



LUXEMBOURG

November 2005

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NATIONAL POLICY

Terrorism is one of the most blatant forms of assault on human dignity and freedom. Acts of terrorism are normally committed against one or more countries, or their institutions or their populations, for the purpose of threatening them or destroying the political, economic or social structures of those countries; acts of terrorism may assume the greatest variety of forms, from destruction of possessions or public or private facilities to serious injuries or even murder.

The Law of 12 August 2003 (1) on the suppression of terrorism and the financing of terrorism and (2) approving the International Convention for the Suppression of the Financing of Terrorism, opened for signature in New York on 10 January 2000, transposed into Luxembourg law, apart from the provisions of the said Convention, the Framework Decision of the Council of the European Union of 13 June 2002 on combating terrorism. In the present document that Law will be referred to as "the Law of 12 August 2003 on terrorism". That Law also introduced into Luxembourg law the definition of terrorism in general.

LEGAL FRAMEWORK

Criminal law

An act of terrorism means any crime or misdemeanour which is punishable by a prison sentence for a maximum period of at least to three years or a heavier penalty and which, given its nature or context, may seriously damage a country, an organisation or an international body where committed intentionally with the aim of:

- seriously intimidating a population, or
- unduly compelling public authorities, an organisation or an international body to perform or abstain from performing any act, or

- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country, an organisation or an international body. (Art. 135-1 of the Criminal Code).

That measure faithfully reproduces the text of Article 1 of the Framework Decision and supplements it by referring to international "bodies". That last reference was integrated into Article 135-1 in order to transpose the requirements of Article 9(1)(e) of the Framework Decision. Under Article 9(1)(e), Member States are to establish their jurisdiction over terrorist offences committed 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 the European Union and based in that Member State. The reference to international "bodies" in Article 135-1 is thus intended to cover that rule on powers of the jurisdictions.

Those who have committed an act of terrorism provided for in the preceding article shall be punished by extended imprisonment of between fifteen and twenty years. They shall be punished by life imprisonment if that act led to the death of one or more persons. (Art. 135-2.)

A terrorist group is a structured group of more than two persons, established over a period of time, and acting in concert to commit one or more of the acts of terrorism referred to in Articles 135-1 and 135-2. (Art. 135-3.)

Article 135-4 provides:

"(1) Any person who, intentionally and knowingly, actively forms part of a terrorist group shall be punished by a term of imprisonment of between one and eight years and be fined between 2,500 euros and 12,500 euros, or shall receive only one of those penalties, even if he/she had no intention of committing an offence within the framework of that group or of being associated with that offence as perpetrator or accomplice.

(2) Any person who participates in preparing for or carrying out any lawful activity of that terrorist group, when he knows that his participation contributes to its objectives, as provided for in the preceding article, shall be punished by a term of imprisonment of between one and eight years and be fined between 2,500 euros and 12,500 euros, or shall receive only one of those penalties.

(3) Any person who participates in the taking of any decision in the context of the activities of a terrorist group, when he knows that his participation contributes to its objectives, as provided for in the preceding article, shall be punished by a term of extended imprisonment of between five years and ten years and be fined between 12,500 euros and 25,000 euros, or shall receive only one of those penalties.

(4) Any leader of a terrorist group shall be punished by a term of extended imprisonment of between ten and fifteen years and be fined between 25,000 euros and 50,000 euros, or shall receive only one of those penalties.

(5) The conduct referred to in points 1 to 4 of this article which has taken place on national territory shall be prosecuted according to Luxembourg law irrespective of the place where the terrorist group is based or carries out its activities."

Article 135-2 provides that an act of terrorism is punished by a term of extended imprisonment of between fifteen and twenty years. That penalty is increased to life imprisonment where the act has caused the death of one or more persons, irrespective of whether death was caused deliberately.

