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European evolutions on terrorism

Evoluções europeias sobre o terrorismo

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Dossiê TERRORISMO

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Abstract

The attacks of 11th September 2001 on the World Trade Center, the Pentagon, and in Pennsylvania began a new chapter even in European security and crime policy. As soon as it became evident that a substantial part of the preparation for the attacks had taken place on European soil, it was no longer sufficient for the European Union and its member states to stand in solidarity with the U.S. – they were duty-bound to develop their own framework for the effective prosecution and prevention of terrorism. This paper attempts to trace the developments, factual and legal, that have flowed from the September 11th attacks, though it will not be possible to discuss every aspect, nor all of the actions taken by the Council of Europe or the European Union.

Keywords: Terrorism; Anti-Terrorism Measures; Europe.

Resumo

Os ataques de 11 de Setembro de 2001 no World Trade Center, no Pentágono e na Pennsylvania iniciaram um novo capítulo na segurança europeia e na política criminal. Tão logo ficou evidente que uma substancial parte da preparação para os ataques tomaram lugar em solo europeu, não era mais suficiente para a União Europeia e seus Estados membros serem solidários aos EUA – eles estavam obrigados a desenvolver o seu próprio sistema para a efetiva persecução e prevenção do terrorismo. Este artigo procura traçar os desenvolvimentos, fáticos e legais, que têm emanado dos ataques de 11 de Setembro, embora não seja possível discutir todos os aspectos ou todas as ações desenvolvidas pelo Conselho da Europa ou pela União Europeia.

Palavras-chave: Terrorismo; Medidas antiterror; Europa.

A. Einleitung

The attacks of 11th September 2001 on the World Trade Center, the Pentagon, and in Pennsylvania began a new chapter even in European security and crime policy. As soon as it became evident that a substantial part of the preparation for the attacks had taken place on European soil, it was no longer sufficient for the European Union and its member states to stand in solidarity with the U.S. – they were duty-bound to develop their own framework for the effective prosecution and prevention of terrorism. This paper attempts to trace the developments, factual and legal, that have flowed from the September 11th attacks, though it will not be possible to discuss every aspect, nor all of the actions taken by the Council of Europe or the European Union.[1]

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B. Anti-terrorism measures in Europe before the 11th September 2001[2]

Legal instruments for combatting terrorism had been passed at the European level even before 2001. Particularly noteworthy is the 1977 European Convention on the Suppression of Terrorism,[3] which does not define terrorist acts, but does set out, using the term "serious acts of violence", a number of areas of offences[4] within which extradition between the member states should be simplified. Defences or mitigating factors of ‚political motivation' were to be excluded.

In 2005, the European Council passed the Convention on the Prevention of Terrorism.[5] The convention required of its signatories that they carry out effective measures to prevent terroristic crimes from being committed. To this end, signatories were to criminalize public incitement to terrorist offences, as well as recruitment or training for terrorist purposes, as long as the conduct was illegal and intentional. The convention relied on the definition of terrorist crimes on the existing terrorism conventions from the United Nations, and represented an addition to these conventions; it did not contain its own definition of terrorist offences. The convention also required closer cooperation between the state parties for the purpose of preventing terrorism.[6]

With the founding of the European Union in 1992, a new forum was created that called for new legal instruments directed specifically against terrorism. The stipulations on "Cooperation in Police and Judicial Affairs" contained under Art K 1 Nr 9 the "prevention and suppression of terrorism" as a "matter of common interest". At the same time, the process was begun of founding the joint European policing agency, Europol, which began work in 1999 and is today one of the most important European agencies in the prosecution of crime.

With the entry into force of the Treaty of Lisbon on 1 December 2009, the provisions on Europol now fall under the Treaty on the Functioning of the European Union (Title V – Area of freedom, security and justice), and a Council decision replaced the original Europol Convention with effect from 1 January 2010.

Europol's job is to improve police cooperation between member states in the suppression of serious international crime. It has established a system for the exchange, collection, and analysis of information for these purposes on the European level (see D, below).

