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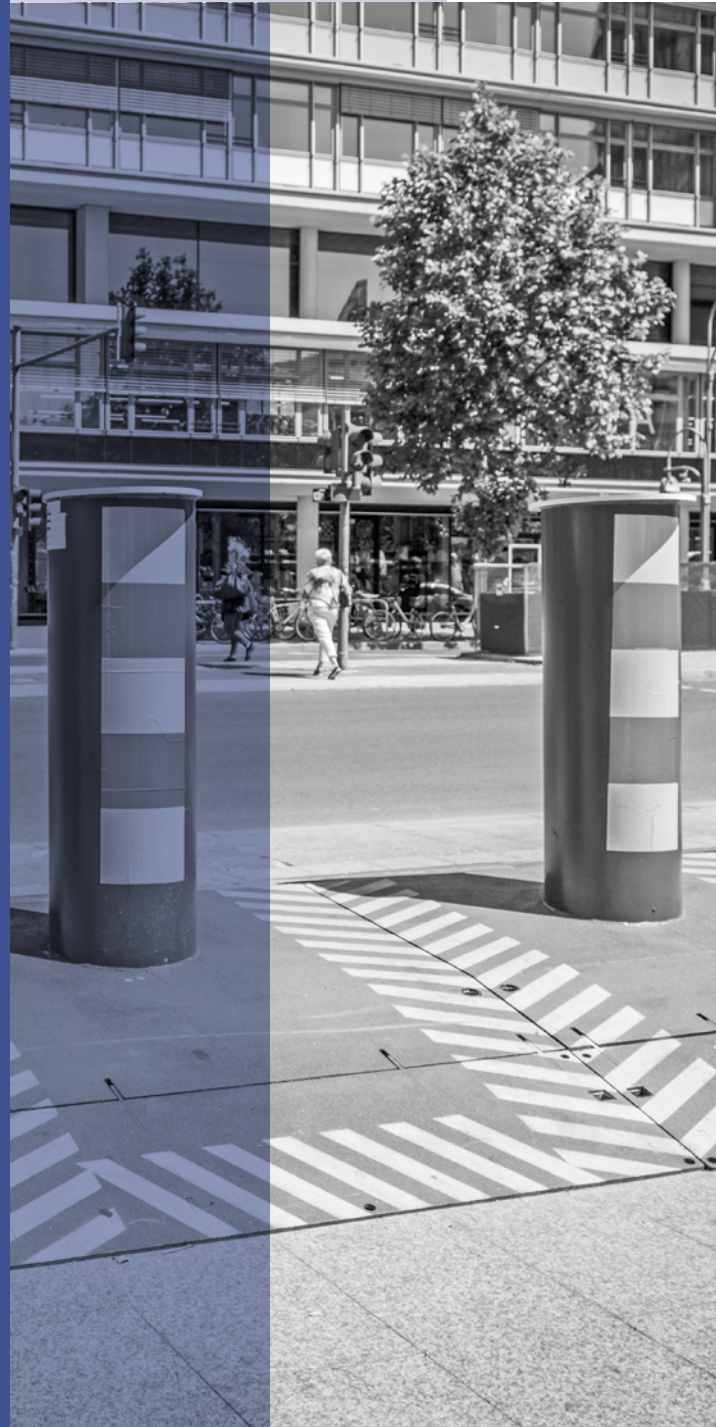
EUROPEAN UNION AGENCY  
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# DIRECTIVE (EU) 2017/541 ON COMBATING TERRORISM

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## IMPACT ON FUNDAMENTAL RIGHTS AND FREEDOMS

REPORT



Luxembourg: Publications Office of the European Union, 2021

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Print	ISBN 978-92-9461-413-1	doi:10.2811/441	TK-09-21-252-EN-C
PDF	ISBN 978-92-9461-414-8	doi:10.2811/061866	TK-09-21-252-EN-N

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# Foreword

When terrorism strikes, its immediate destructive impact is painfully evident. But the fear and distrust it instils also have profound and corrosive long-term effects on society. The need to protect people against attacks is clear. Yet while doing so we must carefully consider the impact of counter-terrorism measures on human rights.

This report examines the EU's main criminal law instrument in the field of counter-terrorism, Directive (EU) 2017/541. Specifically, it considers how the directive engages issues of fundamental rights, affecting individuals, groups and society as a whole.

The research focuses on Belgium, Germany, Greece, Spain, France, Hungary and Sweden. These Member States were selected to reflect diverse experiences and ensure geographical balance. The fieldwork in these countries involved over 100 interviews, including with judges, prosecutors, defence lawyers, law enforcement officers, and experts from oversight institutions, non-governmental organisations and academia. The analysis also relies on evidence collected through desk research on the relevant legal and institutional framework.

The results provide valuable insights into how practitioners experience the directive's practical application at national level with regard to fundamental rights. They focus 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.

These offences often involve activity – such as travelling and consulting reading material – that is legal when engaged in without nefarious intent. The risk of discouraging lawful conduct and excessively restricting rights, such as the right to access information and the freedom of movement, is real. Precisely defining the offences is key – both to make clear what kind of behaviour will be deemed criminal and to ensure consistency across countries. Invasive investigative methods, such as intercepting electronic communications, can yield important information – but must be used with restraint to avoid undermining privacy and other rights.

Avoiding discrimination and the targeting of people for manifesting legitimate religious or political beliefs is also a highly delicate exercise. So is making sure that counter-terrorism provisions are not used to target controversial, but legal, activity. This includes imposing administrative measures, which entail fewer limits on authorities than criminal proceedings but can considerably affect a multitude of rights.

Countering terrorism is vital to protecting our rights, freedoms and democracy. We hope that the insights presented in this report encourage policymakers across the EU to do so in full compliance with fundamental rights.

**Michael O'Flaherty**  
*Director*



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## Abbreviations

<b>Charter</b>	Charter of Fundamental Rights of the European Union	<b>MICAS</b>	individual administrative and supervisory control measure ( <i>mesure individuelle de controle administratif et de surveillance</i> )
<b>CJEU</b>	Court of Justice of the European Union	<b>NGO</b>	non-governmental organisation
<b>ECHR</b>	European Convention on Human Rights	<b>ODIHR</b>	Office for Democratic Institutions and Human Rights
<b>ECtHR</b>	European Court of Human Rights	<b>OSCE</b>	Organization for Security and Co-operation in Europe
<b>EU</b>	European Union		
<b>FRA</b>	European Union Agency for Fundamental Rights		

## Key findings and FRA opinions

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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 experiences 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), the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and the 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, Germany, Greece, Spain, France, Hungary and Sweden. These Member States were selected to reflect the diversity of experiences of 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 covered seven Member States, and drew 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 work directly on terrorism cases – experience the application of the directive in practice with regard to its impact on fundamental rights.



## 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.

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

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 conduct 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**

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, freedom of expression and information under Article 11 of the Charter, freedom of the arts and sciences under Article 13 of the Charter and 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 include 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 freedom of expression and information, freedom of the arts and sciences, and 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 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.



### **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 freedom of expression and information, freedom of the arts and sciences, and 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 workers 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.

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



#### 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 ensure that the right of defence is 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.

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 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 or 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.

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

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 (e.g. religion) at a particular disadvantage compared with others. Article 10 guarantees 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.



### 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.

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



### 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.

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 are in line with international conventions, protocols and other instruments against terrorism, including UN 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 the use of such legislation and measures 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.

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

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 a 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 about the effectiveness of the procedures.



### 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.



# Introduction

## WHY THIS REPORT?

Acts of terrorism represent a serious threat to the lives and safety of people, and a profound security challenge for states. As underlined in the UN global counter-terrorism strategy, terrorism aims to destroy human rights, fundamental freedoms and democracy.<sup>1</sup> 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.

Directive (EU) 2017/541 on combating terrorism (the directive)<sup>2</sup> is the main criminal law instrument at EU level in the field of counter-terrorism. It was adopted in 2017, replacing Framework Decision 2002/475/JHA on combating terrorism,<sup>3</sup> in response to similar standard-setting initiatives by the UN and the Council of Europe to address the developing terrorist threat associated primarily with the phenomenon of 'an increasing number of individuals who travel abroad for the purposes of terrorism and the threat they pose upon their return',<sup>4</sup> commonly referred to as foreign terrorist fighters.

To this end, the directive requires Member States to take additional measures in combating terrorism that EU legislation previously did not cover. They include criminalising offences such as travelling for the purpose of terrorism, or receiving training for terrorism. When it was proposed, the directive drew significant public attention and its impact on fundamental rights was among the key issues discussed during the legislative process and beyond. That was partly because the legislative proposal by the European Commission was not accompanied by an impact assessment, and the legislative process was expedited – which the proposal stated was necessary due to the 'urgent need' to improve the EU security framework.<sup>5</sup>

According to Article 29(2) of the directive, in 2021, 3 years after the Member States have transposed it into national law, the European Commission shall assess the added value of the directive and, if necessary, decide on appropriate follow-up actions. This assessment shall also cover its impact on fundamental rights and freedoms, including on non-discrimination, on the rule of law, and on the level of protection and assistance provided to victims of terrorism.

The European Commission asked the European Union Agency for Fundamental Rights (FRA) to conduct research on the directive's impact on fundamental rights and freedoms in order to support this assessment, 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 AND PURPOSE

The main objective of the project was to examine the fundamental rights-related challenges arising during the practical application of the measures transposing the directive into national law. Besides assisting EU institutions

in assessing the impact of EU counter-terrorism legislation on fundamental rights, it aims to provide guidance that can help Member States and their practitioners ensure a fundamental rights-compliant application of counter-terrorism legislation in practice.

The report is based primarily on qualitative fieldwork research involving interviews with practitioners and experts who have extensive experience in this area in the seven Member States covered: **Belgium, Germany, Greece, Spain, France, Hungary** and **Sweden**. FRA selected these Member States in consultation with the European Commission to reflect the diversity of experiences of terrorism and application of counter-terrorism legislation, as well as geographical balance.

The report looks beyond the legal provisions that Member States adopted to transpose the directive into national law and which were assessed in the European Commission's report on the transposition of the directive, issued in 2020.<sup>6</sup> Instead, this report focuses on experiences with the practical application of the provisions of the directive. Because of the qualitative nature of the research, its findings are not representative of the situation in each Member State that the fieldwork covered, and should not be generalised to the EU as a whole.

As the directive is a criminal law instrument, the main focus of the report is on fundamental rights challenges related to investigating, prosecuting and judging those offences that the directive modified or newly introduced into EU law in comparison with the previously applicable legal framework.

**Chapter 1** introduces common issues arising in the context of criminal proceedings concerning these offences. They relate to the use of investigative tools, evidence, limitations of procedural rights, deprivation of liberty and the position of children in terrorism proceedings.

**Chapter 2** looks at the offence of public provocation to commit a terrorist offence, covered by Article 5 of the directive, the scope of which was expanded by the directive.

The following two chapters cover offences that the directive newly introduced into EU law. **Chapter 3** deals with the offences of travelling for the purpose of terrorism, and of organising or facilitating such travel, covered in Articles 9 and 10. **Chapter 4** looks at the offence of receiving training for terrorism, covered in Article 8.

**Chapter 5** addresses challenges arising in the context of applying administrative measures to persons involved, or suspected of involvement, in offences that the directive covers, including with respect to the applicable safeguards and remedies.

Article 29(2) places special emphasis on non-discrimination. The research therefore paid particular attention to the effect of the application of the directive in this respect, and the findings concerning the impact on specific groups are integrated into the five chapters of the report.

The scope of the Commission's request did not include issues concerning the protection of, support to and rights of victims of terrorism, which Title V of the directive introduced into EU law. Nor does the report cover the directive's impact on the rule of law, except issues encountered in examining the impact on fundamental rights, for example legal certainty or establishing intent.



## 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.

Furthermore, as the research focused on selected changes that the directive introduced, it does not comprehensively cover all potential fields in which the directive may have an impact on fundamental rights. This includes notably the provisions of the directive concerning the offence of terrorist financing (Article 11); sentencing and penalties (Article 15) and the related issues of the situation in prisons, deradicalisation and reintegration; and measures against public provocation content online (Article 21). Some respondents shared experiences with these issues alongside their more general views on fundamental rights challenges in counter-terrorism legislation and policies. However, the research did not cover them systematically, and the report refers to them only where relevant in the context of other findings.

EU Member States have faced different degrees of exposure to terrorism, affecting their overall perceptions of the terrorist threat.<sup>7</sup> While some countries across the EU have maintained a high official terrorist alert level in recent years,<sup>8</sup> others classify the level of threat as low.<sup>9</sup> This also has an impact on how they apply counter-terrorism measures in practice.

Also among the countries covered by the fieldwork, the different degree of exposure to terrorism and its particular types should be taken into account when reading this report. Historical experience – with separatist terrorism in Spain, right-wing terrorism in France, left-wing terrorism in Germany and Greece, and, more recently, terrorism inspired by organisations such as Da'esh and Al-Qaeda in Belgium, Germany, Spain and France, in particular (usually referred to as 'jihadist' terrorism; see box 'On terminology: "jihadist terrorism"') – played an important role in shaping the counter-terrorism legislation and policy frameworks of these countries already before the adoption of the directive.

As a result, experiences with the offences that the directive introduced or modified also vary among the Member States covered. In some of them, adopting the directive prompted the criminalisation of certain acts. In others, the offences had already been part of national law. For example, France considered its pre-existing legislation to be already sufficient to transpose the directive.<sup>10</sup> In the other Member States that the fieldwork covered, the directive led to legislative changes in respect of some or all of the offences on which this report focuses: those connected to public provocation, travel and receiving training.

All 25 Member States where the directive applies are equally required to comply with the provisions of the directive and ensure that even pre-existing legislation meets its requirements. Accordingly, the report encompasses the practitioners' experiences with the offences and procedural issues regardless of when these elements entered national law. Nevertheless, some Member States have less experience in practice than others with certain offences. That signals that the directive's full impact on fundamental rights across the EU might not yet be fully visible.

Limited data are available at national and EU levels on the practical application of the directive's provisions and the investigation and prosecution of individual offences. The number of persons a year arrested in connection with terrorism

in general has remained relatively stable in recent years, according to EU-wide data that Europol has collected.<sup>11</sup>

Comprehensive information about criminal proceedings does not exist, as not all Member States share data on criminal convictions with Eurojust.<sup>12</sup> In addition, counter-terrorism work is sensitive. As a result, more detailed information that could help paint a more comprehensive picture of the directive's impact in respect of individual offences – such as the number of investigations of specific offences, use of individual investigative measures or reasons for discontinuing some types of cases – is not available in most Member States. This gap makes particularly valuable the direct experience and views of practitioners collected during the research and presented in this report.

This report aims to provide practitioners' insights into the application of selected provisions of the directive. In this context, the analysis does not focus on the situation in individual Member States. Rather, it deals with issues that emerge across several Member States covered by the fieldwork.

This affects the structure of the report. Chapters are structured according to fundamental rights issues that the fieldwork identified as they relate to different provisions of the directive. Country-specific findings and examples are included to illustrate these cross-cutting issues or highlight situations where the legislation or its application significantly differs, thus giving rise to a specific set of challenges or notable practices.

The respondents' experiences of individual issues are also clustered by professional groups rather than by Member States. Comparing the perspectives of professionals involved with counter-terrorism in different roles reveals different views on some issues. It also confirms that, in some respects, ensuring a fundamental rights-compliant application of counter-terrorism legislation is considered challenging by practitioners across different professional groups.

## RESEARCH METHODOLOGY

This report primarily draws from data collected through interviews with practitioners. It was supported by desk research in all 25 Member States bound by the directive<sup>13</sup> conducted between March and June 2020<sup>14</sup> by FRA's multidisciplinary research network, Franet.<sup>15</sup> The desk research was undertaken to shape the development of the fieldwork component. It collected basic information about the legal and institutional frameworks in the Member States and about key fundamental rights issues that emerge from applying the directive and from applying counter-terrorism legislation and policies in general.

Interviews with practitioners with particular experience or specialisation in counter-terrorism took place in Belgium, Germany, Greece, Spain, France, Hungary and Sweden between June and November 2020. The 107 practitioners interviewed included trial 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 (see Table 1).

FRA identified relevant practitioners with the support of national authorities and a number of partners at international, EU and national levels including, among others, the European Commission, Eurojust, Europol, the Organization

for Security and Co-operation in Europe (OSCE) and the Council of Bars and Law Societies of Europe.

All interviews were conducted directly by FRA staff. Because of the measures taken to address the outbreak of the COVID-19 pandemic, they took place online. Respondents replied orally to interviewers' questions based on a predefined questionnaire that was not shared with the respondents in advance. Interviews were audiorecorded, if the respondent consented, and were documented using an interview-reporting template in full compliance with FRA's data protection standards.

Given the particular sensitivity of the respondents' work, all interviews took place under the guarantee of anonymity.

**TABLE 1: INTERVIEWED PRACTITIONERS IN SEVEN MEMBER STATES**

Professional category	Belgium	Germany	Greece	Spain	France	Hungary	Sweden	Total
Defence lawyer	2	4	2	2	2	2	2	16
Investigative judge	3	0	1	1	1	0	0	6
Judge	1	2	2	3	2	2	3	15
Law enforcement	6	2	4	4	1	2	0	19
NGO/academia	5	3	2	3	4	3	2	22
Oversight body	3	2	0	3	3	0	4	15
Public prosecutor	2	2	2	1	3	2	2	14
<b>Total</b>	<b>22</b>	<b>15</b>	<b>13</b>	<b>17</b>	<b>16</b>	<b>11</b>	<b>13</b>	<b>107</b>

Source: FRA, 2021.

The interviews explored the respondents' experiences of and views on fundamental rights challenges, concerns and specific practices related to the application of the directive against the backdrop of the broader impact of counter-terrorism legislation, policies and measures. The interviewers could ask follow-up questions or request clarifications, and encouraged respondents to speak freely and draw on their personal experiences.

## LEGAL OVERVIEW

### International law and standards

The UN is the main global standard-setting body in the field of counter-terrorism. It has not adopted a comprehensive legal instrument in this field so far, but it has developed 19 universal legal instruments dealing with sectoral issues, such as nuclear, aviation or maritime terrorism.<sup>16</sup> Furthermore, the UN Security Council has been active in adopting resolutions addressing the terrorist threat.

There is no agreed international definition of terrorism. UN Security Council Resolution 1566 (2004) refers to terrorist acts as 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism'.<sup>17</sup> UN Security Council Resolution 2178 (2014)<sup>18</sup> is most relevant to

this report. It addresses the issue of foreign terrorist fighters by requiring the criminalisation of receiving training and travelling for terrorist purposes, among other activities.<sup>19</sup>

In the context of the Council of Europe, the key legal instrument on terrorism from the criminal justice perspective is the Warsaw Convention on the Prevention of Terrorism.<sup>20</sup> In 2015, it was supplemented by the Additional Protocol to the Convention on the Prevention of Terrorism.<sup>21</sup> The protocol addresses the phenomenon of foreign terrorist fighters by implementing the criminal law aspects of UN Security Council Resolution 2178 (2014) and requiring States Parties to criminalise participation in an association or group for the purposes of terrorism, receiving terrorist training, travelling abroad for the purposes of terrorism, and financing or organising travel for this purpose.<sup>22</sup>

### **European Union law**

The first criminal law instrument comprehensively addressing terrorism at EU level was Framework Decision 2002/475/JHA on combating terrorism.<sup>23</sup> It set out a list of intentional acts (e.g. murder, kidnapping or hostage taking) that had to be considered terrorist offences when they could seriously damage a country or an international organisation and were committed with the aim of seriously intimidating a population, compelling a government or international organisation to perform or abstain from performing an act or seriously destabilising or destroying the fundamental structures of a country or an international organisation. It also defined what a terrorist group consists of, and set out the offences of directing such a group or participating in its activities. Moreover, it set out other offences linked with terrorist activities; modes of complicity; applicable levels of penalties; mitigating factors; liability and penalties for legal persons; jurisdictional bases for prosecuting such offences; and assistance measures for the victims of terrorism and their families.

This framework decision was later amended by Framework Decision 2008/919/JHA.<sup>24</sup> The main novelty was requiring Member States to criminalise additional offences, namely the acts of public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism.<sup>25</sup> The definitions of terrorism and of the individual offences in the framework decisions were criticised for not being sufficiently precise.<sup>26</sup>

Directive (EU) 2017/541 on combating terrorism replaced Framework Decision 2002/475/JHA, as amended by Framework Decision 2008/919/JHA. It sought in particular to align the efforts of the EU with those of the UN, especially Resolution 2178 (2014), in addressing the threat posed by the phenomenon of foreign terrorist fighters. It aimed to ensure that acts related to this phenomenon are punishable under the national law of the Member States (recitals 5 and 6).

