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**NOTE**

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From: EU Counter-Terrorism Coordinator  
To: Council  
Subject: Foreign fighters and returnees: discussion paper

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Document 16002/1/14 REV 1 assesses the level of implementation of the measures decided by the Justice and Home Affairs Council on 9-10 October 2014. In addition, Ministers are invited to provide political guidance in two specific areas: the judicial response to the phenomenon of foreign fighters and further improvements in information exchange on foreign fighters.

**The judicial response**

While the judicial response to the foreign fighters phenomenon has improved, it does not reflect the scale of the problem (around 10 convictions for around 3000 EU citizens/residents involved in the phenomenon of foreign fighters). Three issues are particularly challenging and merit a political steer:

## **(1) The legal framework**

On 24 September 2014, the UN Security Council adopted Resolution 2178 which requires UN Member States to criminalize travel abroad for terrorist purposes and financing and facilitation of such travel. A number of Member States had updated their legal frameworks already prior to the UNSC Resolution to better address the foreign fighters challenge, others are in the process of doing so or considering it.

In October 2014, the Council invited the Commission, also in light of the adoption of the UNSC Resolution 2178(2014), to further monitor the effectiveness of the responses provided under the Framework Decision, and explore ways to address possible shortcomings, based on the implementation report adopted in September 2014, the report produced by Eurojust, and any relevant information.

In the CATS, where a discussion took place on the basis of a paper by the CTC<sup>1</sup>, Member States expressed hesitation to update the Framework Decision, questioning the necessity and citing the urgency to implement UNSCR 2178, which could be achieved more quickly at national level.

The following reasons support updating the Framework Decision, as was already done in 2008 when international developments had moved beyond the Framework Decision of 2002: Without update, it would no longer be the yardstick for minimum required criminalization of terrorism across the EU. Harmonized criminalization of foreign fighter related offenses across the EU would provide a common legal framework, which would be an important reference point for the EU agencies and facilitate cross-border cooperation. Differences in criminalization without common minimum standards risk prosecution gaps. It would send a strong political message and would be an inspiration for third countries.

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<sup>1</sup> document 14188/14

The work towards updating the Framework Decision would in itself be beneficial, as it would mean a strategic policy debate on the various criminal policy approaches towards foreign fighters. The European Court of Justice would have the possibility of review. Updating of the EU Framework Decision would happen in addition and in parallel to the national measures Member States are already taking in view of UNSCR 2178, so that the need for urgency could be addressed. If not updated, the Framework Decision 2002/475/JHA on combating terrorism<sup>2</sup>, as amended by Framework Decision 2008/919/JHA<sup>3</sup>, risks staying behind the legal developments both at the global level and the national level.

In its report<sup>4</sup>, Eurojust points out that domestically a number of Member States have already identified the need to expand the list of terrorist offences to address the threat foreign fighters beyond those included in the Framework Decision, and that the lack of a common criminal justice approach and lack of common minimum standards at EU level risks prosecution gaps. The Eurojust report also states that the types of conduct related to travel of foreign fighters which UNSC Resolution 2178 (2014) requires Member States to criminalize are not covered by the Framework Decision. Eurojust recommends a reflection on the revision of the EU legal framework for combating terrorism to address the evolving threat posed by foreign fighters and to ensure a common reference for investigations and prosecutions. It states that adapting EU minimum standards 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. Eurojust welcomes the debate at EU level on the effectiveness of the criminal justice response and is ready to assist further by hosting a strategic meeting.

***In view of all these elements the Council is invited to express its views on the way ahead.***

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<sup>2</sup> OJ L 164, 22/06/2002, p. 3–7.

<sup>3</sup> OJ L 330, 09/12/2008, p. 21–23.

<sup>4</sup> Foreign Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response, Updated Report, November 2014, Eurojust restricted

## **(2) International legal assistance and sharing of best practices with regard to the gathering of evidence**

As Eurojust also points out in its report, collection and use of evidence with regard to foreign fighters poses practical and legal challenges: evidence from the battlefields in Syria and Iraq is difficult to obtain, collection and use of internet based evidence is challenging, cross-border legal assistance is often necessary to get access to evidence (foreign fighters transit through other countries, internet providers might be located abroad). In its report Eurojust states that 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 exchanges of experience by national judicial authorities and collection of best practices with regard to internet related evidence.