The focus on the legal level was initially extradition,[7] at least prior to the resolution of the European Parliament of 30 January 1997 on the suppression of terrorism in the EU.[8] The resolution contained for the first time its own definition of terrorism, under which it was "to be seen in the European Union as criminal conduct [...] which through use or threat of violence seeks to change political, economic, and social structures in democratic states and is thus different from resistance action in third countries directed against governments that have terroristic character themselves."[9]

The resolutions of the European Council meeting at Tampere[10] were important for setting the direction of antiterrorism in Europe. At their centre stands the call for more intensive cooperation among the member states, especially through the support of joint investigative teams.

C. Measures taken by the European Union after 11 September 2001

1 *Overview*

It is evident from the foregoing that terrorism and organized crime were themes of common European crime policy even before 11 September 2001. But these themes could only be actively pursued Europe-wide after the founding of the European Union and the Treaties of Amsterdam and Nice, which provided the necessary legal instruments. It should not be overlooked that there was terrorism in Europe before the 11th September. The attacks on the 1972 Munich olympics, the kidnapping of Hans-Martin Schleyer and the related hijacking of the *Landshut* in the fall of 1977, the terrorism of the Basque separatist movement ETA or the

Irish Republican Army are all examples. The attacks of 2001 fell in the era of the establishment of new legal frameworks and new institutions such as Europol, and signalled the beginning of European actionism. The firsthand experience of terrorism swept away many political disagreements, and the reality of what was within terrorists' reach overtook protracted discussion.

To put it briefly, the EU reacted to the September 11th attacks with a bundle of measures including the introduction of the European Arrest Warrant, measures for suppressing the financing of terrorist groups, and a legal cooperation treaty with the U.S. Efforts continued to strengthen cooperation in these areas and provided greater prevention.[11] All these measures were conducted under an action plan agreed on 21st September 2001, which declared antiterrorism as one of the priority goals of the European Union.

Following the Madrid attacks on 11 March 2004, the European Council meeting of 25-26 March 2004 issued a declaration whereby all Member States will act jointly in a spirit of solidarity and by mobilising all instruments at their disposal, including military resources, if one of them is the victim of a terrorist attack;

Following the London bombings of July 2005, a counter-terrorism strategy based on the approaches "prevent", "protect", "disrupt" and "respond" was adopted in December 2005.

With the entry into force of the Treaty of Lisbon on 1 December 2009, the solidarity clause was institutionalised (Article 222 of the TFEU). It provides for joint action on the part of Member States when one of them is the object of a terrorist attack, following that Member State's request for assistance, which is coordinated in the Council.

The efforts to combat terrorism were previously based on the five-year programme adopted in 2004 in The Hague, which set out action priorities for 2005-10. These efforts are now continued under the Stockholm Programme (2010-14) adopted in December 2009.[12]

In the common position paper of the Council on the use of special measures to combat terrorism (27 December 2001),[13] a definition of "terrorist conduct" (Art 1 Abs 3) was presented that led the way into the framework decision of the Council on antiterrorism (2002/475/JI of 13 June 2002).[14] This framework decision has since served as the leading basis for the criminal-law sanction of terrorism within the EU, at least in the area of substantive law.[15] It was amended by the framework decision of the Council of 28 November 2008 (2008/919/JI)[16] to include harmonization measures and three new offences.

At this point it makes sense to briefly discuss the EU's tools for exercising influence over the criminal law of the member states.

The framework decisions mentioned above were based on the old EU treaty. Once the Lisbon Treaty came into force on 1 December 2009, a new legal architecture within the European Union brought new treaty mechanisms with it. Framework decisions continue to apply under the new treaty, but future harmonization of antiterrorist legislation will have to take place in the form of directives. Art 83(1)(2) TFEU names terrorism as the first competence area for the harmonization of criminal law.

What does that mean?

2 *The European Union's antiterrorism tools*

The legislative and institutional structure of the EU with respect to criminal law is complex, and a complete description of it would sidetrack the whole discussion. Instead, just this brief outline:

The European Union's efforts to combat terrorism fall under police and judicial cooperation in criminal matters, Title V of the Treaty on the Functioning of the European Union (TFEU). Article 83 of the Treaty refers specifically to terrorism as a serious crime.