The main novelty of the directive in comparison with Framework Decision 2002/475/JHA (as amended by Framework Decision 2008/919/JHA) is therefore the inclusion of new terrorism-related offences (or 'offences related to terrorist activities') that are preparatory to terrorist offences, namely receiving training for terrorism (Article 8), and travelling, or organising, or otherwise facilitating travelling, for the purpose of terrorism (Articles 9–10). In this context, it is notable that the directive states that it does not govern the activities of armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of those terms under that law (recital 37), but it does not provide further clarity in this regard. Terrorist financing is also included as a distinct crime when it concerns any terrorist or other terrorism-related offences (Article 11). The wording of the offence of public provocation is modified to include the ambiguous notion of 'indirect provocation' (Article 5).

The directive also updates the list of acts considered to constitute terrorist offences. It adds illegal interference with systems and data, as well as some acts related to radiological weapons (Article 3(1)(f) and (i)). It extends criminal complicity to a wider range of offences, and criminalises incitement to all offences (Article 14(1)(2)). In other aspects, it maintains the overall definition of terrorist offences that Framework Decision 2002/475/JHA introduced, which also includes actions that do not entail intentional grave violence. The definition continues to rely on a broad set of terrorist aims, listed in Article 3(2), which also encompass, unlike other international instruments, the aim of 'seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation'.

Besides the definitions of criminal offences, the directive introduces a number of additional requirements upon Member States, including ensuring the availability of effective investigative tools and tools for freezing and confiscating proceeds of offences that the directive covers (Article 20), as well as measures to ensure the prompt removal or blocking of online content constituting public provocation (Article 21). It also introduces a considerably more robust set of provisions for protecting victims of terrorism, supporting them and ensuring their rights (Articles 24–26).

The definition of terrorist and terrorism-related offences in the directive is also relevant to other EU legislation, potentially having an impact on fundamental rights beyond the criminal law response to terrorism. In this context, Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online<sup>27</sup> concerns removal of online content defined on the basis of the definitions of terrorist and terrorism-related offences in the directive. Most notably, it requires hosting service providers to remove or disable access to flagged terrorist content in all Member States within 1 hour of receiving a removal order from a competent authority.<sup>28</sup>

### **Counter-terrorism measures and fundamental rights**

Acts of terrorism can have a severe impact on a variety of fundamental rights, starting with the right to life, which is a precondition for the enjoyment of other rights. At the same time, EU and international organisations and standards clearly acknowledge the inherent impact of counter-terrorism measures on fundamental rights, and the need to implement effective counter-terrorism measures while ensuring respect for fundamental rights.

The UN global counter-terrorism strategy underlines that 'effective counter-terrorism measures and the promotion of human rights are not conflicting goals, but complementary and mutually reinforcing objectives'.<sup>29</sup> To this end, it devotes one of its four pillars to measures to ensure respect for human rights for all and the rule of law. The relevant resolutions of the UN Security Council and the work of its Counter-Terrorism Committee Executive Directorate also recognise the role of human rights.<sup>30</sup> Among other bodies within the UN system, the Office of the High Commissioner for Human Rights promotes human rights-compliant security policies, and provides states with relevant guidance.<sup>31</sup>

The Council of Europe Convention on the Prevention of Terrorism likewise acknowledges that 'measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms'.<sup>32</sup> The Commissioner for Human Rights of the Council of Europe has been active in monitoring human rights issues that arise while applying counter-terrorism measures.<sup>33</sup> The Council of Europe's counter-terrorism strategy for 2018–2022 also aims to ensure that all counter-terrorism measures accordingly respect human rights, the rule of law and

democracy.<sup>34</sup> Jurisprudence of the European Court of Human Rights (ECtHR) includes a number of judgments that either directly concern counter-terrorism legislation and measures or speak to key fundamental rights issues that arise in the counter-terrorism context.<sup>35</sup>

Finally, relevant documents of other international organisations that support states in combating terrorism underline the importance of human rights. One example is the OSCE consolidated framework for the fight against terrorism.<sup>36</sup>

The EU institutions acknowledge the need to fully respect fundamental rights when combating terrorism. The European Parliament does so in its resolution on findings and recommendations of the Special Committee on Terrorism.<sup>37</sup> So does the Council of the EU in its conclusions on internal security and European police partnership<sup>38</sup> and through the activities of the EU Counter-Terrorism Coordinator.<sup>39</sup> The European Commission does so in its 2020 security union strategy<sup>40</sup> and counter-terrorism agenda.<sup>41</sup>

The directive acknowledges that terrorism is a serious attack against human rights and fundamental freedoms, democracy and the rule of law (recital 2). At the same time, it unequivocally states that any measures taken in implementing it should respect fundamental rights and freedoms enshrined in the Charter of Fundamental Rights of the European Union (the Charter), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the International Covenant on Civil and Political Rights and other human rights obligations under international law (recitals 22 and 35, Article 23). Besides a number of specific Charter rights listed in recital 35, it also explicitly recalls Member States' obligations under Union law with regard to the procedural rights of suspects or accused persons in criminal proceedings (recital 36).<sup>42</sup>

All the above instruments and bodies extensively acknowledge that counter-terrorism measures necessarily involve serious interference with fundamental rights and freedoms, including those of suspects and accused persons. The main rights that counter-terrorism measures affect are those intrinsically related to criminal law and proceedings.

First and foremost, criminalising terrorist offences has an impact on the principle of 'no punishment without law' (the principle of legality in criminal law), as their legal formulation must ensure precision, clarity and foreseeability, to avert abuses.<sup>43</sup>

Second, the directive criminalises otherwise lawful behaviours solely based on intent, in the form of the preparatory offences. If criminalisation and resulting prosecutions are too extensive, they may have a negative impact on the enjoyment of rights and freedoms associated with those activities. These include the freedoms of expression and information; assembly and association; thought, conscience and religion; and movement. A negative impact on fundamental rights may also arise from applying other measures to persons suspected of involvement in terrorism, such as administrative measures that limit these rights and freedoms, yet are imposed without procedural safeguards comparable to those applicable in criminal proceedings and without the involvement of courts.

Third, tools applied in counter-terrorism investigations – especially surveillance and intrusive investigative techniques – have an impact on procedural safeguards, including the presumption of innocence, the right to a fair trial, and the right to privacy and protection of personal data. The right to liberty and security is also frequently affected, as terrorism and related offences may lead to extensive deprivation of liberty.

Finally, prohibition of discrimination is a major concern. When counter-terrorism measures are applied, different groups of people may be treated differently based on their ethnic origin, race or religion. Such an impact can arise during detection and investigation, as terrorist-profiling practices for identifying suspects could be based on discriminatory elements and could lead to targeting people simply because they belong to a certain group. As a result, an entire group can be stigmatised.<sup>44</sup>

It can also arise during later stages of criminal proceedings, as belonging to a distinct group may be considered supporting evidence of terrorist intent. Moreover, even when counter-terrorism legislation appears neutral in its scope and focus, it may still facilitate the development of policies and practices that result in indirect discrimination or harassment of people belonging to distinct groups.

## Endnotes

- 1 UN (2006), **The UN global counter-terrorism strategy**, Resolution adopted by the General Assembly on 8 September 2006, A/RES/60/288.
- 2 **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, OJ 2017 L 88, 31 March 2017.
- 3 **Council Framework Decision of 13 June 2002 on combating terrorism** (2002/475/JHA), OJ 2002 L 164, 22 June 2002.
- 4 European Commission (2015), Proposal for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM(2015) 625 final, 2 December 2015, p. 2.
- 5 The proposal stated: 'Given the urgent need to improve the EU framework to increase security in the light of recent terrorist attacks including by incorporating international obligations and standards, this proposal is exceptionally presented without an impact assessment.' *Ibid.*, p. 12.
- 6 European Commission (2020), Report from the Commission to the European Parliament and the Council based on Article 29(1) of 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, COM(2020) 619 final, 30 September 2020.
- 7 At the same time, one in five people in the EU (19 %) are very concerned about experiencing a terrorist attack, FRA data show. Numbers are high both in those Member States that have recently experienced such attacks and in those that have not. FRA (European Union Agency for Fundamental Rights) (2021), **Crime, safety and victims' rights – Fundamental Rights Survey**, Publications Office of the European Union, Luxembourg, p. 102.
- 8 For example Spain, Ministry of the Interior (Ministerio del Interior), '**Nivel de alerta antiterrorista**', level 4 on a scale of 1–5; France, Directorate of Legal and Administrative Information (Direction de l'information légale et administrative), '**Vigipirate: Le niveau de vigilance redescend au risque attentat**', press release, 11 March 2021, level 2 on a scale of 1–3; Sweden, Police (Polisen), '**Terrorism awareness**', level 3 on a scale of 1–5. Among Member States that the fieldwork did not cover, see for example the Netherlands, Ministry of Justice and Security (Ministerie van Justitie en Veiligheid), '**Dreigingsbeeld Terrorisme Nederland**', level 3 on a scale of 1–5.
- 9 Among Member States that the fieldwork did not cover, see for example Czech Republic, Ministry of the Interior (Ministerstvo vnitra), '**Stupně ohrožení terorismem**', level 1 on a scale of 1–3; Slovenia, Office of the Government of the Republic of Slovenia for Communication (Urad Vlade Republike Slovenije za komuniciranje), '**Ocena teroristične ogroženosti Slovenije**', level 2 on a scale of 1–5.
- 10 European Commission (2020), Report from the Commission to the European Parliament and the Council based on Article 29(1) of 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/JH A, COM(2020) 619 final, 30 September 2020, p. 3.
- 11 The following data were reported by Member States to Europol: 1 077 persons arrested in 2015, 1 002 in 2016, 1 219 in 2017, 1 056 in 2018, 1 004 in 2019 and 449 in 2020. The 2020 data do not cover the United Kingdom and refer to a period marked by the COVID-19 pandemic, which the lower figure is likely to reflect. Europol (2020), **European Union terrorism situation and trend report 2020**, 23 June 2020, p. 12; Europol (2021), **European Union terrorism situation and trend report 2021**, 22 June 2021, pp. 6 and 12.
- 12 Eurojust receives information on completed criminal proceedings from some Member States, and the number of contributing Member States varies (e.g. 17 in 2018 as opposed to 12 in 2019). The following information is summarised in *Terrorism Convictions Monitor*, the issues of which are not public and were shared with FRA by Eurojust for the purpose of this research: 526 terrorism convictions in 2015, 587 in 2016, 569 in 2017, 664 in 2018 and 520 in 2019. The last figure does not cover the United Kingdom. Eurojust, *Terrorism Convictions Monitor*, issues 24, 27, 30, 33 and 35.
- 13 The directive is binding on all Member States except Denmark and Ireland.
- 14 Information based on desk research (i.e. related to Member States not covered by the subsequent fieldwork) therefore reflects the situation as of March 2020.
- 15 For more information, see FRA's [webpage on Franet](#).
- 16 For a full list, see the website of the [UN Office of Counter-Terrorism](#).
- 17 UN (2004), Security Council **Resolution 1566 (2004)**, 8 October 2004, para. 3.
- 18 UN (2014), Security Council **Resolution 2178 (2014)**, 24 September 2014.
- 19 This resolution was subsequently complemented by other documents, in particular by Security Council Resolution 2396 (2017). See UN (2017), Security Council **Resolution 2396 (2017)**, 21 December 2017.
- 20 Council of Europe (2005), **Council of Europe Convention on the Prevention of Terrorism**, CETS No 196, 16 May 2005.
- 21 Council of Europe (2015), **Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism**, CETS No 217, 22 October 2015.
- 22 Council of Europe (2015), **Explanatory report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism**, CETS No 217, Riga, 22 October 2015, paras. 5 and 7.
- 23 **Council Framework Decision of 13 June 2002 on combating terrorism** (2002/475/JHA), OJ 2002 L 164, 22 June 2002.
- 24 **Council Framework Decision 2008/919/JHA** of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, OJ 2008 L 330, 9 December 2008.
- 25 EU mutual recognition instruments also address terrorism, thus facilitating judicial cooperation in such matters; see for example **Council Framework Decision 2002/584/JHA** of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190, 18 July 2002, Art. 2.
- 26 See for example EU Network of Independent Experts in Fundamental Rights (2003), 'The balance between freedom and security in the response by the European Union and its Member States to the terrorist threats'. Thematic comment drafted for the European Commission, DG Justice and Home Affairs, 31 March 2003, p. 11.
- 27 **Regulation (EU) 2021/784** of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, OJ 2021 L 172, 17 May 2021.
- 28 At the request of the European Parliament, FRA issued a legal opinion on the proposed regulation in 2019. See FRA (2019), **Proposal for a regulation on preventing the dissemination of terrorist content online and its fundamental rights implications**, Opinion 2/2019, 12 February 2019, Publications Office of the European Union, Luxembourg.
- 29 UN (2006), **The UN global counter-terrorism strategy**, Resolution adopted by the General Assembly on 8 September 2006, A/RES/60/288.
- 30 UN Security Council Counter-Terrorism Committee Executive Directorate (2021), **Human rights**, February 2021.
- 31 See for example UN (2018), **Guidance to States on human-rights compliant responses to the threat posed by foreign fighters**, UN, New York.
- 32 Council of Europe (2005), **Council of Europe Convention on the Prevention of Terrorism**, CETS No 196, 16 May 2005.
- 33 Council of Europe, Commissioner for Human Rights (2015), '**Positions on counter-terrorism and human rights protection**', Strasbourg, 5 June 2015.



- 34 Council of Europe, Committee of Ministers (2018), **Council of Europe counter-terrorism strategy (2018–2022)**, CM(2018)86-addfinal, 4 July 2018.
- 35 Council of Europe, European Court of Human Rights (2021), **Guide to the case-law of the European Court of Human Rights – Terrorism**, updated on 31 December 2020.
- 36 Organization for Security and Co-operation in Europe (OSCE), Permanent Council (2012), Decision No 1063, **OSCE consolidated framework for the fight against terrorism**, PC.DEC/1063, 7 December 2012, para. 17.
- 37 **European Parliament resolution of 12 December 2018 on findings and recommendations of the Special Committee on Terrorism** (2018/2044(INI)), OJ 2020 C 388, 13 November 2020.
- 38 Council of the European Union (2020), **Council conclusions on internal security and European police partnership**, 13083/1/20, 24 November 2020.
- 39 Council of the European Union, EU Counter-Terrorism Coordinator (2020), **speech at the 2020 UN virtual counter-terrorism week**, 10 July 2020.
- 40 European Commission (2020), **Communication from the Commission on the EU security union strategy**, COM(2020) 605 final, 24 July 2020.
- 41 European Commission (2020), **Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A counter-terrorism agenda for the EU: Anticipate, prevent, protect, respond**, COM(2020) 795 final, 9 December 2020.
- 42 Directive **2012/13/EU** of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142, 1 June 2012; Directive **2010/64/EU** of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280, 26 October 2010; Directive **2013/48/EU** of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294, 6 November 2013; Directive (EU) **2016/343** of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ 2016 L 65, 11 March 2016; Directive (EU) **2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings OJ 2016 L 132, 21 May 2016; Directive (EU) **2016/1919** of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ 2016 L 297, 4 November 2016.
- 43 According to the ECtHR, Article 7(1) ECHR also encompasses the requirement that an offence must be clearly defined in law, and an individual can know from the wording of the relevant provision what acts and omissions will make them liable. See for example ECtHR, **Kafkaris v. Cyprus [GC]**, No 21906/04, 12 February 2008, paras. 138–140; **Del Río Prada v. Spain [GC]**, No 42750/09, 21 October 2013, paras. 77–79; **Kokkinakis v. Greece**, No 14307/88, 25 May 1993, para. 52. See also Council of Europe, ECtHR (2021), **Guide on Article 7 of the European Convention on Human Rights – No punishment without law: The principle that only the law can define a crime and prescribe a penalty**, updated 30 April 2021, pp. 12–13. For corresponding case-law of the Court of Justice of the European Union (CJEU), see CJEU, C-42/17, **Criminal proceedings against M.A.S. and M.B. [GC]**, 5 December 2017, paras. 54–55; C-634/18, **Criminal proceedings against JI v. Prokuratura Rejonowa w Słupsku**, 11 June 2020, paras. 47–49. Accordingly, recital 35 of the directive acknowledges that the principle of legality also covers the requirement of precision, clarity and foreseeability in criminal law.
- 44 See further FRA (2018), **Preventing unlawful profiling today and in the future: A guide**, Publications Office of the European Union, Luxembourg.



# 1

## CRIMINAL PROCEEDINGS IN TERRORISM CASES

The directive does not in itself establish detailed rules on criminal proceedings and investigations of terrorism. However, it introduces offences that, in comparison with Framework Decision 2002/475/JHA, newly cover a broad variety of conduct that may trigger investigations and the use of investigative tools, bringing these activities within the scope of application of the directive. Furthermore, the directive requires in Article 20(1) that Member States should make a specific set of investigative tools available for investigations into terrorism and related offences. In Article 15, it also sets the threshold for sentencing the perpetrators of these offences.

That being so, the directive explicitly requires compliance with fundamental rights and freedoms (Article 23 and recital 35), including the right to a fair trial and the right of defence that the Charter, the ECHR and other instruments enshrine. In addition, procedural rights already found in other EU legislation apply to offences that the directive covers (recital 36).<sup>1</sup>

This chapter covers the respondents' experiences of the impact on fundamental rights of criminal proceedings and investigations concerning terrorist and related offences that the directive instituted. It focuses first on investigative tools and issues related to the collection and use of evidence. Then it presents findings on the impact of procedural measures on the rights to a fair trial and of defence. The chapter subsequently discusses issues related to deprivation of liberty and, finally, specific issues arising in cases concerning children suspected or accused of terrorism.

### 1.1. INVESTIGATIVE TOOLS AND POWERS



Article 20(1) of the directive requires that investigative tools used in organised crime, or other serious crime cases, be available for authorities to investigate and prosecute terrorist and related offences. The tools listed are searching personal property; interception of communications; covert surveillance, including electronic surveillance; audio and visual recording of persons in public or private vehicles and places; and financial investigation (recital 21). According to the directive, such tools should respect fundamental rights and freedoms (Article 23 and recital 35), as well as EU law on the procedural rights of suspects and accused persons (recital 36). Furthermore, any available investigative tools should be targeted and proportionate, and should also respect the right to the protection of personal data (recital 21).<sup>2</sup>

In this respect, according to the jurisprudence of the Court of Justice of the European Union (CJEU) and the ECtHR, the most intrusive investigative acts (e.g. communications surveillance or acquisition and processing of traffic and location data) should be authorised by a court, as a rule, on reasonable grounds based on objective evidence, and they must also be open to subsequent judicial review. Effective remedies should also be available to the people affected.<sup>3</sup>

Criminalising preparatory acts as offences makes it easier to trigger the application of investigative tools, and this may disproportionately interfere with fundamental rights, as various commentators have pointed out with concern.<sup>4</sup> This contributes to a general debate about the proper reconciliation between liberty and fundamental rights (including security of the person), on the one hand, and public or national security, on the other.<sup>5</sup> During the discussions at national level about enhancing the investigative powers of the national authorities in various Member States, various organisations and expert bodies stated that criminal investigations and measures against terrorism risk serving preventive purposes in reality, and investigations would target people for acts they might be preparing or considering and not for acts already committed, departing from fundamental principles of criminal law.<sup>6</sup> The experiences of the interviewed practitioners confirm these concerns.

Many of the problems with the use of investigative powers and tools arise as a consequence of the directive's vague substantive criminal provisions, some respondents maintain (see also Section 1.2.1). Further common concerns for many professionals interviewed include new intrusive hacking and online surveillance tools that are available to authorities, and the blurred distinction between data collected for criminal investigations and that collected for other purposes, for example by intelligence services.

Findings show that the rights affected include in particular respect for private and family life (Article 7 Charter and Article 8 ECHR) and protection of personal data (Article 8 Charter), the prohibition of discrimination (Article 21 Charter and Article 14 ECHR), the presumption of innocence and the right of defence (Article 48 Charter and Article 6 ECHR), and the principle of legality and proportionality of criminal offences and penalties (Article 49 Charter).

#### 1.1.1. Availability of investigative tools and main concerns

Findings confirm that the investigative tools referred to in the directive, such as house searches, interception of communications and covert police action, are generally available to authorities dealing with terrorist and related offences in the Member States. In particular, law enforcement officers, public prosecutors and investigative judges stress the need to use special (and more intrusive) investigative techniques, such as wiretapping, due to the secretive manner in which terrorists operate. Some of these professionals explain that traditional investigative measures, such as physical surveillance or interception of landlines, are often largely ineffective in terrorism cases.