Article 135-3 introduces an autonomous definition of the concept of "*terrorist group*" into the Criminal Code; for that purpose, it reproduces verbatim the conditions set out in Article 2 of the Framework Decision. Those conditions are two in number:

1. There must be a link between a number of persons: a "structured group of more than two persons". It should be noted that in the words of Article 2(1) of the Framework Decision, "structured group" means "a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure".
2. A specific purpose, which consists in the intention to commit in concert one or more terrorist acts referred to in Article 135-1.

Article 135-4 introduces specific offences, depending on the role played and the degree to which the various persons are involved in the activities of the terrorist group.

According to Article 135-5, an act of financing terrorism consists in the fact of supplying or gathering, by any means whatsoever, directly or indirectly, unlawfully and intentionally, funds, securities or assets of any kind, with the intention or the knowledge that they will be used, in whole or in part, to commit one or more of the offences provided for in Article 135-1 to 135-4 and 442-1, even if they are not actually used to commit one of those offences.

Article 135-5 of the Criminal Code reproduces the offence forming the subject-matter of the Convention, namely the financing of terrorism, defined in Article 2 of the Convention.

According to Article 135-6, anyone who has committed an act of financing terrorism will receive the same penalties as those provided for in Articles 135-1 to 135-4 and 442-1 and according to the distinctions set out in those provisions.

Article 135-7 provides that exemption from penalties will be granted to anyone who, before any attempt has been made to commit the offences set out in Articles 135-1, 135-2, 135-5 and 135-6 and before any proceedings have commenced, discloses to the authorities the existence of acts preparatory to the commission of the offences set out in those articles or the identity of the persons who have carried out those acts.

In such cases, sentences of extended imprisonment will be reduced to the extent determined by Article 52 and according to the scale set out therein in respect of those who, after the proceedings have commenced, disclose to the authority the identity of the offenders who remain unknown.

Exemption from penalties will be granted to anyone guilty of participating in a terrorist group who, before any attempt has been made at an act of terrorism forming the objective of the group and before any proceedings have commenced, discloses to the authority the existence of the group and the names of the leaders or subordinates. (Art. 135-8)

The statutory machinery relating to the *fight against the financing of terrorism* was further reinforced by the Law of 12 November 2004 on the fight against money laundering and against

the financing of terrorism in that it placed the offence of financing terrorism, which until then had been a primary offence of money laundering, on an equal footing with the offence of money laundering in the strict sense.

Thus, the entire anti-laundering statutory machinery was made applicable to the financing of terrorism; in particular, the three types of professional obligations traditionally applicable in the fight against money laundering – namely the obligation to “know your clients”, the obligation to have an adequate internal organisation and the obligation to cooperate with the authorities – were extended to the offence of the financing of terrorism.

It follows that the professionals referred to in the abovementioned Law of 12 November 2004 are required to cooperate fully with the competent Luxembourg authorities and must provide the State Prosecutor, on request, with the necessary information in accordance with the procedures provided for in the applicable legislation. They are also required to inform the competent authorities, on their own initiative, of any fact capable of indicating the financing of terrorism and they cannot carry out a transaction which they know or suspect to be linked with the financing of terrorism before reporting it to the State Prosecutor, who may instruct them not to carry out the transaction in question. They cannot inform the client concerned or a third party that information has been passed to the competent authorities or that an investigation is under way.

In addition, that Law supplemented Article 23 of the Code of Criminal Procedure by inserting a new paragraph 3, which provides that any public official who, in the performance of his duties, discovers facts that might indicate the financing of terrorism is required to inform the State Prosecutor at the Luxembourg District Court and to hand over all related information, records and documents. That statutory provision is designed to emphasise that public officials must report any suspicion of the financing of terrorism, even if they are not aware of evidence from which the existence of a criminal offence may at this stage be concluded.

Procedural rules

The State Prosecutor and the district courts of Luxembourg have sole jurisdiction in cases concerning offences consisting in acts of money laundering and also in cases concerning offences contrary to Articles 135-1 to 135-6 of the Criminal Code. (terrorism).

Therefore the court with jurisdiction for cases of terrorism is the Luxembourg District Court, and on appeal the Court of Appeal of the Grand Duchy of Luxembourg, according to the ordinary rules of procedure.

