

# DIRECTIVE (EU) 2017/541 ON COMBATING TERRORISM

## IMPACT ON FUNDAMENTAL RIGHTS AND FREEDOMS

### SUMMARY



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Ensure the foreseeability and clarity of criminal law offences in the field of terrorism

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Avoid criminalising lawful activities and objectively determine terrorist intent

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Apply effective safeguards to the use of investigative tools and evidence

**8**

Avoid the discriminatory impact of counter-terrorism measures on specific groups, in particular Muslims

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Apply counter-terrorism measures only to conduct that is of a terrorist nature

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Ensure proportionate use of administrative measures and access to an effective remedy

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Acts of terrorism represent a serious threat to the lives and safety of people, and a profound security challenge for states. At the same time, counter-terrorism legislation, policies and other measures can entail, directly or indirectly, serious limitations to fundamental rights, and can adversely affect individuals, groups and society as a whole.

This summary presents FRA's main findings from its report on Directive (EU) 2017/541 on combating terrorism, the main criminal law instrument at EU level in the field of counter-terrorism.

The directive was adopted in 2017 to address the developing terrorist threat associated primarily with individuals who travel abroad for the purposes of terrorism and pose a threat upon their return, commonly referred to as foreign terrorist fighters. To this end, the directive requires Member States to take new measures to combat terrorism, including criminalising offences such as travelling for the purpose of terrorism, or receiving training for terrorism.

The directive, and its impact on fundamental rights, has drawn significant public attention. The European Commission asked FRA to conduct research on the directive's impact on fundamental rights and freedoms in order to support its own assessment of the directive, focusing on specific changes that the directive introduced in comparison with previous EU legal instruments.

The findings and opinions deriving from this research aim to contribute to implementing EU legislation, policy and other measures in the field of counter-terrorism across the EU in full compliance with fundamental rights.

## Scope of research

FRA's findings are based primarily on interviews with practitioners and experts who have particular experience or specialisation in counter-terrorism in **Belgium, France, Germany, Greece, Hungary, Spain and Sweden**.

The fieldwork was supported by limited desk research in all 25 Member States bound by the directive.

## On terminology: 'jihadist terrorism'

This report uses the term 'jihadism' or 'jihadist terrorism' when referring to terrorism associated with or inspired by organisations such as Da'esh\* or Al-Qaeda. The term is not without controversy as 'jihad' has a much broader meaning. Nevertheless, the majority of academic sources use it to refer to this particular type of terrorism. The Europol classification of terrorism, which was used as a point of reference by many respondents during the fieldwork, uses the term to describe "a violent ideology exploiting traditional Islamic concepts".\*\*

*\* Throughout this report, the Arabic acronym Da'esh is used for the terrorist group, rather than 'ISIS' or 'ISIL'.*

*\*\* Europol (2020), **European Union terrorism situation and trend report 2020**, 23 June 2020, p. 35; see also pp. 94-95.*

## Key findings and FRA opinions

This report presents the findings of the European Union Agency for Fundamental Rights (FRA) on the impact that **Directive (EU) 2017/541 on combating terrorism** has on fundamental rights and freedoms. The directive is the main criminal law instrument at the EU level in the field of counter-terrorism. It was adopted in 2017 to respond to changes in terrorist threats, in particular the phenomenon of foreign terrorist fighters.

The directive highlights the threat that terrorism poses to democracy, rule of law and the enjoyment of fundamental rights. It also recognises the need to respect fundamental rights and freedoms when implementing its provisions. Article 29 (2) of the directive requires the European Commission to assess the directive's impact on fundamental rights and freedoms. The Commission requested FRA to carry out research in connection with that assessment.

This report presents FRA's main findings from its research. It provides insights into the experience of practitioners, and other experts with in-depth knowledge in this field, with the practical application of the provisions of the directive at the national level concerning three specific offences: public provocation to commit a terrorist offence, travelling for the purpose of terrorism and receiving training for terrorism. It also examines cross-cutting issues arising in the context of criminal and administrative proceedings related to terrorism.