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**'It's really necessary to use special investigative measures in the field of terrorism, because it's a very closed environment. In order to obtain evidence from that environment, you can't knock on the door, enter and obtain the evidence. You have to do it in a very discreet, almost secret way.'**  
(Public prosecutor)



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**‘The higher the interference with fundamental rights, the more concrete the level of suspicion needs to be. It must be proportionate to the offence.’**

(Public prosecutor)

Across most Member States covered by the fieldwork, the legal conditions for approving the use of investigative acts do not differ essentially between terrorism and other serious crimes. As an exception, house searches appear to take place under looser legal requirements in some Member States (including Belgium, as well as countries that the fieldwork did not cover such as Luxembourg and Portugal).<sup>7</sup> On the other hand, depending on the national categorisation of crimes (e.g. as misdemeanours), some offences, such as glorification of terrorist crimes, might not permit the use of more intrusive tools, such as interception of communications.

The more intrusive a measure is, the more evidence is required for its authorisation, some respondents among law enforcement officers and prosecutors underline. In this context, one prosecutor notes that approval by a judge ensures both the legality of investigations and respect for the rights of the accused. Nevertheless, a strong concern expressed by defence lawyers, academics and NGO experts across fieldwork Member States is that, in practice, special investigative tools and powers are easily authorised and are used excessively in terrorism investigations. Invoking terrorism functions as an ‘open door’ to authorise any investigative measures, some of them claim.

Increased availability and easier authorisation of special investigative tools can lead to their proliferation and a disproportionate impact on fundamental rights, such as - depending on the nature of the measure - the right to private and family life or protection of personal data.<sup>8</sup>

Besides many academics, NGOs and defence lawyers, a number of judges also confirm that the preparatory nature of most terrorist and related offences results in authorising intrusive investigative tools with less available tangible evidence than in other crimes. A prosecutor illustrates this by saying that, in terrorism cases, courts are ‘generous when authorising the initial [investigative] measure’. As a result, more people could become subject to investigations without reasonable grounds. For example, it is possible to start investigations merely because someone has planned or started a journey, a law enforcement officer observes.



Approval of investigative actions is based on risk assessment, algorithms and profiling, as terrorist offences are defined based on a risk of future acts, an academic notes. In this respect, a defence lawyer argues that investigations may also target specific groups of persons based on minimal initial evidence and merely on their profile based on an ideology, such as anarchists.

The focus on preparatory offences, as an early stage of involvement in terrorist activities where evidence may still be limited, can lead to situations where investigative acts are approved with less evidence, some respondents report. Many also emphasise the urgency of preventing a potential terrorist attack. However, haste to arrest a potential offender may lead to procedural errors, some respondents argue.

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**'My gut feeling is that the number of investigations initiated will be disproportionate to the convictions.'**  
(Public prosecutor)

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**'If I am always waiting for the bomb to explode ..., people will say [the] judiciary isn't working well and is not delivering the protection of other fundamental rights; if I step in very soon, critics ... will ask: "Are you still a democratic country?" Finding that balance is very hard.'**  
(Investigative judge)

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**'If you go to court and say: "We suspect that this person, a Muslim, member of [Da'esh], is planning a terrorist attack and we need to listen to his phone", I don't think there are so many judges that would say "No"'**  
(Defence lawyer)

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**'The speed and necessity to arrest an offender leads to procedural misconduct by the authorities, as well as the view that the need to ensure the security of citizens outweighs individual rights, which must give way in the public interest.'**  
(Defence lawyer)

Practitioners also offer further reasons for easier approval of intrusive investigative actions. These include a lack of resources, or of cooperation by other authorities, preventing courts from performing a proper proportionality assessment.

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**'Judges do not verify a large proportion of the documents, reports and statements, partly also because they simply cannot do so for reasons such as lack of time, lack of adequate international judicial assistance or lacking transparency and cooperation of certain authorities.'**  
(Defence lawyer)

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**'The judicial authority, not usually having any evidence to the contrary, necessarily authorises requests by the police authorities.'**  
(Academic)

Some judges also observe that higher courts are reluctant to invalidate any investigative acts taken in search of evidence, but rather try to preserve their validity. Few sanctions are available for illegally gathering evidence and there are limited opportunities to exclude such evidence from the case file, an academic notes. Finally, some defence lawyers express concerns over entrusting prosecutors, rather than judges, with the power to authorise special investigative tools, stating that prosecutors mainly focus on prosecuting rather than on safeguarding the rights of the persons involved.

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**'The exclusion of illegally or improperly obtained evidence is exceptional, because in terrorism cases establishment of the truth is generally given priority. This way, illegally and improperly obtained evidence becomes part of the proceedings and forms the basis of the final decision eventually.'**  
(Defence lawyer)

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**‘Telecommunication surveillance is standard.’**

(Public prosecutor)

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**‘The existing powers and the application of the measures are not proportionate any more. Today, public authorities can keep everything under surveillance.’**

(Defence lawyer)

### **1.1.2. Acquiring and using communication data**

Various sources have flagged concerns regarding the use and conditions of interception of (both traditional and online) communications. In particular, they raise questions about the impact on the rights to private and family life and protection of personal data.<sup>9</sup> The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has also emphasised that legislation in some European countries leads to increased surveillance while reducing judicial oversight.<sup>10</sup>

Respondents across professional groups confirm that interception of communication is widely used – lately focusing on online communication – as the main source of evidence in cases of terrorism, including for the newly criminalised offences.

Professional groups appear to perceive the acquisition of communication data and its conditions differently.

Judges, prosecutors and law enforcement officers underline that, as a rule,<sup>11</sup> courts approve interceptions if there are reasonable grounds to believe that a person is involved in a terrorist crime, but a mere suspicion does not suffice. Respondents from these professional groups across the fieldwork Member States also emphasise that, besides the initial approval of the measure, judicial authorities supervise and review ongoing interceptions as well.

Many academics and defence lawyers contend that judicial control is not effective in practice in cases related to terrorism. Some argue that it is very difficult for courts to rebut the evidence that the police invoke. A prosecutor confirms that only once or twice have courts rejected his interception requests.

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**‘The judges have strong trust in police and therefore, when they come up with information requesting judicial authorisation to apply interception of communication or other investigative measures restricting fundamental rights, they tend to grant it.’**

(Academic)

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**‘I do not think that there is oversight in practice or supervision; I do not think that the judicial authorities direct the law enforcement authorities. The police have the initiative and [take] the lead in carrying them out, and the judicial authorities simply limit themselves to ratifying these actions.’**

(Defence lawyer)

In some Member States, in addition to judicial approval, independent authorities can scrutinise investigative measures, respondents note. The Commission for Security and Integrity Protection in Sweden<sup>12</sup> and the Hellenic Authority for Communication Security and Privacy in Greece,<sup>13</sup> for example, receive notifications of all individual communications surveillance activities and can access all relevant documents and data-processing logs to ensure that the judicial authorisation and mandate is not exceeded and that data security is ensured.

Respondents from different professional groups also draw attention to the possible impact that interception of communications may have on the rights of third persons who are not implicated in terrorism, in particular on their privacy.<sup>14</sup> For example, a defence lawyer notes that it is easy for a person who merely has contact with a suspect to become a target of interceptions, given that surveillance measures are applied ‘extensively and for a long time, with a high scattering effect’. Since suspects usually use secure communication channels, wiretaps need to be used on people around them, so even family members may be targeted, an investigative judge observes.

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**‘When you’re blocked by encryption, you still want to find the truth so you have to consider the surroundings: you are looking for the breadcrumbs that fall from the table and that still sometimes help us find a lead.’**

(Investigative judge)



Among the different tools, the use of electronic surveillance and hacking tools draws particular criticism in debates due to its potential to infringe on fundamental rights. It has even been challenged before courts, which sometimes declared it unconstitutional.<sup>15</sup>

Germany and Sweden are among the countries that have made lawful hacking techniques (referred to as 'covert intrusion into information technology systems' in Germany and 'secret data interception' in Sweden) available for terrorism cases.<sup>16</sup> So have other Member States not covered by the fieldwork, such as Austria, Italy and the Netherlands.<sup>17</sup> Authorities in France and Luxembourg can conduct covert electronic investigation under a pseudonym to acquire communication data and conversations.<sup>18</sup>

Law enforcement officers stress that these tools are useful, although some argue that such tools are technically demanding, which limits their use.



## CASE-LAW

### Challenging the constitutionality of law enforcement hacking tools

In Germany, legislation allowing investigating authorities to use spyware was partially annulled by the Constitutional Court for lacking a mechanism to protect the core area of private life.\* Its subsequent amendment has also faced criticism – including from the Federal Commissioner for Data Protection – and is currently being challenged before the Constitutional Court.\*\*

In Austria, the Constitutional Court also ruled that the law allowing the use of hacking tools ('trojans') was unconstitutional because it violated the right to private life. It held that this tool could affect a large number of people, including those not involved in a crime, and that there was no guarantee of effective ongoing monitoring.\*\*\*

In contrast, the Italian Court of Cassation allowed the use of trojans in investigations.\*\*\*\* Academic publications have criticised this judgment for its impact on the rights to privacy and inviolability of the home and freedom and secrecy of correspondence.\*\*\*\*\*

\* Germany, Federal Constitutional Court (Bundesverfassungsgericht), **1 BvR 966/09**, 20 April 2016.

\*\* Germany, Society for Civil Liberties (Gesellschaft für Freiheitsrechte) (2019), '**GFF lodges constitutional complaint against mass use of "Statestrojans"**', 15 July 2019; Germany, Federal Commissioner for Data Protection and Freedom of Information (Bundesbeauftragte für den Datenschutz und die Informationsfreiheit), Opinion on the draft law amending the Criminal Code, the Juvenile Court Act, the Code of Criminal Procedure and other laws BT-Drs. 18/11272 and the formulation aid with amendment to introduce a source telecommunications surveillance and online searches into the Code of Criminal Procedure, A-Drs. 18(6)334 (**Stellungnahme zum Entwurf eines Gesetzes zur Änderung des Strafgesetzbuchs, des Jugendgerichtsgesetzes, der Strafprozessordnung und weiterer Gesetze BT-Drs. 18/11272 und der Formulierungshilfe mit Änderungsantrag zur Einführung einer Quellen-Telekommunikationsüberwachung und einer Online-Durchsuchung in der Strafprozessordnung, A-Drs. 18(6)334**), 29 May 2017, p. 4.

\*\*\* Austria, Constitutional Court (Verfassungsgerichtshof), **G 72-74/2019-48, G 181-182/2019-18**, 11 December 2019.

\*\*\*\* Italy, Supreme Court of Cassation (Corte Suprema di Cassazione), **Judgment in case No 26889/16**, 28 April 2016.

\*\*\*\*\* For example, Rubechi, M. (2016), 'Security, protection of fundamental rights and privacy: new needs, old issues (one year after the Paris attacks)' (**'Sicurezza, tutela dei diritti fondamentali e privacy: nuove esigenze, vecchie questioni (a un anno dagli attacchi di Parigi)**'), *federalismi.it – Italian, Comparative and European Public Law Journal (federalismi.it – Rivista di Diritto Pubblico Italiano, Comparato, Europeo)*, No 23/2016, 30 November 2016.

Another common concern that respondents express relates to surveillance of communications by law enforcement or intelligence agencies outside the criminal law context on security grounds.<sup>19</sup> The reason is that such material can be used as evidence in criminal proceedings or otherwise feed into them (see Section 1.2.3 for more details on the issue), although it is acquired under less strict conditions.

There is limited external oversight of the data-processing powers of such agencies. That has given rise to criticism by data protection authorities of some Member States that the fieldwork covered, such as France and Hungary.<sup>20</sup> In Greece, the national data protection authority criticised its recent exclusion from exercising control and supervision over personal data processing by intelligence and law enforcement authorities for 'national security' purposes, and subsequently developed a narrow reading of this exception.<sup>21</sup>

Interception and surveillance of communications for counter-terrorism purposes outside the context of criminal proceedings take place without prior judicial authorisation or with limited judicial scrutiny, some judges,

prosecutors and law enforcement officers note. The situation appears to be similar in some Member States that the fieldwork did not cover, such as Portugal and Italy, where such cases do not require authorisation by a court.<sup>22</sup> In Greece, counter-terrorism law enforcement and intelligence agencies may acquire communication data and carry out interceptions on national security grounds, provided that a prosecutor approves their reasoned request and issues a decree.<sup>23</sup> In Hungary too, the national security services do not need a suspicion of crime or judicial approval to conduct surveillance of communications, provided that the Minister of Justice authorises it.<sup>24</sup>

Vague indications of terrorist activities and of connections with terrorist organisations, or even the suspect's personal beliefs, may suffice to trigger communication surveillance, some academics and defence lawyers argue. This raises questions of compatibility with the prohibition of discrimination, the presumption of innocence and the principle of legality. The threshold of suspicion is lower for authorising interceptions outside the criminal context, a law enforcement officer confirms. A prosecutor explains that it is unrealistic to expect that such requests will be declined once the requesting authority determines that a threat to security exists.

## 1.2. EVIDENTIARY ISSUES AND CONCERNS

The directive does not impose any rules concerning evidence. Moreover, Article 6 of the ECHR, which corresponds to Articles 47 and 48 of the Charter, does not lay down rules on the admissibility of evidence as such, since this is a matter of national law.

According to ECtHR jurisprudence, the admission of evidence obtained in violation of other fundamental rights does not necessarily conflict with the right to a fair trial, unless the proceedings as a whole are not considered fair. The nature of the violation and the probative value of the evidence in question are factors that influence this consideration.<sup>25</sup> However, admitting statements resulting from torture or from other ill-treatment violates the right to a fair trial, irrespective of their probative value.<sup>26</sup>

Evidential issues concerning terrorism and related offences inherently derive from the nature and legal descriptions of these offences, interview findings suggest. That includes the definitions of the crimes of public provocation, receiving terrorist training and travelling for the purpose of terrorism.

Regular rules of evidence apply to cases related to terrorism, the findings confirm. Courts freely assess all types of evidence adduced under the principle of freedom of proof<sup>27</sup> and generally presume evidence from non-EU countries to be obtained legally. That approach may not facilitate identifying evidence that is a product of torture.

Collecting and objectively assessing evidence are the main challenges, the findings show. Many respondents are concerned that the broad and preparatory nature of most terrorist and related offences, combined with the freedom of proof, often leads to a subjective assessment of available evidence. As a result, applying counter-terrorism measures may have a discriminatory impact on specific groups (Article 21 Charter and Article 14 ECHR). Issues arise concerning the presumption of innocence and defence rights (Article 48 Charter and Article 6 ECHR)<sup>28</sup> and the principle of legality and proportionality of criminal offences and penalties (Article 49 Charter).

### 1.2.1. Proving preparatory offences and intent

Collecting evidence to establish terrorist and related crimes – especially to establish the required intent – is a key challenge, interviewed professionals across countries agree. This is particularly true when people are suspected or accused of travelling or receiving training for terrorist purposes or public provocation of terrorism, many argue. While Chapters 2, 3 and 4 deal with

particular issues regarding the definition of individual offences and the proof of intent, this section analyses cross-cutting issues.

Many respondents underline that difficulties in proving the offences arise from the broad substantive criminal provisions and the preparatory nature of said offences, which encompass ordinary activities such as travel or visiting websites. Some of them relate this vagueness of the preparatory offences to the definitions of terrorism, terrorist offences or terrorist organisations in the directive and previous EU legislation as well as national law, since the formulation of preparatory offences is based on these concepts.



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**‘Difficulties do not arise from rules [on evidence], but rather from the broadness of the substantive criminal provisions.’**

(Judge)

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**‘The main problem is the description of the offences ... This loose and unclear description of the criminal behaviour also creates procedural issues ... So we have a procedural reflection of the problem that exists in the substantive law.’**

(Academic)

#### AVAILABLE GUIDANCE

#### Supporting interpretation and implementation in line with international and EU human rights law and standards

In *Counter-terrorism and human rights in the courts: Guidance for judges, prosecutors and lawyers on application of EU Directive 2017/541 on combatting terrorism*, the International Commission of Jurists provides the judiciary and other legal practitioners with a tool to interpret the provisions of the directive consistently with EU and international human rights law. It summarises the legal standards and jurisprudence relevant to each of the offences under the directive, including public provocation to commit a terrorist offence, travelling for the purpose of terrorism and receiving training for terrorism, as well as to the rights of suspects in criminal proceedings.\*

\* *International Commission of Jurists (2020), Counter-terrorism and human rights in the courts: Guidance for judges, prosecutors and lawyers on application of EU Directive 2017/541 on combatting terrorism, International Commission of Jurists, Geneva.*

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**‘What we are facing is the large diversity of behaviours that are sanctioned by the same legal provisions.’**

(Judge)

Offences such as terrorist travel ‘lack distinct, objective elements’ and duplicate other offences, according to an academic. A number of respondents in Belgium and France draw attention to the use of broad substantive provisions of ‘participation in a terrorist organisation’ and ‘terrorist criminal conspiracy’, respectively, to cover a wide range of activities. This vagueness permits ‘far-reaching criminal repression’, in the opinion of a judge.

At the same time, the focus on preparatory activities leads to a preventive approach to potential future terrorist acts, whereby the amount of evidence required to start an investigation, arrest a person or charge them with terrorist and related offences is lower than for other crimes, some defence lawyers and NGO experts argue. Some law enforcement officers and prosecutors share concerns about proving preparatory offences. What might at that stage appear to the authorities a possible preparatory act may in fact not be related to terrorism at all, but the potential risk can play an important role in prompting a response, they say.

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**'At the first stage of the proceedings, you only need an indication that a terrorist offence is occurring – the threshold is low and you do not need a lot to put someone in detention and start an inquiry.'**

(NGO expert)

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**'It is fear or something that motivates you to really go to all lengths to make sure that we don't miss anything and we are sure that there is nothing going on before we stop an investigation.'**

(Law enforcement officer)

As the offences lack distinctively illegal objective elements, intent becomes the determining factor distinguishing between a lawful activity and a crime.

A prosecutor observes that the authorities 'punish what people think rather than what they do'. This confirms the need for a restrictive interpretation of the crimes, this respondent says. Some also point out with concern that the required intent is abstract, as the offences do not require an affiliation with a terrorist organisation or a wish to contribute to its purposes.

Given its central role, establishing intent is crucial to the principle of legality, to ensure that the offence is applied in a foreseeable manner. Respondents provide different perspectives on this.

Proof of intent must be based on objective findings, prosecutors and law enforcement officers in particular stress. According to these respondents, evidence establishing intent typically includes digital files, records of communication and statements manifesting the intent of the suspect.

Determining intent without statements by the person is complicated and remains necessarily subjective, some law enforcement officers explain. One of them expresses a concern that trying to build a case on purely subjective elements would amount to 'trying one's beliefs'.

Other respondents, mostly defence lawyers and academics, argue that the authorities do not properly analyse the intent of a person in practice; they only make assumptions and evaluate the facts subjectively.

Respondents across professions and Member States appear to agree that there are no specific criteria or guidance to establish terrorist intent, and there is no consistent case-law yet. This increases the probability of individuals being accused of one of the new offences that the directive introduced, according to an academic.

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**'The establishment of intent, since intent is not a fact but an internal disposition of every human being ..., is a very difficult task, and the law as it stands does not provide sufficient guarantees that there will be no flawed use or misuse of its provisions ... When the whole weight of a crime falls on a subjective element, then we have a problem.'**

(Academic)

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**'In practice, there is a tendency in terrorist cases to pay little attention to the characterisation of the intentional element of the offences, particularly with regard to preparatory acts.'**

(Judge)

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**'[A]n offence where the legal requirements and the criteria of intent is almost non-existent – this is a big issue in terms of fundamental freedoms.'**

(Defence lawyer)

Furthermore, respondents from different professional groups offer diverging views on the attention paid to intent throughout the different stages of a case.

Some defence lawyers argue that intent is poorly assessed at the pre-trial stage in comparison with the main trial. Another respondent argues that prosecutors adopt a broad concept of intent, testing its boundaries. One prosecutor nevertheless confirms that courts work with stricter criteria than those applied at previous stages, and, although prosecutors are often sure that they will prove intent, they sometimes face more difficulties at trial than expected. Some defence lawyers are of the view that even courts deduce intent from mere indications.

Prosecutors and law enforcement experts, on the other hand, state that terrorist intent is assessed from the first stages of investigation, and the required degree of proof increases as proceedings progress.