In the battle against terrorism, the European Union has a number of specific tools that make it easier for Member States‘ law enforcement agencies to provide mutual assistance:

- Europol;
- Eurojust;
- the European arrest warrant;
- joint investigation teams, comprising leading members of enforcement authorities in Member States and, if required, Europol personnel.

Other tools are concerned more directly with terrorist organisations, their members and operations. These include a common list of persons whose terrorist assets must be confiscated.

The EU has no original criminal legislative competency over terrorism.[17] It cannot pass an offence into law which would be directly effective in the member states. But the EU has competency to harmonize certain areas of criminal law, including over terrorism. It can set minima, if necessary, that the member states must implement in their national criminal law. Guidelines emanating from the EU open the door to interpretation of national law in conformity with EU law.

3 *The framework decision on antiterrorism after the 2008 amendments*

After defining terrorist offences, the framework decision lays down the penalties that EU countries must incorporate in their national legislation.

The framework decision harmonises the definition of terrorist offences in all EU countries by introducing a specific and common definition. Its concept of terrorism is a combination of two elements (Art. 1 FD):

- an objective element, as it refers to a list of instances of serious criminal conduct (murder, bodily injuries, hostage taking, extortion, fabrication of weapons, committing attacks, threatening to commit any of the above, etc.);
- a subjective element, as these acts are deemed to be terrorist offences when committed with the aim of seriously intimidating a population, unduly compelling a government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

The framework decision defines a terrorist group (Art. 2 FD) as a structured organisation consisting of more than two persons, established over a period of time and acting in concert, and refers to directing a terrorist group and participating in its activities as offences relating to a terrorist group.

Furthermore, EU countries must ensure that certain intentional acts are punishable as offences linked to terrorist activities even if no terrorist offence is committed (Art. 3 FD). These include:

- public provocation to commit a terrorist offence;
- recruitment and training for terrorism;
- aggravated theft, extortion and falsification of administrative documents with the aim of committing a terrorist offence.

To punish terrorist offences, EU countries must make provision in their national legislation for effective, proportionate and dissuasive criminal penalties, which may entail extradition (Art. 5 FD). In addition, EU countries must ensure that penalties are imposed on legal persons where it is shown that the natural person

has the power to represent the legal person or authority to exercise control within the legal person that has committed a terrorist offence.

EU countries must take the necessary action to (Art. 9 FD):

- establish their jurisdiction with regard to terrorist offences;
- establish their jurisdiction where they refuse to hand over or extradite a person suspected or convicted of such an offence to another EU country or to a non-EU country;
- coordinate their activities and determine which of them is to prosecute the offenders with the aim of centralising proceedings in a single EU country, when several EU countries are involved.

Each Member State shall take the necessary measures to establish its jurisdiction over terrorist offences if the offence is committed in whole or in part in its territory (Art. 9). Each Member State may extend its jurisdiction if the offence is committed in the territory of a Member State or the offence is committed on board a vessel flying its flag or an aircraft registered there or the offender is one of its nationals or residents or the offence is committed for the benefit of a legal person established in its territory or the offence is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that Member State.[18]

4 *Analysis*

German commentators have partially criticized the framework decision. Firstly, it is seen as going against the principle of sparing in European criminal law,[19] and secondly, the framework decision brings in an area-wide "policification"[20] of criminal law.

Despite this not unjustified criticism, it cannot be overlooked that the first requirement for combatting cross-border crime and especially terrorism is the creation of a common regulatory framework. A comprehensive comparative-law study of the definitional limits of terrorism and organized crime on the basis of the legal systems of thirteen member states as of 2004 has gone much of the way toward meeting this need.[21]

In the member states examined, there was commonality only in that terrorism was consistently defined as pursuing a certain objective: unlike organized crime (individual enrichment), it seeks to radically change the societal status quo through use or threat of violence. The provisions on punishing terrorism were enormously varied, however. The dominant approach seemed to be the connection of serious offences with terroristic objectives, as is done in Russia, Austria, Switzerland, Denmark, France, Estonia, and the U.S., and as Art 1 of the EU framework decision calls for member states to do. Germany, by contrast, featured the widest statutory regulation – and not even because of the framework decision. The offence of membership of a terrorist organization required no connection to terroristic goals, as foreseen by Art 1 of the framework decision. The only similar provisions were to be found in Italy and Hungary. In these states, as in Germany, participation in a terroristic organization was enough, even without a more serious terrorist offence actually having been committed. But in these latter two states, terroristic goals were still a required element, making their rules tighter than Germany's. It was also remarkable that countries with a greater potential for terrorist threats held more strictly to the offence principle, though it cannot be overlooked that procedural law in countries like England or the U.S. contains much of police law, and is thus of greater importance compared to substantive law. Where substantive law does not appear to have expanded, considerable additional investigative powers are often added to the procedural rules.