These empirical findings confirm that the directive affects a wide range of fundamental rights and freedoms that the Charter of Fundamental Rights of the European Union (the Charter) and international human rights instruments safeguard. These instruments include in particular the European Convention on Human Rights and the International Covenant on Civil and Political Rights.



Charter rights that it most directly affects include the right to liberty and security (Article 6), respect for private and family life (Article 7), protection of personal data (Article 8), freedom of thought, conscience and religion (Article 10), freedom of expression and information (Article 11), freedom of assembly and of association (Article 12), freedom of the arts and sciences (Article 13), non-discrimination, including on the grounds of ethnic origin, religion or belief (Article 21), the rights of the child (Article 24), freedom of movement and of residence (Article 45), right to an effective remedy and to a fair trial (Article 47), presumption of innocence and right of defence (Article 48), and the principles of legality and proportionality of criminal offences and penalties (Article 49).

This set of findings draws from interviews with 107 practitioners and experts across seven Member States, namely Belgium, France, Germany, Greece, Hungary, Spain and Sweden. These Member States were selected to reflect the diversity of experience with terrorism and application of counter-terrorism legislation, as well as geographical balance. FRA interviewed judges and investigative judges, defence lawyers, public prosecutors, law enforcement officers, experts from relevant non-governmental organisations (NGOs), academic specialists on counter-terrorism and related criminal law matters, and oversight experts including representatives of ombuds institutions and bodies with a specialised oversight mandate.

Limited desk research in 25 Member States (the directive is not binding on Denmark and Ireland) supported the fieldwork. It collected basic information about the legal and institutional framework and key fundamental rights issues emerging in the counter-terrorism context across the EU. This research served to inform the development of questions for fieldwork interviews.

The national legal frameworks vary, as does their practical application. Still, a number of common challenges emerge as regards the impact that applying the directive has on fundamental rights and freedoms, the findings show. The report brings the findings to the attention of the EU institutions and Member States and can help them assess the need for further steps to ensure that the application of the directive complies fully with fundamental rights.

As the fieldwork interviews cover seven Member States, and draw upon the experience of a maximum of 22 interviewees per Member State, the findings do not claim to be representative of the situation in a given Member State or the EU as a whole. Nevertheless, the results provide a valuable and rare insight into how practitioners – who apply the directive in their work, and many of whom directly work on terrorism cases – experience the application of the directive in practice with regard to its impact on fundamental rights.

## ENSURE THE FORESEEABILITY AND CLARITY OF CRIMINAL LAW OFFENCES IN THE FIELD OF TERRORISM

### FRA OPINION 1

Member States should take steps to ensure that criminal law offences in the field of terrorism are foreseeable and clear. This could include providing practitioners with the necessary guidance clarifying the scope of individual terrorist and terrorism-related offences in the context of the relevant national law, and fostering regular exchange of information and experiences among the practitioners involved. It could also include, where appropriate, reviewing the applicable definitions of individual offences in national law and their practical application, in order to avoid overlaps between different offences, which can result in a lack of foreseeability, and to avoid the use of broad, all-encompassing provisions instead of clearly defined crimes.

The European Commission should consider providing further clarity regarding the definitions of individual offences in the directive, and review them where necessary. This would strengthen the foreseeability and clarity of the law. This, in turn, would help provide for a comparable level of fundamental rights safeguards across the EU, and ensure that EU law has a consistent impact on fundamental rights and freedoms across all Member States.

Recital 35 of the directive refers to the principles of legality and the proportionality of criminal offences and penalties, enshrined in Article 49 (1) of the Charter. They also encompass the requirement of precision, clarity and foreseeability in criminal law. In line with the established jurisprudence of the European Court of Human Rights and the corresponding case law of the Court of Justice of the EU, this means that an individual can know from the wording of the relevant provision what acts and omissions are criminally punishable. Article 49 (3) also requires that sentences passed be proportionate to the acts committed.

