



The Harmonisation of Terrorist Offences at EU Level

CB CALESA – Conference on International Law and Counter-Terrorism, Piracy and Maritime Security Threats at Sea



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OVERVIEW

I. Terrorism in EU Criminal Law

II. Harmonisation of terrorist offences

III. Parallel actions

IV. Conclusions

V. Q & A

Terrorism in EU Criminal Law

What is EU Criminal Law about?

- create criminal policy
- enact criminal legislation

[specific rules are articulated and liability is assigned and graded at national level, namely at the level of EU Member States (MSs)]

→ interaction between the EU legal order and the national legal orders (top-down approach/bottom-up approach)

Terrorism in EU Criminal Law

Terrorism is a representative example of EU criminal policy and criminal laws

- covers *all stages* of the evolution of EU Criminal Law
- EU (criminal) laws on terrorism have a wide range of effect



Harmonisation of terrorist offences

Information exchange for (terrorism) prevention purposes

Anti-money laundering and counter-terrorist financing legal framework

Cross-border judicial and police cooperation (in terrorism cases)



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Terrorism in EU Criminal Law

EU Primary Law (legal basis for adopting criminal counter-terrorism laws)

- today: Art 83 (1) TFEU
- before: Art 31(e) TEU (Amsterdam Treaty); Art 31(1)(e) TEU (Nice Treaty)

terrorism **always mentioned expressly** in all above-mentioned provisions

Art. 83 (1) subparagraph 1 TFEU: ‘The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.’

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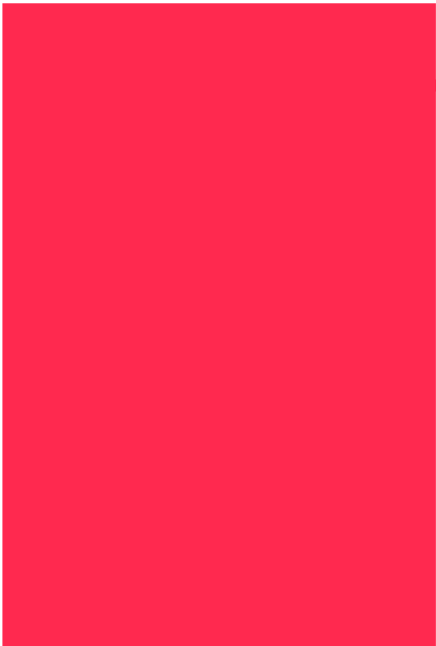
Terrorism in EU Criminal Law

Compliance with fundamental rights required (cf. Charter of Fundamental Rights of the EU)

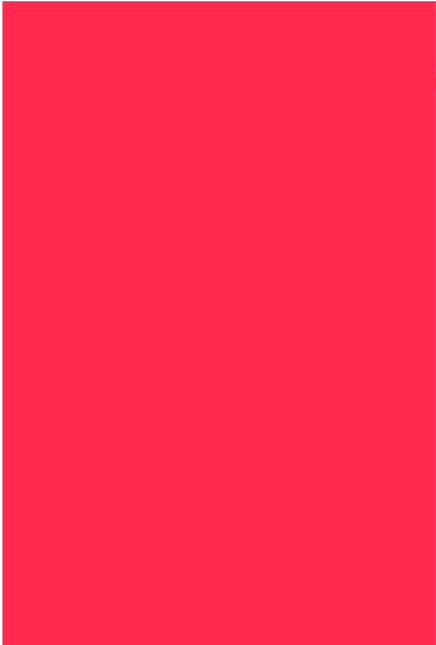
- principle of legality
- principle of proportionality

(in the majority of EU MSs, both principles are enshrined in national constitutions)

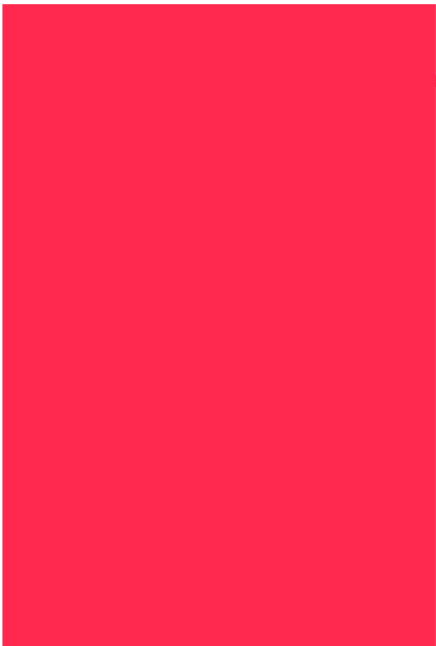
Harmonisation of Terrorist Offences



Council Framework Decision of 13 June **2002** on combating terrorism
(2002/475/JHA)



