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**COMMISSION STAFF WORKING DOCUMENT**

**Synthesis of the replies from the Member States to the Questionnaire on criminal law,  
administrative law/procedural law and fundamental rights in the fight against terrorism**

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#### **Introduction**

On 18 December 2007, the Commission sent the Member States a questionnaire on criminal law, administrative law/procedural law and fundamental rights in the fight against terrorism.

The Commission prepared this questionnaire to collect information from the relevant Member State authorities as to the effectiveness of the existing legal framework for combating terrorism and its compliance with fundamental rights. The questions put to the Member States were intended to help identify those aspects of the law – if any – which presented difficulties for the relevant authorities in ensuring public safety and security while fully respecting fundamental rights.

All twenty-seven Member States have replied to the questionnaire by 28 July 2008 and have agreed to the publication of a synthesis of their answers. Account has been taken of additional explanations and clarifications submitted by some of the Member States at the request of the Commission by the cut-off date of 8 October 2008.

The quality and accuracy of this compilation inevitably depend on the quality and completeness of the information sent to the Commission which influence the value and the accuracy of this factual analysis. The variety of the replies adds to the interest of this analysis. The material has allowed the Commission to elaborate a comprehensive and factual overview of the issues in question in the European Union, fulfilling the objectives of this stock-taking exercise.

## Questions

- 1. WHAT PROBLEMS – IF ANY - HAVE NATIONAL AUTHORITIES ENCOUNTERED WITH PERSONS WHO WERE SUSPECTED OF TERRORIST ACTIVITIES, BUT WHO COULD NOT BE PROSECUTED EITHER BECAUSE OF THE LACK OF EVIDENCE OR BECAUSE THEIR BEHAVIOUR NEVER AMOUNTED TO AN OFFENCE? IF SO, COULD YOU INDICATE HOW MANY SUCH CASES HAVE ARISEN?**

Member States' reactions to this question vary widely. There are two main reasons that may explain such variety.

With regard to terrorism Member States find themselves in different situations. While some Member States have prosecuted and convicted a considerable number of individuals for terrorist offences, others – at least in the recent past – have not had to deal with terrorism. Member States' replies should be considered against this background. Thus, some national authorities have not encountered any problem of prosecuting terrorist suspects since no terrorist activity has been reported on their territories. As Finland plainly states, 'there is no knowledge that an indictment for a terrorist offence has ever been under consideration'. The same reasoning applies to Latvia, which stresses its lack of experience in this kind of cases, and Lithuania where 'there have been no investigations of terrorist cases'. Similarly, the Czech authorities explain that, since terrorist cases are very scarce, the issues question 1 refers to 'hardly arise'.

Two other Member States, Estonia and Poland, where no problems or no major problems with terrorist suspects have been reported, have no records of prosecutions and convictions for terrorist offences (see question 5 below). Malta also explained that there has only been one case of prosecution for terrorist offences, that still pending before the judge.

Nonetheless, in spite of a low rate of recorded terrorist activity, Member State's authorities might still encounter problems of the kind described in question 1. Slovenia constitutes a very good example: with no reported convictions or prosecutions for terrorist offences, it had three cases related to international terrorism rejected in preliminary proceedings. The suspects could not be prosecuted because of lack of evidence, insufficiency of international cooperation or because the behaviour under investigation did not constitute a criminal offence.

By contrast, despite a number of prosecutions and convictions (see question 5 below) Greece has encountered no problems so far and Hungary notes only one problematic case, in the sense of question 1.

The second element to consider is that Member States' replies also depend on different approaches to the question. In this respect, the fact that persons suspected of terrorist activities cannot be prosecuted either because of the lack of evidence or because their behaviour never amounted to an offence is not perceived as a 'problem' by some Member States.

In this sense, Luxembourg differentiates between behaviour which does not amount to a criminal offence and the lack of evidence. The former is not considered problematic: 'if some behaviour does not constitute an offence (...), legally speaking there is no terrorist act nor should it be considered that there have been problems with the suspected persons'. As for the latter, Luxembourg qualifies it as 'a situation that must equally be accepted under the rule of law'.

In a similar vein Germany clarifies that, the issues referred to in question 1 are simply the consequence of applying the rule of law to all areas of criminality, including terrorist offences. Nevertheless, Germany adds that, in some cases, terrorist suspects against whom it has not been possible to take measures under criminal law or the law on residence are sometimes subject to surveillance measures which may involve significant amounts of time and effort.

The Romanian views are close to those of Germany and Luxembourg in the sense that Romania does not consider the situations described in Question 1 as, in principle, problematic. This Member State underlines the role of the prosecutors who ‘verify in a criminal case all the information regarding such deeds and make the relevant decision according to the evidence produced’. Moreover, Romania states that ‘prosecution is not a benchmark for their activity, as they make sure that no innocent person is prosecuted, and that all perpetrators are tried observing all criminal procedure rights granted under the law’.

Having considered these two elements, the replies of those Member States which, in addition to Slovenia, report difficulties hindering the prosecution of terrorist suspects, are analysed below. As a preliminary remark, it can be noted that, most often, these Member States refer to evidence-related problems.

This is the case for Ireland, Italy and the UK which refer to the difficulty of converting criminal intelligence into evidence capable of withstanding scrutiny in a court of law (on this see also Question 4). In the case of Italy, this difficulty led to the introduction of ‘new rules on expulsion from the country of persons suspected of adding to the effectiveness of acts of cross-border terrorism’. This system, Italy explains, has been flexible and effective as a preventive tool against foreign individuals whose actions, while not amounting to a criminal offence, are considered a ‘risk’ to the country.

Both Denmark and Sweden stress the difficulties of obtaining sufficient evidence in cases involving attempted offences. This is particularly relevant since, as Sweden puts it, ‘the overwhelming majority of investigations concerning terrorist suspects do not concern offences that have been committed but the preparation of terrorist offences and conspiracy to commit such offences’. Denmark notes, in addition, that the attempted terrorist offences are often committed jointly by several people. The loose structure of the group, explains Denmark, makes it difficult to identify those that should be prosecuted and to produce evidence of each individual’s involvement in the attempt. Finally, Denmark has encountered difficulties as regards evidence for the financing of terrorism, in particular proving that the recipient of the funding was (part of) a terrorist organisation. This, Denmark explains, lies in the fact that the organisations concerned are based and operate outside the EU’s borders.

While some Member States are concerned with producing evidence in court, Austria and Cyprus refer to a previous stage, noting the restrictions on measures that can be used for investigating criminal offences. In particular, in Austria, investigative measures are considerably limited ‘where enquiries do not get beyond the stage of suspicion of a specific person’. Telecommunications surveillance and technical monitoring of non-public behaviour are thus excluded. Moreover, ‘any measures taken by the security police below the level of suspicion of a criminal offence must always be proportional which also means that it is inconceivable for these measures to continue in force for an indefinite period’. In Cyprus, the interception of communications is currently not allowed when investigating criminal offences. However, Cyprus plans to amend its Constitution and, by extension, the 1996 Private Communications Confidentiality Protection Act, by removing the confidentiality rule for telecommunications under certain conditions and in certain cases. Such exceptions should

include ‘the investigation into probable offences against the Cypriot State, public safety or public order’.

Portugal and Slovakia point to difficulties in identifying terrorist suspects. In particular, Portugal notes problems of identifying suspects travelling with false documentation as well as the difficulties of proving the link between the offence of forgery and that of logistically supporting or financing terrorist activities. Slovakia underlines the lack of international cooperation mechanisms adapted to the operational identification of suspects with biometrics. It also refers to the alleged ‘misuse of the asylum system’ as a means to obstruct extradition or deportation of terrorist suspects.

Only Belgium clearly states that it considers that there are legal gaps. Its authorities indicate that general public incitement to commit terrorist offences, or the distribution of information through the Internet, which third parties could use to prepare and commit terrorist offences, are not criminal offences.

Finally, the Spanish reply approaches the question from a completely different perspective. When considering ‘problems’, Spain refers to possible mistakes by law enforcement authorities when deciding to keep a terrorist suspect under detention. A wrong assessment of the grounds for suspicion may lead law enforcement authorities to take this measure when in fact the behaviour of the suspect does not amount to a criminal offence or there is not sufficient evidence.

***Replies vary widely.***

***Often, the absence of problems can be explained by a very low rate of terrorist activity. Some national authorities have not encountered any problem in prosecuting terrorist suspects because they have not been confronted with terrorist activities taking place in their territories.***

***Sometimes, Member States did not consider that there was a problem because they took the following approach: the fact that persons suspected of terrorist activities cannot be prosecuted either because of the lack of evidence or because their behaviour never amounted to an offence should be considered as a situation that must be accepted under the rule of law.***

***The Member States reporting difficulties hindering the prosecution of terrorist suspects most often refer to evidence-related problems. These include the admission of intelligence material in court; the difficulty of obtaining sufficient evidence in cases involving attempted offences, and restrictions or limitations related to investigative measures.***

**2. DOES YOUR NATIONAL LAW CONTAIN SPECIFIC PROVISIONS ON SUBSTANTIVE OR PROCEDURAL CRIMINAL LAW DESIGNED TO FACILITATE THE INVESTIGATION AND PROSECUTION OF CRIMINAL OFFENCES LINKED TO TERRORISM OR ARE YOU PLANNING ANY REFORM IN THAT RESPECT? IF SO, PLEASE SPECIFY.**

Most Member States indicate that their national law contains specific provisions on substantive or procedural criminal law designed to facilitate the investigation and prosecution of criminal offences linked to terrorism.

However, some Member States reply that there are no specific provisions and that they have no intention of reforming the law.

Among those Member States that confirmed the existence of specific sets of terrorism-related criminal laws, an overwhelming majority of them gives detailed accounts of the relevant

national provisions and legislative instruments, which allows for a very interesting overview. Nonetheless, the different interpretation of this question by Member States should be borne in mind. In this respect, when some Member States' replies include fewer relevant provisions than others, it may very well be because they interpret this question in a stricter way (i.e. mentioning only those provisions 'designed to facilitate', rather than all terrorism-related provisions in general) and not necessarily because they actually have fewer relevant provisions.

The differences in the interpretation of this question are apparent when it comes to substantive criminal law, where the Framework Decision on combating terrorism<sup>1</sup> provides for a level playing field among EU Member States and still, the replies vary considerably from one Member State to another. Actually, some Member States did not mention provisions on substantive criminal law at all.

In this respect, Finland makes the point that it does not mention national measures covering conspiracy to commit a terrorist offence because Question 3 deals with this issue. Finland is one of the few Member States, together with the Czech Republic, Estonia, Latvia, Lithuania and Malta, which give a negative reply to Question 2. The Czech Republic and Lithuania, however, include significant further information in their answers.

In particular, although the Czech Republic states that there are no such special provisions under national law, it adds that procedural measures concerning intentional offences apply in the context of a terrorist attack<sup>2</sup>. Besides, the Czech Republic plans to introduce further amendments 'primarily concerned with preventing terrorist attacks and, therefore, aimed at intelligence services being able to intercept signs and indications of a terrorist threat in time'. Furthermore, it provides for a wide range of provisions of substantive criminal law making terrorist activities and the logistic support to such activities punishable.

A similar case is that of Lithuania. While it states that it does not have specific provisions to investigate or prosecute criminal offences linked to terrorism, this Member State refers to 'legal and organisational measures' that 'ensure necessary priority for effective investigation of terrorist related offences'. These include universal jurisdiction as well as investigations conducted by specialised bodies in the criminal police bureau and from the prosecutor general's office.

Poland's reply includes qualifying remarks that are in fact close to those of the Czech Republic and Lithuania. On the one hand, Poland refers to several specific measures of substantive law in addition to a specific provision extending Polish jurisdiction to terrorist offences committed abroad by foreigners. On the other hand, it states that the Code of Criminal Procedure does not provide for separate rules on the taking of evidence in terrorist offences, or on jurisdiction of courts or duration of detention.

The rest of the Member States give a positive answer to this question detailing the relevant provisions on substantive and procedural criminal law, which are analysed below.

Concerning substantive criminal law, Belgium, Germany, Italy and Luxembourg underline the existence of provisions on terrorist groups or logistic and financial support of terrorist activities. In particular, Belgium, Italy and Luxembourg note that in their national legal orders

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<sup>1</sup> 2002/475/JHA: Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002, p. 3.

<sup>2</sup> These refer to the use of intelligence means and devices including monitoring of persons and objects; use of under-cover agents; sham transfers of illicit objects; interception and recording of telecommunications; retention, opening and replacement of consignments, and freezing of assets.

the mere membership of a terrorist group constitutes an offence, while France notes that the qualification of an offence as a terrorist offence implies more serious penalties.

Austria, Bulgaria, Romania, Slovenia, Spain and the Netherlands report a wide range of provisions, covering not only offences linked to terrorism, like the provisions mentioned by the Member States above but also the core terrorist offences as defined in Article 1 of the Framework Decision on combating terrorism. It should be noted that all these Member States pay special attention to the financing of terrorism: Austria and Slovenia point to specific provisions while Bulgaria, Romania and the Netherlands refer to specific legislative instruments dealing with this issue. Also, Spain is considering making the financing of terrorism a separate offence in addition to its current qualification as a form of collaboration with a terrorist group.

It is also interesting to note that Austria, Hungary and Slovakia include provisions on particular circumstances so that offenders who assist the authorities by providing relevant information for the investigation of terrorist offences or their prevention may have their penalties reduced or their prosecutions stayed.

Finally, Cyprus, Germany, Slovakia and the Netherlands all comment on plans for new provisions on some forms of behaviour linked to terrorism. In particular, Cyprus envisages introducing the offence of withholding information on the commission of terrorist offences as well as including provisions on particular circumstances of the kind referred to above; Germany is planning to introduce amendments relating to the preparation of terrorist attacks and the incitement to commit such attacks; Slovakia intends to reword the offence of forming, contriving and supporting a terrorist group and introduce new forms of participation in the commission of a terrorist offence, namely public provocation, recruitment and training, and the Netherlands intends to make training in a terrorist camp punishable.

Despite the variety of replies, the level of similarity (approximation) achieved in this area of substantive criminal law should be noted. As explained above, the Framework Decision on combating terrorism has played an important role<sup>3</sup>. Actually, Austria, the Czech Republic, Ireland and Poland refer explicitly to the alignment of national legislation with this Framework Decision, but approximation also results from other EU-related instruments<sup>4</sup>. Furthermore, international Conventions should be taken into consideration, especially the Council of Europe Convention on the Prevention of Terrorism, which is mentioned by Romania, Slovakia and the Netherlands<sup>5</sup>.

