorism organization and individual activity of a deranged or mentally unstable person.

### 3. Gathering and transferral of evidence

Treaty on the Functioning of the European Union<sup>33</sup> chapter 4 articles 82-86 regulate judicial cooperation in criminal matters, which is mainly based on the principle of mutual recognition of judgments. Article 83 helps to harmonize criminal law in the EU in the case of serious cross-border crimes – e.g. terrorism – by adapting to common minimum standards. National law and international agreements dictate which judicial authority has that competence. The Treaty of Amsterdam<sup>34</sup> covers the cooperation in criminal and police matters. Numerous Council of Europe Criminal Law Conventions also governs international cooperation in criminal matters.<sup>35</sup>

Council Decision 2005/671/JHA of 20<sup>th</sup> September 2005 on the exchange of information and cooperation concerning terrorist offences<sup>36</sup> article 2 stipulates cooperation and transferral of gathered information to Eurojust and Europol.

The purpose of Framework decision 2006/960/JHA of 18<sup>th</sup> December 2006 is to establish the rules under which Member States' law enforcement authorities may exchange existing information and intelligence effectively and expeditiously for conducting criminal investigations or criminal intelligence operations. Meanwhile, it shall not be without prejudice to bilateral or multilateral agreements or arrangements between Member States and third countries and to instruments of the EU on mutual legal assistance or mutual recognition of decisions regarding criminal matters, including any conditions set by third countries concerning the use of information once supplied.<sup>37</sup>

If a Member State has obtained information in accordance to the aforementioned framework and wishes to use it as evidence before a judicial authority, the Member State has to obtain consent of the Member State that provided the information or intelligence. This framework

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<sup>33</sup> The Treaty on the Functioning of the European Union. Publicly available at: [https://eur-lex.europa.eu/eli/treaty/tfeu\\_2012/oj](https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj)

<sup>34</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. Publicly available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11997D/TXT>

<sup>35</sup> For example, Council of Europe Convention on the Prevention of Terrorism (Treaty no. 196). Publicly available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196>. Also Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS no. 217). Publicly available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/217>

<sup>36</sup> Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences. Publicly available at: <https://eur-lex.europa.eu/legal-content/EN-ET/TXT/?uri=CELEX:32005D0671&from=EN>

<sup>37</sup> Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union. Publicly available at: [https://eur-lex.europa.eu/eli/dec\\_framw/2006/960/oj](https://eur-lex.europa.eu/eli/dec_framw/2006/960/oj)

however does not impose an obligation to provide information and/or intelligence; it only ensures that this kind of information can be provided at the request of a competent law enforcement authority.<sup>38</sup>

There are also time limits for provision of information: urgent requests shall be responded within at most eight hours when the requested information is held in a database directly accessible by a law enforcement authority, otherwise the authority has to provide reasons or postpone and provide the requested information ASAP, but not later than within three days. Non-urgent cases shall be responded within a week and in all other cases, the response shall be ensured within 2 weeks.<sup>39</sup>

Exchange of information can take place via any existing channels for international law enforcement cooperation: Europol, Eurojust. National law of the Member State regulates spontaneous exchange of information.<sup>40</sup>

On the 29<sup>th</sup> of March in 2004, the Council on the European Union adopted a declaration on combating terrorism, where the EU leaders agreed to create and EU Counter-Terrorism Coordinator (CTC) and appointed Mr. Gijs de Vries to the position.<sup>41</sup> On the 19<sup>th</sup> of September in 2007, Gilles de Kerchove was appointed Counter-Terrorism Coordinator.<sup>42</sup> The CTC is in charge of several tasks, namely his tasks are related to briefing, reporting and meeting with authorities.<sup>43</sup>

Eurojust works closely with Europol to increase the exchange of information.<sup>44</sup> Communications among Europol, Member States, non-EU countries and third parties take place through three main channels: The Europol Information System (EIS), Secure Information Exchange Network Application (SIENA) and Europol Platform for Experts (EPE).<sup>45</sup> In the fight against terrorism, only the first two aforementioned channels are relevant.