Council Framework Decision **2008**/919/JHA of 28 November 2008
amending Framework Decision 2002/475/JHA on combating terrorism



Directive (EU) **2017**/541 of the European Parliament and of the
Council of 15 March 2017 on combating terrorism and replacing
Council Framework Decision 2002/475/JHA and amending Council
Decision 2005/671/JHA



11 September **2001** attacks in NY and Washington DC
(World Trade Center and Pentagon)



11 March **2004** attack in Spain (Madrid bombings) & 7 July
2005 attack in UK (London bombings)



13 November **2015** attacks in France (Bataclan, Paris) &
22 March **2016** attack in Belgium (Airport, Brussels)



Individual terrorism (“common” terrorist offences)



Preparatory acts to terrorist offences



Neutral (?) acts when coupled with terrorist intent

A directs an organised group of people who attack and kill many in an airport

F trains people gathered in a secret camp on how to use weapons in attacks

K tries to convince a person he knows to join a terrorist group

P buys the tickets for **O**

B participates in an organised group of people who aim to kill many in an airport

G gives guidance through the internet on how to use a weapon to a person intending to commit a deadly attack

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N publicly explains that such attacks are to be expected by people being treated unjustly

S is preparing to make the same journey

E prepares a fake passport for **D** to use and enter the airport

J takes chemistry lessons so as to later learn how to make bombs

O travels to a different country to receive training to commit a terrorist act some day

Harmonisation of terrorist offences

Terrorism definition (Art 3 Directive (EU) 2017/541 (DCT))

- ‘intentional acts, as defined as offences under national law, which, given their nature or context, **may seriously damage a country or an international organisation**’ (par 1; emphasis added)
 - ranging from attacks against life to interference with or disruption of supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life
- when committed with the purpose of (par. 2):
 - seriously intimidating a population;
 - unduly compelling a government or an international organisation to perform or abstain from performing any act;
 - seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation

Harmonisation of terrorist offences

Remarks

- punishment is placed **one step before the actual harm**
- interests of States and international organisations (all of them?) treated as equal or comparable
- gravity (?) and clarity (?) of terrorist purposes
 - What does 'serious destabilisation' mean?
- **Yet**, considered a well-structured definition, considering the balance between objective and subjective elements

Harmonisation of terrorist offences

Offences relating to a terrorist group* (Art 4 DCT)

- directing a terrorist group
- participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, **with knowledge of the fact** that such participation will contribute to the criminal activities of the terrorist group



Harmonisation of terrorist offences

‘Terrorist group’ (Art 2 (3) DCT)

- ‘a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences; “**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**’
- a structured group without a developed structure?

Harmonisation of terrorist offences

Remarks

- criminalisation **irrespective of the actual commission of a terrorist offence** on the part of the specific group member or the group as whole
- organised terrorist groups considered a constant source of danger for a multitude of legal interests
- organised activity considered **far more dangerous than individual acts** (group members considered 'consumable')
- criminalisation **heavily relying on subjective elements** ('with knowledge') that remain hard to prove

Second generation of terrorist offences (I)

- public provocation to commit a terrorist offence – Art 5 DCT
- ‘[...] distribution, or otherwise making available by any means, whether online or offline, of a message to the public, **with the intent** to incite the commission of one of the offences listed in points (a) to (i) of Article 3(1), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed’

Harmonisation of terrorist offences

Remark

- the scope of criminalisation starts becoming **blurry** and the dependence on subjective elements is equally increasing
 - Cf. Recital 10 DCT: '[...] inter alia, the *glorification and justification of terrorism or the dissemination of messages or images online and offline, including those related to the victims of terrorism* as a way to gather support for terrorist causes or to seriously intimidate the population. [...] In each concrete case, when considering whether such a danger is caused, the specific circumstances of the case should be taken into account, such as the author and the addressee of the message, as well as the context in which the act is committed' (emphasis added)

Harmonisation of terrorist offences

Second generation of terrorist offences (II)

- recruitment for terrorism – Art 6 DCT
- ‘[...] soliciting another person to commit or contribute to the commission of one of the offences listed in points (a) to (i) of Article 3(1), or in Article 4’
- again, punishment **pushed away** from the actual commission of a terrorist attack

Harmonisation of terrorist offences

Second generation of terrorist offences (III)

- providing training for terrorism – Art 7 DCT
- ‘[...] providing instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, **for the purpose of** committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1), **knowing** that the skills provided are intended to be used for this purpose’
- the subjective elements are becoming **considerably important**

Harmonisation of terrorist offences

Third generation of terrorist offences (I)

- receiving training for terrorism – Art 8 DCT
- ‘receiving instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, **for the purpose of** committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1)’
- the subjective elements are becoming **absolutely critical**

Harmonisation of terrorist offences

Self-training

- Cf. Recital 11 DCT: '[...] Self-study, including through the internet or consulting other teaching material, should also be considered to be receiving training for terrorism when resulting from active conduct **and done with the intent to** commit or contribute to the commission of a terrorist offence. In the context of all of the specific circumstances of the case, **this intention** can for instance be inferred from the type of materials and the frequency of reference. Thus, downloading a manual to make explosives for the purpose of committing a terrorist offence could be considered to be receiving training for terrorism.'