Finally, some law enforcement officers and prosecutors note that proving intent, objectively and concretely, often requires waiting until a person 'externalises' their intention in some way before starting a criminal investigation. Even an unambiguous declaration of intent to commit a terrorist or a related offence does not amount to a crime, unless the statement already constitutes glorification of terrorism, some law enforcement officers emphasise. They add that a desire to engage in terrorist acts is not in itself punishable. One raises concerns that criminalising activities such as travelling disregards the possibility that a person may later change plans and refrain from becoming involved with terrorism.<sup>29</sup> Yet it can be argued that even such manifestations of intent on their own would, at least, allow investigations to start, another law enforcement officer notes.

#### *A person's background and beliefs as an element of intent?*

The fieldwork reveals growing concerns among many respondents, including some judges and prosecutors, that a person's background and beliefs may influence the assessment of intent, which is essential for proving preparatory offences. This influence may amount to discrimination (see Sections 2.2.2, 3.2.2 and 4.2.2 in relation to each of the specific offences). Personal convictions and beliefs may be substituted for real evidence exactly because intention is difficult to prove, some academics explain.

Law enforcement officers, prosecutors and judges generally reject the idea that a person's background would be decisive in establishing intent. They acknowledge that it is considered as part of the 'bigger picture', i.e. together with other information and evidence. While a history of terrorist activities or radicalisation is considered particularly relevant, some respondents remark that a defendant's adherence to an ideology more generally can also prove intent. A judge and a prosecutor in one Member State suggest that a suspect's relationships or beliefs play a role in establishing intent only when these constitute a manifestation of intent. A respondent in Spain refers to a Supreme Court ruling that radical ideas do not constitute a crime, even if the ideas are against democracy.<sup>30</sup>

A person's background and beliefs may nevertheless cause bias, findings indicate. Adherence to a particular ideology is also considered a way to prove intent, some respondents note. Radicalisation is not an offence but can be used as evidence to establish an offence, a prosecutor explains.

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**'[F]acts that would otherwise be regarded as unlikely to be incriminating in another context will be so by reason of the religious practice, the neighbour or the clothing of an individual.'**

(Academic)

Some respondents, including some judges, believe that a suspect's Muslim background does play a role at least in the police's initial suspicions. Some defence lawyers interviewed, but also law enforcement officers, suggest that a Muslim or Arab background may be a basis for profiling, and may be considered an element establishing terrorist intent.

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**'They mostly focus on Muslims or Arab-speakers, but discreetly ... If a police officer sees a Muslim or Arab-speaker, he will be more suspicious.'**

(Defence lawyer)

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**'Muslims (mostly young people) feel that they are always potential suspects, not only in relation to the police, but also to other authorities.'**

(Academic)

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**'The Muslim population is the most affected population group. Or even persons of Arab origin who are supposed to be Muslim due to their name or appearance, they were targeted.'**

(Oversight expert)

A prosecutor and a law enforcement officer underline the danger of assuming intent based on one's own perceptions and beliefs, which may differ from those of persons with a Muslim background. Particular caution is needed in such cases, to avoid judging beliefs and criminalising religion, some judges therefore remark. Finally, some NGO experts and academics underline that while prejudice against certain groups of people probably plays a role, equality data and concrete studies are needed to confirm this assumption.<sup>31</sup>



AVAILABLE  
GUIDANCE

Researching  
the impact  
of counter-  
terrorism  
measures on  
discrimination  
in Europe

To encourage and support human rights research on discrimination in counter-terrorism, Amnesty International and the Open Society Foundations issued *A human rights guide for researching racial and religious discrimination in counter-terrorism in Europe*.<sup>\*</sup> The guide provides a tool for researchers, legal practitioners and oversight bodies to better understand the legal context, collect evidence and prove cases of discrimination. It can also serve as a useful reference tool when assessing if counter-terrorism legislation, policies and measures comply with the prohibition of discrimination.

In anticipation of the assessment of the directive's impact on fundamental rights and freedoms, including on non-discrimination, the European Network Against Racism issued a report entitled *Suspicion, discrimination and surveillance* in 2021. It documents experiences that members of groups at a risk of discrimination and racism have had of counter-terrorism and counter-radicalisation measures.<sup>\*\*</sup> Based on interviews with experts and members of affected groups in Germany, Spain, France, Hungary and Poland, the report examines the impact that counter-terrorism measures and the broader policy discourse have had on Muslims and draws links to the directive and its focus on 'pre-emptive' offences.

<sup>\*</sup> *Amnesty International and the Open Society Foundations (2021), A human rights guide for researching racial and religious discrimination in counter-terrorism in Europe.*

<sup>\*\*</sup> *European Network Against Racism (2021), Suspicion, discrimination and surveillance: The impact of counter-terrorism law and policy on racialised groups at risk of racism in Europe.*

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**'Highly political expert assessments are used as a basis. These assessments are politically formed, or Eurocentric and value-based.'**

(Defence lawyer)

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**'The confession of a person obtained in a third country is a very difficult issue. Jurisprudence of the ECtHR contains some cases where it is demonstrated that evidence has been delivered by torture and some countries still apparently do so, so it is a problem. There are also few tools to verify that.'**

(Investigative judge)

### 1.2.2. Evidence from non-EU countries

Respondents across professional groups and in all Member States express concerns about obtaining evidence from non-EU countries and assessing its reliability, given that evidence for terrorist cases comes increasingly from outside the EU. This assessment depends on the judge's and the prosecutor's knowledge of the situation in the country involved, which, some argue, could be insufficient. This may lead to a wrong assessment of evidence and even prejudice against religious or ethnic groups, some defence lawyers warn, given also that experts' opinions and testimonies used in proceedings can reflect a lack of understanding of the situation in non-EU countries.

Evidence from non-EU countries – especially confessions – could be a product of torture or may intentionally incriminate someone, respondents also emphasise.<sup>32</sup> Some law enforcement officers and prosecutors act on the presumption that information from non-EU countries is lawfully obtained when they receive it through official channels, especially if the Member State closely cooperates with that country. When there is no indication that a testimony was obtained through torture, authorities presume it was lawfully collected, an academic argues. Other respondents, including judges and prosecutors, add that it is not possible in practice to know exactly how another country obtained evidence, and there are very few ways to verify that it was not through torture or other inhumane treatment.

The overall findings indicate that no Member State has a mechanism in place to assess if evidence from non-EU countries was obtained under torture or other inhuman treatment. Courts do not initiate this assessment *ex officio*, respondents confirm. Only one judge argues that the risk that evidence was acquired through torture is systematically examined.

Many respondents state that the defence should request this assessment during trial, yet this leads to a number of concerns. If examining whether or not evidence was obtained through torture in a non-EU country is a challenge for authorities, it is even more difficult for the defence to demonstrate this, some defence lawyers explain. Moreover, if the defendant is tried *in absentia*

and not represented, courts are even less likely to make this assessment, many respondents confirm, including prosecutors and judges.

Pleas concerning exclusion of evidence are anyway 'generally rejected in court, as establishing the truth always has priority' in terrorist cases, a defence lawyer observes; authorities rely overly on assurances by the authorities of the other country and do not properly assess any allegations of torture in respect of confessions obtained in countries outside the EU. Several respondents explain that, even when it is established that evidence has been obtained illegally, it is still accepted in the proceedings under the principle of free assessment of evidence, except for the most serious violations.

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**'On the court's own initiative, I do not think that such a review takes place [i.e. of whether torture was used to obtain evidence abroad], but it is carried out inevitably only if the defence raises a plea.'**

(Judge)

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**'As to a risk of some evidence having been obtained in a third country in violation of human rights, it would be up to the defence lawyer to raise this. There is no mechanism ... requiring a judge to check it.'**

(Defence lawyer)

In Belgium, some respondents note that investigative judges can attend interrogations in a non-EU country, subject to the agreement of its authorities. This can help ensure that such testimonies are obtained lawfully.

Some respondents therefore call for additional safeguards in relation to evidence originating from non-EU countries. Videoconferences should be the preferred way of obtaining testimonies from persons in such countries, an academic suggests. Confessions should be excluded from evidence when a lawyer or an independent organisation is not present during examinations of defendants in non-EU countries, a defence lawyer proposes.

In a number of Member States, including Belgium, Germany, Greece and France, many practitioners also mention the challenges arising when information collected by the military or evidence from the battlefield (e.g. a fingerprint found on a gun) is used to investigate terrorist offences. This can be particularly relevant to offences that the directive introduced into EU law, such as travelling or receiving training for terrorism, and can have an impact on the presumption of innocence and the right to defence.

Many law enforcement officers, prosecutors and judges interviewed underline the difficulty of collecting evidence in non-EU countries, especially from areas such as the Iraqi-Syrian conflict zone, tracing where the material comes from and verifying if it was legally obtained.

Law enforcement officers and prosecutors in different Member States have diverse views on whether such battlefield material is useable as evidence in criminal proceedings. Some report that, like intelligence information (see Section 1.2.3), battlefield information may be used as an indication, which, however, needs to be verified by proper evidence. Others argue that such information can be used in criminal proceedings if its probative value can be somehow established.

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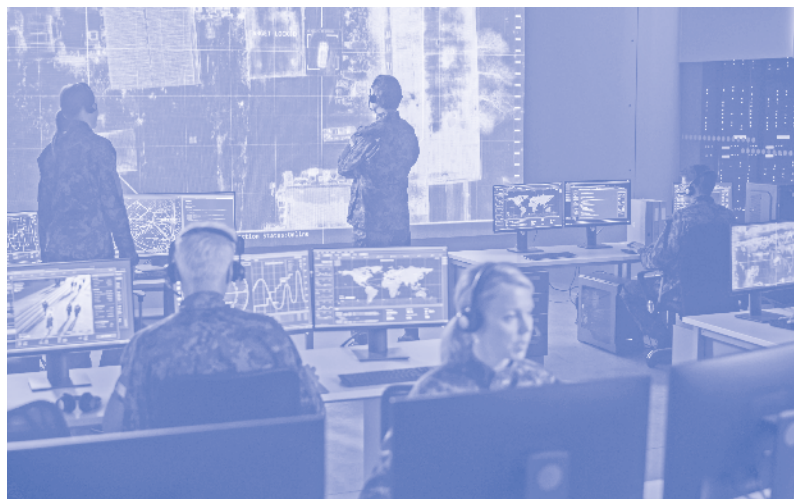
**'The problem that concerns us regards the evidence that comes from the battlefield. Can it be used? What probative value does it have? How was it obtained by authorities that are not investigative but military? The legality of obtaining such information is very difficult to establish in these cases. On a battlefield, where bullets and bombs fall left and right, it is difficult to control how evidence is secured. For example, if an explosive device is found, how do you know who discovered it, who took it, when, in order to further evaluate and use it?'**

(Law enforcement officer)



### 1.2.3. Intelligence information

Another common concern emerging from the research relates to the powers of law enforcement or intelligence agencies operating on terrorism outside the criminal law context, on security grounds.<sup>33</sup> These concerns are amplified by a perceived lack of overall accountability or supervision of specialised law enforcement authorities and intelligence services discussed in many countries.<sup>34</sup> For example, intensive parliamentary and public debates on the issue have taken place in some Member States that the fieldwork did not cover, including Bulgaria, the Netherlands and Portugal.<sup>35</sup>



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**‘[It is] no longer, or rarely, possible to conduct investigations without intelligence information.’**

(Public prosecutor)

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**‘With regard to evidence, it gets really bad when intelligence services get involved.’**

(Judge)

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**‘There are cases where foreign authorities are involved and communicate information that is not included in the case file and affects the outcome of a case.’**

(Defence lawyer)

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**‘It is a vicious circle: surveillance leads us to initial suspicion; initial suspicion to a judicial warrant; judicial warrant to find the evidence that you already know exists because of surveillance.’**

(Academic)

Terrorism is generally considered a threat both to national security and to law and order. Intelligence and security services often have a mandate to deal with counter-terrorism, as past FRA reports have described.<sup>36</sup> Moreover, some Member States grant intelligence-like means to specialised law enforcement units dealing with terrorism, such as collecting information through communications surveillance outside criminal proceedings, past research findings suggest.<sup>37</sup>

For this reason, intelligence information feeds into criminal proceedings on terrorist and related offences, either to trigger investigations or even as evidence in trial proceedings, the interviews suggest. Verifying and challenging such information, especially when it concerns acts committed abroad, and questions about under what conditions and to what extent to use it are all issues that have an impact both on the efficacy of investigations and on defence rights, according to respondents across professional categories and Member States.

Intelligence information is usually used to raise suspicions and trigger investigations, without being included in the criminal file as evidence, a number of prosecutors, law enforcement officers and judges report. Professionals from Germany, Spain and Sweden also refer to using intelligence information as supporting material to trigger the approval of interceptions or other intrusive acts. In Belgium, investigative judges can consult this information but cannot include it in the file and formally use it to authorise investigative measures, according to respondents.

Moreover, court proceedings also often use intelligence information, defence lawyers from Germany, Greece and Spain report. Such information can be used under the freedom of proof, some judges in other countries explain, but it needs to be legally acquired, inserted in the case file and declassified, if necessary. One respondent nevertheless explains the circular way in which intelligence is used to find evidence that would support it.

In some Member States, police or intelligence officers can also introduce information collected outside criminal proceedings when they testify and present intelligence findings at court as expert witnesses, backing up the prosecution's construction of the case. Respondents from different Member States express their concern about that. A respondent in Spain remarks that this happens even though courts have insisted that such testimonies or expert opinions be treated as indications and not as evidence. Intelligence information is presented to courts as written expert reports, usually depicting the defendant as a terrorist, other respondents say.

In another Member State, some judges note that courts cannot properly assess such testimonies, as these experts do not reveal the sources of their information. This corresponds with the concern of judges in other Member States that intelligence services only selectively share information with courts. It is difficult for the defence to challenge such testimonies, understand how the information is acquired and find independent experts to rebut those testifying for the police, as most experts work for the law enforcement authorities, defence lawyers in Belgium, Spain and Sweden note. This has an impact on the right to defence.

Given the role that intelligence information can play, formally or informally, in criminal proceedings in counter-terrorism cases, various respondents express concerns that it tends to be gathered under less strict conditions than regular evidence and that most countries have no additional safeguards for using it in criminal proceedings. Some therefore argue in favour of reviewing the applicable legislation, to prevent intelligence information acquired by specialised agencies circumventing procedural guarantees applicable to criminal proceedings.

### 1.3. THE RIGHTS TO ACCESS A LAWYER AND THE MATERIALS OF A CASE

Article 23 of the directive emphasises respect for fundamental rights. Recital 36 states that the procedural rights of suspects or accused persons in criminal proceedings founded in EU legislation should be respected. In particular, case-law and secondary EU legislation on the right to a fair trial require, as a rule, that defendants have access to a lawyer promptly from the moment that charges are brought against them and when put in police custody.<sup>38</sup> They also require that defendants have access to the materials in possession of the authorities that are essential to challenge the arrest or detention, as well as to the whole case file, at least before the trial, to be able to comment on it through their lawyer in oral submissions.<sup>39</sup>

At the same time, EU directives on procedural rights provide for certain proportionate derogations at the pre-trial stage on the rights to access a lawyer and the materials of the criminal file. These may be, for example, to avert serious adverse consequences for life, liberty or physical integrity, and are subject to judicial authorisation or review.<sup>40</sup>

Overall, respondents do not report major challenges, and findings do not suggest major restrictions of defence rights. Rather, legislation in some Member States includes specific restrictions that may have an impact on, in particular, the right to an effective remedy and to a fair trial (Article 47 Charter and Article 6 ECHR), the presumption of innocence and the right of defence (Article 48 Charter and Article 6 ECHR), and the right to respect for private and family life (Article 7 Charter and Article 8 ECHR).

Restrictions to access to a lawyer are provided for in the legislation of some Member States for detained defendants in terrorism cases. Some of these

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**'[I]n the last years there have been testimonies of police officers presenting intelligence findings as evidence, which is accepted as an expert testimony. The problem is that there is often no information on where the information comes from and how it has been gathered. There are many things that are just "done".'**

(Academic)

are not limited to terrorism but can be applied in certain other serious crime cases as well. For example, investigative judges in Belgium can order such restrictions to avoid endangering the investigation or third parties.<sup>41</sup>

In some Member States, legislation allows for derogations that have roots in those countries' historical experiences of terrorism. For example, German legislation contains the special institution of a 'reading judge', who is otherwise not involved in the proceedings but monitors the written communication of lawyers with their clients accused of terrorism. Some respondents criticise its impact on defence rights and the right to privacy.<sup>42</sup>

In Spain, 'incommunicado detention' allows the authorities to limit access to a lawyer for up to 10 days. It has been subject to severe criticism but remains available to the authorities.<sup>43</sup> However, respondents from different professions indicate that nowadays it is used seldom and for shorter periods of time.

Respondents in some Member States also comment on the possibility of restricting access to the file. In Spain, for example, some respondents report that legislation provides for the possibility to withhold the case file from the defence until 10 days before the end of the investigation.<sup>44</sup> While respondents offer different views on how frequent or extensive such withholding of evidence is in practice, some report that it often happens without clear grounds, may last even for a year and hampers effective challenges to the lawfulness of pre-trial detention.

#### 1.4. DEPRIVATION OF LIBERTY

Recital 35 of the directive states that its implementation must comply with the right to liberty and security enshrined in Article 6 of the Charter, which corresponds to Article 5(1)(c) of the ECHR.<sup>45</sup> The latter allows, *inter alia*, detention of a person arrested on reasonable suspicion of having committed a crime, to bring the person before a judge or to prevent the person from committing a crime or fleeing. A 'reasonable' suspicion requires that sufficient evidence exist that the objective elements of the crime in question occurred.<sup>46</sup>

The ECHR does not allow preventive detention of individuals who are considered dangerous or have a tendency to commit crimes. Rather, it permits detention of an individual to prevent them from committing a specific offence, when authorities convincingly justify this.<sup>47</sup> Pre-trial detention must be necessary and proportionate, and subject to other safeguards, such as informing defendants of the charges and the grounds of their detention, and effective and speedy judicial review. Its duration should be reasonable.<sup>48</sup>

Considering the above, the ECtHR ruled that it is a violation of Article 5 of the ECHR to subject a defendant to pre-trial detention without establishing a clear link between their actions and the terrorist offences with which they were charged.<sup>49</sup>

In addition, Article 15 of the directive prescribes the minimum custodial sentences that Member States' laws should provide for. According to Article 49 of the Charter, the severity of penalties must be proportionate to the criminal offence. The ECtHR considers the level of the sentence imposed for terrorist offences as a factor when examining alleged breaches of fundamental rights.<sup>50</sup> Moreover, both the ECtHR and the CJEU stress the importance of securing detention conditions that are humane and conform to fundamental rights standards.<sup>51</sup>

Interviewed professionals confirm that pre-trial detention (both initial arrest and detention on remand) is frequently imposed in cases of acts preparatory

to terrorism, as a preventive measure based on abstract security concerns.<sup>52</sup> Moreover, in some countries the detention can last longer and the regime can be more severe. This issue most directly affects the right to liberty and security of person (Article 6 Charter and Article 5 ECHR) and the principles of legality and proportionality of criminal offences and penalties (Article 49 Charter and Article 7 ECHR) but can affect other rights as well, such as to human dignity (Article 1 Charter) and to respect for private and family life (Article 7 Charter and Article 8 ECHR).

In some countries, the police can keep suspects under arrest longer in terrorist cases than for regular crimes prior to bringing them before a judge or prosecutor, research and interview findings show. This includes 48 hours in Belgium; 144 hours in France; and 72 hours, which can be extended to an additional 10 days, in Spain. Among countries that the fieldwork did not cover, Luxembourg also allows 48 hours.<sup>53</sup>

This approach is even more common when it comes to detention on remand. Belgium relaxed the requirements for detaining people accused of terrorism on remand, compared with other crimes.<sup>54</sup> This can lead in principle to indefinite extension of pre-trial detention for terrorism every 3 months, according to one respondent. It is also possible to prolong detention in Germany and Spain.<sup>55</sup> Pre-trial detention for terrorist crimes can last 5 years and courts can still consider it proportionate, a respondent in Germany observes.

In France, pre-trial detention can last 4 years for terrorism and some other particularly serious offences, compared with 3 years for other crimes.<sup>56</sup> The accused in one case spent 3.5 years in pre-trial detention before being acquitted and was subsequently subject to house arrest, an interviewee reports.

Respondents in some countries also refer to the possibility of placing suspects in special wings or facilities or in solitary confinement. In Belgium, such placement must be based on an individualised assessment of the risk that the person poses, respondents state.<sup>57</sup> In Germany, some respondents indicate that detainees in terrorism cases are as a rule held in isolation and under stricter conditions than people suspected of other crimes. Besides the right to liberty in itself, extended detention under such conditions can also interfere with a wide array of other rights, including the right to privacy and family life and the right to human dignity.