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<sup>38</sup> See footnote 38.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Council of the European Union declaration on combating terrorism (29.03.2004). Publicly available at: <http://data.consilium.europa.eu/doc/document/ST-7906-2004-INIT/en/pdf>

<sup>42</sup> Press release of Javier Solana (19.09.2007). Publicly available at: <https://www.consilium.europa.eu/media/21894/95988.pdf>

<sup>43</sup> Council of the European Union. Counter-Terrorism Coordinator. <https://www.consilium.europa.eu/en/policies/fight-against-terrorism/counter-terrorism-coordinator/>

<sup>44</sup> Eurojust Counter-Terrorism Q&A. Publicly available at: [http://www.eurojust.europa.eu/press/Documents/2018-06-20\\_Eurojust-CounterTerrorism-QA.pdf](http://www.eurojust.europa.eu/press/Documents/2018-06-20_Eurojust-CounterTerrorism-QA.pdf)

<sup>45</sup> Europol. Information exchange. Publicly available at: <https://www.europol.europa.eu/activities-services/services-support/information-exchange>

Airlines are obliged to hand national authorities passengers' data (PNR)<sup>46</sup> for all flights from 3<sup>rd</sup> countries to the European Union (and vice versa) in order to prevent, detect, investigate and prosecute terrorist offences.<sup>47</sup> Every Member State has the obligation to establish a Passenger Information Unit (PIU), who has the responsibility for collecting and exchanging PNR data.<sup>48</sup> This data is of great value when gathering evidence to prove the charge of traveling for terrorism.

On 25<sup>th</sup> January 2016, Europol under the authority and direction of the European Council created the European Counter Terrorism Centre (ECTC), which is a central hub in the EU in the fight against terrorism. One of the focus of the ECTC is the international cooperation among counter terrorism authorities. ECTC is the only point in the EU where counter terrorism operational information from law enforcement from all EU Member States and third parties, is brought together for analytical purposes<sup>49</sup> and to construct the wider EU perspective on counter terrorism phenomena for both operational and strategic goals. The ECTC can assist by cross-checking live operational data with the already available data at Europol, quickly bringing financial leads to light, and by analysing all available investigative details to assist in compiling a structured picture of the terrorist network. The ECTC can contribute to a coordinated response during a major terrorist event. Different teams are available for this purpose, often combined with counter terrorism experts temporarily seconded from Member States, depending on the nature of the event.<sup>50</sup>

The Europol Information System (EIS) is Europol's central criminal information and intelligence database. It covers all of Europol's mandated crime areas, including terrorism. EIS allows Member States to directly share and retrieve information on convicted persons, criminal structures and offences and the means used to commit them, the system allows checking

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<sup>46</sup> Passenger Name Record – names, dates, itinerary, payment method

<sup>47</sup> Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (<https://eur-lex.europa.eu/eli/dir/2016/681/oj>)

<sup>48</sup> In Estonia, data is forwarded to the Police and Border Guard Board, the data will make up a database BRIIS (booking information system), which is linked with Estonian as well as international internal security databases. See also: <https://www.politsei.ee/et/juhend/lennureisijate-broneeringuinfo-1/3> and <https://www.siseministerium.ee/en/flight-booking-information>

<sup>49</sup> E.g. counter terrorism analysis work file (AWF), which provides the framework for operational analytical support with the Member States and non-EU partners. As a result, the number of data categories that are permitted to be stored and processed is broader than in the EIS (within the counter terrorism AWF, there is focused analysis on certain counter terrorism phenomena). Existing and emerging terrorist phenomena are handled within separate, so called Analysis Projects (AP). In these highly secure environments, the information is collected, cross-matched and analyzed. See footnote 3.