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<sup>3</sup> This instrument approximates the definition of terrorist offences in Member States as well as that of offences relating to terrorist groups and other behaviour linked to terrorist acts. It also ensures that Member States establish penalties for natural and legal persons having committed or being liable for such offences which reflect their seriousness. Furthermore, it requires Member States to set out jurisdictional rules ensuring that the terrorist offence may be effectively prosecuted and adopt specific measures with regard to victims of terrorist offences because of their vulnerability. This instrument also provides for particular circumstances that may entail the reduction of the penalty, although it gives Member States the choice as whether to take such circumstances into account or not.

<sup>4</sup> See, for example, the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182, 5.7.2001, p. 1.

<sup>5</sup> The Convention includes three new offences linked to terrorist activities -public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism- as well as adequate safeguards to guarantee the full respect of fundamental rights. Currently, most Member States have signed the Convention and some have already ratified it. The proposal for the amendment of the Framework Decision on combating terrorism should also be noted in this respect, since it aims to introduce the three offences into the EU counter-terrorism legal framework.

Therefore the differences in the replies do not imply major legislative divergences but are likely to reflect the Member States' views as to which of many approximated rules particularly facilitate the investigation and prosecution of criminal offences linked to terrorism.

On the contrary there is only very limited approximation of procedural rules, in particular those applying to terrorist offences. That being said, Member States' replies show some significant similarities, as indicated below.

Generally, the specificities of Member States' procedures for investigating and prosecuting offences linked to terrorism may be divided into those affecting the investigation and those concerning jurisdiction.

Special investigative powers are reported by most Member States. In particular, the infiltration of undercover agents is referred to by a number of Member States including Belgium, Denmark, France, Greece, Italy and Romania, while the use of informants is explicitly referred to by Belgium and France. It should also be noted that Austria, Belgium, France, Greece, Germany, Slovenia and Sweden underline the use of covert audio or visual surveillance devices in undercover investigations<sup>6</sup>.

The interception of telecommunications or derogations to standard rules on telecommunications surveillance is also widely mentioned: Austria, Belgium, France, Germany, Italy, Luxembourg, Portugal, Slovenia, Sweden, the Netherlands refer to it. The UK refers to the codes regulating the retention of telecommunication data while the possibility of requesting traffic data is noted by Germany and Romania. Austria and Greece refer to automated comparison of data.

Derogations from standard rules on search of premises are mentioned by Portugal and France. This last Member State also sets out special rules on seizures. The UK underlines specific powers of stop and search. Denmark refers generally to coercive measures, and Greece and Italy to DNA analysis.

Access to information or surveillance of bank accounts and transactions is pointed to by Belgium and Slovenia. Similarly, Ireland refers to special powers to detect and prevent the use of the financial system for the financing of terrorism while France underlines the possibility of requesting the cooperation of tax services when investigating terrorism financing.

As regards the intelligence obtained during these investigations, Slovakia provides for derogations to the rules on the use and deletion of intelligence and Denmark mentions derogations concerning its compilation. Also relating to the resulting intelligence, Ireland mentions the use of 'opinion' evidence from senior police officers. However, this issue, as well as the measures for the protection of witnesses noted by several Member States, will be analysed below, under Question 4.

Special powers or conditions of detention are mentioned by France, Germany, Ireland, Portugal, Spain, Sweden and the UK while in Slovakia it is possible to postpone the filing of charges. As regards reforms planned in this field, the UK comments on a new piece of legislation that was introduced to its Parliament on 24 January 2008 and contains several new provisions to improve the ability of the police to investigate and prosecute criminal offences linked to terrorism.

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<sup>6</sup> Some Member States clarify that covert audio or visual surveillance can only be used in public spaces.



Additionally, Italy refers to the possibility of using ‘investigative interviews’ in prisons as well as issuing residence permits for investigative purposes and expelling immigrants for reasons of terrorism

As regards jurisdiction, several measures are mentioned. Those most commonly referred to are the jurisdiction of special prosecutors and special or upgraded courts, mentioned by Belgium, Bulgaria, France, Ireland, Luxembourg, Romania and Slovakia. France similarly refers to the quasi-universal jurisdiction of French courts over terrorist suspects who are on French territory and to extended periods for the prosecution of the offence and the imposition of the penalty. Concerning the process itself, the UK refers to provisions on preparatory hearings<sup>7</sup>.

It should also be noted that several Member States refer to European and international mechanisms of cooperation. For example, a Cypriot draft law includes provisions on international cooperation or information sharing when investigating terrorist offences and Romania underlines judicial cooperation on criminal matters, including the European Arrest Warrant<sup>8</sup>. This last instrument is also mentioned by Greece and Poland and joint investigation teams are referred to by France and Poland. In addition, the possibility of obtaining traffic data from communications service providers in the context of the investigation of terrorist offences, mentioned by Germany and Romania, is provided for by the Directive on data retention<sup>9</sup>.

Finally, Italy includes a paragraph on the impact of these measures on fundamental rights. This Member State considers that the measures for the expulsion of foreigners suspected of terrorist activities might be the most invasive ones. However, it also notes that such rules are consistent with Italian constitutional case law, which allows for derogations from the standard constitutional guarantees if they are justified by the need to protect other constitutional rights and limited in time.

***Most Member States have indicated that they have specific provisions on substantive or procedural criminal law designed to facilitate the investigation and prosecution of criminal offences linked to terrorism.***

***It is important to note the level of approximation that has been achieved in substantive criminal law, mostly further to the implementation of the Framework Decision on combating terrorism. Approximation will increase following the implementation of the amendment adopted by the Council on 28 November 2008<sup>10</sup>.***

***On the contrary, there is very limited approximation of procedural rules applying to terrorist offences. That being said, most Member States mention the use of special investigative powers; many refer to infiltration by undercover agents and the use of covert audio or visual surveillance devices in undercover investigations. Various Member States also referred to the interception of telecommunications or derogations to standard rules on telecommunications surveillance and special powers or conditions of detention.***

<sup>7</sup> See Terrorism Act 2006, Section 16: "preparatory hearings in terrorism cases".

<sup>8</sup> 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member, OJ L 190, 18.7.2002, p. 1.

<sup>9</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, p. 54.

<sup>10</sup> Date of adoption to be confirmed.

***A number of Member States mention specificities as regards jurisdiction, most widely, the jurisdiction of special prosecutors and special or upgraded courts.***

**3. IS THE ISSUE OF CONSPIRING TO COMMIT A TERRORIST CRIME DEALT WITH UNDER YOUR NATIONAL LAW? IF SO, HOW IS IT COVERED - AS A CRIME IN ITSELF, OR IN AN INDIRECT WAY – FOR EXAMPLE AS BEING PART OF A TERRORIST GROUP, OR AS PREPARING FOR A TERRORIST ATTACK?**

Before starting the analysis of the replies to this question, it should be noted that the concept of ‘conspiracy’ is not necessarily the same in all Member States. Substantial divergences may appear. For example, under the Dutch legal system, conspiracy is committed as soon as two or more persons have agreed to commit the crime, while in France conspiracy or ‘association de malfaiteurs’ requires one or more material facts.

Also, there are some divergences<sup>11</sup> affecting the legal categories dealing with conspiracy to commit terrorist offences in an indirect way, such as participation in a terrorist group or preparation of a terrorist attack.

That being said, all Member States give a positive answer to the first part of the question. Conspiring to commit a terrorist crime is dealt with under all Member States’ legal systems. However, conspiring to commit terrorist offences is a crime in itself only in a few Member States. In particular, it appears that the conspiracy to commit terrorist offences (at least the most serious of them) is explicitly dealt with under the Dutch, French, Spanish and Swedish legal systems. Also, the UK responds that under its general law, it is possible to prosecute conspiracy to commit any offence contained within its counter-terrorist legislation. In addition, the Czech Republic refers to conspiracy as a form of preparation which applies to the most serious criminal offences; Austria makes conspiracy punishable if it relates to a list of criminal offences such as kidnapping or murder and, under Maltese law, conspiracy with intent to commit an offence in Malta which is punishable by custodial sentence constitutes a crime.

Nearly all Member States referred in their replies to indirect ways of addressing the conspiracy to commit terrorist offences. This includes some Member States that, in addition to explicit provisions on conspiracy, mention complementary rules that may apply depending on the circumstances of a particular case. Multiple provisions were therefore included in Member States’ replies. These provisions can be divided into two groups: on the one hand, those on participating in a terrorist group/criminal organisation or supporting it<sup>12</sup> and, on the other hand, those on incitement, complicity, and preparation of terrorist offences<sup>13</sup>. In addition, some Member States refer to provisions criminalising public provocation to commit terrorist

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<sup>11</sup> On divergences between the legal categories dealing with participation in criminal offences under Member States’ legal systems, see the Commission staff working document — Annex to the Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism (COM(681) final), of 6 November 2007.

<sup>12</sup> Provisions of this kind were mentioned by Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Finland, Greece, Germany, Hungary, Italy, Latvia, Lithuania, Luxemburg, Malta, Poland, Portugal, Romania, Slovakia and Slovenia and the UK.

<sup>13</sup> Provisions of this kind were referred to by Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Luxemburg, Malta, Romania, Slovakia, Slovenia, the Netherlands and the UK.

offences or the promotion of terrorist activities, recruiting for terrorism and training for terrorism as separate offences<sup>14</sup>.

Ireland constitutes a special case since it refers to Section 6 of the Criminal Justice (Terrorist Offences) 2005 Act which is formulated in very wide terms, covering different forms of behaviour, namely, engaging in a terrorist activity or in a terrorist-linked activity and attempting to do so.

As for the equivalence between these provisions and ‘conspiracy’, it must be noted that this is a complex question affected by the divergence between national legal systems mentioned above. Italy, for example, fully equates the offence of ‘association for terrorist ends including international ones or for subversion of the democratic order’ with the offence of conspiracy to commit a terrorist crime. The same applies to Estonia, Lithuania and Luxembourg and their national provisions dealing with participation in terrorist groups/criminal organisations or with the preparation of terrorist offences.

Finland and Portugal explicitly address the issue of equivalence, but come to different conclusions. Portugal’s statement clarifies that there is no exact correspondence between criminal conspiracy as defined in Anglo-Saxon law and crimes by terrorist organisations under Portuguese law. By contrast, Finland argues that, considering all relevant provisions containing elements of conspiracy, in particular those on preparation and promotion of terrorist offences, ‘it is difficult to establish a substantively independent, separate criminalisation for conspiracy and discern any need whatsoever for this’. Germany expresses very similar views, noting that ‘there is no need to establish a specific offence of conspiracy’.

*All Member States confirm that conspiring to commit a terrorist crime is covered under their national legislation. However, only a few of them refer explicitly to conspiracy to commit a terrorist offence. Mostly, national legal systems cover this behaviour indirectly, as an offence relating to a terrorist group, as participation in or preparation of a criminal offence.*

**4. DOES THE PROSECUTION OF TERRORIST CASES POSE ANY PARTICULAR PROBLEMS RELATED TO OBTAINING, EVALUATING OR PRODUCING IN COURT EVIDENCE FROM SENSITIVE SOURCES? IF SO, DOES YOUR NATIONAL LAW PROVIDE FOR ANY PARTICULAR PROCEDURES FOR DEALING WITH THIS?**

Questions 1 and 4 have some similarities, in particular with respect to the different background of Member States in fighting terrorism, which must be considered when analysing their replies. Indeed, the reason why some Member States have not encountered particular problems related to obtaining, evaluating or producing in court evidence from sensitive sources may very well be the absence or low level of terrorist activity in their territories. This explanation emerges from the replies of the Czech Republic, Finland, Latvia and Lithuania.

Also, in Estonia, Malta and Slovakia, which report no problems of this kind, the statistics show no prosecutions or convictions for terrorist offences (see Question 5 below). The lack of records applies equally to Poland, although it does not explicitly deny the existence of problems related to obtaining, evaluating or producing evidence from sensitive sources in court.

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<sup>14</sup> Provisions of this kind were referred to by Finland, Latvia and Romania.

Nevertheless, as explained under Question 1, the number of problems encountered by Member States is not necessarily linked to the level of terrorist activity. For example, Hungary has not encountered major problems despite a number of prosecutions and convictions for terrorist offences since 2001. A number of Member States explain the procedures followed in their national legal orders in these situations without considering them as ‘particularly problematic’. This is the case for Austria, France, Greece, Italy, Portugal, Romania, Sweden and the Netherlands.

By contrast, Belgium, Cyprus, Denmark, Germany, Ireland, Luxembourg, Spain, Slovenia, and the UK note the existence of certain difficulties or conflicts and describe how their national systems deal with them.

Luxembourg and Spain point to the insufficient protection of witnesses, which may make their testimony more difficult to obtain. Spain explains that witnesses are only protected during the criminal proceedings. However, there is special protection for undercover agents and the same applies to intelligence services and law enforcement authorities in Luxembourg.

By contrast, Belgium, together with Denmark, Greece, Hungary, Portugal, Sweden, Slovakia and the Netherlands, mentioned national rules which permit the protection of witnesses while Cyprus envisages introducing witness protection under the Draft 2008 Combating Terrorism Act.

A problem noted by this last Member State is that conversations cannot be intercepted in criminal investigations; however, as explained under Question 1, a draft law aims to deal with this issue through a legal derogation from the confidentiality of communications in exceptional circumstances. Ireland and the UK refer to problems involved in producing evidence obtained from sensitive sources.

In contrast with this limitation, under Dutch law, information from intelligence services can be provided in court by hearing witnesses, and official documents from intelligence services can be considered to be valid written evidence. Furthermore, the Dutch Supreme Court has confirmed this procedure by stating that ‘in principle, there is no objection to the use of materials gathered by intelligence and security services in the criminal process’. However, with respect to its use as evidence, the court ‘will have to carefully assess, on a case by case basis, whether it can contribute to the evidence of the case, in view of the sometimes limited options to verify such material’

Similarly, Sweden states that it has no provisions which prohibit certain kinds of evidence. Instead, it is possible for the public prosecutor to adduce all the evidence which is judged to be necessary to the case. Similarly, Belgium points out that evidence coming from informants as well as non-classified information from intelligence services poses no particular problems.

Regarding the admission of information from intelligence services in court, Austria and France explain that it is possible to submit information to the court without disclosing the source. In Ireland, the possibility to ‘claim privilege’ not to disclose the source of evidence is subject to a court decision as to whether the claim of privilege is justified. Also, the use of ‘opinion’ evidence from senior police officers is permissible under Irish law.

However, these Member States also report limits as to the actual use of information from sensitive sources in court. Austria and the Netherlands stress the principle of free evaluation of evidence so that it is incumbent upon the judge to assess the value of this type of information, while in France, in principle, the information collected by the intelligence services is not sufficient to convict the suspect unless it has been confirmed or reinforced later in the context of a judicial investigation.