Many respondents, especially from Belgium, Greece and Spain, also claim that authorities detain on remand persons accused of terrorist or related offences more easily than those accused of other offences, or even automatically. Some judges confirm this, and one even reports that pre-trial detention is ordered almost systematically as a precautionary measure. Another explains this by the gravity of the crime and the risk that the accused will abscond.

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**'The problem with pre-trial detention is that it is a practice not provided for by the law, [but] it is ordered almost systematically whenever a terrorist offence is involved.'**  
(Judge)

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**'There are few terrorism trials that are not custodial matters ... for that the crimes are too important.'**  
(Judge)

Academics and defence lawyers appear particularly critical of the use of pre-trial detention. Some argue that the authorities use it as an early punishment and often impose it in terrorism cases under public pressure. Others claim that the principle of free assessment of evidence allows judges to arbitrarily disregard the facts of the case or the circumstances of the defendants accused of terrorism and decide in favour of detention.

Rather than being based on already existing evidence, detention is used to facilitate the search for evidence, another defence lawyer suggests. As a result, people are detained based on a low evidential threshold and are stigmatised as terrorists, some respondents from these groups note. Some other professionals, on the contrary, argue that pre-trial detention is a reasonable outcome of the danger that potential acts of terrorism pose.

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**‘The principle of free assessment of evidence in the field of pre-trial detention operates against the accused and leads to a subjective evaluation of the evidence and to the imposition of pre-trial detention, in view of the gravity of the accusations’**

(Defence lawyer)

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**‘[T]he presumption of innocence in such offences is only a wish, rather than an institutional reality ... In the reasoning, the judge refers to the more specific elements of the act which are in fact the issues to be investigated. Thus, the imposition of pre-trial detention ends up being an instinctive choice ... subject to various extra-institutional factors, such as sometimes the publicity, the predispositions of the judge and the supposed increased criminal importance of the acts being investigated.’**

(Academic)

## IN BRIEF

### Sentencing and prison conditions

The fieldwork did not specifically explore issues of sentencing and detention conditions in prisons, but some respondents flagged them up during the interviews. Some highlighted the risk of passing disproportionate sentences because of significant overlaps between different offences and because defendants in some Member States can be charged with multiple offences, such as several overlapping preparatory offences or participation in a terrorist group in combination with other crimes.\*

Other concerns related to the use of special detention facilities or wings for terrorism offenders, for example in Belgium or Spain, and to certain security measures that can be imposed on persons upon their release from prison, for example in France.\*\* This last concern relates closely to the question of use of administrative measures in the counter-terrorism context, discussed in detail in Chapter 5.

\* *In Luxembourg – a Member State not covered by the fieldwork – the Supreme Court expressed doubts about this with regard to the need to introduce new crimes in 2015. It considered that a person who, for example, is participating in terrorist training also commits the crime of participating in a terrorist group. See Luxembourg, Supreme Court (Cour supérieure de justice), Opinion on draft law implementing certain provisions of Resolution 2178 (2014) of the United Nations Security Council and amending the Penal Code and the Code of Criminal Investigation (Avis de la Cour Supérieure de justice sur le projet de loi portant mise en œuvre de certaines dispositions de la Résolution 2178 (2014) du Conseil de sécurité des Nations Unies et portant modification du Code pénal et du Code d’instruction criminelle), 19 February 2015.*

\*\* *For example, a magistrates’ trade union strongly criticised a draft bill that would allow the imposition of an additional series of security measures on such persons without assessing the existing set of measures. See France, Syndicat de la magistrature (2020), ‘Observations on the proposed law establishing security measures against perpetrators of terrorist offences at the end of their sentence’ (‘Observations du Syndicat de la magistrature relatives à la proposition de loi instaurant des mesures de sûreté à l’encontre des auteurs d’infractions terroristes l’issue de leur peine’), Paris, 26 June 2020.*

## 1.5. CHILDREN IN TERRORISM PROCEEDINGS

No provisions in the directive specifically address children suspected or accused of terrorism. Recital 35, which highlights certain Charter rights to pay particular attention to, does not refer to children. However, the general references to fundamental rights and procedural rights of suspects and accused persons, in its Article 23 and recitals 35 and 36, should be taken to also include the rights of children guaranteed by Article 24 of the Charter and their procedural rights under the directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings (procedural safeguards directive).<sup>58</sup>

The latter ensures children the right to a fair trial and aims to prevent children from reoffending and foster their social integration (recital 1). It also recognises that particular attention should be paid to children involved in criminal proceedings to preserve their potential for development and reintegration into society (recital 9).

Hence, on the one hand, the procedural safeguards directive provides for enhanced procedural guarantees for children who are suspects or accused, for example the right to be accompanied by the holder of parental responsibility during the proceedings (Article 15), and additional safeguards to ensure children are assisted by a lawyer (Article 6). On the other hand, it makes sure that the specific needs of children who are suspected or accused, concerning their protection, social integration, and general mental and physical condition, are duly considered. To this end, it requires authorities to carry out an individual assessment and a medical examination of such children (Articles 7 and 8).

Respondents in a number of Member States share concerns over the situation of children in conflict zones (see Section 3.2.3).<sup>59</sup> Actual experiences with children suspected or accused in terrorism cases vary among Member States. In some countries, such as Belgium and France, cases involving child defendants (mainly for glorification of terrorism or travelling) are relatively frequent, respondents note. In most others, cases are rare at present, although the UN Human Rights Committee notes that some Member States that were not covered by the fieldwork lack sufficient protection against prosecution of teenage children forcibly recruited to terrorist groups.<sup>60</sup>

In most Member States that the fieldwork covered, there do not appear to be derogations with regard to the rights of children accused of terrorism in comparison with the rules applicable to children charged with regular crimes. Some respondents in France note that children aged 13–18 involved in terrorism cases may be subject to extended police or pre-trial detention.<sup>61</sup> In Hungary, some respondents note as problematic the reduction of the minimum age of criminal liability for terrorism and related offences to 12 years.<sup>62</sup>



Across countries, practitioners rather refer to the existence of additional safeguards for children accused or suspected of terrorist and other offences. In some Member States, professionals with child expertise automatically support courts in terrorism cases involving children, to safeguard the best interests of the child.

In Spain, all such proceedings involve a team of specialists including a psychologist, a social worker and an educator from the outset, say practitioners. The team advises the judge on issues such as the degree of the child's accountability for their own actions, establishing terrorist intent and possible detention. This assists in assessing the role of personal circumstances and degree of maturity, which are important elements when establishing the intent to travel, as well as other offences. In Hungary too, trials of juveniles involve teachers, psychologists, social workers or other professionals with knowledge of the special needs of children and experience in the field of child protection as assessors (lay judges), to support the court with their expertise.<sup>63</sup>

Other safeguards in individual Member States include, for example, stricter requirements for imposing pre-trial detention; monitoring and examination by social services; being questioned in the presence of the parents; individual and background assessments; closed hearings; specially trained judges; special detention centres; educative and resocialisation measures; and shorter sentences. Their application varies considerably between countries, as does the allocation of jurisdiction for these cases within the judicial system. In some countries, juvenile courts are responsible for dealing with such cases. In Spain, they fall within the powers of a juvenile judge within a specialised court that deals with terrorism.

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**'They are easily influenced compared with adults, and manipulated, and must be treated as victims.'**

(Defence lawyer)

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**'A minor has not yet formed his or her personality, nor reached social maturity, so that we could speak with certainty about terrorist intent.'**

(Investigative judge)

The overall approach to children involved in terrorist or related offences, and to establishing their intent and actual role and degree of involvement, is a concern that respondents share across different groups. Some professionals argue that children cannot formulate a genuine terrorist intent because they are not mature enough to comprehend what terrorism truly entails, and that they are often manipulated into performing terrorist and related offences to earn a living or gain social inclusion. A defence lawyer recalls a terrorist case in which the prosecuted youth was acting in a manner so dependent on an adult defendant that the lawyer questioned the presence of independent intent. Many professionals therefore maintain that children should be seen as victims of the situation rather than perpetrators.

Respondents also mention a variety of other challenges and lessons learned that are relevant to fundamental rights. For example, they highlight the benefits of additional special training for judges to deal with children recruited by jihadists, and the development of new care systems and alternative sanctions to address issues of ideological recruitment and radicalisation in France.

On the other hand, views diverge on deradicalisation programmes and groups. For example, a defence lawyer advocates enhanced efforts on stability, schooling and training instead, following an individual approach.

One judge also raises the issue of depriving parents of responsibility if they appear to have a sustained role in radicalising a child defendant. In the interviewee's view, this calls for legal amendments, as in many cases the parents assist the radicalisation process. This, however, also raises complex questions related to the rights of the child as well as the right to private and family life.

# Endnotes

- 1 Directive **2012/13/EU** of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142, 1 June 2012; Directive **2010/64/EU** of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280, 26 October 2010; Directive **2013/48/EU** of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294, 6 November 2013; Directive (EU) **2016/343** of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ 2016 L 65, 11 March 2016; Directive (EU) **2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings OJ 2016 L 132, 21 May 2016; Directive (EU) **2016/1919** of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ 2016 L 297, 4 November 2016.
- 2 Directive (EU) **2016/680** of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, OJ 2016 L 119, 4 May 2016.
- 3 For example CJEU, **Joined Cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net and Others v. Premier ministre and Others [GC]**, 6 October 2020; **Case C-623/17, Privacy International v. Secretary of State for Foreign and Commonwealth Affairs and Others**, 6 October 2020; **C-419/14, WebMindLicenses**, 17 December 2015; ECtHR, **Roman Zakharov v. Russia [GC]**, No 47143/06, 4 December 2015; **Vinks and Ribicka v. Latvia**, No 28926/10, 30 January 2020. See also European Data Protection Board (2020), **Recommendations 02/2020 on the European Essential Guarantees for surveillance measures**, adopted on 10 November 2020. Some measures such as house searches do not necessarily have to be subject to prior judicial approval, but subsequent judicial scrutiny must take place; see for example ECtHR, **Gutsanovi v. Bulgaria**, No 34529/10, 15 October 2013, para. 222; **DELTA PEKÁRNY a.s. v. Czech Republic**, No 97/11, 2 October 2014, para. 87; **Varga v. Romania**, No 73957/01, 1 April 2008, paras. 70–74.
- 4 See for example Brunhöber, B. (2018), 'Funktionswandel des Strafrechts in der Sicherheitsgesellschaft', in Puschke, J. and Singelstein, T. (eds), *Der Staat und die Sicherheitsgesellschaft*, Springer Verlag, Wiesbaden, pp. 193–215; Kaijafa-Gbandi, M. (2018), 'Supranational delineation of criminal repression: ideological developmental axes of EU criminal law', *ProJustitia* 2018, p. 7, *Criminal Chronicles (Poinika Chronika)* 2018, p. 497 et seq.; Sieber, U. (2009), 'Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld von terroristischer Gewalt – Eine Analyse der Vorfeldtatbestände im "Entwurf eines Gesetzes zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten"', *Neue Strafrechtszeitschrift*, No 7, pp. 353–408; Weißer, B. (2008), 'Der "Kampf gegen den Terrorismus" – Prävention durch Strafrecht?', *Juristenzeitung*, No 8, pp. 388–395; Sweden, Data Protection Authority (Datainspektionen) (2020), 'A new terrorist offences act' ('**En ny terroristbrottslagstiftning**'), Opinion to the Minister for Justice, 17 March 2020.
- 5 For the academic debate, see for example Brunhöber, B. (ed.) (2014), *Strafrecht im Präventionsstaat*, Stuttgart, Franz-Steiner-Verlag; Petzsche, A., Heger, M. and Metzler G. (eds) (2019), *Terrorismusbekämpfung in Europa im Spannungsfeld zwischen Freiheit und Sicherheit*, Nomos Verlag, Baden-Baden; Philippe, X. (2019), 'The freedom of movement' ('*La liberté d'aller et venir*'), in Cabraillac, R. (ed.), *Libertés et droits fondamentaux*, Dalloz, Hors collection, p. 470; Puschke, J. and Singelstein, T. (eds) (2018), *Der Staat und die Sicherheitsgesellschaft*, Springer Verlag, Wiesbaden.
- 6 For example in Bulgaria, see Foundation for Access to Rights (Фондация за достъп до права) (2016), 'Statement: Counter-Terrorism Act' ('*Становище: Закон за противодействие на тероризма*'); in France, see Union Syndicale des Magistrats (2017), 'USM's observations on the bill to strengthen internal security and the fight against terrorism' ('*Observations de l'USM sur le projet de loi renforçant la sécurité intérieure et la lutte contre le terrorisme*'), 6 September 2017; in Luxembourg, see Consultative Commission for Human Rights of the Grand Duchy of Luxembourg (Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg) (2016), Opinion on Bill 6921 (*Avis sur le projet de loi 6921*), January 2016.
- 7 Belgium, Act regarding additional counter terrorism measures (**Wet 27 april 2016 inzake aanvullende maatregelen ter bestrijding van terrorisme/Loi 27 Avril 2016 relative à des mesures complémentaires en matière de lutte contre le terrorisme**), 27 April 2016, Arts. 2–5; Luxembourg, Act of 27 June 2018 adapting the criminal procedure to the needs linked to the terrorist threat (**Loi du 27 juin 2018 adaptant la procédure pénale aux besoins liés à la menace terroriste et portant modification**), Art. 1, Section 5; Portugal, Decree-Law 78/87 approving the Code of Criminal Procedure (**Decreto-Lei nº 78/87, que aprova o Código de Processo Penal**), 17 February 1987, Arts. 174(5)(a), 177(2)(a) and (3)(a).
- 8 With regard to the use of investigative techniques and permissible interference with the right to private life, see for example ECtHR, **Vetter v. France**, No 59842/00, 31 May 2005.
- 9 For example Foundation for Access to Rights (Фондация за достъп до права) (2016), 'Statement: Counter-Terrorism Act' ('*Становище: Закон за противодействие на тероризма*'); Luxembourg, Consultative Commission for Human Rights of the Grand Duchy of Luxembourg (Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg) (2016), Opinion on Bill 6921 (*Avis sur le projet de loi 6921*), January 2016; Council of Europe, European Commission for Democracy through Law (Venice Commission) (2016), Poland, Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts, **Opinion No 839/2016**, 13 June 2016.
- 10 UN Human Rights Council (2018), **Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association**, A/HRC/38/34, 13 June 2018, para. 23.
- 11 There are limited exceptions in urgent cases. For example, in Spain, the Ministry of the Interior or the Director of Security of the State may authorise interceptions in such cases; Spain, Organic Law 13/2015 of 5 October, amending the Law of Criminal Procedure (**Ley Orgánica 13/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal para el fortalecimiento de las garantías procesales y la regulación de las medidas de investigación tecnológica**), 5 October 2015, with respect to Art. 579.4 of the Law of Criminal Procedure. In Hungary too, during preparatory proceedings a prosecutor can approve certain acquisitions of various communication data, but not interception of the content of communications; Hungary, Act XC of 2017 on the criminal procedure (**2017. évi XC. törvény a büntetőeljárásról**), 1 July 2018, Art. 339. In Belgium, the public prosecutor can access traffic and location data without judicial approval; Belgium, Code of Criminal Procedure (**Code d'instruction criminelle/Wetboek van Strafvordering**), Art. 46bis.
- 12 Sweden, Ordinance with instructions for the Swedish Commission on Security and Integrity Protection (**Förordning [2007:1141] med instruction för Säkerhets- och integritetsskyddsmyndigen**), 22 November 2007.
- 13 See also Greece, Law 2225/1994, On the protection of freedom and the confidentiality of communications and other provisions O.G. A 121/20.07.1994 (**Για την προστασία της ελευθερίας και ανταπόκρισης και επικοινωνίας και άλλες διατάξεις ΦΕΚ Α 121/20.07.1994**), Arts. 3, 4 and 5, as amended, in particular by Law 4786/2021 O.G. A 43/23.3.2021 (**Νόμος 4786/2021, ΦΕΚ Α 43/23.3.2021**), Art. 37; and Law 3115/2003, Hellenic Authority for Communication Security and Privacy O. G. A 47/ 27.2.2003, as amended (**Αρχή Διασφάλισης του Απορρήτου των Επικοινωνιών. ΦΕΚ Α' 47/27.2.2003**).



- 14 See also Luxembourg, Consultative Commission for Human Rights of the Grand Duchy of Luxembourg (Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg) (2016), Opinion on Bill 6921 (*Avis sur le projet de loi 6921*), January 2016.
- 15 For example Society for Civil Liberties (Gesellschaft für Freiheitsrechte) (2019), '**GFF bringt BKA-Gesetz erneut vor Bundesverfassungsgericht**', press release, 4 September 2019; German Bar Association (Deutscher Anwaltverein), 'Statement of the German Bar Association by the Committee on Hazard Prevention Law on the draft law on the restructuring of the Federal Criminal Police Office' ('**Stellungnahme des DAV durch den Ausschuss Gefahrenabwehrrecht zum Entwurf eines Gesetzes zur Neustrukturierung des Bundeskriminalamtsgesetzes**'), No 33/2017, April 2017, p. 41; Human Rights Watch (2018), **World Report 2018**; Luxembourg, Consultative Commission for Human Rights of the Grand Duchy of Luxembourg (Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg) (2016), Opinion on Bill 6921 (*Avis sur le projet de loi 6921*), January 2016, 2016; Austria, Parliamentary correspondence No 469 (**Parlamentskorrespondenz Nr. 469**), 26 April 2018.
- 16 Germany, Act on the Federal Criminal Police Office and cooperation between the Federal Government and the *Länder* in criminal police matters (Federal Criminal Police Office Act) (*Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten (Bundeskriminalamtsgesetz)*), Art. 49; Sweden, Secret Data Interception Act (2020:62) (**Lag (2020:62) om hemlig dataavläsning**).
- 17 Austria, Criminal Procedure Amendment Act 2018 (**Strafprozessrechtsänderungsgesetz 2018**), Art. 1(17), inserting Art. 135a into the Criminal Procedures Act 1975; Italy, Decree-Law No 152 of 13 May 1991, coordinated with the law converting it into Law No 203 of 12 July 1991 on urgent measures to combat organised crime and promote transparency and good administrative practice (**Decreto-legge 13 maggio 1991, n. 152, coordinato con la legge di conversione 12 luglio 1991, n. 203, recante Provvedimenti urgenti in tema di lotta alla criminalità organizzata e di trasparenza e buon andamento dell'attività amministrativa**), Art. 13; Netherlands, Intelligence and Security Services Act 2017 (**Wet op de inlichtingen- en veiligheidsdiensten 2017**), Art. 45, 26 July 2017.
- 18 France, Code of Criminal Procedure (*Code de procédure pénale*), Art. 230–46; Luxembourg, Act of 27 June 2018 adapting the criminal procedure to the needs linked to the terrorist threat (**Loi du 27 juin 2018 adaptant la procédure pénale aux besoins liés à la menace terroriste**).
- 19 On the topic of communication surveillance in the intelligence context, see also FRA (2015), **Surveillance by intelligence services: Fundamental rights safeguards and remedies in the EU – Volume I: Member States' legal frameworks**, Publications Office of the European Union, Luxembourg; and FRA (2017), **Surveillance by intelligence services: Fundamental rights safeguards and remedies in the EU – Volume II: Field perspectives and legal update**, Publications Office of the European Union, Luxembourg.
- 20 France, National Data Protection Commission (Commission Nationale de l'Informatique et des Libertés) (2017), Observations on the bill reinforcing internal security and the fight against terrorism (*Observations sur le projet de loi renforçant la sécurité intérieure et la lutte contre le terrorisme*), 11 July 2017; Hungary, Hungarian Authority for Data Protection and Information Freedom (Nemzeti Adatvédelmi és Információszabadság Hatóság) (2014), **letter of the Head of the Hungarian Authority for Data Protection and Information Freedom about the register on the data that the electronic information service providers share with the national security services**, 24 June 2014.
- 21 Greece, Hellenic Data Protection Authority (Archi Prostatias Prosopikon Dedomenon) (2020), Opinion 1/2020 on the provisions of Law 4624/2019 (**Gnomodotisi epi ton diataxeon tou N. 4624/2019**), 27 January 2020, p. 10. Greece, Hellenic Data Protection Authority (Archi Prostatias Prosopikon Dedomenon) (2020), Decision 20/2020 (**Απόφαση 20/2020**), 20 July 2020.
- 22 Portugal, Organic Law 4/2017, establishing a special access procedure to telecommunication and internet data for intelligence officers of the Internal Intelligence Service and the External Intelligence Service (**Lei Orgânica n.º 4/2017, que aprova e regula o procedimento especial de acesso a dados de telecomunicações e Internet pelos oficiais de informações do Serviço de Informações de Segurança e do Serviço de Informações Estratégicas de Defesa**), 25 August 2017, Arts. 3 and 4; Italy, Provisions implementing the Criminal Procedure Code (**Disposizioni di attuazione del codice di procedura penale**), Art. 226.
- 23 Greece, Law 2225/1994, On the protection of freedom and the confidentiality of communications and other provisions O.G. A 121/20.07.1994, as amended (**Για την προστασία της ελευθερίας και ανταπόκρισης και επικοινωνίας και άλλες διατάξεις ΦΕΚ Α 121/20.07.1994**), Arts. 3 and 5.
- 24 Hungary, Act CXXV of 1995 on national security services (**1995. évi CXXV. törvény a nemzetbiztonsági szolgálatokról**), 27 March 1996, Art. 58(2).
- 25 For example ECtHR, **Ibrahim and Others v. the United Kingdom [GC]**, Nos 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 250; ECtHR, **Gäfgen v. Germany [GC]**, No 22978/05, 1 June 2010, paras. 162–165; ECtHR, **Allan v. the United Kingdom**, No 48539/99, 5 November 2002, paras. 42–43.
- 26 For example ECtHR, **Gäfgen v. Germany [GC]**, No 22978/05, 1 June 2010, paras. 165–168; ECtHR, **Jalloh v. Germany [GC]**, No 54810/00, 11 July 2006, para. 105; ECtHR, **Ibrahim and Others v. the United Kingdom [GC]**, Nos 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 254. This applies even where the person from whom the evidence had been extracted in this way is someone other than the accused; see ECtHR, **Othman (Abu Qatada) v. the United Kingdom**, No 8139/09, 17 January 2012, paras. 263 and 267.
- 27 See also Spencer, J. R. (2002), 'Evidence', in Delmas-Marty, M. and Spencer, J. R. (eds), *European criminal procedures*, Cambridge University Press, Cambridge, pp. 594–640.
- 28 See also FRA (2021), **Presumption of innocence and related rights – Professional perspectives**, Publications Office of the European Union, Luxembourg, Chapter 4.
- 29 The Lithuanian Supreme Court clarified this in a case in which a person was planning a suicide bombing abroad and had informed others of this intention. The court ruled that, when a person merely discloses their intention to commit a crime, such an announcement made directly before committing the crime is not in itself criminally punishable. Lithuania, Supreme Court (Lietuvos Respublikos Aukščiausioji Teisma), Criminal Case No 2K-46-677/2016, procedural No 1-01-2-00115-2010-4, 12 January 2016.
- 30 Spain, Supreme Court, Criminal Chamber (Tribunal Supremo, Sala de lo Penal), **Supreme Court judgment 354/2017**, 17 May 2017.
- 31 For data on the discrimination and harassment experiences of immigrants, descendants of immigrants and minority ethnic groups, including in the context of police stops and treatment by the police, see FRA (2017), **Second European Union Minorities and Discrimination Survey – Main results**, Publications Office of the European Union, Luxembourg. As regards statistical survey data for the EU on how often people are stopped by the police, in what kind of situations they are stopped, the action taken by the police during stops, and views on whether or not the police acted respectfully, see FRA (2021), **Your rights matter: Police stops – Fundamental Rights Survey**, Publications Office of the European Union, Luxembourg. The statistical data in the report on the general population come from FRA's **Fundamental Rights Survey**; those on people with an ethnic minority or immigrant background, including Roma, come from FRA's **Second European Union Minorities and Discrimination Survey 2016** – which includes North Africans, who are overwhelmingly Muslim – and FRA's **Roma and Travellers Survey 2019**.
- 32 On the use of evidence obtained in breach of the prohibition of torture, see ECtHR, **Jalloh v. Germany [GC]**, No 54810/00, 11 July 2006, para. 105; ECtHR, **Ibrahim and Others v. the United Kingdom [GC]**, Nos 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 254. This applies even when the evidence has been extracted in this way from someone other than the accused; see ECtHR, **Othman (Abu Qatada) v. the United Kingdom**, No 8139/09, 17 January 2012, paras. 263 and 267.