<sup>50</sup> See footnote 3.

information<sup>51</sup> on a certain person or an object of interest (cars, documents). EIS also allows the storage and automatic cross-checking of biometrics (DNA). 24 countries that use EIS share lists of foreign terrorist fighters (FTFs)<sup>52</sup>. Data entered into the EIS remains under the full control of the inputting entity<sup>53</sup> and cannot be altered in any way by other parties. Users can run searches in the system and upon a positive hit, user may request more information through their Europol National Unit. EIS also interfaces with the Secure Information Exchange Network Application (SIENA)<sup>54</sup>, which enables information exchange between Member States, Europol and third parties that have operational cooperation agreements with Europol.<sup>55</sup>

The Internet Referral Unit (IRU) was established in 2015 and it is based at ECTC and produces strategic insights into jihadist terrorism, but also provides information for use in criminal investigations. Terrorists use internet and social media to recruit followers and promote or glorify acts of terrorism and violent extremism. IRU detects and investigates this content, analyses it and flags and shares it with relevant partners. It also detects and requests the removal of this content.<sup>56</sup>

The EU Member States have established the Counter Terrorism Joint Liaison Team (CT JLT) to work more closely on cross-border investigations, consisting of counter terrorism experts and analysts from the Member States and Europol counter terrorism experts and analysts.

In 2017, the Parliament was focusing on rules that will enable the interoperability of the databases<sup>57</sup> and allow for the simultaneous consultation of the different systems.

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<sup>51</sup> By the end of 2017 the EIS held information on over 46 000 persons linked to terrorism (the majority linked to the foreign terrorist fighter phenomenon), contributed by 37 countries. Footnote 3.

<sup>52</sup> By the end of 2015, around 20 counter-terrorism units had direct access to that list.

<sup>53</sup> The data owner is responsible for ensuring the accuracy of the data, verifying time limits on the storage of data and ensuring that the data is up to date. Also, the owner of the data can limit the right to access to the data case-by-case, but as a general rule, all users have direct access to all data.

<sup>54</sup> EIS is used by Europol's officials, Member State liaison officers and seconded national experts stationed at Europol headquarters, also staff in the Europol National Units and in competent authorities in Member States. Europol Information System (EIS), publicly available at: <https://www.europol.europa.eu/activities-services/services-support/information-exchange/europol-information-system>

<sup>55</sup> Secure information exchange network application (SIENA). Publicly available at: <https://www.europol.europa.eu/activities-services/services-support/information-exchange/secure-information-exchange-network-application-siena>

<sup>56</sup> By the end of 2017, 86% of flagged content by IRU was removed. See also: <https://www.europol.europa.eu/about-europol/eu-internet-referral-unit-eu-iru>

<sup>57</sup> Briefing: Interoperability of European information systems for border management and security. Publicly available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI%282017%29607256](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI%282017%29607256)

In November 2017, the EU adopted Regulation (EU) 2017/1939 to set up a European Public Prosecutor's Office (EPPO)<sup>58</sup>, which will tackle large-scale, cross-border crime against the EU budget. In September 2018, the European Commission presented a press release<sup>59</sup> to extend the European Public Prosecutor's Offices competence to include the fight against terrorist offences.

On 20<sup>th</sup> of June in 2018 during the annual seminar on counter-terrorism organized by Eurojust, France, Germany, Spain and Belgium made a joint statement (declaration) calling for the creation of a European Judicial Counter Terrorism Register at Eurojust to achieve effective cooperation and greater availability of all information held by the national judicial authorities.<sup>60</sup>

On the 5<sup>th</sup> of November 2018 at a ministerial meeting, Eurojust declared that it stands ready to swiftly create and host the aforementioned register.<sup>61</sup> Europol's next step on this initiative is to launch a working group to explore and prepare the implementation modalities.<sup>62</sup>

On the 5<sup>th</sup> of February 2019, the Council of the EU presented a press release about the fact that the Romanian Presidency of the Council and representatives of the European Parliament reached a preliminary agreement on the two proposed regulations establishing a framework for interoperability between EU information systems in the area of justice and home affairs. The regulations establish the following interoperability components:

- 1) A European search portal, which would allow competent authorities to search multiple EU information systems simultaneously, using both biographical and biometric data.
- 2) A shared biometric matching service, which would enable the searching and comparing of biometric data (fingerprints and facial images) from several systems.
- 3) A common identity repository, which would contain biographical and biometric data of third-country nationals available in several EU information systems.