Important to note furthermore is that not *all* the information obtained by the intelligence services is admissible in court. In this sense, Austria notes that information disclosed to the intelligence service under certain conditions cannot be submitted to the court and Sweden refers to the limitation that classified information constitutes. In Belgium, France and Romania there are procedures to declassify information in some cases so that the information may be used in court. This last country clarifies that data from the intelligence services may be declassified and used in court as long as it does not hinder national security. However, the problem remains, as Belgium underlines, for some classified information from intelligence services which cannot be declassified nor therefore used in court.

Finally, Denmark and Germany explicitly refer to the conflict between the confidentiality of intelligence information and the right of the defence to access the case files. Germany, in particular, points out that the requirements for confidentiality are frequently in conflict with the 'principle of publicity' prevailing in the German criminal process and with the unrestricted right of the defence to access the case files. The State's interest in confidentiality, notes Germany, must not work to the detriment of the accused party. If evidence that might have been able to aid the acquittal of the accused is not produced in court, the defence must be compensated by way of particularly meticulous assessment of the evidence and, where appropriate, the accused has to be acquitted, applying the principle '*in dubio pro reo*' (i.e. 'Giving the defendant the benefit of the doubt' Denmark refers to a specific case where the defence sought access to all information received by the police intelligence service from a particular source. However, the police intelligence service was allowed to withhold the information since it was of no relevance to the accused in the case in question.

*On the one hand, few Member States indicate that they have experienced no problems in the prosecution of terrorist cases related to obtaining, evaluating or producing in court evidence from sensitive sources. On the other hand, only a few Member States limit themselves to indicating their difficulties. Mostly, Member States explain the procedures followed in their national legal orders in these situations without considering them as particularly problematic.*

*A recurring issue is the admission of intelligence gathered by security services as evidence in court. Certain legal systems admit this kind of information although the principle of free evaluation of evidence or the need for further confirmation in some cases mitigates its value as evidence. An issue related to the admission of such intelligence in court is the conflict between the confidentiality of this information and the right of the defence to access the case files.*

**5. SINCE 2001, COULD YOU INDICATE HOW MANY PERSONS HAVE BEEN PROSECUTED AND HOW MANY CONVICTED FOR A TERRORIST OFFENCE IN YOUR COUNTRY?**

<b>Member States</b>	<b>Prosecutions</b>	<b>Convictions</b>
Austria	-	2
Belgium	-	8
Bulgaria	-	-
Cyprus	0	0
Czech Republic	1	1
Denmark	20	6
Estonia	0	0
Finland	0	0
France	-	423
Germany	71	56
Greece	25	19
Hungary	23	15
Ireland	-	-
Italy	-	-
Latvia	0	0
Lithuania	0	0
Luxembourg	0	0
Malta	1	0
Poland	0	0
Portugal	31	26
Slovenia	0	0
Slovakia	-	0
Spain	-	1117
Sweden	9	4
Romania	26	15
The Netherlands	30	15

United Kingdom	241	41
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It should be noted that, although Ireland did not indicate the number of persons prosecuted and convicted in the period in question, it did provide an approximate reply, stating that there are around 10 or 15 trials for terrorist offences every year and currently 62 persons serving sentences for terrorist offences in the country.

Some further remarks must be made about the figures given in the table. First of all, it should be explained that some Member States did not always give figures on prosecutions but only on convictions and have sometimes indicated that the convictions included in the table are not definitive. This is the case for the two of the convictions noted by Austria and for three of those registered by Denmark. Also, Greece points out that the nineteen convictions registered have been imposed in first instance and the Netherlands that the figure of fifteen includes convictions both after and before appeal.

Another factor to consider is that, in some Member States, there are no data available for the entire period but only for part of it, mainly because counter-terrorist provisions did not exist in 2001 and were only introduced at a later stage. This circumstance is noted by Belgium, the Czech Republic, Finland and Luxembourg. Belgium and the Czech Republic introduced the relevant provisions in 2004 and Luxembourg in 2003. In Finland, legislation on the financing of terrorism was passed in 2002 and, for the other terrorist offences, in 2003. Finally, France indicates that statistics on prosecutions and convictions for criminal conspiracy in committing terrorist offences started to be produced only in 2007, although the criminal offence has existed since 1996.

As regards the data provided by the UK, it is important to note that the figures in the table do not include the cases of those charged with or convicted for offences such as murder, grievous bodily harm, firearms, explosives offences, fraud or false documents but not qualified as terrorist offences.

Finally, it should be borne in mind that the number of persons prosecuted and convicted may have changed since Member States submitted their replies.

*The figures provided by Member State illustrate the significant differences between Member States as regards the number of prosecutions and convictions for terrorist offences.*

**6. DOES YOUR NATIONAL LAW PROVIDE FOR ANY SPECIFIC MEANS TO ADDRESS THE SITUATION WHERE A PERSON WHO IS SUSPECTED OF TERRORIST ACTIVITIES IS CONSIDERED A THREAT TO NATIONAL SECURITY BUT IS NOT PROSECUTED (ASSIGNED RESIDENCE, LIMITED COMMUNICATION, ADMINISTRATIVE DETENTION, ETC.)? WHICH DEGREE/INTENSITY OF SUSPICION IS NECESSARY TO IMPOSE SUCH MEASURES?**

A fair number of Member States reply that their national law provides no specific means to address the situation described in this question, including Austria, Bulgaria, Cyprus, Denmark, Estonia, Finland, Greece, Ireland, Luxembourg, Malta, Poland, Slovakia, Slovenia and Spain. Some of these Member States provide additional explanations.

In particular, Bulgaria explains that measures of this kind can only apply to persons against whom criminal charges have been raised and are subject to strict control by the court. Slovenia notes that ‘all measures constituting an interference with the right of an individual

can only be taken by means of a final decision of judicial authority or a court of law'. Finally, Spain explains that 'any situation of this type must be extended to authorship of or participation in a crime, the instigation of a prosecution and the implementation therein of provisional precautionary measures'.

Similarly, Romania refers to a wide range of coercive measures but specifies that they can only be taken, as preventive measures, under criminal proceedings. Latvia refers to derogations to the rules governing the termination of criminal proceedings in cases where the person is prosecuted for very serious crimes, including terrorist offences.

Portugal offers a qualified reply, explaining on the one hand that none of the specific measures referred to in Question 6 can be applied in Portugal, but on the other hand referring to national rules governing the entry into, residence on and departure and expulsion from Portuguese territory of third-country nationals. Under these rules, administrative authorities may order the detention of third-country nationals that have illegally entered or resided in the country. These authorities must however submit an application to a judicial authority for this detention to be declared valid within 48 hours and, if necessary, for additional coercive measures to be taken. The third-country national may be detained for the time required to enforce the decision on expulsion, and, in no circumstances for longer than 60 days.

The Czech Republic, France, Germany, Hungary, Lithuania, Poland<sup>15</sup>, Sweden and the UK also refer to detention and coercive measures linked to expulsion procedures. Among them, however, only the German and Swedish provisions deal explicitly with persons suspected of terrorist activities.

In particular, in the Czech Republic, persons against whom administrative expulsion proceedings have been instituted may be detained for a period of up to 180 days. Administrative expulsion can be effected if, while residing in the country, third-country nationals endanger national security or seriously disrupt public order. The decision for administrative expulsion must be based on a reasonable justification and this justification must reportedly be produced, so unsubstantiated assumptions are not sufficient.

Moreover, in the Czech Republic asylum seekers are obliged to remain in a reception centre until departure if it is reasonable to assume that the applicant may be a threat to national security, but not longer than 120 days, unless such a procedure is against the international commitments of the Czech Republic. The rule does not apply to children under age, disabled persons or pregnant women, among others.

French law provides for the imposition of assigned residence on third-country nationals subject to an expulsion order that can not immediately be enforced. In addition, a third-country national whose residence permit has been issued for a period shorter than ten years may be subject to special surveillance on grounds of his behaviour or previous activities. This includes restricting the validity of his residence permit to certain areas.

In Germany, Section 58a of the Aliens Act lays down a special procedure for the expulsion of third-country nationals, without prior order to leave the country, in order to avert a particular danger to the security of the country or a terrorist risk. The authority must have reached this conclusion upon a fact-based assessment. If such expulsion cannot be implemented directly,

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<sup>15</sup> Despite its negative answer to Question 6, Poland comments on measures of this kind in its answer to Question 8. To facilitate analysis of Member States' replies, all information on detention and coercive measures linked to expulsion procedures is examined at this stage, regardless of whether it was given in reply to Question 6 or 8.



the individual must be detained for a maximum of six months in order to ensure expulsion as per court order.

As regards other terrorism-related expulsions under Sections 54 and 55 of the Aliens Act<sup>16</sup>, third-country nationals may be detained in preparation or in order to ensure expulsion under the same conditions as in general cases under alien law, namely where there is reasonable cause to suspect that the person in question intends to avoid expulsion.

Moreover, in these two cases, where the third-country national is subject to an enforceable order of expulsion<sup>17</sup>, detention may be replaced by surveillance measures. These include the obligation to report to the competent police station at least once a week and to stay in the district covered by the immigration authorities, unless specified otherwise. Third-country nationals may also be obliged to take up residence in another town or specific accommodation if this seems necessary in order to make the behaviour which resulted in expulsion more difficult or to prevent it, and in order to facilitate improved monitoring of compliance with statutory obligations. The prohibition of using specific communication means or services may also be imposed on these third-country nationals provided and to the extent that they still have access to communication means and the restriction is necessary to avert a serious danger to national security or to the lives of third parties.

In Hungary, the immigration authorities have powers to order, in specific cases, the confinement of third-country nationals in a designated place, imposing a code of conduct on them as well as reporting obligations, where the place of confinement is not a community hostel or refugee centre. Most relevant to the purpose of this questionnaire, these obligations can be imposed if third-country nationals cannot be returned or expelled due to commitments resulting from international treaties and conventions, are released from detention when there are still grounds for such detention or have a residence permit granted on humanitarian grounds.

In addition, immigration authorities can order the expulsion of third-country nationals that pose a threat to national security, public safety or public order. In order to secure the expulsion, they also have powers of detention in a number of cases, namely, if the person in question is hiding from the authorities or obstructing the expulsion, has seriously and repeatedly violated the code of conduct of the place of compulsory confinement, has failed to report as ordered, hindering the pending immigration proceedings, or after having served a sentence for an intentional crime.

Lithuania and Poland refer to court decisions imposing the detention of third-country nationals, respectively, where the person in question poses a threat to national security or if this is necessary to ensure the implementation of expulsion proceedings.

In Sweden, under the Act on special controls on aliens, third-country nationals may be expelled if necessary for reasons of national security or if, with reference to the third-country national's previous activities, there is risk that he will commit or assist in the commission of a terrorist offence. When an expulsion on these grounds cannot be implemented, the individual may be subject to the obligation to report to the police at regular intervals and, in certain

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<sup>16</sup> This includes members or supporters of associations supporting terrorism, people who jeopardise the security of the Federal Republic of Germany or who carry out acts of violence in the pursuit of political objectives or incite violence in public or threaten to use violence, leaders of prohibited organisations and 'preachers of hate'.

<sup>17</sup> Because of the different procedure followed in cases of particular danger to the security of the country or a terrorist risk and other terrorist related cases, 'expulsion order' translates, respectively, into 'Abschiebungsanordnung' and 'Ausweisungsverfügung'.

circumstances, house search, physical search or examination, covert mail and telecommunications surveillance may also apply.

In the UK, the British Nationality Act 1981 includes the power to deprive a person of any form of British nationality if this is conducive to the public good, unless it results in the person concerned being made stateless. Deprivation of British citizenship would result in the simultaneous loss of the right of abode in the United Kingdom and so pave the way for possible deportation or exclusion from the UK.

Only Belgium, Germany, Italy and the UK note the existence of coercive measures which are not related to the entry, residence and departure or expulsion of third-country nationals. They therefore apply equally to national citizens and third-country nationals.

Belgium, in particular, explains that coercive means may be used by the State Security Service, subject to strict conditions, in executing their task of protecting persons. However, this Member State also notes that such means do not specifically serve the situation of persons suspected of terrorist activities as described in Question 6.

Actually, this is also the case for Germany and Italy. In particular, under German law a person may be detained if such action is necessary either in order to avert danger or to prevent criminal offences. In the second case, the measure must be essential to prevent the imminent perpetration or continuation of a criminal offence. As a rule, a court order must be granted before this measure can be taken. Exceptionally, if this is not possible, confirmation by a court is necessary. The court order must specify the length of the detention which in any case is subject to maximum periods differing from one Land to another. However, if the detention was imposed in order to avert danger, the person must be released under any circumstances where the danger ceases before the specified time has elapsed.

Germany equally allows the possibility of imposing reporting conditions in order to reduce the number of detainees, whereby potential offenders are required to report to the competent police authorities on a regular basis, in order to prevent them visiting a particular location and committing a criminal offence.

Italy refers to the application of preventive measures that are not dependent upon the perpetration of a crime although in fact, this usually precedes it. They can be applied to three categories of subject: those that can be considered to be involved in criminal activities; those who, in the light of their way of life and their habits, can be considered to live from the profits of illegal activities, and those who are considered to carry out activities which are prejudicial to society, public order or the physical and mental health of minors. In all three cases, these conclusions must be reached on the basis of factual elements.

However, these persons are first requested to change their behaviour and can only be placed under special police supervision or can be compelled to stay in their place of residence (municipality or country) with a compulsory order if they ignore this request. Placing them under special police supervision involves obligations and restrictions similar to being on probation and, in the most serious cases, is accompanied by a ban on residency or a residency requirement. The decision on the imposition of these measures is subject to discretionary evaluation by the court.

Italy notes that, leaving the perpetration of a crime out of consideration, the imposition of these measures gives rise to uncertainties regarding their legitimacy and applicability. Introduced by Law No 1423 of 1956, the relevant provisions have undergone numerous additions and amendments, the last of which, in 1990, took into account a number of judgments by the Constitutional Court on the subject.

The UK refers to control orders under the Prevention of Terrorism Act 2005, which are preventive orders specifically designed to prevent, restrict and disrupt individuals' engagement in terrorism-related activity. Control orders may either be derogating or non-derogating, depending on whether they involve derogation from Article 5 of the European Convention on Human Rights in order to deprive someone of his/her civil liberties. However, derogating control orders have never been imposed. The statutory test which needs to be met for the imposition of non-derogating control orders is reasonable suspicion.