- 33 In Bulgaria, see for example Bulgarian Helsinki Committee (Български хелзинкски комитет) (2017), *Human rights in Bulgaria in 2016 (Правата на човека в България през 2016 г.)*; Foundation for Access to Rights (Фондация за достъп до права) (2016), 'Statement: Counter-Terrorism Act' ('Становище: Закон за противодействие на тероризма'); Стоянова, А. (2016), 'An outrageous new change in the counter-terrorism law is being silently pushed forward' ('Скандална нова промяна в антитерористичния закон се пробутва тихомълком'), *Terminal* 3, 5 August 2016. In Hungary, see Hungarian Helsinki Committee (Magyar Helsinki Bizottság) (2016), 'Opinion in relation to the draft legislation on the new Criminal Procedure Act', 20 June 2016; Civil Liberties Union (Társaság a szabadságjogokért) (2016), 'Recommendations to the draft legislation on the new Criminal Procedure Act'; Bárándy, G. and Enyedi, K. (2017), 'Covert operations and secret surveillance – Thoughts on the new Criminal Procedure Act' ('Leplezett eszközök és titkos információgyűjtés, avagy az új büntetőeljárási törvény margójára'), *Büntetőjogi Szemle* 2017/3. In the Netherlands, see Dutch Data Protection Authority (Autoriteit Persoonsgegevens) (2016), 'Response of the Dutch Data Protection Authority to the legislative proposal "Intelligence and Security Services Act 20"' ('Reactie Autoriteit Persoonsgegevens op het wetsvoorstel "Wet op de inlichtingen – en veiligheidsdiensten 20"'), 16 December 2016. See further also Amnesty International (2017), *Dangerously disproportionate: The ever-expanding national security state in Europe*.
- 34 For example Belgium, Committee T (n.d.), *Report 2020: Evaluation of measures concerning the fight against terrorism in the light of human rights (Rapport 2020: Evaluatie van de anti-terrorisme maatregelen in het licht van mensenrechten/Rapport 2020: Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droit humains)*, pp. 109–110; Casimiro, S. (2019), 'Liberdade e Segurança no Combate ao Terrorismo: Quis Custodiet Ipsos Custodes? Uma Perspetiva Jurídica', *Nation and Defense (Nação e Defesa)*, No 152, pp. 23–38.
- 35 Bulgaria, National Assembly (Народно събрание) (2020), Minutes of the 225th plenary session held on 28 July 2016 (*Стенограма от 225-то пленарно заседание, проведено на 28 юли 2016 г.*); National Assembly (Народно събрание) (2020), Minutes of the 262nd plenary session held on 14 December 2016 (*Стенограма от 262-то пленарно заседание, проведено на 14 декември 2016 г.*); National Assembly (Народно събрание) (2020), Minutes of the 263rd plenary session held on 15 December 2016 (*Стенограма от 263-то пленарно заседание, проведено на 15 декември 2016 г.*). For the Netherlands, see for example Bits of Freedom (2018), 'Dragnet surveillance for secret services'. Portugal, Parliament of the Republic of Portugal, *Journal of the Assembly of the Republic (Diário da Assembleia da República)*, I-Série, No 88, 18 May 2017, pp. 18–33.
- 36 FRA (2015), *Surveillance by intelligence services: Fundamental rights safeguards and remedies in the EU – Volume I: Member States' legal frameworks*, Publications Office of the European Union, Luxembourg, pp. 10–11, 13, 23–27; FRA (2017), *Surveillance by intelligence services: Fundamental rights safeguards and remedies in the EU – Volume II: Field perspectives and legal update*, Publications Office of the European Union, Luxembourg, pp. 17, 21, 27–28, 41–43. These reports did not deal with criminal proceedings, which are the focus of the present report (see Section 5.3, 'FRA activity: focus on surveillance by intelligence services') and their findings are therefore not applicable to the directive. Nevertheless, they speak to related issues concerning the fundamental rights impact of security measures, namely the work of intelligence services.
- 37 See also FRA (2015), *Surveillance by intelligence services: Fundamental rights safeguards and remedies in the EU – Volume I: Member States' legal frameworks*, Publications Office of the European Union, Luxembourg, p. 14.
- 38 ECtHR, *Ibrahim and Others v. the United Kingdom*, Nos 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 255; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294, 6 November 2013, Art. 3(2).
- 39 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142, 1 June 2012, Art. 7(1) and (2); ECtHR, *Öcalan v. Turkey* [GC], No 46221/99, 12 May 2005, para. 140. ECtHR; *Beraru v. Romania*, No 40107/04, 18 March 2014, paras. 69–71. See also FRA (2019), *Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, Publications Office of the European Union, Luxembourg.
- 40 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294, 6 November 2013, Art. 3(6) and Art. 8; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142, 1 June 2012, Art. 7(4); ECtHR, *Ibrahim and Others v. the United Kingdom*, Nos 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, paras. 260–262; ECtHR, *McKeown v. the United Kingdom*, No 6684/05, 11 January 2001, para. 43.
- 41 Belgium, Law on preventive detention (*Loi relative à la détention préventive/Wet betreffende de voorlopige hechtenis*), 20 July 1990, Art. 2bis (9).
- 42 Germany, Code of Criminal Procedure (*Strafprozessordnung*), Art. 148(2) and Art. 148a.
- 43 Spain, Organic Law 13/2015, of 5 October, amending the Law of Criminal Procedure (*Ley Orgánica 13/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal para el fortalecimiento de las garantías procesales y la regulación de las medidas de investigación tecnológica*). For examples of criticism, see Spain, Spanish National Ombudsman Office (Oficina del Defensor del Pueblo) (2010), *Annual Report 2010 – National Mechanism for the Prevention of Torture (Informe Anual 2010 – Mecanismo Nacional de Prevención de la Tortura)*, pp. 193 and 194; UN, Human Rights Committee (2019), *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No 2657/2015*, CCPR/C/125/D/2657/2015, 8 August 2019.
- 44 See Spain, Minister of Justice (Ministerio de Justicia), consolidated text of Criminal Procedure Act (*Ley de Enjuiciamiento Penal*), *Official Bulletin of the State (Boletín Oficial del Estado)*, 6 October 2015, Art. 302.
- 45 *Explanations on the Charter of Fundamental Rights (2007)*, OJ 2007 C 303, Explanation on Article 6 – Right to liberty and security.
- 46 For example ECtHR, *Selahattin Demirtaş v. Turkey (No 2)* [GC], No 14305/17, 22 December 2020, para. 317.
- 47 For example ECtHR, *S., V. and A. v. Denmark* [GC], Nos 35553/12, 36678/12 and 36711/12, 22 October 2018, paras. 89 and 91.
- 48 For details, see ECtHR (2021), *Guide on Article 5 of the European Convention on Human Rights – Right to liberty and security*, updated 30 April 2021; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142, 1 June 2012, Art. 7(1) and (2).
- 49 ECtHR, *Selahattin Demirtaş v. Turkey (No 2)*, No 14305/17, 22 December 2020, paras. 314 et seq., 337–339.
- 50 For example ECtHR, *Erdogdu and Ince v. Turkey* [GC], Nos 25067/94 and 25068/94, 8 July 1999, para. 53.
- 51 For details on those conditions, see FRA's *Criminal Detention Database 2015–2019*, which contains the relevant case-law of the ECtHR and the CJEU concerning conditions of criminal detention, and information on detention conditions in all (then) 28 EU Member States. See also FRA (2019), *Criminal detention conditions in the European Union: Rules and reality*, Publications Office of the European Union, Luxembourg.
- 52 On this topic, see for example Heinrich, B. (2017), 'Zum heutigen Zustand der Kriminalpolitik in Deutschland', *Kriminalpolitische Zeitschrift*, No 1, pp. 4–20; Viganò, F. (2018), 'The control of the Constitutional Court on anti-terrorism measures' ('Il controllo della Corte costituzionale sulle misure antiterrorismo'), *Quadrilateral Meetings (Incontri Quadrilaterali)*, September 2018.

- 53 Belgium, Act of 31 October 2017 amending the Act of 20 July 1990 on preventive detention, the Act of 7 June 1969 laying down the time during which searches, house visits or arrests may not be carried out, the Act of 5 August 1992 on the police function and the Act of 19 December 2003 on the European arrest warrant (**Loi modifiant la loi du 20 juillet 1990 relative à la détention préventive, la loi du 7 juin 1969 fixant le temps pendant lequel il ne peut être procédé à des perquisitions, visites domiciliaires ou arrestations, la loi du 5 août 1992 sur la fonction de police et la loi du 19 décembre 2003 relative au mandat d'arrêt européen/Wet tot wijziging van de wet van 20 juli 1990 betreffende de voorlopige hechtenis, de wet van 7 juni 1969 tot vaststelling van de tijd gedurende welke geen opsporing ten huize, huiszoeking of aanhouding mag worden verricht, de wet van 5 augustus 1992 op het politieambt en de wet van 19 december 2003 betreffende het Europees aanhoudingsbevel**), Art. 5; France, Code of Criminal Procedure (**Code de Procédure Pénale**), Arts. 706-88 and 706-88-1; Spain, Organic Law 13/2015, of 5 October, amending the Law of Criminal Procedure (**Ley Orgánica 13/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal para el fortalecimiento de las garantías procesales y la regulación de las medidas de investigación tecnológica**), 5 October 2015, Art. 520b; Luxembourg, Criminal Procedural Code (**Code de Procédure Pénale**), Art. 39.
- 54 Belgium, Act concerning several provisions in the fight against terrorism (**Wet houdende diverse bepalingen ter bestrijding van terrorisme/Loi portant des dispositions diverses en matière de lutte contre le terrorisme**), 3 August 2016, Art. 6.
- 55 Germany, Code of Criminal Procedure (**Strafprozessordnung**), Arts. 112, 112a, 121 et seq.; Spain, Minister of Justice (Ministerio de Justicia), consolidated text of the Criminal Procedure Act (**Ley de Enjuiciamiento Penal**), Art. 504.
- 56 France, Code of Criminal Procedure (**Code de procédure pénale**), Art. 145-2.
- 57 In this respect, courts in Belgium ruled that placing individuals sentenced for terrorist offences in a special prison wing that provides for more isolation, and less access to other prisoners, family and other contacts, constitutes an individual security measure and therefore can be justified based only on an individual assessment, not on the offence itself. In a similar manner, restricting detainees' rights (e.g. prison leave) cannot be refused solely because a prisoner is in the special wing. See Belgium, Brussels Court of First Instance, 26 April 2018, *Nieuw Juridisch Weekblad 2020*, No 417, p. 179; and Belgium, Brussels Court of Enforcement of Sentences, 1 October 2018, *Journal des Tribunaux 2018*, No 6754, 959.
- 58 Directive (EU) **2016/800** of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, 21 May 2016.
- 59 Europol also draws attention to the increasingly young age of suspects, including involvement of children in right-wing terrorism cases. Europol (2021), **European Union terrorism situation and trend report 2021**, 22 June 2021, pp. 9 and 78.
- 60 UN, Human Rights Committee (2018), **Concluding observations on the fourth periodic report of Bulgaria**, CCPR/C/BGR/CO/4, 15 November 2018, paras. 33-34.
- 61 France, Order No 45-174 of 2 February 1945 on delinquent children (**Ordonnance n° 45-174 du 2 février 1945 relative à l'enfance délinquante**), Art. 11.
- 62 Hungary, Criminal Code (**Büntető törvénykönyv**), Art. 16(g).
- 63 Hungary, Act XC of 2017 on the criminal procedure (**2017. évi XC. törvény a büntetőeljárásról**), 1 July 2018, Art. 68o.



# 2

## PUBLIC PROVOCATION TO COMMIT A TERRORIST OFFENCE

Article 5 of the directive introduces the crime of public provocation to commit a terrorist offence. It explicitly covers both offline and online provocation. The offence comprises two material elements and a subjective one: an act of communicating, whether online or offline, a message advocating, directly or indirectly, the commission of terrorist offences; causing an objective danger that an offence will be committed as a result of the act of communication; with the intent to incite the commission of such offences. Notwithstanding the requirement of danger, there is no need for a terrorist crime to be actually prepared or attempted as a result of the provocation.

The directive provides for the criminalisation of direct as well as indirect provocation. In comparison with Framework Decision 2002/475/JHA, its scope explicitly encompasses glorification and, as recital 10 states, justification of terrorism.<sup>1</sup> This chapter therefore focuses in particular on these forms of indirect provocation.

Public provocation, unlike travelling for the purpose of terrorism and receiving training for terrorism, had already been part of EU law and therefore punishable under national legislation prior to the adoption of the directive. Greece, which had previously criminalised provocation under a generic provision on advocating criminal offences, introduced a new provision covering public provocation specifically in relation to terrorism in 2019.<sup>2</sup> Other fieldwork Member States considered that their national laws already met the directive's requirements.



The scope of indirect provocation varies considerably among national legal orders. They include both narrower approaches and broader ones, such as ‘apology for terrorism’ in France<sup>3</sup> and the public justification of terrorist offences and humiliation of victims of terrorism or their families in Spain.<sup>4</sup>

Respondents indicate experience with the application of the offence in Belgium, Germany, Spain and France. In comparison, they report very few or no cases of public provocation to commit a terrorist offence in Greece, Hungary and Sweden.<sup>5</sup>

This chapter covers the respondents’ experiences of the application of the offence and the fundamental rights impact of the unclear line between crime and legal forms of expression; the challenge of determining terrorist intent and the danger caused by the speech or content; and the concerns about the potential impact on the rights of individuals belonging to specific groups.

## 2.1. DISTINGUISHING BETWEEN CRIMINAL CONDUCT AND FREEDOM OF EXPRESSION

Recital 10 of the directive explains that criminalisation of public provocation encompasses a range of behaviours. Besides direct provocation to commit terrorist crimes, it also covers indirect provocation including glorification and justification of terrorist acts and dissemination of content online and offline, including that related to victims. At the same time, recital 40 clarifies that the definition of the offence excludes expressing radical, polemic or controversial views in the public debate on sensitive political questions.

ECtHR jurisprudence illustrates the difficulty of reconciling freedom of expression with the crime of public provocation to terrorism in its various forms.<sup>6</sup> The objective of the fight against terrorism represents a legitimate limitation to freedom of expression.<sup>7</sup> However, Article 10 of the ECHR, which has the same meaning and scope as Article 11 of the Charter,<sup>8</sup> permits only restrictions to freedom of expression that are necessary and proportionate ‘within a democratic society’ and are clearly prescribed by law, which includes their accessibility and foreseeability.<sup>9</sup>

Accordingly, opinions that do not incite violence, i.e. by advocating the use of violent means or by justifying terrorist acts to achieve the objectives of their supporters, and cannot be seen as promoting violence by instilling deep and irrational hatred of identified persons, cannot justify any restrictions to freedom of expression.<sup>10</sup> This means that, for example, measures solely based on newspaper articles, or pre-trial detention for making political statements against government policies, are disproportionate and therefore incompatible with the ECHR. On the other hand, the ECtHR has also ruled that criminalising certain sufficiently specific acts of provocation may be justified and proportionate, taking into account the context of the act.<sup>11</sup>

Even before the adoption of the directive, the criminalisation of indirect provocation in particular, its impact on freedom of expression and the risk of punishing individuals for mere thoughts had been a source of considerable concern at both national<sup>12</sup> and international levels.<sup>13</sup> Commenting on the offence of incitement to terrorism, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism recalled that it must be prescribed by law in precise language, including by avoiding reference to vague terms such as ‘glorifying’ or ‘promoting’ terrorism. The solution that the Special Rapporteur offered in his report on best practices in countering terrorism was to replace references to direct or indirect provocation with the phrase ‘whether or not *expressly* advocating terrorist offences’ (emphasis added).<sup>14</sup>

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**‘In the same ways that laws are systematically passed as [a] political response, each time there is a tragic event, there is a criminal policy that represses speech; and the red line between provocation and apology ... is still quite thin.’**

(Academic)

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**‘There are no provisions or guidelines or other tools, and they have not been further specified by legal provisions. The concepts of provocation and incitement are very subtle and therefore judged on a case-by-case basis. The general criteria have been delineated in jurisprudence and theory but not [specifically in relation] to public provocation or incitement to commit acts of terrorism. There are no prosecutorial opinions or guidance.’**

(Public prosecutor)

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**‘I cannot understand why some cases are in trial and some cases are not in trial, why in some cases the Supreme Court changes the criteria, and I think we are all lost.’**

(Defence lawyer)



Some of these concerns also emerge during the practical application of the offence at national level, practitioners interviewed confirm. They regard in particular the legality and proportionality of criminal offences and penalties, including the requirement of precision, clarity and foreseeability (Article 49 Charter and Article 7 ECHR), respect for private and family life (Article 7 Charter and Article 8 ECHR), freedom of thought, conscience and religion (Article 10 Charter and Article 9 ECHR), freedom of expression and information (Article 11 Charter and Article 10 ECHR), freedom of the arts and sciences (Article 13 Charter and Article 10 ECHR) and the prohibition of discrimination (Article 21 Charter and Article 14 ECHR).