5 *Coordination between prosecuting authorities and the creation of central agencies and Europol*

After the attacks of 11 September 2001, pressure arose in Europe and beyond to create information networks and set up central coordinating agencies.[22] The most important of these was and is the setup and expansion of the European central police agency, Europol.

D. Europol

1 *Überblick*

Europol is a European Union agency with responsibility for improving cooperation between Member States' police authorities and law enforcement services.

Europol's field of competence is the combating of serious crime and terrorism, but it is not a European police force as such. The agency uses its unique information capabilities and the expertise of 700 staff to identify and track the most dangerous criminal and terrorist networks in Europe. Law enforcement authorities in the EU rely on this intelligence work and the services of Europol's operational coordination centre and secure information network, to carry out almost 12 000 cross-border investigations each year. These have led to the disruption of many criminal and terrorist networks, to the arrest of thousands of dangerous criminals, to the recovery of millions of euro in criminal proceeds, and to the recovery from harm of hundreds of victims, including children trafficked for sexual exploitation. Europol also acts as a major centre of expertise in key fields of law enforcement activity and as a European centre for strategic intelligence on organised crime. Its Organised Crime Threat Assessment is a seminal product for EU policy-makers and police chiefs.

Europol enjoys excellent cooperation arrangements with law enforcement partners in Europe and beyond.[23]

Whether Europol will be granted executive powers in future – as has been recently called for[24] – depends chiefly on the rules under which it could act and the controls to which it will be subjected. The issue is one of counterweight, since there is not a Europe-wide prosecutor‘s office.

2 *Numbers and facts – the EU Terrorism Situation and Trend Report 2011 (TE-SAT 2011)*

What is the actual terrorism situation in the European Union? The nature of the matter is such that official data on terrorist activity will be scant, but the numbers published by Europol in the EU Terrorism Situation and Trend Report do assist in estimating the threat level and the development of terrorism. The following data and graphs come from the TE-SAT 2011:[25]

- In 2010, 249 terrorist attacks were reported in nine Member States, while 611 individuals were arrested for terrorism-related offences.

  The majority of these attacks were in France (84) and Spain (90). A recent fall in attacks in the EU was reflected by a drop of nearly 50% in attacks in Spain. Several Member States were successful in preventing attacks by terrorist groups including those by Islamist terrorist groups.

  Terrorism continues to impact on the lives of EU citizens – in 2010, seven people died in the EU as a result of terrorist attacks. Islamist terrorists carried out three attacks on EU territory.

  Separatist groups, on the other hand, were responsible for 160 attacks, while left-wing and anarchist groups were responsible for 45 attacks. One single-issue attack was reported from Greece.

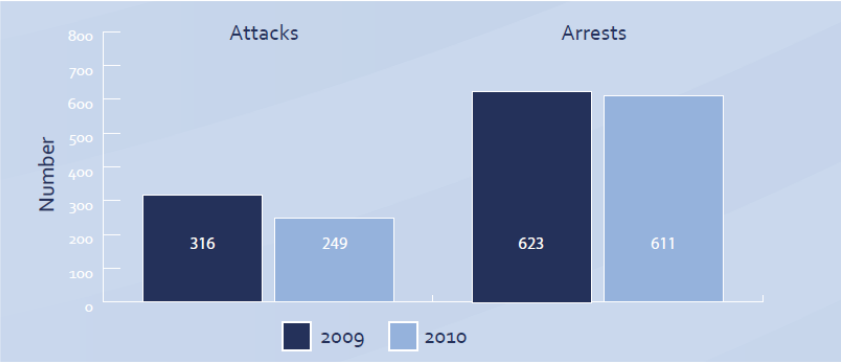

Figure 1. Number of failed, foiled or completed attacks; number of arrested suspects, 2009 and 2010.