According to the UK's reply, the obligations placed on an individual are tailor-made to the risk he or she poses and must be necessary and proportionate in each case. Although there is no exhaustive list of control measures, these can include restrictions on access to communications equipment, imposition of a curfew, the requirement to reside at a designated address and restrictions on access to other individuals. The duration of a control order is twelve months, with the possibility of renewal. A breach of any conditions without reasonable excuse can lead to prosecution carrying a maximum prison sentence of five years. There are a number of safeguards in place to protect the rights of the individual subject, e.g. the mandatory permission and review by the High Court for each control order. There is also regular scrutiny of the legislation as a whole, i.e. the legislation is subject to annual renewal after a debate and vote by both Houses of the UK Parliament.

The UK also includes in its reply the sanctions associated to the designation of an entity or individual as involved in terrorist acts or associated to Al Qaida or the Taliban. In particular, the freezing of assets and economic resources at UK level is implemented through the Terrorism (United Nations Measures) Order 2006 and the Al Qaida and Taliban (United Nations Measures) Order 2006.

As regards the Terrorism Order 2006, the UK explains that the Treasury is responsible for designating persons who will be subject to asset freezes. To this end, it is advised by the intelligence agencies and/or police, who submit 'statements of case' setting out the reasons why a person should be subjected to a freeze including the evidential basis, which may include closed source material. Such statements must provide reasonable grounds for the Treasury to suspect that the person is or may be a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism; is owned or controlled by a designated person; or is acting on behalf of or at the direction of a designated person<sup>18</sup>.

In addition, the Netherlands comments on a Legislative Proposal for administrative measures relating to national security which is currently before the national Parliament. The proposal aims to introduce measures such as restriction of access to certain areas or places or the vicinity of certain persons, as well as the obligation of regularly reporting to the police. Under this proposal an administrative measure may be imposed 'if it is necessary with a view to protecting national security, on a person who, based on his behaviour, may be associated with terrorist activities or the support of terrorist activities'.

***A fair number of Member States reply that their national law provides no specific means to address the situation where a person who is suspected of terrorist activities is considered a threat to national security but is not prosecuted. Some of them clarify that any measure of this kind can only be taken by way of criminal proceedings.***

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<sup>18</sup> Concerning the Al Qaida and Taliban Order 2006, the UK explains that all UN Member States are obliged to impose an assets freeze, travel ban and arms embargo against all individuals and entities designated as associated to Al Qaida or the Taliban by the UN's Al Qaida and Taliban Sanctions Committee. In addition, the UK provides for an explanation of this designation process.

*Among those Member States which indicate that their national law does provide for such measures, some refer to detention or coercive measures linked to the expulsion of third-country nationals. Few Member States have detention or coercive measures which are not related to expulsion procedures and are therefore equally applicable to national citizens and third-country nationals. Coercive measures may include assigned residence, regular reporting to the police, communication surveillance, restrictions on the use of specific means of communication etc. One Member State referred to deprivation of nationality and freezing of assets.*

*These measures are normally taken on the grounds of national security, public order, prevention of criminal offences or protection of citizens; the relevant provisions are rarely exclusively applicable to persons suspected of terrorist activities.*

**7. IF YOUR NATIONAL LAW PROVIDES FOR MEASURES SUCH AS THE ONES MENTIONED ABOVE IN 6, PLEASE INDICATE HOW MANY PERSONS HAVE BEEN SUBJECTED TO SUCH MEASURES AND, IF POSSIBLE, BRIEFLY DESCRIBE THE CASES AND THE MEASURES IMPOSED.**

Most Member States did not provide figures, either because their reply to Question 6 was negative or because they lacked specific data.

This being said, the Czech Republic explains that no asylum seeker has yet been obliged to remain in a reception centre on the grounds, according to its Asylum law, that it is reasonable to assume that the applicant may be a threat to national security. France notes generally that no cases have been registered; Lithuania explains that no terrorist suspects have been subject to the measures mentioned in Question 6 and Portugal notes that the mechanism of administrative expulsion has never been used.

Germany specifies that detention by the police authorities is essentially a matter for the Länder. Statistics, it adds, would not be meaningful in this context since the measure is not one which can be imposed specifically where there is a terrorist risk. As regards surveillance measures, once more the Länder are responsible for issuing the relevant orders and implementing the measures. However, Germany notes one expulsion without prior order to leave the country, in order to avert a particular danger to the security of the country or a terrorist risk. The foreigner was detained pending deportation in accordance with the relevant provisions described under Question 6 and left the country of his own volition before there was any need for renewal of the detention.

Italy refers to one single case, where the measure placing persons under special police supervision was adopted for a period of 3 years, pending the adoption of a provision for expulsion from the national territory for reasons of public order and public safety.

In Sweden, orders under the Act on Special Controls on Aliens were issued on six occasions during the period in question. These orders may involve expulsion but also the restrictive measures referred to under Question 6.

In the UK, two people have had their British citizenship taken away on national security grounds. Thirty-eight individuals have been subject to control orders since the Prevention of Terrorism Act 2005 came into force in March 2005. All of them have been ‘non-derogating’ control orders. In addition, asset freezing has been imposed on one hundred and one individuals and sixty-one entities designated under the Terrorism Order. Out of these, twenty-six individuals and nine entities are listed by the European Union. The UK also explains that fifteen British residents are subject to sanctions derived from their designation as individuals

associated to Al Qaida or the Taliban by the UN Al Qaida and Taliban Sanctions Committee, including asset freeze, travel ban and arms embargo.

*Most Member States did not provide figures on the application of such measures, either because their reply to Question 6 was already negative or because they lacked specific data. Most of those who were in a position to reply reported no cases or very few.*

**8. DOES YOUR NATIONAL LAW PROVIDE FOR SPECIAL RULES CONCERNING THE EXPULSION OF THIRD-COUNTRY NATIONALS SUSPECTED OR CONVICTED OF TERRORIST ACTIVITIES<sup>19</sup>**

Only in Austria, France, Germany, Italy, Romania and Sweden does national law explicitly deal with expulsion linked to suspicion of or conviction for involvement in terrorist activities.

In Austria, the Alien Police Act, which has been in force since 1 January 2006, provides explicitly for return decisions and re-entry bans aimed at members of terrorist organisations. Such measures may be imposed if a third-country national ‘gives due cause to believe that he belongs or has belonged to a criminal or a terrorist organisation’. The ban can be imposed for an indefinite period.

France comments on both administrative and judicial expulsions. Concerning the former, French law sees behaviour linked to terrorist activities<sup>20</sup> as an exceptional case where long-term residents or third-country nationals with close family ties in France cannot benefit from the protection against expulsion that they would generally be granted. As regards judicial expulsions, access to French territory may be forbidden to ‘third-country nationals convicted of a criminal offence, in particular in case of serious damage to national interests, terrorist acts or offences committed by combating groups or dissolved movements’. This punishment may be imposed indefinitely or for ten years or more.

As explained under Question 6, in Germany Section 58a of the Aliens Act provides for expulsion without prior order to leave the country ‘where such action is necessary to avert a particular danger to the security of the Federal Republic of Germany or a terrorist risk’. The authority, explains Germany, must have reached this conclusion on the basis of a fact-based assessment. Additionally, under Sections 54 and 55 of the same Act, a simplified deportation procedure may be applied in other terrorism-related cases.

Italy refers to the expulsion of third-country nationals for reasons of prevention of terrorism under Decree Law No 144 of 27 July 2005, in particular, where there are ‘valid reasons to believe that his staying on the national territory could in some way facilitate terrorist organisations or activities, including international ones’.

Romania explains that its Act on Aliens lays down special measures to declare foreign nationals or stateless persons undesirable or have their right of residence suspended where there are reliable indications that they intend to carry out terrorist acts or support terrorism.

Finally, as explained under Question 6, under Swedish law, third-country nationals may be expelled if necessary for reasons of national security or if, with reference to the third-country national’s previous activities, there is risk that he will commit or assist in the commission of a terrorist offence.

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<sup>19</sup> Some Member States have included, in their replies, related information, dealing with exclusions or bans of entry. However, the analysis has focused on the grounds and mechanisms of expulsion.

<sup>20</sup> This applies also to those whose behaviour hinders fundamental interests of the State or amounts to explicit and deliberate provocation to discrimination, hatred or violence against groups of persons.

Other Member States do not have specific rules on the expulsion of third-country nationals suspected or convicted of terrorist activities. However, two different types of replies were received. On the one hand, Estonia, Finland and Luxembourg limit themselves to stating that they have no such specific rules. On the other hand, Belgium, Bulgaria, the Czech Republic, Cyprus, Denmark, Greece, Hungary, Ireland, Latvia, Lithuania, Poland, Portugal, Slovenia, Slovakia, Spain, the Netherlands and the UK comment on legal provisions that may apply to the expulsion of third-country nationals suspected or convicted of terrorist activities even though they do not explicitly refer to this. Moreover, the French, Italian, Romanian and Swedish replies also cite rules of this kind.

Most often, the relevant rules address situations where the third-country national poses a threat to national security or public order. Nearly all Member States also mentioned the conviction for criminal offences either as a separate ground for expulsion or as a hypothesis of threat to national security or public order. Ireland and the UK, for their part, refer to expulsions conducive to the public good.

In this context it should be recalled that all EC Directives adopted in the field of asylum and immigration already contain 'public order' clauses which allow Member States to withdraw residence permits and to expel third-country nationals who constitute a threat to public policy or public security. In the recitals of these legal instruments it has been repeatedly explained that the notion of public policy and public security also covers cases in which a third-country national belongs to an association which supports terrorism, supports such an association, or has extremist aspirations.

The reply of the UK specifies that the power to deport a third-country national where this would be conducive to the public good can be used to deport individuals who pose a threat to national security and those who have demonstrated unacceptable behaviour by using means or medium to express views which: foment, justify or glorify terrorist violence in furtherance of particular beliefs; seek to provoke others to terrorist acts; foment other serious criminal activity or seek to provoke others to serious criminal acts; or foster hatred which might lead to inter-community violence in the UK. The UK also refers to the use of diplomatic assurances. However, this information will be dealt with under Question 10.

Finally, Cyprus and Malta constitute a particular case. Cyprus refers to the general procedure of expulsion of 'illegal immigrants'. These include persons convicted for a criminal offence for which they served a prison sentence, persons who demonstrably constitute a danger to public order and members of unlawful associations and 'any person whose entry in Cyprus is prohibited by any legal instrument in force'. Malta explains that acts of terrorism, wherever they happen, are prosecutable in Malta and that, under the Immigration Act, those found guilty of crimes punishable with certain minimum prison sentences become 'prohibited immigrants' which means that the Principal Immigration Officer may issue a removal order against them.

As for the basis of the decision, France explains that the decision on expulsion may be based on facts that have led to criminal convictions or on the precise succession of consistent facts indicating that the person is dangerous even though he/she has not committed a specific offence or that it has not been possible to gather criminal evidence. The administrative authority bases its decision on the information supplied by the special police services, regardless of the initiation of criminal proceedings. In the context of the fight against terrorism, *le Conseil d'Etat* case law considers as evidence the reports of the special police service, unless otherwise established, and provided that the reports meet certain requirements and include precise and consistent elements with regard to the links of the person in question to a radical or terrorist movement.

In the Netherlands, the risk posed to national security does not depend on a criminal conviction but ‘there must be concrete indications’ that the third-country national constitutes such a risk. With regard to the presence of concrete indications, the Netherlands points out that an official report from the General Intelligence and Security Service must be considered. Official reports from national/foreign ministries or intelligence services may also be taken into account in relevant cases.

Shorter explanations were provided by Germany, Hungary and the UK. As explained above, in Germany the special expulsion procedure under Section 58a of the Residence Act requires a fact-based assessment. Hungary explains that the administrative authority has to take into account the importance and type of acts committed by the third-country national. Finally, the UK explains that the standard proof applied for deportation of third-country nationals on conducive grounds is the civil law test of balance of probabilities. It is also interesting to note that, in Spain, internal rules of the General Prosecutors Office prohibit replacing a custodial sentence with expulsion where the offender is convicted of offences relating to a terrorist group.

Belgium, the Czech Republic, Denmark and France refer to personal circumstances which may counter-balance or limit the possibility of expulsion. The duration of residence is noted by all four as one of these circumstances. Generally, the longer the individual has regularly resided in the Member State, the more protected he is against expulsion. Family or social ties with the country considering the expulsion are equally taken into account. However, as explained above, France does not apply this protection when the expulsion relates to terrorist activities. Similarly, in Denmark, when an alien is expelled on the grounds that he has been convicted of certain especially serious offences, the duration of the alien’s residence in Denmark is not taken into consideration.

Situations of vulnerability normally entail protection. For example, Belgian protection criteria include the status of refugee and the permanent incapacity to work. The Czech Republic mentions those that have been granted the status of refugee as well those whose nationality has not been determined. Denmark refers to age and health as well as the risk that the person will suffer harm in his home country.

It should be stated that Bulgarian, Czech, Danish, Romanian, Slovakian and Swedish law refer explicitly to the risk of torture or inhuman or degrading treatment in the country of deportation as a limit to expulsion. Slovakia and Sweden note in addition the threat of corporal or capital punishment and the Czech Republic the risk that the offender will be persecuted for his race, nationality, social group or political or religious beliefs.

*Only a few Member States indicate that their national law provides for special rules concerning the expulsion of third-country nationals suspected or convicted of terrorist activities. The rest of the Member States do not have specific rules on this issue.*

*However, many of them commented on legislative provisions that may apply in these cases, even if they do not explicitly refer to third-country nationals suspected or convicted of terrorist offences.*

**9. HOW OFTEN WERE THE LEGAL PROVISIONS (IF ANY) CONCERNING THE EXPULSION OF THIRD-COUNTRY NATIONALS SUSPECTED OR CONVICTED OF TERRORIST ACTIVITIES APPLIED FROM 2003 TO 2007?**

<b>Member States</b>	<b>Orders of expulsion relating to terrorism</b>
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Austria	1
Belgium	1
Bulgaria	-
Cyprus	27
Czech Republic	0
Denmark	-
Estonia	0
Finland	-
France	91
Germany	1
Greece	0
Hungary	-
Ireland	< 10
Italy	51
Latvia	0
Lithuania	1
Luxembourg	-
Malta	-
Poland	-
Portugal	3
Slovenia	0
Slovakia	-
Spain	1 (confidential)
Sweden	2
Romania	-
The Netherlands	-
United Kingdom	33



It should be noted that some data provided by certain Member States have not been included in the table, in particular where the number of expulsions effected does not only cover individuals suspected or convicted of terrorist activities but also individuals expelled on other grounds or where the measures reported do not necessarily imply expulsion. This affects Slovakia, Germany and Sweden. Germany, for example, notes that in 2005, there were 93 cases of expulsions through the simplified procedure set out by Articles 54 and 55 of the Aliens Act. This figure, however, includes security-related expulsions other than those linked to terrorist activities and has therefore not been included in the table. Also, it should be recalled that the transfer of third-country nationals in the context of the European Arrest Warrant does not amount to an expulsion.