Third generation of terrorist offences (II)

- travelling for the purpose of terrorism – Art 9 DCT
 - **travelling to a country other than that Member State for the purpose of** committing, or contributing to the commission of a terrorist offence, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group, or for the purpose of the providing or receiving of training for terrorism (outbound travelling)
 - **travelling to that Member State for the purpose of** committing, or contributing to the commission of a terrorist offence, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group, or for the purpose of the providing or receiving of training for terrorism (inbound travelling); or
 - **preparatory acts** undertaken by a person entering that Member State with the intention to commit, or contribute to the commission of a terrorist offence

Harmonisation of terrorist offences

Further justifications provided in Recital 12 DCT:

- ‘Considering the seriousness of the threat and the need, in particular, to stem the flow of **foreign terrorist fighters**, it is necessary to criminalise outbound travelling for the purpose of terrorism, namely not only the commission of terrorist offences and providing or receiving training but also the participation in the activities of a terrorist group. **It is not indispensable to criminalise the act of travelling as such. [...]**’
(emphasis added)
- We progressively **lose sight** of the terrorist offence

Harmonisation of terrorist offences

Foreign terrorist fighters:

- concerns arising from the increase in travel of fighters to the conflicts in Syria and Iraq since 2010:
 - such individuals contributing to hostilities in those States, and, thus, making those conflicts more difficult to resolve
 - possibility of returning to take action against the States from which they have travelled

Harmonisation of terrorist offences

Is the concern real?

- Europol, TESAT **2018** speaking of 1500 returnees
- Europol, TESAT **2020** speaking of 6 adults who returned in the Netherlands, but pointing out the lack of reliable empirical data
- Europol TESAT **2021** speaking of a small number of returnees, but also highlighting the impact of Covid-19 in that regard
- Europol TESAT **2022** speaking of 50 returnees (accompanied by 89 minors) arrested in several EU MSs

Harmonisation of terrorist offences

Third generation of terrorist offences (III)

- organising or otherwise facilitating travelling for the purpose of terrorism—
Art 10 DCT
- ‘[...] any act of organisation or facilitation that assists any person in travelling for the purpose of terrorism, [...], **knowing that the assistance thus rendered is for that purpose**’

Harmonisation of terrorist offences

Remarks

- offences set out in Arts. 9–10 DCT require an act, which itself does not constitute ‘harm’; **travel itself is no criminal activity**
- the right to leave any country, and to return to one’s own country is enshrined in Arts 13 (2) UDHR, 12 (2) ICCPR, 2 (2) Protocol Nr. 4 to ECHR without prejudice to the States’ right to exercise powers over their borders
- the behavioural element of the travel offences is – without the existence of the mental element – merely the exercise of a human right

Third generation of terrorist offences (IV)

- terrorist financing – Art 11 DCT
 - providing or collecting funds, by any means, directly **or indirectly, with the intention that they be used, or in the knowledge that they are to be used**, in full or in part, to commit, or to contribute to the commission of, any of the offences referred to in Articles 3 to 10
 - where the terrorist financing concerns any of the offences laid down in Articles 3, 4 and 9, **it shall not be necessary that the funds be in fact used, in full or in part**, to commit, or to contribute to the commission of, any of those offences, nor shall it be required that the offender knows for which specific offence or offences the funds are to be used

Harmonisation of terrorist offences

Other offences related to terrorist offences – Art 12 DCT

- aggravated theft with a view to committing one of the offences listed in Article 3;
- extortion with a view to committing one of the offences listed in Article 3;
- drawing up or using false administrative documents with a view to committing one of the offences listed in points (a) to (i) of Article 3(1), point (b) of Article 4, and Article 9

Harmonisation of terrorist offences

Importantly:

- ‘For an offence referred to in Article 4 or Title III to be punishable, **it shall not be necessary that a terrorist offence be actually committed**, nor shall it be necessary, insofar as the offences referred to in Articles 5 to 10 and 12 are concerned, to establish a link to another specific offence laid down in this Directive.’ (Art 13 DCT, emphasis added)