Table 1. Failed, foiled and completed attacks in 2010 per member state and per affiliation

Member State	Islamist	Separatist	Left-wing	Right-wing	Single-issue	Not specified	Total 2010
Austria	0	1	1	0	0	0	2
Czech Republic	0	0	1	0	0	0	1
Denmark	2	0	0	0	0	0	2
France	0	84	0	0	0	0	84
Greece	0	0	20	0	1	0	21
Italy	0	1	7	0	0	0	8
Spain	0	74	16	0	0	0	90
Sweden	1	0	0	0	0	0	1
United Kingdom	-	-	-	-	-	40	40
Total	3	160	45	0	1	40	249

- In 2010, 611 individuals were arrested for terrorism-related offences. An increased percentage of individuals linked to Islamist terrorism (47%) were arrested for the preparation of attacks in Member States – an indication that Islamist terrorists continue to undertake attack planning against Member States.

  25.3% of convictions are for Islamist terror activities, while 74.7% have other causes.

  With respect to Islamist terrorism, this means that in 2010, only 1.2% of attacks were the result of Islamists; other motivations caused 98.8% of attacks.

The subjective impression that terrorism in the EU is rising was also rejected by the Europol analysis.

However one wants to interpret the data, Islamist terrorism in Europe plays only a subordinate role. That no wave of Islamist activity accompanied the death of Osama bin Laden only serves to bolster this conclusion.

The Europol numbers only reflect terrorist activities punishable by law. What remains hidden – non-criminal preparation activities, hideouts, contact points, and safe-houses within EU member states – cannot be accounted for. It cannot be concluded from the numbers that the EU is not interesting for Islamist terrorists, but merely that it is not interesting as a target for Islamist terrorists. One explanation might be that the training or hideout possibilities within the EU are especially attractive.

The TE-Sat Report 2011 highlights some further interesting points.

Table 2. Arrests in 2010 per member state and per affiliation

Member State	Islamist	Separatist	Left-wing	Right-wing	Single-issue	Not specified	Total 2010
Austria	1	1	3	0	0	0	5
Belgium	11	9	0	0	0	0	20
Denmark	6	0	0	0	0	0	6
France	94	123	0	0	0	2	219
Germany	9	14	2	0	0	0	25
Greece	0	0	18	0	0	0	18
Ireland (Republic of)	5	57	0	0	0	0	62
Italy	4	16	8	1	0	0	29
The Netherlands	19	19	0	0	0	1	39
Portugal	0	3	0	0	0	0	3
Romania	14	2	0	0	0	0	16
Slovenia	2	0	0	0	0	0	2
Spain	11	104	3	0	0	0	118
Sweden	3	1	0	0	0	0	4
United Kingdom	-	-	-	-	-	45	45
Total	179	349	34	1	0	48	611

Table 3. Number of convictions/acquittals for terrorism charges in 2010, per Member State and group type

Member State	Islamist	Left-wing	Right-wing	Separatist	Not specified	Total
Belgium	9				1	10
Denmark					1	1
France	14			26		40
Germany	10	2				12
Ireland (republic of)				18		18
Italy	5	17				22
The Netherlands	8					8
Spain	24	18		155	1	198
Sweden	2				2	4
UK	12		4	2	1	19
Total	84	37	4	201	6	332

Islamist terrorist groups are changing in composition and leadership. Terrorist groups are becoming multi-national, command and control from outside the EU is decreasing and more lone actors with EU citizenship are involved in terrorist activities. Returning jihadists from conflict zones continue to be a threat to the EU. They return with specific contacts, skills and modi operandi, and the potential intent to apply these in EU Member States. The political situation in the Northern Caucasus is increasingly reflected by the activities of members of the Caucasian diaspora in the EU, supporting activities of terrorist groups in the Northern Caucasus financially and otherwise. The turmoil in North Africa that began in January 2011 is likely to impact al-Qaeda's core and affiliated organisations, in both the short and long term. The current situation could lead to a setback for al-Qaeda but it could also result in more powerful terrorist organisations impacting the EU, and

an increase in the radicalisation of individuals both in North Africa and the EU. In the short term, the absence of terrorist organisations amongst the mass Arab protests across the region has left al-Qaeda struggling for a response. Should Arab expectations not be met, the consequence may be a surge in support for those terrorist organisations, and an increase in radicalisation, both in North Africa and elsewhere.[26]

E. Summary

The EU has introduced a number of measures for making the prosecution of terrorism more efficient. The establishment of institutions such as Europol is necessary to gain leverage for prosecuting authorities across borders against the mobility and technical capability of terrorists.