Expulsion orders subject to appeal have been included in the table, even if the appeal has been reported as successful. This affects, in particular, Italy and the UK. As regards this last Member State, only 8 individuals were actually deported.

Finally, it should be kept in mind that the figures may have changed since Member States submitted their replies.

*The information provided shows significant differences between Member States on the application of expulsion measures but also that these measures are generally only applied in a limited number of cases.*

**10. IN HOW MANY CASES COULD A DECISION TO EXPEL A THIRD-COUNTRY NATIONAL SUSPECTED OR CONVICTED OF TERRORIST ACTIVITIES NOT BE TAKEN, OR SUCH A DECISION NOT BE ENFORCED, BECAUSE OF FUNDAMENTAL RIGHTS OBLIGATIONS? HOW DOES YOUR MEMBER STATE DEAL WITH SUCH CASES?**

As regards the first part of the question, occurrences of this situation have been reported by few Member States. Furthermore, those which do refer to relevant cases note only a few of them; in fact, the highest figure, provided by Italy, is seven.

Bulgaria, Denmark, Finland, Germany, Hungary, Ireland, Poland, Portugal, Slovakia and the UK did not provide any figures. As an explanation for this, it may be assumed that, for most of these Member States, their reply follows logically from the absence of data under Question 9. Belgium, Cyprus, the Czech Republic, Estonia, Greece, Latvia, Luxembourg, Malta, Spain and Slovenia reported no occurrences.

As for the Member States that do report occurrences, the most common reason preventing the expulsion of third-country nationals is the risk of torture or inhuman or degrading treatment in the country of deportation. Some Member States refer to national provisions prohibiting expulsion under these circumstances; others refer directly to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). More importantly, some decisions preventing the expulsions were taken at national level while in other cases the reason preventing the expulsion is an appeal before the European Court of Human Rights (ECtHR).

In particular, France mentions two cases. In one of them, the decision of non-enforcement was taken by national authorities. In a second case, the third-country national applied to the ECtHR and the case is still pending.

Italy mentions seven expulsions which have still not been enforced owing to the appeal pending before the ECtHR, five of them based on reasons of national security. One of these appeals, the *Saadi* case, was upheld by the ECtHR, which concluded that carrying out the expulsion order would amount to a violation of Article 3 ECHR. Similarly, the Netherlands

reports two cases where the expulsion has not been enforced following an appeal before the ECtHR which is pending in both cases.

Lithuania refers to one case where a national court decided that the expulsion would entail a risk of torture or inhuman or degrading treatment and the third-country national remained in the country. Sweden notes ‘few’ cases of security-related expulsions where the Swedish authorities found that the expulsion was not possible on the same grounds. In addition, two third-country nationals convicted of preparations for a terrorist offence have applied to the Government for the court orders of expulsion to be rescinded under the Aliens Act. This instrument, as explained under Question 8, prohibits the expulsion where there is a risk of torture or inhuman or degrading treatment as well as corporal or capital punishment.

The risk of capital punishment is also referred to by Austria, where a third-country national given several death sentences in his country of origin for involvement in terrorist activities could not be extradited because of the 6<sup>th</sup> additional protocol to the ECHR concerning the death penalty.

Other grounds preventing expulsion mentioned by Member States are the status of refugee and close family ties. As regards the former, France notes one case where national authorities did not enforce the expulsion because of the status of refugee of the third-country national. Concerning the latter, Romania refers to one case where two persons convicted for committing terrorist offences could not be expelled because they were married to Romanian citizens with children resulting from such marriages.

Concerning the second part of the question, France explains that third-country nationals whose expulsion cannot be enforced are subject to assigned residence so that they remain within a certain area, normally one or more municipalities. In order to go outside these limits, an explicit permit from the French authorities is required. In addition, they are obliged to report regularly to the police services.

Germany notes that where there is considerable likelihood that repatriation will be in conflict with the provisions of constitutional or international law, an assessment is made to determine whether it is possible, by obtaining diplomatic assurances, to effect repatriation in accordance with the relevant obligations.

Hungary states that if the immigration authority or the court finds that the principle of non-refoulement applies, the expulsion cannot be ordered or executed, not even if the person is linked to terrorist activities. In such cases, the immigration authority has to consider if the expulsion can be executed to the territory of a State where the expelled person’s fundamental rights would not be violated. If there is no such country, Hungary continues, the authority will only be entitled to use special means of surveillance and control (see Question 6 above).

Sweden states that if there is an obstacle to the expulsion, the government may rescind an expulsion order or grant a residence and work permit for a limited period.

The Netherlands offers very detailed information on this point. First of all, it clarifies that a third-country national declared unwanted has an obligation to depart and is criminally liable if he/she is aware of this obligation and does not comply with it. Where the Minister of Justice considers that there is a risk of violation of Article 3 ECHR in his/her country of origin, this person will not be expelled as long as the risk exists. However, the third-country national must still do everything to assist, in particular by indicating to which safe third country, or countries, he may be able to depart.

In addition, the Netherlands refers to a department in the immigration and naturalisation service which deals specifically with cases concerning persons who have committed serious

crimes or have violated human rights in their country of origin. In general, these persons are declared undesirable in the Netherlands. However, in exceptional cases, a residence permit will be granted to these persons if Article 3 ECHR consistently prevents deportation and refusing a residence permit is disproportionate in view of their exceptional situation. The Netherlands notes that three residence permits were given in the past three years on these grounds.

Finally, the Netherlands explains that there have been no deportations using diplomatic assurances but equally it does not in principle exclude their possible use in the future, in compliance with Article 3 ECHR. At the same time, the Netherlands underlines that the absolute prohibition of torture ‘can not in any way be interfered with, not even in the context of deportation’.

Diplomatic assurances are mentioned by the UK, whose authorities explain that they go to considerable effort to make sure that the assurances are effective and reliable. In particular, they include extensive judicial safeguards and arrangements for verifying the assurances.<sup>21</sup> Finally, where the option of deportation is not available in view of these human rights obligations, other mechanisms such as control orders (referred to under Question 6 above) may apply. The UK notes that control orders are not solely used for foreign nationals.

*Only a few Member States report cases where a decision to expel a third-country national suspected or convicted of terrorist activities could not be taken, or such a decision not be enforced, because of fundamental rights obligations. Furthermore, those which referred to cases of this kind noted very few of them. The most common reason preventing the expulsion of third-country national is the risk of torture or inhuman or degrading treatment in the country of deportation.*

*Similarly, few Member States explain how they deal with these cases. Replies include searching for another safe third country to deport the suspect to, the use of diplomatic assurances to effect repatriation, always in accordance with international obligations, the granting of temporary work and residence permits or the adoption of coercive measures such as assigned residence or reporting obligations.*

**11. ARE THERE ANY SPECIAL RULES UNDER YOUR NATIONAL LAW GOVERNING THE RIGHTS AND REMEDIES (E.G. INTERIM MEASURES WITH SUSPENSIVE EFFECTS, SPECIFIC JUDICIAL REMEDIES, ETC.) FOR DETAINED PERSONS WHO ARE SUSPECTED OR ACCUSED OF TERRORIST ACTIVITIES, WHICH ARE DIFFERENT FROM THE RULES APPLICABLE TO PERSONS DETAINED FOR OTHER CRIMES?**

A large majority of Member States replies ‘No’ to this question, including Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Luxembourg, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia and Sweden. All of them state that they do not have such special rules as regards the rights and remedies of the detainee: detained persons suspected or accused of terrorist activities are subject to the same rules applicable to persons detained for other crimes.

Actually, only Germany, Ireland, Portugal, Spain, the Netherlands and the UK mention special rules for detainees who are suspected or accused of terrorist activities. In this context one should notice that these are the six Member States with the highest records of

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<sup>21</sup> The UK currently has four such agreements, with Lebanon, Libya, Jordan and Algeria.

prosecutions or convictions for terrorist offences<sup>22</sup>, if we exclude France. However, France's negative reply to Question 11 should be read together with its reply to Question 2, where it refers to the possibility of extended police detention if there is a serious risk of an imminent terrorist attack, in France or abroad.

It should be noted that most of the Member States which give a positive reply clarify that there are no special rules as regards the legal remedies of the detainee. Any specificities are more likely to affect the rights of the detainee or the length of detention.

As a preliminary remark, it should also be borne in mind that the term 'detention' is very wide and generally covers the period in between the arrest of a suspect and his acquittal or conviction, unless the suspect was released, with or without charge, before the trial. The rules governing such a period vary from one Member State to another and, more importantly, divide such 'detention' into separate stages of different length where the person is subsequently subject to police and judicial authorities and different conditions. These stages do not necessarily coincide under the different national legal systems. The same applies to the terminology that each Member State uses to refer to them. In order to maintain the accuracy of this analysis, references to all relevant national provisions or legal acts, as provided by Member States, have been included below.

That being said, Germany has two specific measures which affect the rights of the detainee, which are respectively conducted or confirmed by judicial authority. First of all, there may be monitoring of the contact between the defence lawyer and the detainee suspected of the criminal offence of forming terrorist organisations<sup>23</sup>. The monitoring covers any documents and objects, which cannot be exchanged between them unless the lawyer allows them to be submitted to the judge first. It equally includes correspondence with the defence lawyer in relation to other cases or areas of law. Secondly, the law foresees the isolation of the detainee, a strictly exceptional measure that may apply in detention if a person's life or liberty is at risk and there is a suspicion that the threat originates from a terrorist organisation<sup>24</sup>. In such a case, the detainee will not even have access to a defence lawyer nor can he attend the preliminary investigations. The trial will not take place while the isolation measure is in place. It is important to underline that this measure has not been used in the last 30 years and originates from the times of Red Army Faction terrorism.

In Spain<sup>25</sup> and Portugal<sup>26</sup>, the judge and the public prosecutor, respectively, may order the restriction of communication with regard to detainees suspected of terrorist offences. In Portugal, isolated detainees cannot communicate with any person, except a defence lawyer before the first judicial questioning. In Spain, a defence lawyer is assigned to the detainee, who will only have restricted access to him.

Dutch law<sup>27</sup> enables the detention of persons suspected of terrorist activities even if there is only a normal level of suspicion, while for other offences 'substantial evidence' against the suspect is required. In addition, full access to procedural documents by the person concerned

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<sup>22</sup> See question 5. In the case of Ireland, the approximate figures provided in its reply to question 5 have been taken into account.

<sup>23</sup> See Section 29 of the Act governing the enforcement of penalties, ("Strafvollzugsgesetz"), in relation to Sections 148 (2) and 148a of the Code of Criminal Procedure, ("Strafprozessordnung").

<sup>24</sup> See Sections 31 to 38a of the Introductory law of the Judiciary Act, ("Einführungsgesetz zum Gerichtsverfassungsgesetz")

<sup>25</sup> See Article 527 of the Code of Criminal Procedure.

<sup>26</sup> See Article 143 of the Code of Criminal Procedure.

<sup>27</sup> Act amending the Code of Criminal Procedure, the Criminal Code and a number of other Acts for the purpose of broadening the opportunities for investigation and prosecution of terrorist crimes.

and his/her lawyer may be postponed for up to two years while normally all documents must be made public no later than after 90 days of detention. This also applies to Portugal<sup>28</sup>, where access to all evidence in the file may be postponed, in cases of persons suspected of terrorist activities, for a maximum period of three months.

As for the length of detention, in Ireland<sup>29</sup>, Spain<sup>30</sup> and the UK<sup>31</sup>, longer periods of police custody are permitted in respect of persons suspected of terrorist activities. Portugal<sup>32</sup> refers to the length of the detention ordered as a preventive measure, which can be extended in respect of suspects of terrorism.

Finally, the UK refers generally to the Police and Criminal Evidence Act 1984, Code H<sup>33</sup> and to Schedule 8 of the Terrorism Act 2000. The Code sets out the requirements for the detention, treatment and questioning of suspects related to terrorism in police custody by police officers while Schedule 8 concerns the treatment of persons detained under the Terrorism Act 2000.

***Most Member States do not have any special rules governing rights and remedies (e.g. interim measures with suspending effects, specific judicial remedies, etc.) for detained persons who are suspected or accused of terrorist activities, which are different from the rules applicable to persons detained for other crimes.***

***Member States which do have special rules for these cases clarify that these do not affect the remedies of the detainee. Most often, they affect the length of the detention, restrict communication by the detainee — including with the defence lawyer — or delay full access of the detainee and the defence lawyer to procedural documents.***

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<sup>28</sup> See Article 89 of the Code of Criminal Procedure.

<sup>29</sup> See the Criminal Justice (Treatment of persons in Custody Regulations) Act 2006.

<sup>30</sup> See Article 520 of the Code of Criminal Procedure.

<sup>31</sup> See Terrorism Act 2006.

<sup>32</sup> See Article 215 of the Code of Criminal Procedure.

<sup>33</sup> See [http://police.homeoffice.gov.uk/publications/operational-policing/2006\\_PACE\\_Code\\_H.pdf](http://police.homeoffice.gov.uk/publications/operational-policing/2006_PACE_Code_H.pdf).

## **12. WHAT SANCTIONS ARE PROVIDED UNDER YOUR NATIONAL LAW FOR VIOLATION OF FUNDAMENTAL RIGHTS IN THIS CONTEXT BY PUBLIC AUTHORITIES?**

Nearly all Member States reported a range of sanctions which may apply when the public authorities violate the fundamental rights of the detainee. Malta limits itself to explaining that the rules applicable ‘are the same both for criminal offences and acts of terrorism’. It should be explained that this is the case for all Member States: the sanctions they mention apply regardless of the type of crime for which the person has been detained. Furthermore, most Member States have not included provisions dealing specifically with the situation of detainees but have referred, more generally, to violations of fundamental rights in the public service.

Most often, Member States refer to the criminal liability of the person responsible for the violation: Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Spain, Sweden and Slovenia note that the violation of fundamental rights by persons holding public office, or civil servants, is punishable under national law.

The criminal offences in question are usually of a general nature, referring to the breach of duty or abuse of power in the public service. However, the Bulgarian penal code deals explicitly with the use of illegal coercive action by an official on duty against the accused, witnesses or experts to extract a confession, a testimony, conclusions or information. With similar precision, the Portuguese penal code specifically refers to unlawful detention and to the behaviour of an authority that, in such cases, erects illegal obstacles hindering the immediate access of the detainee to the court. Italy lists the offences of the penal code on the subject, ‘offences against personal freedom’, which include illegal arrest, undue limitation of personal freedom, abuse of authority against arrested or detained persons and arbitrary personal search and inspection.