The directive builds on broad definitions of terrorist offences and a terrorist group, as introduced in **Framework Decision 2002/475/JHA on combating terrorism** which preceded the Directive. FRA's findings show that this makes the scope of the newly introduced offences in Member States' legislation, which are defined through their relationship to these broadly conceived criminal acts, unclear. Furthermore, a number of interviewees commented that the scope of some of the offences introduced or modified by the Directive is open to interpretation due to the wording of the substantive provisions and the recitals. This includes the offences of public provocation to commit a terrorist offence (Article 5), receiving training for terrorism (Article 8) and travelling for the purpose of terrorism (Article 9), which introduce conducts such as 'indirect provocation' or 'self-study'.

In addition, in some Member States, offences that encompass a wide range of loosely defined behaviours are frequently applied – such as various forms of participation in a terrorist organisation. This reduces

legal clarity. Overlaps also exist between the definitions of different offences in national law. Taken together, these factors give rise to diverging interpretations of the offences across the EU as well as conflicting jurisprudence within individual Member States, and reduce the foreseeability of what behaviour is criminalised and under what offence.

## AVOID CRIMINALISING LAWFUL ACTIVITIES AND OBJECTIVELY DETERMINE TERRORIST INTENT

### FRA OPINION 2

Member States should ensure that the criminalisation of preparatory offences such as public provocation to terrorism, travelling for the purpose of terrorism and receiving training for terrorism does not impact on the legitimate exercise of individual rights or result in a chilling effect on such rights, including in particular the freedom of expression and information, the freedom of the arts and sciences, and the freedom of movement. Practical safeguards should be put in place and guidance should be provided to investigating authorities so that activities of professionals such as journalists, researchers or humanitarian organisations do not lead to their implication in terrorism investigations.

The European Commission and Member States should provide, based on their respective spheres of competence, appropriate guidance and training to practitioners involved in the investigation, prosecution and adjudication of terrorist and related offences, to ensure that objective criteria are developed and used to establish the intent required. Training and exchange of views for staff of competent authorities in cross-border settings would help to develop common understandings of the crimes involved and assist in attaining a harmonious interpretation and application of terrorist and related offences across Member States. Such activities should draw on the support of existing networks of practitioners at European level.

is difficult to prove. In the absence of objective criteria, concerns arise that the authorities may rely on subjective criteria and indications, presume the existence of intent in some cases and transfer the burden of proof to the defence.

Recital 35 states that the directive has to be implemented in accordance with rights that the Charter sets out, and taking into account obligations under other EU and international human rights instruments. These include, among others, the freedom of expression and information under Article 11 of the Charter, freedom of the arts and sciences under Article 13 of the Charter and the freedom of movement within the EU under Article 45 of the Charter.

The directive reinforced the focus of EU counter-terrorism legislation on preparatory offences, that is acts undertaken with the intent of committing or contributing to the commission of actual terrorist offences. These includes public provocation to commit a terrorist offence, receiving training for terrorism and travelling for the purpose of terrorism. These offences criminalise activities defined by a combination of terrorist intent and ordinary behaviour such as using online communication channels, consulting written or online material, or travelling.

Respondents across professional groups, including those who investigate, prosecute and try such cases, express concern that such activities can be very far from an actual terrorist act. This approach marks a shift towards a preventive approach that criminalises certain activities based on their potential to lead to future terrorist offences.

FRA's findings show that this can also affect lawful conduct, and may even discourage individuals from pursuing certain activities because they are concerned about the authorities' interpretation of such activities. This has implications, in particular, for the freedom of expression and information, the freedom of the arts and sciences, and the freedom of movement. It can also lead to the investigation of activities of individuals or groups such as journalists, researchers, artists or humanitarian organisations that have legitimate reasons for pursuing activities such as travelling to conflict zones or studying information related to terrorism.