### **2.1.1. Definition and scope of the offence of public provocation to commit a terrorist offence**

NGOs, academics and defence lawyers across Member States criticise the different forms of the public provocation offence for being unclear, hard to qualify and vague, noting that jurisprudence does not offer clear criteria to distinguish lawful forms of expression from illegal ones (see also Section 1.2.1).

Given the offence’s broad scope of application, some respondents from these groups doubt if public provocation is consistent with the principle of legality of criminal offences and the requirement of foreseeability, as individuals do not know whether their actions will be considered a crime or not.

Other respondents, including some public prosecutors, criticise the unclear and unforeseeable criteria that courts use.

To illustrate diverging practices, an oversight body refers to cases of young people who performed similar acts of offensive speech, but some were prosecuted for public provocation to terrorism and others for incitement to hatred. Some judges agree that distinguishing between lawful and illegal forms of expression is challenging. Respondents in Hungary, where there is less experience of such cases, explain that the absence of universal criteria and judicial practice makes differentiating lawful from unlawful expression particularly difficult.

Although this view is shared by many respondents, it is not unanimous between countries and across professional categories. Some respondents argue that the legislation and jurisprudence are sufficiently clear. Some practitioners in Belgium, Germany and Greece, for instance, observe that prosecuting provocation is not a problem, as the penalised behaviour is often ‘obvious’, whereas others in the same countries disagree. ‘I know it when I see it’, says a law enforcement respondent about the criteria for identifying terrorist content online.

## CASE-LAW

### Scope of 'apology for terrorism'

In France, the offence of apology for terrorism covers condoning or inciting terrorism, including the favourable presentation of acts of terrorism and their perpetrators. Interviewees draw attention to jurisprudence concerning this offence. Despite criticism over its scope, the French courts have held that the offence is sufficiently precise to guarantee against the risk of arbitrariness and does not violate the principle of legality of criminal offences.\*

The issue also came up in the case of the French comedian Dieudonné. He was sentenced to 2 months' imprisonment for apology after posting on social networks *'Je me sens Charlie Coulibaly'* ('I feel like Charlie Coulibaly', in reference to the two terrorist attacks at the *Charlie Hebdo* magazine offices and the HyperCacher supermarket on 7 and 9 January 2015). The defence challenged the constitutionality of Article 421-2-5 of the Criminal Code, arguing that it does not define the constituent elements of the offence. The Court of Appeal, however, confirmed the decision to sentence the defendant.\*\*

In 2020, the Constitutional Council dealt with criminal courts' attempts to also criminalise deliberate possession of 'apologetic' files or documents.\*\*\* It declared it unconstitutional to criminalise 'concealment of apology for terrorism' that would presuppose establishing the individuals' adherence to the ideology expressed in such documents. The court ruled that possessing apologetic files contributes to the dissemination of dangerous ideas and statements only if they are subsequently republished. Neither the physical possession of those files or documents nor potential adherence to the ideology can establish the existence of an intent to commit terrorist acts or to justify them.\*\*\*\*

\* France, Constitutional Council (Conseil Constitutionnel), **Decision No 2018-706 QPC**, 18 May 2018; France, Court of Cassation, Criminal Division (Cour de cassation, Chambre criminelle), **Decision No 17-83602**, 27 February 2018.

\*\* Le Figaro (2016), 'Dieudonné jugé pour apologie du terrorisme soulève une QPC', 1 March 2016; Le Figaro (2016), "'Charlie Coulibaly": Dieudonné condamné en appel', 21 June 2016.

\*\*\* France, Court of Cassation (Cour de Cassation), **Decision No 19-80.136**, 7 January 2020.

\*\*\*\* France, Constitutional Council (Conseil Constitutionnel), **Decision No 2020-845**, 19 June 2020.

Several concrete risks to fundamental rights arise from the blurred line between freedom of expression and crime. Several academics, NGOs and oversight bodies raise the risk of self-censorship. The unforeseeable consequences of an expressed view may have a chilling effect on individuals who would rather refrain from expressing themselves than risk criminal consequences for their conduct.

Some respondents in France mention the notion of *taqiya* (Arabic for 'prudence' or 'fear'), which refers to the precautionary dissimulation or denial of one's religion when facing persecution. These respondents argue that people could refrain from praying and other expressions of faith, which would impair their right to exercise their religion freely.

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'The boundaries between permissible but extreme expression and incitement or glorification of terrorist acts are not always clear ... We have moved backwards in Europe, that is to say, freedom of expression has shrunk beyond what is absolutely necessary ... the damage caused by the provisions, with no clear limits of what is allowed and what is not, is probably greater than the expected benefit ... as there is a risk that these provisions will function in some ways as a precautionary censorship, as a person may not express himself freely for fear of being implicated [under] criminal law and being liable to punishment. This is a great loss in a liberal democracy'.

(Academic)



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**'Our problem is that we don't have any kind of third way, it's not punished at all, or criminally punished, and when it's criminally punished, it's punished as a terrorist justification or glorification.'**

(Defence lawyer)

Some defence lawyers stress that the criminal law response to public provocation is disproportionately severe in relation to the conduct, as it can entail long prison sentences, for example for posting content on social media. That limits freedom of speech more than is necessary.

Some respondents further highlight that the preventive approach represented by the offence means that authorities resort to proactive surveillance to identify public provocation acts before they can incite the commission of a terrorist offence. This entails monitoring of certain individuals and profiles, interfering with the right to privacy and, potentially, entailing discrimination against some groups, several defence lawyers and academics note. Past research has raised concerns that this might stimulate criminal offences, including in Member States not covered by the fieldwork.<sup>15</sup>

In Spain, for example, the introduction of the concept of 'undercover computer agent' allows security forces to create cover profiles in social networks in order to interact with individuals with certain characteristics, in search of new forms of crime. It has been criticised from the perspectives of privacy and the right to a fair trial, owing to concerns that it may constitute provocation to commit crime on the part of the authorities.<sup>16</sup>

The unclear scope of the offence also leaves room for arbitrariness and potential 'cherry-picking' by courts and other authorities, which may interpret the provisions in accordance with personal values or political considerations, according to some defence lawyers, NGOs and academics. While respondents including judges and law enforcement officers emphasise that radical ideas must never be prosecuted, members of NGOs and academia are particularly concerned about potential abuse of public provocation to prosecute such ideas.

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**'I understand that it is theoretical and for the moment the prosecutors are reasonable, but sometimes they're not, and the body of law should protect us from unreasonable prosecutors as well.'**

(NGO expert)

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**'Especially in the area of expression, provocation, glorification, there has been an abuse of European standards to invoke them falsely as a justification for a new broadening of a[n already] very broad regulation.'**

(Academic)

Similarly, a broad interpretation of the offence in practice may lead to prosecution of merely polemical or oppositional views, a public prosecutor warns. A judge urges the importance of distinguishing these from actual provocation to commit a terrorist offence.

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**'A situation that requires attention is the crime of public provocation to terrorist acts, to avoid any abuses. That is, we all know the content of social networks – we should not end up in a witch hunt. There is always a risk but fortunately there is restraint on the part of the authorities that are responsible for identifying such criminal behaviours. Care must be taken in the application of this provision, ... so that any message we see on the streets or on social media is not deemed public provocation to terrorism.'**

(Public prosecutor)

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**'To simplify things a bit, we can say that today the offence of glorification of terrorism is very largely an offence comparable to blasphemy ..., it is literally unbearable to hear people who do not share the national consensus against terrorism ... For example, a young woman, a teenager even, 17–18 years old, who was condemned when a police officer was killed in an operation to rescue hostages, and she said that he deserved it; that's absurd, it had nothing to do with an act that was going to incite other people to commit acts. It's completely different from a 2-minute video of someone speaking out to incite people to commit acts – it's not the same thing at all.'**

(Judge)

Even peaceful acts may be characterised as incitement to terrorism, some respondents argue. A defence lawyer mentions protests with the intention to subvert the constitutional order. An academic refers to the use of counter-terrorist legislation beyond the scope of terrorism, such as the arrest of an activist at the 2015 UN Climate Change Conference.

Political considerations can play a role in determining what constitutes a terrorist threat, a variety of respondents in different Member States warn. The legislation can be used to target left-wing groups or anti-authoritarian, anarchist or nationalist movements and presume criminal intent based on ideology. Vague provisions such as those that the directive introduced can tempt authorities to apply them to behaviour that is criminal, but outside their target group, and is only marginally subject to the provisions, according to an academic.

Finally, the lack of clarity about the scope of the offence, and thus of legal practice, may affect legitimate professional activities, such as the work of journalists.<sup>17</sup> Although many respondents state that public provocation does not seem to have a particular impact on such activities, examples exist in some Member States. A respondent in Germany refers to a case of a scientist arrested after his research used language typical of left-wing extremism.<sup>18</sup> In Spain, several respondents highlight in particular the lack of a harmonised approach in the jurisprudence, and the resulting lack of foreseeability in cases of controversial artistic expression (see also Section 2.2.1).



## 2.2. DETERMINING TERRORIST INTENT AND DANGER IN PUBLIC PROVOCATION CASES

Article 5 of the directive sets out the two elements of intent and danger, i.e. the intent to incite the commission of one of the terrorist offences that the directive lists, and the resulting danger that one or more such offences may be committed. They have raised many questions at national level.

Determining intent is highly problematic, with regard both to the principle of legality and proportionality of criminal offences and penalties (Article 49 Charter and Article 7 ECHR) and to freedom of expression and information (Article 11 Charter and Article 10 ECHR), as practitioners interviewed point out. Most Member States do not provide concrete guidelines on determining intent to guarantee protection from arbitrariness, and intent sometimes even appears to be ignored altogether.

In practice, the notion of danger (or risk) can be used to condemn a specific opinion rather than prevent a real danger, respondents highlight. That infringes on freedom of thought, conscience and religion (Article 10 Charter and Article 9 ECHR). Finally, respondents express concerns about the discriminatory impact of the provisions on specific groups (Article 21 Charter and Article 14 ECHR).

### 2.2.1. Challenges in proving the elements of intent and danger

As in cases involving the other offences (see Sections 1.2.1, 3.2.1 and 4.2.1), establishing if the speech or content is disseminated with terrorist intent emerges as a major challenge. In cases of public provocation, further challenges arise from the particular constitutional protection afforded to freedom of expression in some Member States; the variety of different forms of expression as well as online and offline communication channels that can be relevant and affected; and, unlike in cases involving other preparatory offences, the additional requirement of the directive that the message cause a danger that a terrorist act may be carried out as a result.

Judges, especially, stress the lack of specific criteria and harmonised practices to establish the required intent.

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**‘This is a very delicate matter because we are talking about different rights in conflict. Sometimes interpreting these cases is not unanimous. It is one of the fields in which we have more dissenting opinions and revocations [on appeal]. There is always something subjective in the evaluation of these cases.’**

(Judge)

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**‘There is no harmonised practice by prosecutorial and judicial authorities in distinguishing lawful forms of expression and others that may constitute public provocation or incitement to terrorist acts.’**

(Judge)

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**‘There are no specific guidelines or legislative provisions that I am aware of. It is judged on a case-by-case basis.’**

(Law enforcement officer)

This is a particular issue with glorification, which the directive expressly includes within the scope of the offence. Many respondents across categories note the margin of appreciation left to the courts when it comes to intent.

This raises questions of the lack of foreseeability as a crucial element of the principle of legality. Some respondents in Greece note that the emphasis is on the content of the speech and its author rather than the intent to glorify. Some defence lawyers in other Member States observe that intent is not necessarily examined.

In France, intent is not even assessed in glorification cases but presumed, some respondents indicate. For instance, people have been prosecuted for statements they made to the police while intoxicated.

In some other Member States, academics in particular criticise the disparities among the decisions of different courts with regard to intent and point out that these have a negative impact on freedom of expression. For example, in Spain, respondents note that the rate of acquittals in public provocation cases is relatively high and that the Constitutional Court and the Supreme Court diverge in their interpretations of the offence. That leads to different guidance for first instance decisions, and a lack of foreseeability.<sup>19</sup>

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**'In its wording, the legislative framework is poorly adapted. Incriminating glorification, without further precision, is problematic, although it leaves a great margin of appreciation to the judge [to consider the] context.'**

(Oversight expert)

#### CASE-LAW

### Presence of intent to glorify terrorism

In a high-profile case in Spain, the rapper César Strawberry was accused of glorifying terrorism and humiliating terrorism victims in social network posts. The Supreme Court stated that the will or intent of the author of the messages was not relevant.\*

The Constitutional Court overturned the decision. It stated that the intent to glorify a terrorist organisation had not been established. By failing to assess intent, the Supreme Court did not sufficiently examine whether or not the conduct was an exercise of the fundamental right to freedom of expression.\*\*

\* *Spain, Supreme Court, Criminal Chamber (Tribunal Supremo, Sala de lo Penal), Decision No 4/2017, 18 January 2017.*

\*\* *Spain, Constitutional Court (Tribunal Constitucional), Judgment 35/2020, 25 February 2020.*

Additional challenges in determining intent, and the degree of danger, arise in cases of public provocation involving children, some respondents note.

In France, for example, minors appear to be frequently prosecuted for glorification. In 2019, 10 % of the persons convicted (and 37 % of those convicted for online glorification) were under 18 years of age.<sup>20</sup> In these cases, authorities struggle to distinguish the 'teenage condition' from actual intent to glorify terrorism, according to an oversight expert. Referring to a case that involved a juvenile posting threats online, a public prosecutor observes that young people may not realise the consequences of their actions.

Besides terrorist intent, the directive explicitly requires that the speech or content cause a danger that a terrorist act may be carried out as a result. This requirement of danger is not present in all national legal provisions transposing the offence.<sup>21</sup> Furthermore, even where the law specifically prescribes this assessment, it is not necessarily carried out in practice, the fieldwork research shows. This again appears to be a problem from the perspective of the principle of legality.

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**'A danger that terrorist acts may be carried out as a result of the suspect's or defendant's public provocation or incitement is required ... The danger that should be proved is the risk that a criminal act could be committed and not that such a risk materialises, but the possibility of creating such a risk. It is a step before the risk itself, as the law stands. ... A person's position and their social status, in general their background, is taken into account and assessed when assessing a potential danger.'**

(Public prosecutor)

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**'There is no need for a legislative amendment for the Court of Cassation to take a position of principle and interpret the text in such a way as to require this [i.e. the danger of others committing terrorist acts], but the law only speaks of glorification [of] terrorism, it does not even say what glorification means ... The law is far from being sufficiently precise in this respect.'**

(Judge)

## CASE-LAW

### The need to assess danger, and prohibition of criminalising extreme opinions

In Belgium, the Constitutional Court relied on the directive to protect fundamental rights and limit the scope of counter-terrorism legislation. In 2018, it annulled an amendment of Article 140bis of the Criminal Code that expanded the criminalisation of public incitement to cover the distribution of extremist messages, regardless of whether or not they created a danger of offences being committed. The court ruled that the notion of public incitement was too broad and could infringe on freedom of expression insofar as the judge did not assess the danger, the identity and position of the distributor, the audience or the context.

The court also pointed out that the expression of extreme or disturbing opinions falls outside the scope of the directive and that criminalising incitement to terrorism must not target extreme opinions in a democratic society.\*

\* Belgium, Constitutional Court (*Grondwettelijk Hof/Cour constitutionnelle*), **Decision No 31/2018**, 15 March 2018.

Respondents in Spain and France including judges, prosecutors, oversight bodies and defence lawyers point out that national legislation departs from the directive by not requiring the element of danger. A judge in one of these countries argues that the national law is not compatible with the directive and risks seriously infringing on freedom of expression, and that courts must apply the danger criterion proactively. The directive may therefore have a positive impact in allowing courts to interpret the broad national legal provisions more strictly, some respondents in these countries note.

In France, one respondent considers that the directive's requirements of danger and intent could limit the room for arbitrary application of the offence of apology for terrorism. Other practitioners offer a variety of views on the practical application of the offence in this regard. Two respondents note

that the eventuality of a terrorist act is not taken into account at all; a mere positive opinion about an event or group is enough to convict. Another states that the presence of danger is always taken into account in practice even if it is not required by law.

In Spain, the Supreme Court used the directive to rule that the pre-existing definition of glorification also requires proving the existence of danger (see case-law box on the requirement of danger). Some respondents confirm that this element must now be proven in cases of glorification. At the same time, they offer diverging interpretations on issues that can be particularly relevant in the national context, such as whether glorifying a terrorist organisation that no longer operates could qualify as posing such a danger or not.

## CASE-LAW

### Use of directive by courts to introduce the requirement of danger

The Spanish Supreme Court dealt with a case of posting material promoting Da'esh on social media (see also Section 4.1.2). It pointed out that the directive and the European Convention on the Prevention of Terrorism require that such conduct cause a danger of a terrorist offence being committed.\* It considered that such danger was required even though the relevant provision of national law punished the simple fact of glorifying, without containing the element of danger.\*\*

\* *Spain, Supreme Court, Criminal Chamber (Tribunal Supremo, Sala de lo Penal), Judgment 354/2017, 17 May 2017.*

\*\* *Spain, Criminal Code (Código penal), Art. 578.*

In Member States that expressly stipulate the requirement in law, some law enforcement respondents nevertheless state that the mere intention to incite, coupled with even an abstract risk that terrorist acts could happen as a result, is enough to investigate and, potentially, convict the person. Other respondents indicate that other criteria than the content of the message and the intention may be decisive when assessing the presence of danger. For example, a public prosecutor links the danger to the person making the statement: a message can be criminalised as public provocation when it is communicated by someone with influence. Some defence lawyers worry that, in practice, some courts do not assess the presence of danger at all. That may lead to arbitrariness and violate freedom of speech.

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**'I do not think it's done in view of a danger [i.e. that a terrorist act will be committed as a consequence of an expression], but as a precautionary disapproval of such an expression.'**

(Defence lawyer)

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**'Public authorities attempt to fabricate a situation of danger due to the line of thought the person followed, and thereby interfere with freedom of expression. In case of jihadism, courts and authorities simply say or believe "One cannot take this view" or "This opinion is not to be held".'**

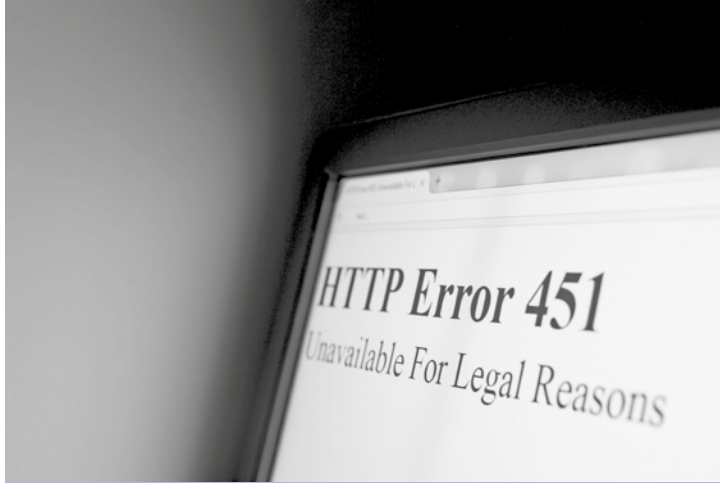
(Defence lawyer)

On the other hand, judges in particular assert that the crime necessarily requires a certain call to action, i.e. actively trying to convince other people. The person delivering the speech therefore must do so with the intention to incite violence and create a risk. Even within the same Member State, views on this issue vary between practitioners: in one country, for example, a public prosecutor and an investigative judge require an intent to incite or cause a danger that such acts can be committed, while a judge believes that merely knowing that such a danger may arise could suffice.

## IN BRIEF

# Online content blocking and removal

Article 21 of the directive obliges Member States to ensure prompt removal of, or block access to, online content constituting public provocation according to Article 5. Member States must put in place transparent procedures and adequate safeguards to ensure that content is removed only when necessary and proportionate, and judicial redress should be available. The directive does not prescribe which authorities should be responsible for ordering such measures.



The research did not cover the issue of online content removal systematically. Some respondents in several Member States nevertheless shared their views on it during the interviews.