In addition, the Czech Republic, Finland, Greece and Sweden cite the relevance of common offences. Finland points out that the crimes against liberty, life and health may also apply and Sweden explains that the offence of breach of duty is subsidiary to the common offence of ‘mistreatment’. In the same line of argument, the Czech Republic specifies that the most serious cases of breach of duty may be punishable under the criminal offence of torture or other inhuman and cruel treatment and Greece notes that violence and all forms of torture are prohibited under the penal code. Romania is the only Member State that refers solely to ordinary crimes irrespective of the identity of the offender.

Although not all Member States offer information on the penalty accompanying the relevant criminal offences, custodial sentences are mentioned by Bulgaria, Czech Republic, Denmark, France, Latvia, Lithuania, Portugal and Slovenia. The prohibition to (temporarily) undertake professional activities is referred to by Bulgaria, the Czech Republic, Latvia Lithuania and Spain. Finally, France, Latvia, Lithuania and Spain also refer to the possibility of imposing fines under national law.

A civil servant may also be subject to disciplinary or administrative sanctions. This type of sanction has been noted by Belgium, the Czech Republic, Germany, Greece, Latvia, Lithuania, Luxembourg, Poland and Portugal. The Czech Republic explains that, if the behaviour in question does not constitute a criminal offence, it may be qualified as an administrative offence. A disciplinary punishment may then be imposed on the members of the security forces responsible for the offence, including written admonition, salary cut, forfeiture of service medals or ranks, fine, confiscation, or prohibition to undertake professional duties. Portugal, for example, explains that a serious violation of official duties is

subject to disciplinary measures including dismissal, irrespective of the civil or criminal liability that may be incurred.

Furthermore, Cyprus, the Czech Republic, Finland, France, Ireland, Italy, Latvia, Slovakia, Sweden, the Netherlands and the UK note that it is possible to claim liability for damages incurred through the exercise of public powers. Finland, Italy and Slovakia cite concrete rules providing for State compensation in cases of wrongful detention. In fact Spain also mentions such a possibility when it refers to possible mistakes concerning the detention of terrorist suspects under Question 1.

Belgium mentions compensation for victims in the context of the Council of Europe Convention on the compensation of victims of violent crimes as well as non-conventional sanctions. These are applied by independent supervisory authorities which deal with complaints from individuals including direct mediation with the person affected or advice as well as recommendations and reports to the government and parliament. The independent authorities include the Ombudsman and parliamentary committees responsible for police services, intelligence services and prisons. Bulgaria refers to supervision by the National Assembly and parliamentary commissions, as well as the Ombudsman, which not only deals with complaints but can also act on its own initiative.

It should be noted that some of the Member States' replies focus on the consequences of the violations of the detainee's fundamental rights for the criminal proceedings, which are not only related to sanctions. For example, Austria explains how administrative measures violating constitutional rights will be repealed and how, in cases before the courts, the evidence obtained in such circumstances may be excluded and the judgment annulled. Belgium refers to the possibility of over-ruling the judgment as well as the repeal of an administrative measure or a law. Similarly, the Czech Republic mentions the possibility of complaints and appeals as well as the extraordinary remedies of appellate review and a new trial. France explains that an administrative measure that violates fundamental rights may be repealed. Greece refers to the nullity of proceedings pursuant to Articles 170 and 171 of the code of criminal procedure. Luxembourg reports the immediate repeal of any act which violates fundamental rights. Finally, the Netherlands mentions different possibilities including the reduction of the sentence, the exclusion of evidence or even the prohibition for the public prosecutor to prosecute.

Finally, some Member States recall the possibility of suing the state before the European Court of Human Rights as the last resort, and the individual and general measures that could consequently be imposed on the state in question. This possibility applies to all Member States, since they are all parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

***Nearly all Member States provided information on a range of sanctions which may apply when the public authorities violate the fundamental rights of the detainee. Most often, Member States refer to the criminal liability of the person responsible for the violation. The relevant criminal offences are usually of a general nature, referring to a breach of duty or abuse of power in the public service. In addition, many Member States note that a civil servant may also be subject to disciplinary or administrative sanctions. In several Member States, it is possible to claim liability for damages incurred through the exercise of public powers.***

***Some of the Member States' replies focus on the consequences of the violations of the detainee's fundamental rights for the criminal proceedings, including appeals, the nullity of proceedings, or the immediate repeal of the act which violates fundamental rights. Some***

***Member States mention the possibility of bringing a case before the European Court of Human Rights.***

**13. IS THERE ANY NATIONAL CASE-LAW INVOLVING RESPECT FOR FUNDAMENTAL RIGHTS IN A CASE CONCERNING TERRORISM WHICH IS PARTICULARLY RELEVANT FOR THE TOPIC OF THIS QUESTIONNAIRE? IF SO, PLEASE PROVIDE A SHORT SUMMARY OF THIS CASE-LAW.**

A number of Member States, including Bulgaria, the Czech Republic, Cyprus, Estonia, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovenia and Sweden, replied 'No' to this question.

Other Member States indicate that, although there is no national case-law involving respect for fundamental rights in a case concerning terrorism, there is case-law concerning fundamental rights that might be relevant. This is the case for Austria, Finland, Germany and Poland.

In particular, Finland refers to decisions of the Supreme Administrative Court concerning the rejection of applications for nationality or residence permits on grounds of public safety and public order while Poland refers to national case-law involving respect for fundamental rights linked to detention.

Austria and Germany provide more detailed information. The former notes that its Supreme Court has ruled that the use of technical equipment in audio and visual surveillance of people does not conflict with the principles of fair and due process of law. However, the Supreme Court has yet to rule on one case where the monitoring of Internet communications by concealed installation of software is questioned. The latter refers to recent case-law of the Federal Constitutional Court concerning the confidentiality of communications, inviolability of the home and the right to self-determination in the use of computers.

As regards the confidentiality of communications, the Court held that investigative measures which involve monitoring of telecommunications without the knowledge of the party affected constitute an interference with the right to privacy. Although they are in principle forbidden, they are permitted if and to the extent that the data is gathered only for the purposes of prosecuting criminal offences of considerable significance or where it helps to protect overriding legal interests. As for the importance attached to this factor, it 'is determined by the legal interest protected by the offence as defined under criminal law and by the intensity of the risk to which it is subject'.

Concerning the inviolability of the home, the Court ruled that the use of technical equipment to monitor and record conversations in a person's home is limited by a 'core area of private life' that must in any case be respected. In practice, this limit implies that 'surveillance must be discontinued immediately in situations where there is reason to believe that the measures will interfere with the core area of private life'. Moreover, if the surveillance directly results in data subject to absolute protection being obtained, the data must be destroyed. Another important point raised is that those affected by any audio surveillance in their home must be informed. The right to information may be disregarded 'where the purpose of the investigation or the life and limb of a person would be placed at risk if it were to be observed'. However, 'a danger to public safety, considered only in a general sense, or the possibility of deploying an undercover office on other missions does not constitute due grounds for the right of information to be disregarded'.

Finally, the Federal Constitutional Court held that '*Rasterfahndung*' (automated comparison of data from different data sources) interferes with the right to exercise self-determination in



the use of information technology. Therefore, 'it is not regarded as permissible unless the threshold for a sufficiently substantive risk for the legal interests under threat has been crossed'. Germany explains that neither a general situation of threat, such as has existed in terms of terrorist attacks ever since 11 September, nor sensitive foreign policy situations are sufficient to justify an order for a computer search. The assessment of risk must actually be founded on other substantive facts, such as those suggesting that terrorist attacks are in preparation or have been carried out.

Belgium, Denmark, France, Ireland, Romania, Slovakia, Spain, the Netherlands and the UK have also indicated that there is national case-law involving respect for fundamental rights in a case concerning terrorism.

For example, Ireland points out there have been cases where the State has been held liable for damages for the violation of persons' legal rights and Spain notes the case-law of the Constitutional Court<sup>34</sup> approving of isolation measures imposed upon alleged ETA members under detention, especially foreseen by the Code of Penal Procedure. Furthermore, the isolation order does not require a detailed justification if it is reasonable to impose it given the seriousness of the offence, which is apparent in the case of terrorism.

Denmark refers to the case described in its reply to Question 4, concerning the access of the defence to information withheld by the police intelligence service and France notes the consistent case-law of the Supreme Court approving of the special composition of the 'cour d'assises' which has jurisdiction for terrorist cases.

Belgium, the Netherlands and the UK provided a summary of relevant cases. Belgium notes two cases where the Constitutional Court examined counter-terrorism provisions. In the first case<sup>35</sup>, the Court ruled in favour of some of the grounds for annulment against the 27 December 2005 law<sup>36</sup>, namely the contradiction with fundamental rights, including the right to fair trial, the right to privacy in one's home, the right to legal remedy and the respect of physical integrity. Consequently, the Court annulled some of its provisions. In the second case<sup>37</sup>, the Constitutional Court turned down on all points the appeal questioning the definition of terrorist offence as too broadly and vaguely formulated and the 19 December 2003 Law on terrorist offences remained in force.

In addition, Belgium refers to decisions of other jurisdictions. For example, the Court of first instance of Brussels ruled on a case where asset freezing was imposed on two individuals included in the UN sanctions list<sup>38</sup>. The Court considered that their names should be removed from the list. However, this requires the agreement of all members of the Security Council Sanctions Committee, which is yet to be achieved. An interesting decision of the Court of appeal of Ghent held that sympathising with acts of terrorism was a form of legitimate exercise of freedom of expression and therefore not punishable, despite the ethical questions that it might raise<sup>39</sup>. The organisation concerned, DHKP-C, was therefore not qualified as a

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<sup>34</sup> Judgement of the Spanish Constitutional Court 127/2000, 16 May 2000.

<sup>35</sup> Judgement of the Belgian Constitutional Court of 19 July 2007.

<sup>36</sup> Law of 27 December 2005 "relating to various amendments to the Code of Criminal Procedure and the Judicial Code with the aim of improving investigation methods in the fight against terrorism and serious organised crime".

<sup>37</sup> Judgement of the Belgian Constitutional Court of 15 July 2005.

<sup>38</sup> Judgement of the Court of First Instance in Brussels of 11 February 2005.

<sup>39</sup> Judgment of the Ghent Court of Appeal of 7 February 2008.

terrorist group. In connection with this decision, the grounds for the stricter prison regime of one member of this organisation were considered unsatisfactory<sup>40</sup>.

The Netherlands mentioned several rulings of the Supreme Court in terrorist cases. In two cases, the Supreme Court ruled on the extradition of persons suspected of terrorist activities. In the first case<sup>41</sup>, the Supreme Court approved the extradition to Turkey of an individual suspected of participation in the PKK and associated terrorist activities. The Supreme Court first rejected the argument that, in an internal armed conflict, the humanitarian law of war applies exclusively: violations of humanitarian law of war in internal armed conflicts may also be punishable under general criminal law. Secondly, it rejected the political nature of the suspected offences. In particular, the violence of the offence and method of execution were taken into consideration. The Supreme Court added that, although it had been argued that the suspect could not have committed the offences in question, it had not been argued that the suspect did not form part of the PKK. In the second case<sup>42</sup>, regarding an extradition to the US, the Court indicated that in case of risk of flagrant violation of the rights of the suspect under Article 6 ECHR, the obligation of the Netherlands to guarantee those rights would obstruct the extradition. However, in principle the parties must have confidence that the requesting country will respect fundamental rights as laid down in the ECHR and International Convention on Civil and Political Rights. In this respect, the Supreme Court indicated that the possibility for the suspect of entering into a plea agreement under US criminal law should also be considered.

In addition, important statements are included in two parallel rulings of the Dutch Supreme Court concerning information collected by the national security service and its use as evidence<sup>43</sup>. The Court ruled that there is, in principle, ‘no objection against the use of material gathered by the intelligence and security service in criminal proceedings’. Furthermore, it indicated that ‘there is no rule of law opposing to its use neither as starting information to initiate a criminal investigation nor as evidence in court’. However, with respect to its use as evidence, the court ‘will have to carefully assess, on a case by case basis, whether it can contribute to the evidence of the case, in view of the sometimes limited options to verify such material’. It is also noted that, under certain circumstances, the results of the investigation conducted by an intelligence and security service cannot be used as evidence, in particular in three cases: first of all if ‘investigative powers were deliberately not used with a view to the inapplicability of criminal law guarantees, in order to make it possible to use information collected by an intelligence and security service’; secondly, if ‘the actions of the service in question have resulted in a violation of a suspect’s fundamental rights that is of such a nature that there is no longer a possibility of a fair trial pursuant to Article 6 ECHR’ and, finally, if ‘as a result of the limited opportunities for evaluating the reliability of the transferred material, the right to a defence has been limited to such an extent that the use of the material in question is not compatible with the requirement of a fair trial pursuant to Article 6 ECHR’.

The Supreme Court has also dealt with the question of the lack of reliability of material collected by an intelligence and security service. In this case, ‘the defence must be given the opportunity to challenge the reliability of the material and to investigate it or have it investigated, where necessary by interviewing witnesses, for instance by the examining

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<sup>40</sup> Judgement of the Civil Summary Judge in Brussels of 6 April 2006; Judgement of the Brussels Court of Appeal of 12 December 2006.

<sup>41</sup> Judgement AF6988 of the Dutch Supreme Court, 02853/02 U, of 7 May 2004.

<sup>42</sup> Judgement AT4110 of the Dutch Supreme Court, 00762/04 U, of 19 April 2005.

<sup>43</sup> Judgement AV4149, 01424/05 and AV4122, 01422/05 of the Dutch Supreme Court, of 5 September 2006.

magistrate’. The court ‘must take into account, on the one hand, the special position of the intelligence and security services, which mostly necessitates secrecy and, on the other hand, the right to a defence pursuant to Article 6.3 ECHR’. The question in which cases the material cannot be included in the evidence as a result of the difficulty of verifying and challenging the material in question, explains the Supreme Court, cannot be answered in a general sense. It is added that ‘the court must endeavour to compensate for any limitations by looking for other ways of evaluating the reliability of the material’.

In addition, the Netherlands mentions relevant cases ruled upon in lower jurisdictions. Several refer to Article 3 ECHR and consider the risk of torture and inhuman or degrading treatment that the deportation of individuals suspected of involvement in terrorist activities may entail. In two cases ruled upon by the Court of The Hague<sup>44</sup>, the appeal was granted. The familiarity of the authorities in the country of origin with the suspicion of involvement in terrorist activities of these individuals was considered as a determining fact. In another case, the same Court rejected the appeal finding that the claimant did not state facts and circumstances that could result in the opinion that he would be personally at risk of torture and inhuman or degrading treatment.