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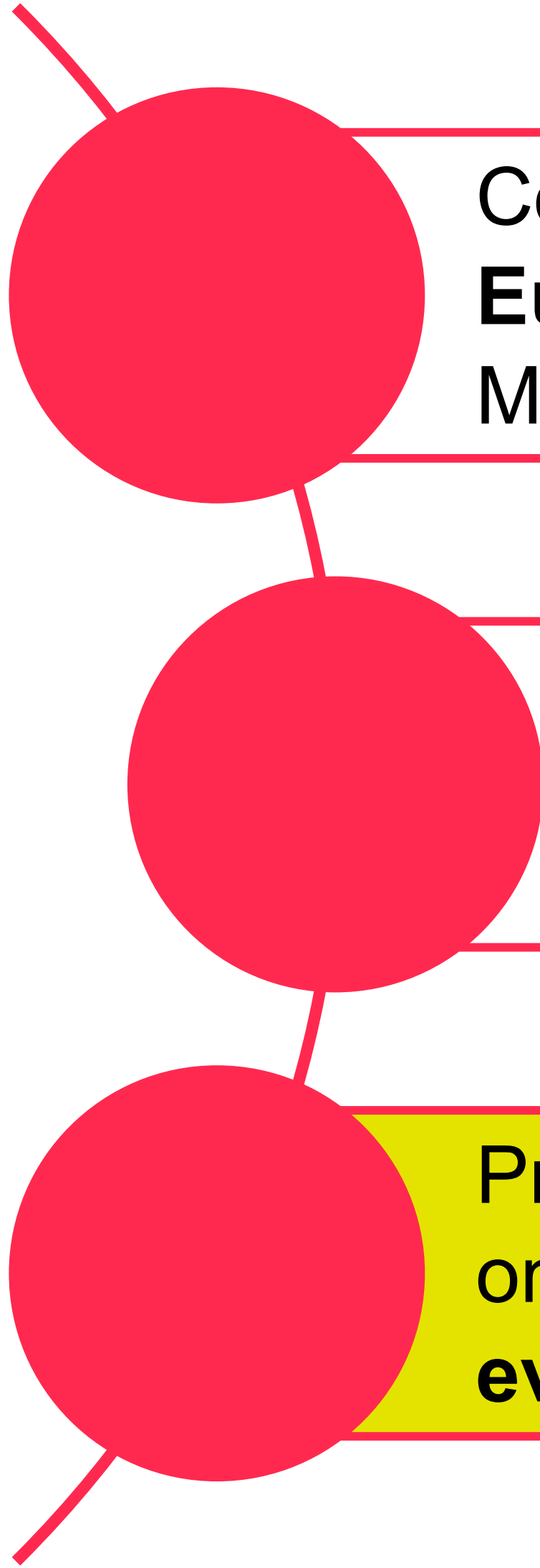
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STOP TERRORISM