Searches

Searches are subject to different rules, depending on whether they are carried out during what is known as the *flagrante delicto* stage or during the preparatory investigation (where the matter has been referred to the investigating judge).

During the *flagrante delicto* stage, when the serious offence or misdemeanour is in the process of being committed or has just been committed, the State Prosecutor and police officers may carry out searches.

After the *flagrante delicto* period, only the investigating judge, a member of the court independent of the Prosecution who examines the incriminating and exonerating evidence, may order searches.

Telephone tapping

The Luxembourg Code of Criminal Procedure contains a section on “special surveillance measures”.

Special surveillance measures of the type that may be ordered by the court are provided for in Articles 88-1 and 88-2 of the Code of Criminal Procedure.

Article 88-1 of the Code of Criminal Procedure provides that “the investigating judge may, exceptionally and by a specially reasoned decision according to the factors present and by reference to the conditions set out below, order the use of technical means to monitor and control all forms of communications, where:

- a) the criminal proceedings have as their object an act of particular gravity where the maximum penalty for a serious offence or a misdemeanour is equal to or more than two years’ imprisonment; and where
- b) owing to specific facts the person whose communications are to be monitored is suspected either of having committed or participated in the offence, or of receiving or transmitting information intended for the accused or the suspect or originating from that person; and where

- c) ordinary investigative means prove ineffective owing to the nature of the facts and the special circumstances of the case.

The measures ordered must be terminated as soon as they are no longer necessary. They terminate by operation of law one month after the date on which the order was made. However, they may be extended, for one month at a time, provided that the total duration does not exceed one year, by a reasoned order of the investigating judge, approved by the President of the court in chambers of the Court of Appeal, who must reach a decision within two days of receiving the order, after hearing the submissions of the State Prosecutor.

These measures cannot be ordered in respect of an accused after he has undergone his first examination by the investigating judge and any measures ordered beforehand will terminate by operation of law on that date.

These measures cannot be ordered in respect of a person bound by professional secrecy within the meaning of Article 458 of the Criminal Code, unless that person is himself suspected of having committed the offence or of having participated in it."

Article 88-2 of the Code of Criminal Procedure sets out details relating to the implementation of the special monitoring measures.

Where the measures for the monitoring and control of communications ordered on the basis of Article 88-1 have failed to produce a result, the copies and recordings and also all other data and information placed on the file must be destroyed by the investigating judge no later than twelve months after the order to terminate the monitoring measures was made.

Where the investigating judge considers that these copies or recordings or the data or information received may be used for the purpose of the continuation of the investigation, he must order that they are to remain on the file, by a reasoned order according to the factors present.

The State Prosecutor and the person whose correspondence or telecommunications have been monitored, who is informed in accordance with subparagraph 6 of this article, may object to that order on the conditions set out in the final subparagraph of Article 88-1. Where, following the measures of monitoring and control of communications ordered on the basis of Article 88-1, the investigating judge decides not to commit the accused for trial, or the accused is

acquitted or convicted, and the decision of the court has become final, the copies and recordings and also any other data and information must be destroyed by the Principal State Prosecutor or the State Prosecutor within one month of the date on which the decision of the court became final.

Communications with persons bound by professional secrecy who are not suspected of having themselves committed or participated in the offence cannot be used. Any recordings or transcripts of these communications are immediately destroyed by the investigating judge.

A person whose correspondence or telecommunications have been monitored must be informed of the measure ordered no later than twelve months following the date on which the measure ceased.

After the first examination, the accused and his counsel are entitled to communication of the telecommunications which have been recorded, the correspondence and all other data and information on the file. The accused and his counsel are entitled to have the recordings played, in the presence of a police officer.

Location of telecommunications

The location of telecommunications is regulated by a recent Law of 21 November 2002, which amended the Code of Criminal Procedure.