The UK includes several relevant judgments in its reply. For example, in November 2006, the High Court dismissed an appeal against the extradition of terrorist suspects to the US finding that the extradition did not breach the ECHR<sup>45</sup>. In particular, diplomatic assurances made it clear that the suspects would not be treated as ‘enemy combatants’. Moreover, there was no evidence that they would be subject to extraordinary rendition and there was nothing in the evidence to suggest that the suspects would be subject to measures breaching Article 3 ECHR or prevented from receiving a fair trial. Finally, even if evidence obtained by torture were to be admitted before the US courts, the court considering the case would ensure that the weight to be attached to the evidence reflected the manner in which it was obtained.

Concerning deportations with assurances and their compatibility with Article 3 ECHR, the UK refers to the decisions of the Special Immigration Appeals Commission (SIAC), which has upheld assurances obtained from Algeria as providing adequate safeguards in all Algerian cases brought before it. SIAC has also upheld a Memorandum of Understanding between the UK and Jordan as providing adequate protection for the purposes of Article 3 ECHR although it did not consider the Memorandum of Understanding between the UK and Libya to provide sufficient safeguards for the purposes of Article 3 ECHR.

Several rulings of the House of Lords are also included in the summary. Several linked cases concern the eventual conflict of fundamental rights and non-derogating control orders made under the Prevention of Terrorism Act 2005<sup>46</sup>. One important issue was whether the court orders breached Article 5 ECHR. The House of Lords held by a majority that control orders with 18 hours of confinement do amount to a breach of Article 5 ECHR while 12 and 14 hours were considered compatible with this provision. The length of the confinement was considered of primary importance, although the impact of the same period of confinement on different individuals might lead to different results as regards the respect of Article 5 ECHR.

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<sup>44</sup> Judgements of the Court of The Hague, location Haarlem, AH9638, AWB 03/30215, 03/30217, of 13 June 2003 and AR8156, AWB 04/38469, of 23 December 2004.

<sup>45</sup> Judgement of the High Court, Ahmad & Anor [2006] EWHC 2927 (admin), of 30 November 2006.

<sup>46</sup> Judgements of the House of Lords, Secretary of State for the Home Department v. JJ and others [2007] UKHL 45, Secretary of State for the Home Department v. MB and AF [2007] UKHL 46, and Secretary of State for the Home Department v. E and another [2007] UKHL 47, of 31 October 2007.

Another important issue was the compatibility of the procedure relating to control orders with the right to a fair trial under Article 6 ECHR. The Lords did not find that the review process of control orders in the particular cases before them had breached this right. The majority view was that in rare cases, the provisions in the Prevention of Terrorism Act 2005 might lead to a breach of the provision in question. However, they concluded that it was possible under Section 3 of the Human Rights Act to interpret the provisions so that they could be operated in a manner compatible with Article 6 ECHR in all cases. They also concluded that the High Court should examine the compatibility of control order proceedings with this provision on a case by case basis, to ensure that in every case the proceedings provide the individual with the substantial measure of procedural justice to which he is entitled under Article 6 ECHR.

In a very significant decision<sup>47</sup>, the House of Lords considered Section 23 of the Anti-terrorism, Crime and Security Act 2001, which — in derogation from Article 5 ECHR — provided for the detention of non-nationals if the Home Secretary believed that their presence in the UK was a risk to national security and the suspect could not be deported for fears to their own safety and other practical considerations. The House of Lords found that Section 23 did not rationally address the threat to security, was disproportionate, and was not strictly required by the exigencies of the situation within the meaning of Article 15 ECHR. Furthermore, since the appellants were treated differently on nationality grounds from UK nationals suspected of terrorism, the measure unjustifiably discriminated against them on grounds of their nationality or immigration status, and such treatment was inconsistent with the UK's international human rights treaty obligations to afford equity before the law and to protect the human rights of all individuals within its territory. The derogation order was therefore quashed and Section 23 was declared incompatible with Articles 5 and 14 ECHR.

In a case concerning the admissibility of evidence obtained by torture<sup>48</sup>, the House of Lords considered that the Special Immigration Appeals Commission (SIAC), when hearing an appeal under Section 25 of the Anti-terrorism, Crime and Security Act 2001, could not receive evidence that had been procured by torture inflicted by officials of a foreign state. However, if SIAC was left in doubt as to whether the evidence had been obtained by torture, then it could admit it, bearing in mind its doubt when evaluating the evidence.

Finally, in another case<sup>49</sup>, the House of Lords ruled on Section 11(2) of the Terrorism Act 2000, which provides for a reversal of the burden of proof as regards membership of a proscribed organisation. The House of Lords concluded that Parliament's intention had not been a proportionate and justifiable response to what was undoubtedly a problem, based on several grounds, among others that an innocent person could fall within the scope of Section 11(2) and that it could be impossible to demonstrate that one had not participated in a proscribed organisation after it had been proscribed.

***Various Member States do not report on national case-law involving respect for fundamental rights in a case concerning terrorism. Others indicate that they do have case-law concerning fundamental rights that might be relevant, although not in the field of terrorism. Finally, a number of Member States indicated that there is national case-law involving the respect of fundamental rights in cases concerning terrorism.***

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<sup>47</sup> Judgement of the House of Lords, *A and others v SSHD (No 1)* (Dec 2004) [2004] UKHL 56, of 16 December 2004.

<sup>48</sup> Judgement of the House of Lords, *A and others v SSHD (No. 2)* (Dec 2005) [2005] UKHL 71, of 8 December 2005.

<sup>49</sup> Judgement of the House of Lords, *Sheldrake v DPP* [2004] UKHL 43, of 14 October 2004.

#### **14. WHAT OVERSIGHT POWERS DOES YOUR NATIONAL PARLIAMENT HAVE OVER THE ACTIVITIES OF NATIONAL INTELLIGENCE SERVICES?**

Member States comment on diverse oversight mechanisms and some of them even refer to non-parliamentary supervisory bodies. Despite this diversity, the most widely used mechanism is undoubtedly a parliamentary committee, or a committee whose members are elected by the Parliament, responsible for supervising the activities of the national intelligence services. In particular, the existence of this type of committee is confirmed by Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia, Slovakia and the UK. The powers of the committee, however, differ substantially from one Member State to another.

Sometimes, these committees are primarily concerned with obtaining general information on the activities of the intelligence services. This is, for example, the case in Finland for its three parliamentary committees — the Constitutional Law committee, the Foreign Affairs committee and the Administration Committee. Although these Committees have regular contacts with the Security Police, they do not perform concrete supervisory tasks by means of inspections, but instead are given general information by the Security Police.

By contrast other committees have remarkable investigative powers. For example, in Belgium control over the intelligence service is exercised by Standing Committee I, which has its own administration and investigative body — Enquiry Service I — with police authority (i.e. it can enter premises and secure items and documents). Standing Committee I conducts investigations and exercises supervision over the intelligence service, either at its own initiative, at the request of the second House of Parliament, the Upper House, the competent minister or the competent government. It also investigates complaints and reports by individuals affected by actions of the security service; equally any civil servant or member of the armed forces can submit a complaint without prior permission of a superior and with the right to remain anonymous. Standing Committee I produces annual reports which are submitted to Parliament. Additionally, reports of each assignment are sent to Parliament and the competent ministries. Both Standing Committee I and Enquiry Service I can require persons to attend a hearing and give evidence under oath; secret information must be disclosed unless it relates to ongoing surveillance or judicial investigation. Experts and interpreters can be required. Refusal to cooperate with Standing Committee I and Enquiry Service I constitutes an offence.

Other Member States which reported similar far-reaching oversight powers are Germany, Hungary, Italy, Lithuania, Luxembourg and Romania<sup>50</sup>.

Germany notes the comprehensive oversight powers of the Bundestag over the Federal intelligence services. A parliamentary supervisory committee is responsible for supervising the Federal Office for Protection of the Constitution, the Federal Intelligence Service and the Military Counterintelligence Service. The Government must, upon request, provide access to the files and computer records of the services, permit interviews with employees of the services and facilitate visits. In addition to this committee, the G10 Commission<sup>51</sup> is

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<sup>50</sup> Since not all Member States detailed the powers of their relevant parliamentary committees, or at least not to the same extent as others, it is not excluded that parliamentary committees in other Member States have equally far reaching oversight powers over the activities of intelligence services.

<sup>51</sup> The committee is named after Article 10 of the Grundgesetz, which protects the secrecy of communications.

responsible for approving the measures taken by intelligence services to monitor telecommunications and mail. Furthermore, the Federal Officer for Data Protection and Freedom of Information, elected by the Bundestag, monitors compliance with the provisions on data protection. In addition, Germany refers to the option of setting up ad hoc Enquiry Committees on individual matters relating to the activities of the federal intelligence services.

Germany adds that the Länder intelligence services are monitored by the Länder parliaments on the basis of comparable Land laws.

In Hungary, the Security Committee of the Parliament, whose chair must necessarily be a member of the opposition, may request information from the Minister and directors of the national security services, conduct enquiries about complaints, and if it assumes that any of the national security services has breached the law, call upon the Minister to correct such activities.

In Italy, the Parliamentary Committee for the Security of the Republic ‘systematically and continually checks that the activities of the security intelligence service are carried out in accordance with the constitution, the laws, solely in the interests of and for the protection of the Republic and its institutions’. To this end, the Committee is assigned extensive powers. To name but a few, the Committee can, in exceptional cases, summon members of the security intelligence service as well as non-members to testify in order to obtain useful information for the purposes of parliamentary control; inspect relevant documents including direct access to the archives of the security intelligence service as regards closed operations, and visit the relevant offices of the security intelligence service without prior warning.

The Lithuanian Parliamentary Committee on National Security and Defence exercises parliamentary scrutiny of the national civil and military intelligence services. Its powers include the scrutiny of operational activities and their compatibility with constitutional rights, the analysis of legal instruments governing operational activities and submission of proposals to improve them, as well as the investigation of gross violation in the course of operational activities.

The Luxembourgish Commission of Parliamentary Control is informed about the activities of national intelligence service by its Director and every six months as regards the measures taken to monitor communications. It may also check specific files, being entitled to inspect all documents that it considers relevant and require the members of the intelligence service responsible for the file in question to attend a hearing. If the oversight necessitates technical expertise, the commission may request the assistance of an expert. After each case, the Commission draws up a confidential report that is sent to the Prime Minister, the director of the intelligence service and the members of Parliament that are members to the Commission.

Romania reports that parliamentary control resides in the right of parliamentary committees to request information, written clarifications or the hearing of persons in relation to certain problems, or in order to verify compliance with the law and the Constitution, examining the cases where such infringements occur. This control also covers the use of the budget.

In the Czech Republic, a special supervisory body with extensive investigation powers oversees the Security Information Service and Military Intelligence. However, the third intelligence service of the Czech Republic, the Office for foreign relations and information, is excluded from its oversight. Otherwise, it should be noted that the special supervisory body is entitled to receive, *inter alia*, written specifications of the tasks imposed by the Government on the intelligence services and information allowing it to supervise the implementation of their budget. It can also request reports on the activities of the intelligence services and the means used to obtain information, provided that the operations in question are closed. The

supervisory body can also enter the premises of the intelligence services and request explanations from the director of the service if it believes that the service's activities have illegally restricted or infringed upon rights and freedoms or if secret information has been divulged.

In other Member States, such as Estonia, Latvia, Slovenia and the UK, parliamentary committees combine investigative powers with a general oversight of the activities of the intelligence services, often including the control of its budget.

In Estonia, the Prime Minister and competent Minister inform the parliamentary security authority supervision committee of the activities of security authorities and surveillance agencies at least every six months. In addition, the committee has the power to summon individuals and request documents for inspection in order to discharge its tasks, which include the safeguarding of fundamental rights. In addition, the committee discusses the security authorities' draft budget at the same time as the national budget is discussed by the Parliament.

Similarly, in Latvia, parliamentary control is exercised by the Saeima National Security Committee. Among its tasks, this Committee lays down the principles for recruiting state security authority personnel; accepts and oversees the use of the budget; hears reports by the Cabinet and heads of the State security authorities and examines the results of checks on these authorities' activities.

In Slovenia, the Commission for the Supervision of Intelligence and Security Services has a wide range of tasks including the examination of the annual work programme of the intelligence service, of reports on its activities and financial management and of its draft budget. The Commission also examines draft acts referring to the operation of the intelligence service. It is responsible for supervising the activity of the intelligence service as regards compliance with national security policy, the use of monitoring measures ordered by a court decision as well as the use of monitoring measures that are not ordered by a court decision.

In the UK, parliamentary oversight of the three intelligence agencies — the Security Service, the Secret Intelligence Service and the Government Communications Headquarters — is provided by the Intelligence and Security Committee. The Committee's statutory remit is to examine the expenditure, administration and policy of the three agencies. In discharge of its tasks, the Committee has access to a range of agencies' activities and highly confidential information. Furthermore, in addition to annual reports, it produces *ad hoc* reports such as the report into rendition (published on 2007) or into the London terrorist attacks on 7 July 2005 (published in 2006).

In Austria, two standing Sub-Committees, dealing respectively with national defence issues and matters within the remit of the Ministry of Interior, have the powers not only of requesting information and access to documents from the competent member of the Federal Government but also of interviewing the competent minister and civil servants.

In Slovakia, the special control body also exercises its powers at two levels. On the one hand, it receives, various documents from the Director of the Information Service on request, e.g. background papers, internal regulations, activity reports and results. On the other hand, its members have a right to enter the premises and establishment of the Information Service.

In Poland, the tasks of the parliamentary committee for the special services are basically consultative. Its main remit is to issue opinions on certain elements relating to special services such as bills and draft regulations, special service operations, proposed appointments of individuals to the posts of head and deputy head of the special services, and the draft budget and the report on its implementation. The committee also has to assess general legal

instruments pertaining to the activities of the special services, annual reports as well as joint operations carried out by these services.

In Denmark, a supervisory parliamentary committee oversees the police and national security intelligence services through the intermediary of the Government. The Government instructs the Committee on the guidelines governing the activities of the intelligence services and keeps the Committee informed about important matters of security or foreign policy which have a bearing on the activities of the intelligence services. Also, the committee may apprise the Government of its opinion on matters dealt with by the committee. In addition, in Denmark the intelligence services fall within the terms of reference of the Parliamentary Ombudsman.

Sweden also refers to the Parliamentary Ombudsmen, who ensure that public servants obey the law and fulfil their duties. Accordingly the Security Police are overseen by the Parliamentary Ombudsmen, who examine complaints from the public and conduct any inspections and other enquiries considered necessary. The Ombudsmen may initiate proceedings against officials who have breached the law.