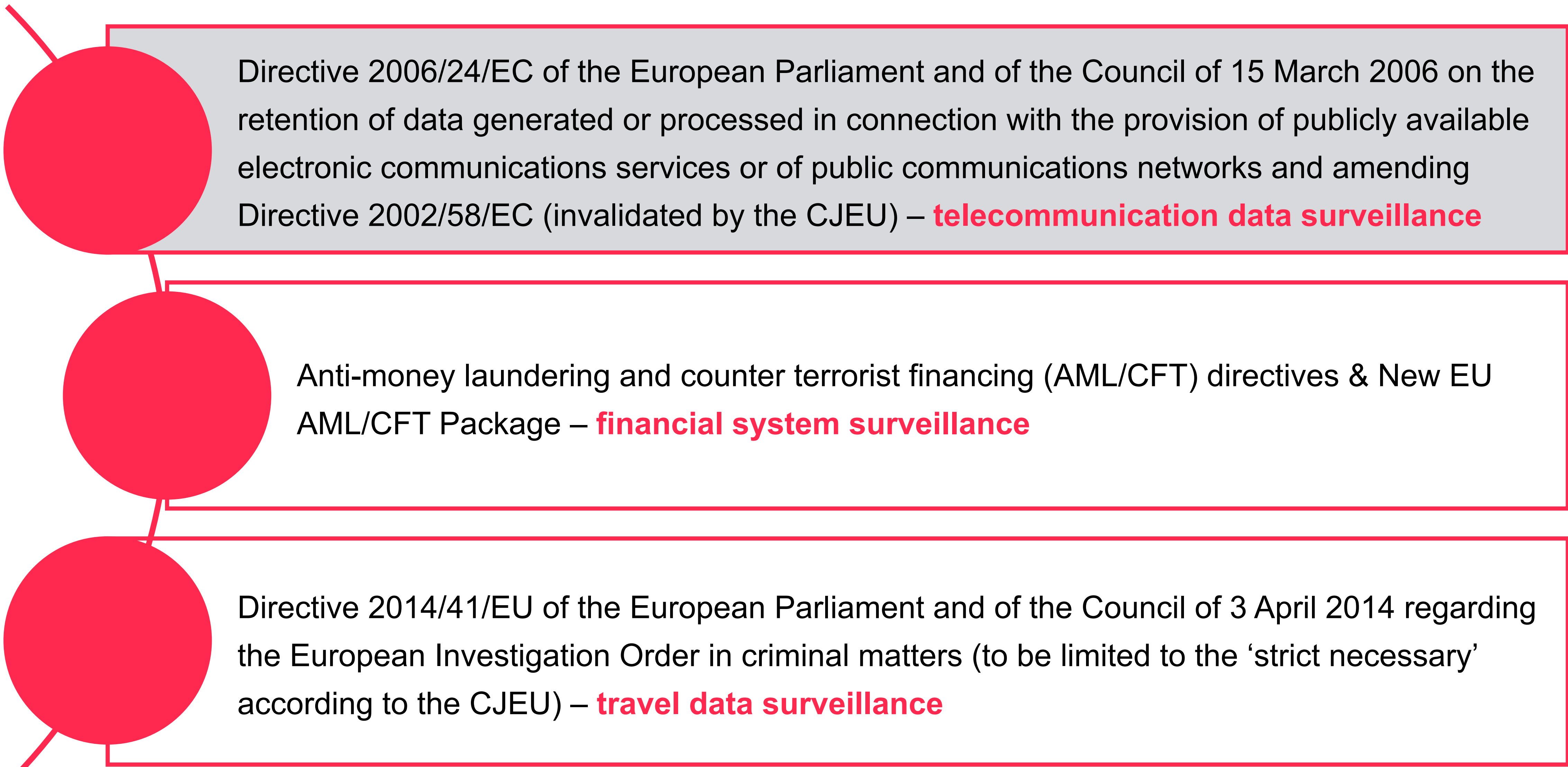
Parallel actions



Council Framework Decision 2002/584/JHA of 13 June 2002 on the **European Arrest Warrant** and the surrender procedures between Member States [2002] OJ L190/1

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the **European Investigation Order** in criminal matters

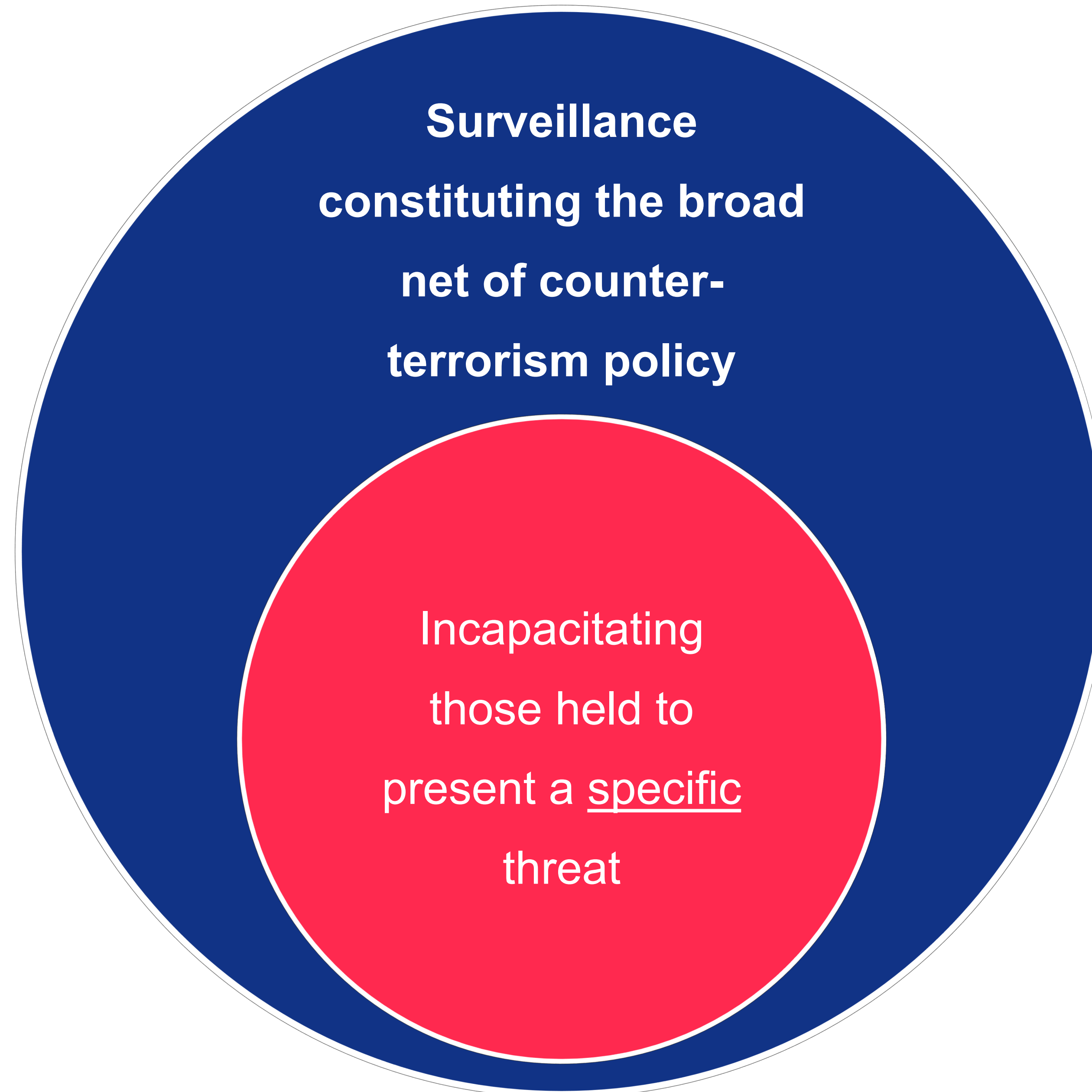
Proposal for a Regulation of the European Parliament and of the Council on **European Production and Preservation Orders for electronic evidence** in criminal matters (COM/2018/225 final - 2018/0108 (COD))