Furthermore, across all Member States that the fieldwork covered, respondents from all professional groups testify that, because of the definitions of the offences, the criminal nature of the behaviour is largely determined by the person's intent, which

Professionals in investigating authorities and courts are often aware of the potential fundamental rights impact. However, they are expected to interpret the offences without necessarily having access to appropriate guidance and training. This also contributes to fragmented jurisprudence within some Member States as well as across the EU.





## APPLY EFFECTIVE SAFEGUARDS TO THE USE OF INVESTIGATIVE TOOLS AND EVIDENCE

Article 47 of the Charter guarantees the right to an effective remedy and to a fair trial. Article 48 guarantees the presumption of innocence, as well as the right of defence of anyone who has been charged. According to recital 36 of the directive, procedural safeguards found in other EU legislation apply to offences that the directive covers. Such safeguards include those concerning the rights to information, interpretation and translation, the right of access to a lawyer and to legal aid, the presumption of innocence and the rights of children in criminal proceedings.

Respondents are concerned about the emphasis that the directive places on broadly formulated preparatory offences, FRA's findings show. This emphasis can lead to wider use of more invasive investigative tools, including the interception of electronic communications. Given also the particular context of counter-terrorism investigations, judges or other competent authorities tend to authorise such measures more readily, including to prevent potential crimes. This may disproportionately interfere with procedural and other rights, such as the right to respect for private and family life, and also affect the rights of persons whom the measures do not directly target. In most Member States that the fieldwork covered, defence lawyers and academic specialists on counter-terrorism and related criminal law matters particularly expressed such views. A number of judges and prosecutors also confirmed them.

FRA's research also finds that information obtained outside the criminal proceedings, particularly from intelligence sources, often plays a key role in the proceedings, but without the necessary transparency, clear rules for its use in the proceedings and safeguards for the rights of the defence and effective judicial oversight. Furthermore, evidence in terrorism cases originates frequently from non-EU countries, but judges or other relevant authorities appear to presume its legality and do not systematically verify if it was obtained without breaching human rights, in particular by means of torture.



### FRA OPINION 3

Member States should ensure that the use of special investigative tools in counter-terrorism criminal investigations is targeted, proportionate and accompanied by safeguards reflecting their invasive nature, including appropriate criteria for their authorisation and supervision, in line with the case law of the Court of Justice of the EU and the European Court of Human Rights. The use of intelligence information during criminal proceedings in terrorism cases should be subject to effective safeguards including judicial oversight that would ensure that the rights of defence are respected in practice.

Where evidence or information that is used in proceedings for terrorist and related offences originates from non-EU countries, Member States should ensure that there is a mechanism in place for judges and other relevant authorities to systematically assess whether or not such evidence has been obtained through the use of torture or other fundamental rights violations.



## AVOID THE DISCRIMINATORY IMPACT OF COUNTER-TERRORISM MEASURES ON SPECIFIC GROUPS, IN PARTICULAR MUSLIMS

### FRA OPINION 4

Member States should ensure that terrorism legislation, policies and measures are formulated and applied in a manner fully consistent with the prohibition of direct and indirect discrimination. In order to assess the impact on different groups, including based on religion and ethnicity, disaggregated data on the application and impact of counter-terrorism measures should be regularly collected and analysed.

Member States should make appropriate guidance and training available to practitioners involved in the investigation, prosecution and adjudication of terrorist and related offences to ensure that religious beliefs and practices are not treated as a proxy for signs of radicalisation and terrorist intent, especially in the absence of other objective evidence in this regard.

Member States should consider putting in place specific measures, where appropriate, to ensure that counter-terrorism legislation and other measures are applied equally to different forms of terrorism regardless of their motivation.