In addition or as an alternative to parliamentary committees, some Member States refer to the possibility of parliamentary questions or parliamentary enquiries. For example, France explains that an enquiry may be held in response to any malfunctioning of the intelligence services. Portugal also refers to parliamentary enquiries and clarifies that the opposition parties must be regularly consulted and informed by the Government of major aspects of security policy. In this last Member State, the Parliament also scrutinises an annual report which must be submitted by the Government on national security, the activities of the armed forces and security services. Denmark also refers to parliamentary questions that may be put to the Government concerning intelligence services.

Some Member States mentioned the existence of indirect parliamentary oversight or oversight ensured by non-parliamentary bodies.

For example, Ireland refers to reporting relations between the Commissioner of the Garda Síochána<sup>52</sup> and the Ministry for justice, equity and law reform, which in turn answers to the Government and Parliament. Moreover, Ireland refers to two non-parliamentary and independent agencies, the 'Garda Síochána Inspectorate' and the 'Garda Síochána Ombudsman Commission'. The former is responsible for ensuring that the resources available are used so as to achieve and maintain the highest levels of efficiency and effectiveness. The latter is responsible for providing the general public with an independent and effective oversight of policing by receiving and dealing with individual complaints concerning the behaviour of the Garda Síochána.

Malta refers to a Commissioner appointed by the Prime Minister to monitor how the Prime Minister exercises his powers in relation to the Security Service and investigate any complaints that there may be regarding this Service. The Commissioner reports directly to the Prime Minister. In addition, there is a Security Committee to examine the expenditure, administration and policy of the Security Service. This committee consists of the Prime Minister, the Minister of Foreign Affairs and the leader of the opposition and draws up an annual report on the discharge of its functions. The Prime Minister puts this report before the Parliament.

Spain refers to the prior judicial control affecting some of the activities of the National Intelligence Centre. In particular, the National Intelligence Centre must be authorised by a

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<sup>52</sup> The Garda Síochána also acts as Ireland's national intelligence service.



Magistrate of the Supreme Court to adopt any measures interfering with privacy (home and communications).

In the Netherlands, the Intelligence and Security Services Supervisory Committee monitors the implementation of the Intelligence and Security Services Act.

The UK refers to two Commissioners, who are senior members of the judiciary. In particular, the Intelligence Service Commissioner keeps under review the issue of warrants authorising 'intrusive' surveillance and interference with property and checks that authorised surveillance is conducted in accordance with the requirements of the law. The Interception of Communications Commissioner keeps under review the issue of warrants permitting the interception of mail and telecommunications and the acquisition of the data as well as the adequacy of the arrangements ensuring that the product of interception is properly handled. There is, in addition, the Investigatory Powers Tribunal, made up of senior members of the legal profession or the judiciary, which investigates allegations by individuals on the agencies' conduct towards them, including the interception of their communications.

Cyprus constitutes a specific case since the Parliament lacks oversight powers over the activities of the intelligence services and there appear to be no independent or non-parliamentary supervisory bodies. Instead, this Member State indicates that the Central Intelligence Service (KYP), falls administratively under the Police Force and operationally under the President of Cyprus.

*Despite the diverse oversight mechanisms mentioned, the most widely used is undoubtedly a Parliamentary Committee responsible for supervising the activities of the national intelligence services. The powers of such Committees, however, differ substantially from one Member State to another. Some are primarily concerned with obtaining general information on the activities of the intelligence services while others have considerable investigative powers.*

*Two Member States refer to the Parliamentary Ombudsman; some indicate the possibility of parliamentary questions or enquiries; others mention the existence of indirect parliamentary oversight ensured by non-parliamentary bodies. Finally, two Member States refer to judicial control of measures taken by the intelligence services that are liable to interfere with privacy or property.*

**15. HAVE THERE BEEN IN YOUR COUNTRY ANY CASES OF VIOLATIONS OF DATA PROTECTION RULES IN RELATION TO THE FIGHT AGAINST TERRORISM OR IN CONNECTION WITH COUNTER-TERRORISM INVESTIGATIONS?**

In most Member States, no records of such cases exist. Actually, only Belgium and Germany identified violations of data protection in this context.

Belgium states that, in some files, leaks to the press have been found, leading to investigations into violations of professional secrecy. Germany explains that the Federal Officer for Data Protection has criticised some violations of this kind<sup>53</sup>, and although the Federal Government does not agree with all the views the Officer expresses, there have been individual court rulings and justified complaints in this respect. As an example, Germany notes a decision of the Federal Constitutional Court which declared impermissible a computer search ordered by

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<sup>53</sup> The activity report for 2005 and 2006 from the Federal Officer for Data Protection and Freedom of Information is available on <http://dip21.bundestag.de/dip21/btd/16/049/1604950.pdf>.

the authorities in the Land of North Rhine-Westphalia, carried out in order to identify terrorists<sup>54</sup>.

In addition, the UK notes two pending cases which allege the unlawful disclosure of material by the Government in the context of national immigration proceedings.

*Cases of violations of data protection rules in relation to the fight against terrorism were only reported by two Member States. One Member State refers to two pending cases.*

**16. IS THE ADOPTION OF LEGISLATION CONCERNING MEASURES LINKED TO THE FIGHT AGAINST TERRORISM PRECEDED BY AN EXPLICIT ASSESSMENT OF THEIR POSSIBLE IMPACT ON FUNDAMENTAL RIGHTS? IF SO, IS THERE A BODY ENTRUSTED WITH SUCH A TASK? IS THERE ANY OFFICIAL REPORT ASSESSING THE EFFECT ON THE FUNDAMENTAL RIGHTS OF INDIVIDUALS OF NATIONAL MEASURES ADOPTED IN THE FIGHT AGAINST TERRORISM? IF SO, PLEASE PROVIDE A COPY OF THE REPORT OR A WEB-ADDRESS WHERE IT CAN BE DOWNLOADED.**

Judging from the replies received, it appears that generally, legislative proposals in the field of terrorism do not receive any special treatment different from non-terrorism-linked proposals. Standard scrutiny mechanisms prior to the adoption of new legislative measures therefore apply. At most, some Member States differentiate between legislative proposals depending on their relevance from the point of view of fundamental rights. An exception in this respect, however, is the UK, where the Independent reviewer of Terrorism Legislation produces a yearly report into the operation of terrorism legislation and also examines proposals for new legislation. Moreover, it should be noted that, in Latvia, the Ministry of Justice has set up a permanent Criminal Law working group, assessing every amendment in the field of criminal law.

As regards scrutiny mechanisms applying to all legislative proposals, the UK indicates that the Minister in charge of a Bill in either the House of Commons or the House of Lords is obliged to make a statement as to his view on whether it is compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The statement must be in writing and must be published.

In addition, the UK refers to the Joint Committee on Human Rights, a parliamentary committee which scrutinises all Government legislative proposals and picks out those with significant human rights implications for further examination. With regard to the oversight of parliamentary bodies responsible for human rights, Lithuania and Romania refer, respectively, to the Human Rights Committee of the Seimas and the Parliament Specialised Committee for Human Rights.

Similarly, Greece refers to the National Commission of Human Rights. This body is responsible for giving advice on the adoption of legislative, administrative and other measures to help enhance the protection of fundamental rights, as well as examining the conformity of Greek legislation with international law provisions on fundamental rights protection, among other tasks. It also prepares an annual report which reflects its work.

It also appears that Austria, Belgium, Cyprus, Germany, Greece, Hungary, Luxembourg, Latvia, Lithuania, Poland, Sweden and the Netherlands systematically assess the compatibility of legislative proposals with fundamental rights, although this assessment forms part of a

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<sup>54</sup> Judgement by the Federal Constitutional Court on 4 April 2006, 1 BvR 518/02, on the Internet: [http://www.bverfg.de/entscheidungen/rs20060404\\_1bvr051802.html](http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html).

wider constitutional or adequacy check. In this context, Slovenia mentions the assessment of legislative proposals' compliance with the EU *acquis*.

In Germany, Hungary, Latvia, Lithuania and the Netherlands, the Ministry of Justice plays a key part in this checking, either on its own or in association with other ministries, while a State legal service has a main role in Cyprus, Poland and Sweden. In Belgium and Luxembourg, the State Council ensures the compliance of legislative proposals with the Constitution. Greece refers to the control of the Parliament's Central Legislation Committee and Scientific Council.

In Germany, Lithuania and the Netherlands, the ministerial scrutiny referred to above is explicitly conducted at parliamentary level. In Cyprus, the Law Office of the Republic is present during the discussions of all legislative proposals before the parliamentary committees and therefore has the opportunity to express its views on the compatibility with fundamental rights not only of the initial proposal but also of amendments proposed by members of the Parliament.

Among the supervision systems described by these Member States, those of Luxembourg and the Netherlands stand out. In Luxembourg, the 'Conseil d'Etat' can even block the legislative procedure of the law for a period of at least three months when it considers that there are major legal or constitutional arguments against its adoption. It is also worth mentioning the role of the national commission for data protection, whose opinion may be requested on every legislative proposal which envisages the processing of personal data.

In the Netherlands, the precise 'instructions for drafting legislation' lay down how the scrutiny of legislative proposals, in particular, their consistency with 'higher rules', must be conducted. Several layers of legislative control include external consultation, among others, of the independent supervisory authority in the area of data protection, which monitors compliance with privacy regulations; the Ministry of Justice, which monitors the quality of legislation, sharing this responsibility with the Ministry of Internal Affairs with regard to the constitutional aspects such as compatibility with fundamental rights, and with the Ministry of Foreign Affairs as regards compatibility with international treaties and conventions; the Council of State, the government's main and final advisory body for legislation, whose opinion on the legislative proposal also considers whether it complies with internationally recognised human rights standards and, finally, the Parliament, which can ask the government to conduct an impact assessment to interpret certain effects of the proposed regulation.

By contrast, some Member States stated that an explicit examination of the legislative proposal's compliance with fundamental rights is carried out only if, in the first place, the proposal is considered to be significant in this respect. However, it must be considered that a preliminary scrutiny would logically take place to decide whether the proposal is significant from the point of view of fundamental rights. This reasoning aligns these Member States with those that carry out a systematic assessment.

On these lines, Denmark explains that the explanatory notes to the legislative proposal include an appraisal regarding fundamental rights in cases where the proposal raises questions in this respect. The appraisal is elaborated by the Government. Denmark also explains that human rights organisations are routinely consulted on these legislative proposals. Their opinions are referred to the Parliament and commented on by the Government at the same time as the proposals are submitted to the Parliament.

In Finland, legislative proposals that are considered to be of significance for fundamental rights and might entail problems of constitutional law are directed to the Constitutional Law Committee of the Parliament as a matter of course. The binding nature of the analysis by this

Committee for the plenary of the Parliament should be underlined. In addition to this mechanism, Finland stresses that, when drafting legislation related to combating terrorism, ‘the Government Ministry concerned must always take fundamental rights into consideration’. Furthermore, the Chancellor of Justice of the Government has the right to examine a legislative proposal with respect to fundamental rights and propose to the Ministry in charge of the proposal that it make changes in order to prevent conflicts with fundamental rights.

In the case of the Czech Republic, legislative proposals containing provisions on fundamental rights are sent to the Government Commissioner for Human Rights for assessment and comments. It should be added that these legislative proposals are also sent to the Ombudsman for comments.

Another Member State where not all legislative proposals are subject to such control is France. In this Member State, the Conseil Constitutionnel assesses the compliance of legislative proposals with the national constitution as well as international treaties. However, this control takes place systematically only for a certain kind of legislative proposal: laws which develop or complement the Constitution, laws subject to referendum and regulations of the parliamentary chambers.

Some Member States stressed the role of State bodies responsible for the protection or promotion of fundamental rights which are not specifically concerned with advising the Government in the adoption of legislation. For example, in Luxembourg, the Consultative Commission on Human Rights is responsible for assisting the Government by means of studies or opinions on general questions concerning fundamental rights.

The Irish Human Rights Commission should also be mentioned in this respect<sup>55</sup>. This body has wide-ranging powers to promote and define human rights. In particular, it ‘keeps under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights’. However, it does not appear that this body is explicitly concerned with the scrutiny of legislative proposals. In addition to the role of the Human Rights Commission, Ireland stresses that all legislation must accord with the Irish Constitution and the ECHR.

Similarly, it seems that a number of Member States do not carry out an assessment of legislative proposals in relation to fundamental rights or, at least, not explicitly. This is the case for Bulgaria<sup>56</sup>, Italy, Malta, Portugal, Slovakia and Spain. Most of them stress, however, the general rule of conformity of all legislative proposals with the constitution as well as international treaties and some clarify that every legislative procedure takes account of such conformity.

Italy explains that, although the explicit assessment referred to in this question is not required under national law, the ‘Provisions on the execution of the judgments of the European Court of Human Rights’ provide for a mechanism by which all measures, including counter-terrorism measures, can be adapted to the case law of the ECtHR on fundamental rights.<sup>57</sup>

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<sup>55</sup> Ireland notes that several of its reports have relevance to the effect of counter-terrorist measures on human rights. These reports may be consulted on the Commission's website at <http://www.ihrac.ie>.

<sup>56</sup> This Member State notes that "all laws are submitted to a preliminary assessment of the impact on public relations" but does not clarify the content or method of such assessment.

<sup>57</sup> In particular, Article 1 of Law No. 12 of January 2006 laying down the “Provisions on the execution of the judgments of the European Court of Human Rights” states that “the President of the Council of Ministers [„] promotes the performance of the government’s functions following the judgments of the European Court of Human Rights issued to the Italian State; communicates these judgments to the Chambers in good time so that they can be examined by the competent permanent parliamentary

Finally, Spain notes that legislative proposals affecting fundamental rights must be approved as a higher rank of legislation which requires an absolute majority in the Chamber of Deputies.

*Judging from the replies received, it appears that generally, legislative proposals in the field of terrorism do not receive any special treatment: standard scrutiny mechanisms prior to the adoption of new legislative measures apply.*

*Many Member States systematically carry out an assessment of the legislative proposals' compliance with fundamental rights, although most often as part of a wider constitutional or adequacy check. Some Member States undertake such explicit assessment if the proposal is considered to be significant in this respect.*

*Some Member States referred to the role of data protection supervisory authorities in the scrutiny of legislative proposals.*

*Certain Member States stressed the role of State bodies responsible for the protection or promotion of fundamental rights which are not specifically responsible for the scrutiny of legislative proposals. Some Member States do not carry out an assessment of legislative proposals in relation to human rights, or at least not explicitly.*

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committees and every year presents a report to the Parliament on the extent to which the above-mentioned judgments have been implemented”.