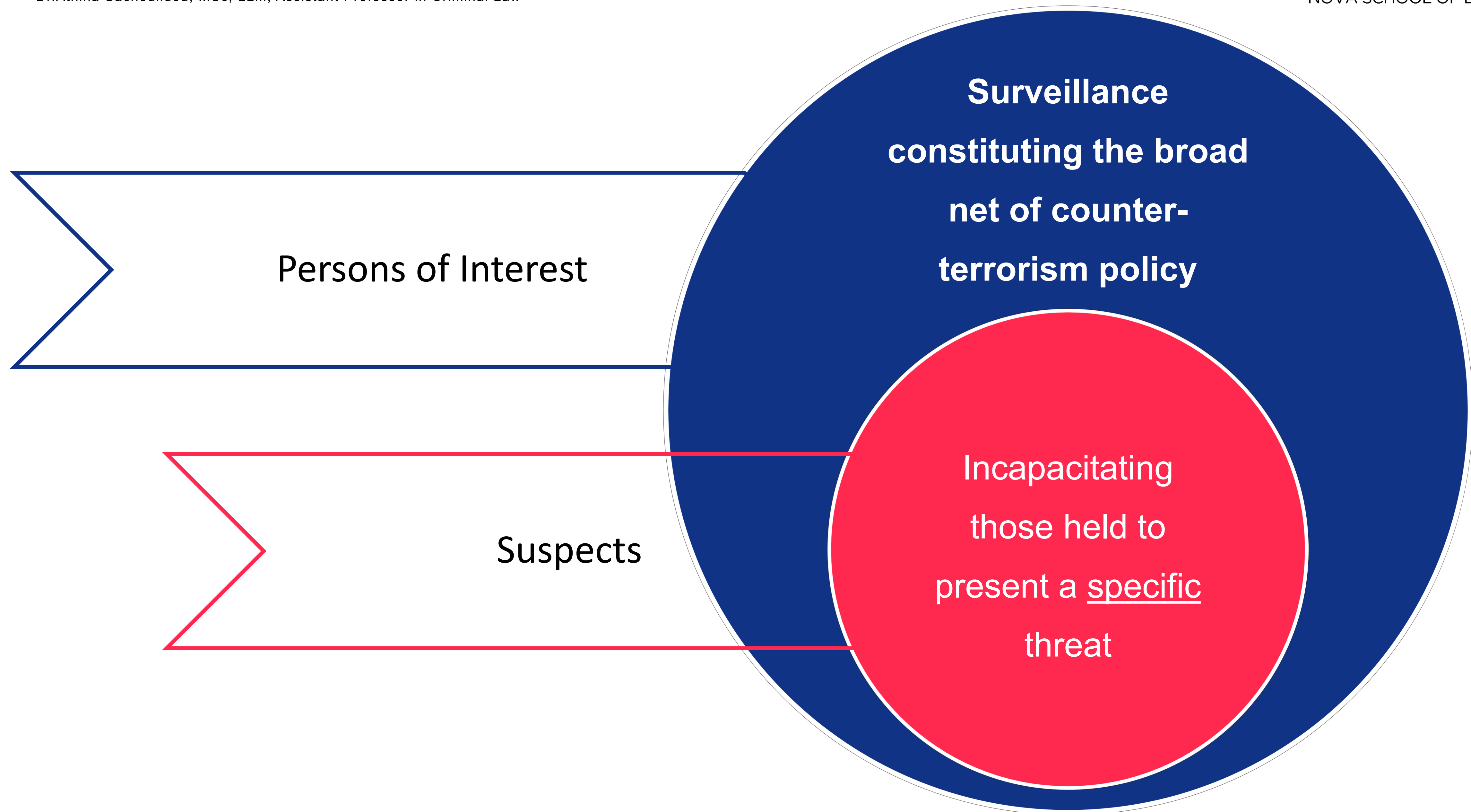


Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (invalidated by the CJEU) – **telecommunication data surveillance**