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<sup>58</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). Publicly available at: <https://eur-lex.europa.eu/eli/reg/2017/1939/oj>

<sup>59</sup> 12.09.2018 press release (European Commission), publicly available at: [http://europa.eu/rapid/press-release\\_IP-18-5682\\_en.htm](http://europa.eu/rapid/press-release_IP-18-5682_en.htm) and [https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-factsheet-epo\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-factsheet-epo_en.pdf)

<sup>60</sup> Joint statement by France, Germany, Spain and Belgium (June 20, 2018). Publicly available at: [http://www.eurojust.europa.eu/press/Documents/2018-06-20\\_DECLARATION%20FR-DE-ES-BE\\_ENGLISH.pdf](http://www.eurojust.europa.eu/press/Documents/2018-06-20_DECLARATION%20FR-DE-ES-BE_ENGLISH.pdf)

<sup>61</sup> 05.11.2018 press release, publicly available at: <http://www.eurojust.europa.eu/press/PressReleases/Pages/2018/2018-11-05b.aspx>, see also [http://www.eurojust.europa.eu/press/PressReleases/PublishingImages/2018-11-05\\_Ministers-Declaration\\_EN.JPG](http://www.eurojust.europa.eu/press/PressReleases/PublishingImages/2018-11-05_Ministers-Declaration_EN.JPG)

<sup>62</sup> European Judicial Counter-Terrorism Register (16.01.2019). Publicly available at: <https://eucrim.eu/news/european-judicial-counter-terrorism-register/>

- 4) A multiple identity detector, which checks whether the biographical identity data contained in the search exists in other systems covered, to enable the detection of multiple identities linked to the same set of biometric data.<sup>63</sup>

Technology affects and influences our daily lives in the 21<sup>st</sup> century, which is why the interoperability of EU's databases and information systems is of importance. Interoperability stands for the ability of multiple and disparate organizations' databases to freely and securely exchange and reuse data between their respective systems.<sup>64</sup> Protecting your citizens who are subject to terrorist attacks abroad is not possible without close external cooperation.

As mentioned above, the Framework decision 2006/960/JHA sets out several requirements in case of information exchange and sets out different time limits. The organizations, legislation and information systems mentioned in this paragraph shows the desire to tackle terrorism from every angle. The proverb "the more the merrier" does not apply in this situation, since it rather causes more confusion for the authority that conducts proceedings of a criminal case quickly and effectively. Since terrorism is a cross-border crime and information about the suspect can be stored in any country, it is of great importance<sup>65</sup> for every country to have access to necessary tools and data by itself, not by a third party. Every authority should have direct access to a single information system, where every fragment of information is stored and therefore it is more likely to solve a case and not be hampered by different procedural and/or time-consuming actions. This kind of system places the burden to every authority to enter data into that system. What one authority considers important, might not be considered important by other authority and therefore is not entered into the system. This again creates a need for an international regulation about which data shall be gathered and entered into such system.

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<sup>63</sup> Press release on the interoperability between EU information systems (05.02.2019), publicly available at: <https://www.consilium.europa.eu/en/press/press-releases/2019/02/05/interoperability-between-eu-information-systems-council-presidency-and-european-parliament-reach-provisional-agreement/>

<sup>64</sup> Interoperability between e-procurement systems and other government databases, publicly available at: [https://ec.europa.eu/regional\\_policy/sources/good\\_practices/GP\\_fiche\\_18.pdf](https://ec.europa.eu/regional_policy/sources/good_practices/GP_fiche_18.pdf)

<sup>65</sup> The person, who carried out the Berlin Christmas market attack on 19th December 2016 used several identities to evade border and law enforcement authorities, which is one of the reasons why different authorities need an effective simultaneous consultation of different information sharing system. See also: <http://www.europarl.europa.eu/news/en/headlines/security/20180316STO99922/how-to-stop-terrorism-eu-measures-explained-infographic>.