Article 21 of the Charter prohibits discrimination on any ground. Among others, this includes race, ethnic origin, and religion or belief. The prohibition covers also indirect discrimination whereby an apparently neutral provision, criterion or practice would put persons with a particular protected characteristic (such as religion) at a particular disadvantage compared with others. Article 10 guarantees the freedom of thought, conscience and religion. Recital 35 of the directive recognises these rights and principles, and recital 39 states that the implementation of criminal law measures under the directive should exclude any form of arbitrariness, racism or discrimination.

FRA's research shows that in all Member States that the fieldwork covered, an individual's association with a religion or belief may in practice increase their likelihood of becoming subject to criminal investigations and other measures. That is because counter-terrorism policies concentrate predominantly on 'jihadism', and the underlying focus of the directive and its transposition has been on the issue of foreign terrorist fighters.

Furthermore, respondents from different professional groups express concrete concerns that religious belief and its manifestations may be misinterpreted as a sign of radicalisation and used in place of objective criteria for establishing intent. Intent plays a determining role in distinguishing between ordinary activities and the

offences of public provocation to commit a terrorist offence, travelling for the purpose of terrorism and receiving training for terrorism. A lack of empirical evidence appears to be a major obstacle to assessing the extent of the possible discriminatory impact of counter-terrorism measures.

Furthermore, FRA's findings show that in some Member States, offences such as public provocation to commit a terrorist offence and travelling for the purpose of terrorism are applied predominantly or exclusively to 'jihadism.' This is the case despite the neutral formulation of the legal provisions in the directive and in national laws, as well as the threat posed by other forms of terrorism. Comparable conduct motivated, for example, by right-wing extremism may not be subject to the same focus or may not be prosecuted under counter-terrorism legislation, as a number of interviewees specifically mention.

## APPLY COUNTER-TERRORISM MEASURES ONLY TO CONDUCT THAT IS OF A TERRORIST NATURE

International and EU law, including the directive, understands terrorism as a particularly serious form of crime pursuing a specific terrorist aim. In the directive, a terrorist aim includes seriously intimidating a population, and unduly compelling a government or an international organisation to perform or abstain from performing any act. These two aims that are in line with international conventions, protocols and other instruments against terrorism, including United Nations Security Council resolution 1566 (2004).

However, in Article 3 (2) (c), the directive also includes a third aim: seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation. This has no counterpart in international law; as a result, there is a risk that the EU and its Member States use a more expansive notion of terrorism, which can create confusion when applied alongside other international instruments.

Furthermore, recital 8 of the directive emphasises that acts with one of the above aims cannot be considered terrorist offences if they do not involve one of the specified serious offences capable of seriously damaging a country or an international organisation. Therefore, peaceful protests should not be considered acts of terrorism, but neither should criminally punishable activities that are hostile to the state but do not reach or aim at a certain intensity of violence or material destruction. Consequently, any activities related to such acts, such as provocation to commit them or various forms of participation in them, should likewise fall outside the scope of counter-terrorism legislation.

FRA's findings show that in some Member States, there are concerns that the notion of terrorism, and consequently the use of counter-terrorism legislation and measures, is expanded to activities that are not of such a strictly defined terrorist nature. This includes their use against ideologies, groups and individuals that the state perceives as undesirable, which can encompass non-violent anarchist or separatist movements, public protests of various types, and non-governmental organisations or non-EU nationals. Defence lawyers, academic specialists on counter-terrorism and related criminal law matters, and NGO experts in particular, but also some judges, state that this can, among other effects, lead to disproportionate use of investigative tools and sentences.

Such expansive interpretation and application of counter-terrorism legislation can adversely affect a variety of fundamental rights, have an impact on groups and ideologies that are not terrorist in nature, and result in transgressing the legitimate purpose of counter-terrorism efforts, disregarding EU and international law.



### FRA OPINION 5

The European Commission should consider issuing guidance to Member States to support an interpretation and application of terrorist and terrorism-related offences that is fully in line with the purposes set out in the directive.