Anti-money laundering and counter terrorist financing (AML/CFT) directives & New EU AML/CFT Package – **financial system surveillance**

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (to be limited to the ‘strict necessary’ according to the CJEU) – **travel data surveillance**

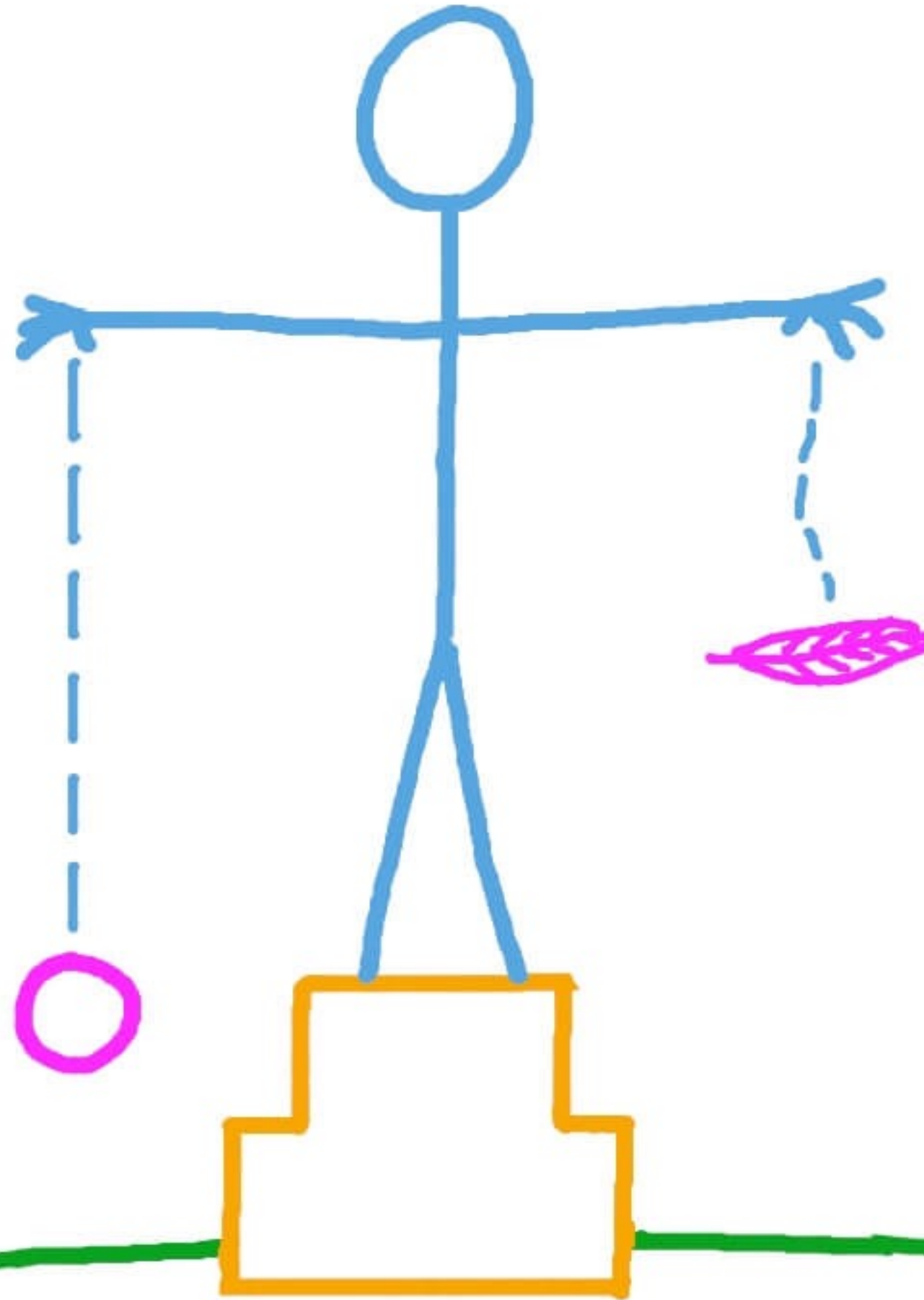




Before the completion of the Commission's review of DCT's implementation:

- Proposal for a Regulation on Preventing the Dissemination of Terrorist Content Online (COM/2018/640 final)
- **Regulation (EU) 2021/784** entered into force in summer 2022 –with the aim of curbing the dissemination of contents by terrorists who intend to spread their message, radicalize and recruit followers, and facilitate and direct terrorist activities
 - duties of care of hosting service providers → **identification and quick removal of terrorist content online**
 - measures to be in place on the part of MS authorities → facilitation of cooperation with each other and with Europol