The new Article 67-1 of the Code of Criminal Procedure provides that "where the investigating judge, dealing with facts which carry a maximum penalty for a serious offence or a misdemeanour equal to or more than six months' imprisonment, considers that there are circumstances which make the location of telecommunications or the localisation of the origin or the destination of telecommunications necessary to the establishment of the truth, he may, if necessary with the technical assistance of the telecommunications operator and/or the telecommunications service provider:

1. have the call data of means of telecommunications from or to which calls are or were sent located;
2. have the origin or the destination of telecommunications localised.

In the cases referred to in subparagraph 1, for each means of telecommunications the call data of which are located or the origin or destination of the telecommunications of which is localised, the date, time, duration and, where necessary,

the place of the telecommunications must be indicated and set out in a report [*procès verbal*].

The investigating judge must indicate the facts of the case which justify the measure in a reasoned order which he communicates to the State Prosecutor.

The investigating judge must state the period during which the measure may apply; that period may not exceed one month from the date of the order, but may be renewed.[...]

An application for annulment of the measure must be submitted within the prescribed period, failing which it will be time-barred, as provided for in Article 126 of the Code of Criminal Procedure.

Where the measures to locate telecommunications ordered by the investigating judge have failed to produce results, the data obtained must be removed from the investigation file and destroyed in so far as they relate to persons who have not been charged.”

INSTITUTIONAL FRAMEWORK

In Luxembourg, the Intelligence Service, the State Prosecutor (together with the Financial Intelligence Unit of the State Prosecutor’s Department of Luxembourg), the investigating judge and the police (anti-terrorism unit) play an active part in the fight against terrorism.

The Financial Intelligence Unit of the State Prosecutor’s Department of Luxembourg is the service which is active in the fight against money-laundering and for that reason it is also a significant body in the fight against the financing of terrorism.

It should be noted that searches are ordered by the State Prosecutor or a police officer in the event of *flagrante delicto*; outside that period, a search can be carried out only on the basis of an order of an investigating judge.

Upon application, the court in chambers of the District Court reviews the lawfulness of the use of special investigation techniques; the trial courts also ascertain that the investigation has been lawful and that it has complied with the European Convention for the Protection of Human Rights.

INTERNATIONAL COOPERATION

In the context of the fight against terrorism, Luxembourg actively promotes an approach of

extended international cooperation, as regards both mutual judicial assistance and extradition.

At present, **mutual judicial assistance** is governed in Luxembourg by the Law of 8 August 2000 on international mutual judicial assistance in criminal matters, which applies to all requests from States which are not linked to Luxembourg by an international agreement on mutual judicial assistance or by international judicial authorities recognised by Luxembourg.

That Law, moreover, is also applicable to requests for mutual judicial assistance from States which are linked to the Grand Duchy of Luxembourg by an international agreement on mutual judicial assistance, unless the provisions of the Law are contrary to the provisions of the international agreement.

The Law seeks to simplify and speed up mutual judicial assistance proceedings; thus, Section 7 of the Law provides that mutual judicial assistance cases are to be dealt with as urgent and priority cases and that the authority to which the request is made is to inform the requesting authority of the state of the proceedings and of any delay.

From a practical point of view, the provisions of the Law allow the other States to address requests for mutual assistance to the Luxembourg Principal State Prosecutor without having to go through diplomatic channels. After considering the request for assistance from the aspect of his powers, the Principal State Prosecutor transmits it to the judicial authorities for implementation if he considers that there is no reason for not doing so.

The implementation of mutual assistance measures is entrusted to the authority which would be competent if the offence had been committed in the Grand Duchy of Luxembourg, that is to say, in general, the investigating judge.

Where no appeal has been lodged against the decision to grant the mutual judicial assistance or the implementing measures, the court in chambers of the District Court with jurisdiction *ratione territoriae* determines whether any items or documents seized on the orders of the State Prosecutor are to be transmitted to the requesting authority, without further formality.

After being implemented, requests for mutual assistance are then returned, either through official channels or directly.