In its report, Eurojust stresses the need to step up international judicial cooperation in cases of foreign fighters. While cooperation of Eurojust has been strengthened with the Western Balkans, Turkey, the US and Schengen partners, there is no systematic cooperation with the countries in North Africa and the Middle East. In the MENA region, Europol has only been tasked to work with Morocco, Turkey and the United Arab Emirates. CEPOL is organizing training programmes for the Balkans, but not yet for the MENA region.

*Should the Commission be invited to deepen its work on challenges related to evidence in the foreign fighters context and ask Eurojust to organize strategic / tactical meetings?*

*Should the relevant working groups be tasked to reflect about how the EU agencies could be used more strategically in cooperation with third countries, in particular those in North Africa and the Middle East?*

### **(3) Disengagement and rehabilitation programmes in the context of judicial proceedings**

An additional challenge faced by the judicial systems of the Member States with regard to foreign fighters is the need for rehabilitation and disengagement programmes, either as alternative to criminal prosecution, as a condition to release from pre-trial detention, as an alternative to a prison sentence (for example as a condition for a suspended sentence, this also avoids the risk of further radicalization in prison of the foreign fighters and of other prisoners from returnees as veterans have contributed to radicalization in prisons), while convicted foreign fighters carry out a prison sentence or in the case of early release from prison. A number of Member States have already started to develop such measures in the judicial context or are in the process of doing so. Inter-disciplinary and inter-agency approaches are helpful in this regard.

*Should the Commission be asked to examine how best such judicial rehabilitation and disengagement programmes could be set up, facilitate the sharing of best practices and consider support to such projects, drawing on the experience of the RAN Centre of excellence and Eurojust?*

#### **Information exchange**

Serious efforts have been made to improve and maximise the information exchange on foreign fighters, as testified in the annex to this document regarding a better use of the SIS and the Interpol SLTD database as well as the Europol Focal Point, the negotiations on an EU PNR, the use of API and national Passenger Information Units (PIUs), the sharing of data between Europol and Frontex.

However, more needs to be done. The following measures should be examined and implemented:

(1) Member States have increasingly provided information to **Europol's Focal Point "Travellers"** but the number of cases reported to Europol continue to fall short of what could be expected on the basis of the estimated number of foreign fighters that Member States report are known to them; Member States' law enforcement agencies are therefore invited to be more systematic in providing Europol with relevant information; Member States are also invited to consider the added value of associating international partners such as the US Custom and Border Protection Service and INTERPOL, as well as Eurojust. In order to improve information transfer to Europol as well as enhance direct operational contacts between their respective counter-terrorism units, Member States are also invited to join the cooperation structures being set up at the initiative of the Presidency at Europol in order better respond to the phenomena of foreign fighters. Furthermore, as the lack of information at Europol is in part due to the fact that security services do not routinely share their information with Europol, the different Member States should explore together with Europol, which is currently carrying out a feasibility study, the possibilities to use the ma3tch techniques currently used by FIU.net<sup>5</sup> for counter-terrorism as a way to ensure a distributed and integrated data analysis and collaboration that virtually connects local classified information sources through a decentralised computer system; this would allow the identification of 'need-to-know' information in real time without information being transmitted to Europol;

(2) **Interpol** provides databases for its member countries that allow for the (targeted) distribution of information on wanted persons, including foreign fighters; this is a very useful and indeed unique tool for the sharing of information on foreign fighters between Member States and key international partners such as the US and Turkey; in order to maximise the use of these databases, experts should study and deliver methods to harmonise the national practices for inserting national information on foreign fighters in such a way that they are better exploitable by relevant third countries but also limited in their distribution to the concerned partners.

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<sup>5</sup> On the ma3tch technology see Udo Kroon, CIO FIU.Net, Ministry of Security and Justice, The Netherlands, udo.kroon@fiu.net, "Ma3tch: Privacy AND Knowledge 'Dynamic Networked Collective Intelligence'," 2013 IEEE International Conference on Big Data

**(3) Eurojust** seeks to promote the sharing of best practice and experience in relation to foreign fighters and returnees and thus improve investigation and prosecution cases. Eurojust continues to collect and analyse relevant judgements of aspiring foreign fighters and returnees. The analysis of jurisprudence experience is intended to contribute to building a better understanding of the phenomenon and its specifics, study some reoccurring issues, as well as interesting particularities of the phenomenon of foreign fighters and national criminal justice responses. Member States should be encouraged to make optimal use of the possibilities for exchange of information on prosecutions and convictions with Eurojust, as set out in Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences.

*Do Ministers agree to the way forward as presented?*

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