DRAWING CONCLUSIONS



Actus reus

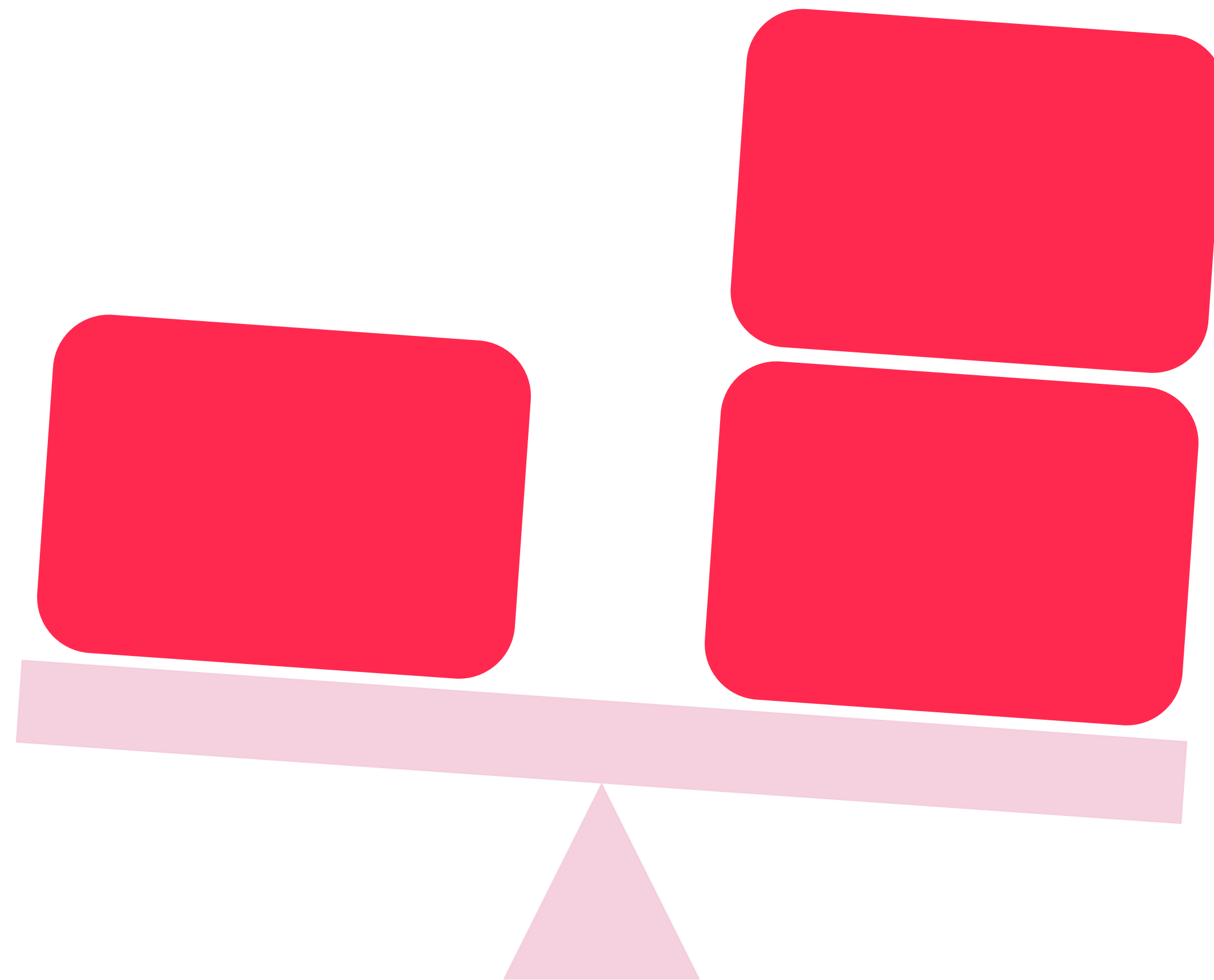
Mens rea

travel or travel-
related
behaviour

intention in
relation to
terrorism or a
terrorist group

Freedom

Security



Conclusions

EU terrorist offences as currently shaped:

- often vague in their terms and, thus, impugned as an infringement on the **principle of legality** (in criminal law) and the requirements of accessibility and foreseeability in particular, and the **principle of proportionality**
- criminalising extremely early stages of preparing the commission of a terrorist offence, contrary to the ***ultima ratio* principle**

Conclusions

Remember:

- EU law has an impact across all MSs; greater geographic scope increases the number of individuals subject to EU law and the significance thereof
- multi-level laws and legal procedures present particular difficulties for individuals subject to them; greater need for preserving the rule of law and vindicating human rights
- EU is (?) the pre-eminent example of a transnational order; the onus is on EU to exhibit the values it claims to uphold



Q & A



Salamat po!/Thank you!/Σας ευχαριστώ!

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