The September 11th attacks showed the world what terrorists are capable of. Before them, such scenarios were the stuff of action films, their connection to reality doubtful. In order to effectively combat terrorism, prevention and suppression measures must grapple with a certain aspect of the unthinkable. Limited resources, technological advance, the unstoppable networking of technology and people via the internet, political instability, and the market economy are all exploitable by terrorists. Answers must be found for these dangers, but criminal law must always remain the ultima ratio. It cannot rehabilitate terrorists – people who do not fear death are not interested in treatment. It must remain clear to us that criminal law and its task of doling out punishment always come far too late.

Notes

[1] An overview of all the legal instruments of the EU relevant to terrorism can be found here: <http://eur-lex.europa.eu/en/dossier/dossier_03.htm> (last accessed 13.9.2011).

[2] Cf in detail Zöller, *Terrorismusstrafrecht,* 2009, p. 161 ff.

[3] ETS No. 90 plus the protocol, ETS No. 190.

[4] e.g. aeroplane hijacking, kidnapping and hostage-taking, deployment of bombs, hand grenades, rockets, letter- or package bombs, if the acts endanger human beings.

[5] SEV No. 196.

[6] Bundestag paper BT-Drs. 17/3801.

[7] Convention on simplified extradition procedures, OJ C 78 of 30.3.1995, p. 2 ff. and convention relating to extradition between member states of the EU, OJ C 313 of 23.10.1996, p. 11 ff.

[8] Resolution OJ C 55 of 24.02.1997, p. 27 ff.

[9] Resolution OJ C 55 of 24.02.1997, p. 27 ff.

[10] Tampere European Council of 15 and 16 October 1999, summary of the chairman: <http://www.europarl.europa.eu/summits/tam_de.htm> (accessed 14.9.2011).

[11] European Security Strategy 2003.

[12] <http://europa.eu/legislation_summaries/glossary/fight_against_terrorism_de.htm> (accessed 13.9.2011).

[13] Official journal L 344 of 28.12.2001, p. 93.

[14] Official journal L 164 of 22.6.2002, p. 3.

[15] Cf Kreß/Gazeas in Sieber et al. (Eds.), *Europäisches Strafrecht,* 2010, § 19 Rn. 10.

[16] Official journal L 330 of 9.12.2008, p. 21.

[17] So runs the dominant opinion. See Hecker, *Europäisches Strafrecht*, 3rd Ed., 2010, § 4 Rn. 79.

[18] <http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/l33168_en.htm> (15.9.2011).

[19] Cf Kreß/Gazeas, in Sieber et al. (eds.), *Europäisches Strafrecht,* 2010, § 19 Rn. 60.

[20] Cf Sieber NStZ 2009, 353 (355 ff.); Weißer, JZ 2008, 388 (393 f.).

[21] Gropp/Sinn (eds.), *Organisierte Kriminalität und kriminelle Organisationen – Präventive und repressive Maßnahmen vor dem Hintergrund des 11. September 2001,* 2006, p. 646 ff.

[22] Vgl. *Gropp/Sinn* (Hrsg.), Organisierte Kriminalität und kriminelle Organisationen – Präventive und repressive Maßnahmen vor dem Hintergrund des 11. September 2001, 2006., S. 676 ff.

[23] <https://www.europol.europa.eu/content/page/about-europol-17> (13.9.2011).

[24] <http://mobile.europol.europa.eu/sites/default/files/epcc-counterterrorismconclusions.pdf> (15.9.2011).

[25] <https://www.europol.europa.eu/sites/default/files/publications/te-sat2011.pdf> (13.9.2011).

[26] <https://www.europol.europa.eu/sites/default/files/publications/te-sat2011.pdf> (13.9.2011).