The ISA<sup>2</sup> programme supports the developments of digital solutions to benefit from interoperable cross-border and cross-sector public services. Although it is meant for public administrations, it could be used as an example when developing a system for the fight against terrorism. See also: [https://ec.europa.eu/isa2/isa2\\_en](https://ec.europa.eu/isa2/isa2_en)

## CONCLUSION

The fight against terrorism in the last years is more topical than ever. The immense growth of technology and digitalization of the modern world have allowed people wider access and possibilities regarding the internet. The methods of obtaining the necessary training or tools, or proving the intent of committing terrorist acts are harder for the authorities to detect. This proposes a new level of threat for the authorities trying to prevent and proceed the crimes. The operative proceedings of such cases require cooperation between Member States as well as third party countries to exceed new levels, develop new approaches and establish a firm and level regulation regarding terrorism related crimes.

First of all, the directive 2017/541 has recently been adopted by the European Parliament and the Council on 15th of March 2017. The directive sets out to level and improve the proceedings of terrorism related crimes all over the EU. The legislation has to be unambiguous, leaving no room for translation. However, the directive is found to be poorly worded. Many of the Member States have adopted to the principles of the directive to their respective domestic laws. This might lead to the regulation to be blurred and inapplicable, causing the charges to be dropped because of lack of evidence, as well as being unlevel in the Member States of EU.

In addition, the regulation criminalizes the traveling for terrorist purposes. Out of all components of the crime, the intent is the most difficult to prove. In criminal proceedings, the charges can often be dismissed in case of sufficient evidence. For example, the criminalization of traveling for terrorism purposes is a necessary regulation, which helps to prevent and tackle terrorism related crimes. However, with the burden of proof relying on intent, the norm has a risk of becoming preventive.

Secondly, the evidence, which can be used in order to successfully convict a person of committing a terrorism related crime, are mainly digital. Physical evidence, which contain mostly technical tools (computers, mobile phones etc.), can be seized, since they can store pictures, videos or other sources of communication (e.g. instant messages). Social media (Facebook, Instagram etc.) can be helpful, however some vital information might also be transmitted via crypted messaging, which might be untraceable. The main problem regarding the digital evidence is composing the information into admissible form. Furthermore, the tools set out in the regulations of procedural law regarding international procurement of evidence, is not as effective and prompt as needed. Within the borders of Europe, it is possible to acquire information via European Investigation Order, which however can take upwards of 4 months

for the target country to fulfil. Surveillance activities can be executed within the state as well as in other Member States. However, in case of terrorism related crimes, the surveillance tools are mostly not useful, since often it is difficult to predate a terrorism act being planned.

Lastly, the essay discussed the international cooperation regarding gathering evidence. Within the last years, many organizations, treaties have been established in order to intensify the cooperation between authorities. All share the common function to improve the collaboration between countries. Many databases have been developed, which allow the joined countries to submit information and data regarding the terrorism. Other countries can freely access and add data, which they find to be useful. This shows great initiative in the cooperation between countries in order to prevent and proceed the criminal matters in regards of terrorism related crimes. However, the number of different institutions and registries makes it more difficult for the investigator to find the relevant information. As of recent, the EU has addressed this issue and is currently developing a central database, which could exempt the investigator from the obligation to find the correct institution or registry to find the information needed.

In conclusion, the directive 2017/541 has been adopted in most of the Member States (except for Denmark, Ireland, Greece, Cyprus, Luxembourg and the United Kingdom) of the EU, which criminalizes and improves the cooperation as well as investigative tools in order to tackle terrorism related crimes. The directive has taken great initiative and means to address the arising problem of tackling the combat against terrorism. In regards, the evidence to support the charge, have developed to be mainly digital, which arises the problem of drawing up admissible evidence. The collaboration between the states is regulated by a wide variety of treaties and organizations, as well as registries in order to gain information as quickly as possible. This confirms that terrorism is a strictly regulated crime and the fight against terrorism takes place on all levels. With the current regulation and tools set out, carrying out a procedure against terrorists, has definitely been improved and worked upon. However, there is not much case law to confirm whether the tools developed over the last years are as effective as they are on the paper.