In this context, it could also look at the interpretation and application of the directive alongside relevant international law, and assess whether all definitions are sufficiently precise and do not permit expansive interpretation by national authorities and the criminalisation of activities that are not of a terrorist nature.

## ENSURE PROPORTIONATE USE OF ADMINISTRATIVE MEASURES AND ACCESS TO AN EFFECTIVE REMEDY

### FRA OPINION 6

Member States should ensure that the use of administrative measures against persons suspected of involvement in terrorist activities is subject to clear rules and conditions for their application, in order to avoid a disproportionate impact on fundamental rights.

Member States should ensure that effective remedies against decisions imposing administrative measures are available, including in terms of allowing people to effectively challenge and review measures imposed on the basis of intelligence information. Bodies offering non-judicial remedies should be equipped with the appropriate mandate, powers and resources to deal with potential complaints, covering the full range of issues that can arise in relation to fundamental rights from the application of administrative measures in the counter-terrorism context, and eliminating any potential gaps in this regard.

The directive is primarily a criminal law instrument. However, Article 28 (1) lists regulations and administrative provisions, in addition to laws, as ways of transposing it into national law. Recital 35 states that the directive has to be implemented in accordance with the rights set out in the Charter and taking into account obligations under other EU and international human rights instruments.

A number of Member States, while criminalising terrorist offences that the directive covers, have also introduced administrative measures, FRA findings show. These measures relate to travel, training and public provocation offences, among others. They can include post-sentence monitoring as well as the inclusion in databases of foreign terrorist fighters and suspected radicals; restriction of movement, such as house arrest or travel bans; measures under immigration legislation, such as expulsion; and particularly severe sanctions, most notably deprivation of nationality. Depending on their specific type, such administrative measures can have a considerable impact on various fundamental rights.

Administrative measures are applied alongside sanctions and criminal procedures, but also to persons against whom no criminal proceedings have been initiated, or even persons acquitted by courts, the research findings indicate.

Administrative law and criminal law have inherently different natures and purposes. That means that administrative measures are not subject to the same strict procedural guarantees as decisions under criminal law. They are generally applied on the basis of less precise criteria and evidence and, given the counter-terrorism context, are frequently based on intelligence information.

This can in practice lead to circumventing the constraints linked to criminal proceedings, according to some respondents. It also reduces considerably the transparency of such measures and the possibility of contesting them effectively, and can potentially lead to a reversal of the burden of proof. Consequently, it is also difficult to effectively seek remedy against such measures, given that even the courts that would provide such a remedy often have limited access to the information used as a basis for imposing the measure.

There are considerable differences between Member States in the availability of non-judicial avenues to submit complaints against counter-terrorism measures, the research finds. In some Member States, bodies with a robust mandate and powers, and expertise, such as some ombuds institutions or specialised oversight bodies, can scrutinise counter-terrorism measures, including their fundamental rights compatibility.

However, in other Member States such possibilities appear to be limited, for various reasons. There may be no body with a dedicated, country-wide mandate; responsibility can be dispersed among several bodies, leading to a compartmentalised approach; there are specific exemptions from the body's mandate, or obstacles to accessing information about individual cases; and there might be limited public awareness of complaint mechanisms, where these exist, raising questions over the effectiveness of the procedures.







This summary presents the main findings from FRA's report on *Directive (EU) 2017/541 on combating terrorism – Impact on fundamental rights and freedoms*. The main report is available on FRA's website.



# PROMOTING AND PROTECTING YOUR FUNDAMENTAL RIGHTS ACROSS THE EU

FRA's report on Directive (EU) 2017/541 considers how the directive engages issues of fundamental rights, affecting individuals, groups and society as a whole. It focuses on three specific offences covered by the directive, all of them preparatory in nature: public provocation to commit a terrorist offence, travelling for the purpose of terrorism, and receiving training for terrorism.

This summary presents the main findings outlined in FRA's report.



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