It should be noted, finally, that Luxembourg is a Party, in particular, to the following international

instruments on legal assistance in criminal matters:

1. the Council of Europe Convention of 20 April 1959 on Mutual Assistance in Criminal Matters and also the Protocol thereto signed in Strasbourg on 17 March 1978;
2. the Treaty on Extradition and Mutual Judicial Assistance in Criminal Matters of 27 June 1962 between Belgium, the Netherlands and the Grand Duchy of Luxembourg;
3. the Convention on the Application of the Schengen Agreements of 14 June 1985, signed on 19 June 1990;
4. the Bilateral Treaty on Mutual Judicial Assistance in Criminal Matters between the United States of America and Luxembourg, signed in Luxembourg on 13 March 1997, together with the exchange of letters relating thereto, approved and ratified by the Law of 23 November 2000, which entered into force on 1 February 2001.

Extradition is currently governed in Luxembourg law by the Law of 20 June 2001 on extradition.

Under Section 1 of that Law, the Law determines the conditions, the procedure and the effects of extradition in the absence of an international treaty and without prejudice to the statutory provisions specific to certain categories of offences. The Law also provides that it does not affect the obligations which the Luxembourg State assumes under international agreements on extradition for offences specified therein.

In that context, it should be noted that Luxembourg is a Party to, in particular, the following international instruments:

1. the Council of Europe Convention of 13 December 1957 on Extradition and the Additional Protocol thereto of 15 October 1975;
2. the Benelux Treaty of 27 June 1962 on Mutual Judicial Assistance, as amended by the Protocol thereto of 11 May 1974;

3. the Convention of the European Union of 10 March 1995 on simplified extradition;
4. the Convention of the European Union of 27 September 1996 on extradition;
5. the Treaty on Extradition with the United States of America of 1 October 1996.

In addition, and concerning more specifically terrorism offences, Luxembourg has ratified the European Convention on the Suppression of Terrorism, signed in Strasbourg on 27 January 1977, and the Protocol amending that Convention, done in Strasbourg on 15 May 2003.

Within the framework of the European Union, it should be noted that between Luxembourg and the Member States of the European Union, the Law of 17 March 2004 on the European Arrest Warrant and the Procedures for Transfer between Member States of the European Union replaced the provisions on extradition provided for in the abovementioned international instruments by the provisions of Framework Decision 2002/584/JHA of the Council of the European Union of 13 June 2002 on the European arrest warrant.

At present, moreover, Luxembourg has ratified eight of the twelve sectoral anti-terrorism Conventions of the United Nations. The Bills for the approval of the Convention on the Marking of Plastic Explosives for the Purpose of Identification, done in Montreal on 1 March 1991, and of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including diplomatic agents, adopted in New York on 14 December 1973, have just been laid before the Chamber of Deputies. The preparations for the approval of the two remaining Conventions, namely the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, concluded in Rome on 10 March 1988, and the Protocol to that Convention of 10 March 1988 for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms on the Continental Shelf, concluded in Rome on 10 March 1988, are still under way.

Relevant Conventions of the Council of Europe – Luxembourg	Signed	Ratified
European Convention on the Suppression of Terrorism (ETS 90)	27/01/1977	11/09/1981
Amending Protocol (ETS 190)	11/06/2003	01/02/2005
European Convention on Extradition (ETS 24)	13/12/1957	18/11/1976
First Additional Protocol (ETS 86)	15/10/1975	12/09/2001
Second Additional Protocol (ETS 98)	-	-
European Convention on Mutual Assistance in Criminal Matters (ETS 30)	20/04/1959	18/11/1976
First Additional Protocol (ETS 99)	09/12/1994	02/10/2000
Second Additional Protocol (ETS 182)	-	-
European Convention on the Transfer of Proceedings in Criminal Matters (ETS 73)	15/05/1972	-
European Convention on the Compensation of Victims of Violent Crimes (ETS 116)	24/11/1983	21/05/1985
Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141)	28/09/1992	12/09/2001
Convention on Cybercrime (ETS 185)	28/01/2003	-
Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS 189)	28/01/2003	-
Council of Europe Convention on the Prevention of Terrorism (CETS 196)	16/05/2005	-
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198)	16/05/2005	

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