Respondents generally consider the issue less of a problem when courts order online content removal as part of criminal proceedings.\* In Member States such as Belgium\*\* and France,\*\* where an administrative authority can order this measure during investigations or outside criminal proceedings, some interviewees are more critical of its potential impact on freedom of expression. Concerns include the lack of transparency of the process, removal of content that is considered a problem based on mere suspicions, the risk of undermining democratic principles by censoring political opinion and controversial thoughts, and

infringing on freedom of expression if there is no court assessment of risk or intent.

In Sweden, where respondents otherwise point to strong constitutional protection of freedom of expression, some note with concern that this protection against censorship covers only the press and traditional media, not the internet.

These challenges and concerns are likely to increase when the removal obligation is also applied to other content that is considered to be of a terrorist nature, not just content that clearly constitutes public provocation. The recently adopted Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online\*\*\*\* expands the obligation to material related to other offences such as recruitment or training. It obliges hosting service providers to ensure removals when competent authorities (which it does not define) order them to do so, and proactively on their own.

This considerably changes the legal landscape in this regard. Given that the definition of online terrorist content in the regulation is based on the definition of terrorist and terrorism-related offences in the directive, its application will again put to the test the clarity and foreseeability of these provisions.

\* See for example Spain, Criminal Code (**Código Penal**), Art. 578(4) and Art. 579(4); Spain, Organic Law 13/2015, of 5 October, amending the Law of Criminal Procedure (**Ley Orgánica 13/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal para el fortalecimiento de las garantías procesales y la regulación de las medidas de investigación tecnológica**), 5 October 2015.

\*\* Belgium, Code of Criminal Procedure (**Code d'instruction criminelle**), Art. 39bis.

\*\*\* France, Decree No 2015-125 of 5 February 2015 on blocking sites inciting acts of terrorism or advocating these and sites containing images of child pornography (**Décret n° 2015-125 du 5 février 2015 relatif au blocage des sites provoquant à des actes de terrorisme ou en faisant l'apologie et des sites diffusant des images et représentations de mineurs à caractère pornographique**), Art. 3; France, Code of Criminal Procedure (**Code de procédure pénale**), Art. 706-23; France, Law 2004-575 on confidence in the digital economy (**Loi 2004-575 Pour la confiance dans l'économie numérique**), 21 June 2004, Art. 6-1.

\*\*\*\* Regulation (EU) **2021/784** of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, OJ 2021 L 172, 17 May 2021.

### *Humiliation of victims of terrorism*

The directive does not explicitly include humiliating victims among the types of conduct establishing the offence of public provocation. However, it does not exclude it either, and recital 10 refers to messages or images online and offline related to victims of terrorism as a way to gather support for terrorist causes or to seriously intimidate the population.

Among the fieldwork countries, only Spain has experience in applying this specific offence, the findings suggest.<sup>22</sup> The offence is seldom prosecuted alone but usually in combination with glorification.<sup>23</sup> Neither intent nor danger is required for the humiliation of victims to constitute a terrorist offence, according to a number of respondents.

Courts have wide discretion when assessing a possible violation of this provision, since no guidance exists on prosecuting indirect provocation, respondents say. This leads some to point out that this offence severely erodes the principles of legality and foreseeability and increases the risk of arbitrariness. It is easier to obtain a conviction for humiliation of victims than for glorification, as no attention is paid to the intent, the risk that an actual offence will be committed or how the victim perceived the alleged humiliation, one respondent notes.

In addition, respondents raise concerns over disproportionately limiting freedom of expression given that the law does not require the victim to feel humiliated. Respondents give examples of cases where the victims declared that they did not feel humiliated, yet the court convicted the defendants. In some cases, courts have held that even an anecdote can humiliate a victim. Some respondents from other Member States refer to Spain to illustrate the risk to freedom of expression when the offence of public provocation is objectified and linked to victims.

The presence of intent is a required element for all offences under the directive and the presence of danger is required for conduct to be punishable under the directive as public provocation. The absence of these two core elements from the offence of humiliation of victims gives rise to fundamental rights concerns. It also indicates that, in harmonising the Member States' criminal justice responses to terrorism, the directive does not necessarily guarantee the application of the same principles and fundamental rights safeguards in a cross-cutting manner for all offences that national law criminalises as forms of terrorism.

#### **2.2.2. Particular impact on individuals belonging to specific groups**

A common concern emerging from the findings is that the offence of public provocation may have a disproportionate impact on certain groups. Although many respondents underline that the legal provisions are not inherently discriminatory, they state that applying them may still have such an effect. Measures to detect and prosecute public provocation are more likely to affect certain groups based on their ethnic or religious background, such as persons of Arab descent or Muslims, a number of oversight experts, judges, defence lawyers and academics agree.



This is a common concern highlighted in relation to all the preparatory offences that this report covers. However, it plays a specific role in cases of public provocation because a person's identity may affect not only the expression of certain views and opinions but also how the authorities interpret them.

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**'The main challenge is making the distinction between someone who is very religious or very radical in their beliefs and someone for whom there is a risk that they are radicalised or a terrorist.'**

(Law enforcement officer)

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**'Young men with the same criminal offence with a migration background and darker skin colour receive a worse risk assessment ... and thus a harsher punishment for the same offence.'**

(Oversight expert)

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**'There is a considerable risk of unconscious discrimination as authorities speculate on what goes on in the mind of certain persons.'**

(Academic)

This relates partly to the broad scope and vagueness of the formulation of the crime, and partly to how intent is determined. The risk of direct and indirect discrimination had already arisen at the legislative stage, one respondent from an oversight body argues. That is because counter-terrorism legislation was drafted without a proper proportionality assessment in relation to individual rights and freedoms.

Defence lawyers and oversight bodies, more than other professional categories, observe a particular focus on people with a Muslim background. One defence lawyer, for example, suggests that judicial authorities tend to consider public expression of views to be provocation depending on the identity of the person who holds them. That can affect Muslim communities.

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**'If you do not register the incidents as right-wing terrorism, then of course you do not have any.'**

(Academic)

Some respondents in Belgium and Sweden note that this is particularly striking when compared with right-wing extremism, where similar conduct is not prosecuted in the same manner as jihadist cases. Despite a number of cases in recent years, even a clear call to violence against an ethnic or religious group by a right-wing extremist is still very unlikely to be considered public provocation, another defence lawyer asserts.



Public provocation is only rarely invoked to convict right-wing glorification or incitement, an academic agrees; the focus is very much on jihadist terrorism, although the measures for dealing with radicalisation could very well address right-wing terrorism as well. While noting the high level of protection of freedom of speech, this respondent believes that the threat from jihadism is also 'more politically interesting'.

A respondent in Spain indicates that courts assess intent and risk differently in jihadist and separatist cases. According to this respondent, convictions for jihadist terrorism are based on risk, assessed by monitoring social networks and the internet. For separatist cases, the courts are more likely to require evidence of both risk and intent.

If public statements do not meet the threshold for criminalisation but the authorities consider them problematic, they can enhance surveillance of individuals but also begin administrative proceedings and measures, interview findings across countries also indicate. These can entail inclusion in databases and watchlists, closing places of worship or measures under immigration law aiming to remove non-EU nationals from the territory and prevent their re-entry. Chapter 5 further discusses the fundamental rights impact of these administrative measures and of their use alongside criminal proceedings.

# Endnotes

- 1 Public provocation to commit a terrorist offence was introduced into EU law by **Council Framework Decision 2008/919/JHA** of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism.
- 2 Greece, Law 4637/2019, Amendments of Criminal Code, Code of Criminal Procedure and other provisions (*Τροποποιήσεις Ποινικού Κώδικα, Κώδικα Ποινικής Δικονομίας και συναφείς διατάξεις*) O.G. A' 180/2019, Art. 187A, para. 6.
- 3 France, Criminal Code (*Code pénal*), Art. 421-2-5.
- 4 Spain, Criminal Code (*Código penal*), Art. 578.
- 5 Available information on completed criminal proceedings that Member States shared with Eurojust supports this finding; Eurojust, *Terrorism Convictions Monitor*, issues 18–36.
- 6 ECtHR (2020), **Guide on Article 10 of the European Convention on Human Rights**, 30 August 2020.
- 7 ECtHR, **Leroy v. France**, No 36109/03, 2 October 2008, para. 36.
- 8 CJEU, Case C-157/14, **Société Neptune Distribution v. Ministre de l'Économie et des Finances**, 17 December 2015, para. 65.
- 9 ECtHR, **Selahattin Demirtaş v. Turkey (No 2)**, No 14305/17, 22 December 2020, paras. 249–254, 270; ECtHR, **Perinçek v. Switzerland [GC]**, No 27510/08, 15 October 2015, para. 131.
- 10 ECtHR, **Sürek v. Turkey No 4 [GC]**, No 24762/94, 8 July 1999, paras. 58–60; **Gözel and Özer v. Turkey**, Nos 43453/04 and 31098/05, 6 July 2010, para. 56.
- 11 One example concerned the publication of a cartoon depicting the destruction of the World Trade Center with the caption 'We have all dreamt of it ... Hamas did it'. The ECtHR took into account the context, including how soon after the events the publication was, the language used and the modest penalty imposed; ECtHR, **Leroy v. France**, No 36109/03, 2 October 2008. See also ECtHR, **Gözel and Özer v. Turkey**, Nos 43453/04 and 31098/05, 6 July 2010; ECtHR, **Selahattin Demirtaş v. Turkey (No 2)**, No 14305/17, 22 December 2020.
- 12 Cavaliere, A. (2015), 'Critical profiles of the Law-Decree countering terrorism No 7 of 18 February 2015', in *Diritto Penale Contemporaneo*, 31 March 2015; Luxembourg, Consultative Commission for Human Rights of the Grand Duchy of Luxembourg (Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg) (2015), *Opinion on Bill 6761 implementing certain provisions of Resolution 2178 (2014) of the United Nations Security Council and amending the Penal Code and the Code of Criminal Investigation (Avis sur le projet de loi 6761 portant mise en œuvre de certaines dispositions de la Résolution 2178 (2014) du Conseil de sécurité des Nations Unies et portant modification du Code pénal et du Code d'instruction criminelle)*, June 2015; Sieber, U. (2009), 'Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld von terroristischer Gewalt – Eine Analyse der Vorfeldtatbestände im "Entwurf eines Gesetzes zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten"', *Neue Strafrechtszeitschrift*, No 7, pp. 353–408; Portugal, Ombudsman (Provedoria de Justiça) (2018), '**Effects of terrorism on the enjoyment of human rights and fundamental freedoms in Portugal**'; Slovakia, President of the Slovak Republic (Prezident Slovenskej republiky) (2015), Decision of the President of the Slovak Republic to return the Act from 9 December 2015 (**Rozhodnutie Prezidenta Slovenskej republiky o vrátení zákona z 9. decembra 2015**), 21 December 2015.
- 13 UN, Office of the High Commissioner for Human Rights (2008), '**Human rights, terrorism and counter-terrorism**', Factsheet No 32, July 2008; OSCE, Office for Democratic Institutions and Human Rights (ODIHR) (2018), **Guidelines for addressing the threats and challenges of 'foreign terrorist fighters' within a human rights framework**, OSCE ODIHR, Warsaw.
- 14 UN Human Rights Council (2010), **Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin**, A/HRC/16/51, 22 December 2010, pp. 15–16. The ECtHR has repeatedly made a distinction between incitement to violence and simple expression of agreement with the objectives of a proscribed organisation; see for example ECtHR, **Sürek and Özdemir v. Turkey**, Nos 23927/94 and 24277/94, 8 July 1999, para. 61.
- 15 For example, in Italy, data protection experts have pointed out that monitoring online conversation in search for a criminal offence may promote rather than limit violent extremism and terrorism; see for example Italian Data Protection Authority (Garante per la protezione dei dati personali), 'More data protection for more cyber-security' ('**Più protezione di dati per più cyber-sicurezza**'), intervention of the President of the Data Protection Authority in *Avvenire*, 12 February 2015.
- 16 Spain, Organic Law 13/2015, of 5 October, amending the Law of Criminal Procedure (**Ley Orgánica 13/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal para el fortalecimiento de las garantías procesales y la regulación de las medidas de investigación tecnológica**), 5 October 2015, with respect to Art. 282bis, paras. 6 and 7, of the Law of Criminal Procedure. For criticism, see for example Rights International Spain (2021), **Legal standards on glorification: Case law analysis of the offence of glorification of terrorism in Spain**, p. 6.
- 17 The ECtHR has confirmed this, ruling in the case of a journalist that, especially in respect of statements made in the context of a debate on a matter of general public interest, any restrictions to freedom of expression had to be strictly regulated; ECtHR, **Stomakhin v. Russia**, No 52273/07, 9 May 2018. On the intent of media professionals and the general public's right to be informed of a different point of view on a situation of conflict, see also ECtHR, **Gözel and Özer v. Turkey**, Nos 43453/04 and 31098/05, 6 July 2010.
- 18 The issue has also received attention in Member States that the fieldwork did not cover. In Poland, researchers stress the risk of criminal liability for some professions; for example, a teacher could incur criminal responsibility for lecturing on nuclear physics, unaware of the presence of a radicalised student who plans to use this knowledge to commit a crime. See Mozgawa, M. (ed.) (2019), *Criminal Code: A commentary (Kodeks karny. Komentarz)*, LEX/el., remarks on Art. 255a.
- 19 The information about completed criminal proceedings that Member States shared with Eurojust likewise indicates that the rate of acquittals in public provocation cases in Spain is higher than in other Member States; Eurojust, *Terrorism Convictions Monitor*, issues 18–36.
- 20 France, Ministry of Justice (Ministère de la Justice), *Infractions d'apologie et de provocation au terrorisme*, SG-SDSE SID/CASSIOPEE-Traitement DACG/PEPP, October 2020; statistics were provided to FRA by the National Consultative Commission on Human Rights (Commission nationale consultative des droits de l'homme). After the murder of the teacher Samuel Paty in October 2020, the media also reported a number of arrests of children for glorification (apology), including four children aged 10. See for example *Le Figaro Étudiant* (2020), '**Arrestation de quatre enfants de 10 ans pour "apologie du terrorisme"**', 7 November 2020.
- 21 Bulgaria, Criminal Code (**Наказателен Кодекс**), Art. 320(1); Croatia, Criminal Code (**Kazneni zakon**), Art. 99; Czech Republic, Criminal Code (**Trestní zákoník**), Art. 312e(1); Estonia, Criminal Code (**Karistusseadustik**), Art. 237; France, Criminal Code (**Code pénal**), Art. 421-2-5; Hungary, Criminal Code (**Büntető törvénykönyv**), Art. 315; Italy, Criminal Code (**Codice penale**), Art. 302; Latvia, Criminal Code (**Kriminālkodekss**), Art. 79<sup>6</sup>; Lithuania, Criminal Code (**Baudžiamasis kodeksas**), Art. 250<sup>6</sup>; Netherlands, Criminal Code (**Wetboek van Strafrecht**), Art. 131; Poland, Criminal Code (**Kodeks karny**), Art. 255a; Romania, Law 535/2004 on preventing and combating terrorism (**Legea nr. 535/2004 privind prevenirea și combaterea terorismului**), Art. 33<sup>2</sup>(4); Slovakia, Criminal Code (**Trestný zákon**), Art. 419b; Spain, Criminal Code (**Código penal**), Art. 578; Sweden, Act on criminal responsibility for public provocation, recruitment and training concerning terrorist offences and other particularly serious crime (**Lag [2010:299] om straff för offentlig uppmaning, rekrytering och utbildning avseende terroristbrott och annan särskilt allvarlig brottslighet**), Art. 3.

22 Spain, Criminal Code (*Código penal*), Art. 578.

23 According to research conducted by Rights International Spain, humiliation alone represented only 5 % of the glorification-related convictions between February 2015 and March 2019, but another 29 % combined the components of glorification and humiliation; Rights International Spain (2021), *Legal standards on glorification: Case law analysis of the offence of glorification of terrorism in Spain*, p. 28.

# 3

## TRAVELLING FOR THE PURPOSE OF TERRORISM

The directive introduced the offence of travelling for the purpose of terrorism (Article 9), as one of the key novelties in comparison with Framework Decision 2002/475/JHA. The travel offence was among the flagship initiatives under UN Security Council Resolution 2178 (2014) and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, to address the phenomenon of foreign terrorist fighters. Recital 12 of the directive underlines that criminalisation of travelling for the purpose of terrorism is necessary 'to stem the flow of foreign terrorist fighters'.

The directive requires Member States to criminalise travel for the purpose of committing, or contributing to the commission of, a terrorist offence, for the purpose of participation in the activities of a terrorist group, or for the purpose of providing or receiving terrorist training. They must also criminalise any act of organising or facilitating such travel (Article 10). Terrorist travel is therefore defined as a preparatory offence distinguished from ordinary travel by the presence of terrorist intent.

Both the Security Council resolution and the additional protocol cover criminalising outbound travel only. The directive, on the other hand, also requires Member States to criminalise travel to their territory. They can do that either directly or by criminalising preparatory acts that persons entering the country commit.

As a result, Member States need to reconcile conflicting international obligations as well as constitutional concerns, in particular as regards their own nationals. This has led them to different choices as to whether or not to explicitly criminalise inbound travel.<sup>1</sup>

Exposure to the phenomenon of foreign fighters has varied between fieldwork Member States, and across the EU more generally. Belgium, Germany and France (together with the United Kingdom in the wider European context) have been considered the main source countries of foreign terrorist fighters in the EU during the period of numerous departures to conflict zones before the adoption of the directive. This resulted in a significant number of prosecutions as well as administrative measures to prevent individuals from travelling to the conflict zones in the first place.<sup>2</sup>

Greece and Hungary, on the other hand, are predominantly transit countries, with few cases to date, respondents confirm. Sweden is presumed to have had a number of departures but few returns, resulting in a small number of prosecutions.<sup>3</sup>

This affected, to some extent, the introduction of the offence into national law. Germany introduced a specific offence in response to the adoption of Resolution 2178 (2014). In Greece and Hungary, the offence only became

part of national law after the adoption of the directive, whereas in Spain and Sweden the directive led to an extension of the scope of an existing offence.<sup>4</sup>

Belgium criminalised terrorist travel as a specific offence in 2014.<sup>5</sup> In the same year, France criminalised an 'individual terrorist enterprise', which covers the preparation of a terrorist offence, including by staying in a theatre of operations of a terrorist group.<sup>6</sup> Both of these countries, however, prosecute most cases involving travel to conflict zones under pre-existing general offences of terrorist criminal conspiracy (France) or participation in a terrorist organisation (Belgium), according to respondents.

This chapter covers the respondents' experiences of the application of the offence as regards its impact on freedom of movement and a variety of legitimate activities, challenges related to the unclear scope and determining terrorist intent, and the impact that the criminalisation of travel may have on the rights of individuals belonging to specific groups, including ethnic and religious groups as well as women and children.

### **3.1. AVOIDING THE CRIMINALISATION OF LAWFUL TRAVEL**

Articles 9 and 10 of the directive require Member States to criminalise any inbound or outbound travel that has a terrorist purpose. At the same time, Article 13 does not require a link between the travel and a specific terrorist offence.

A variety of legal experts, academics and human rights bodies have expressed concerns about criminalising travel as a preparatory act detached from a concrete terrorist offence. They also emphasise the need to properly assess its impact on a variety of rights.<sup>7</sup> The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has drawn attention to the difficulties of prosecuting 'travelling with terrorist intent' in a manner that complies with human rights, including the rights to freedom of movement, expression and association as well as the principle of legality, which requires that legislation has a certain level of precision, clarity and foreseeability.<sup>8</sup>

Interview findings reveal respondents' concerns about the legality and proportionality of criminal offences and penalties (Article 49 Charter and Article 7 ECHR), the presumption of innocence and the right of defence (Article 48 Charter and Article 6 ECHR) and the risk of disproportionately affecting freedom of movement (Article 45 Charter, as well as Article 3(2) of the Treaty on European Union and Article 21 of the Treaty on the Functioning of the European Union, and Protocol No 4 ECHR). Criminalising travel may have particular implications for the work of specific actors, such as humanitarian organisations or journalists, and impact on rights such as the freedom of assembly and association (Article 12 Charter and Article 11 ECHR).

#### **3.1.1. Definition and scope of the offence of travelling for the purpose of terrorism**

The definition and scope of the offence concerns many respondents, given its nature as a preparatory offence to terrorist crimes that are themselves vaguely defined (see Section 1.2.1).

The majority of defence lawyers interviewed, a number of experts from NGOs and academia, and some judges across the Member States raise concerns about its foreseeability, which is a crucial element of the principle of legality. They underline that the objective element of the offence, travel, is an ordinary, lawful activity, which the offence risks restricting. In particular,

‘There is an issue there, especially for travelling ... These crimes can be established only from their outcome. It is a practical issue and an issue of proof; there are no special guidelines or criteria. Only with the outcome, that is, only by establishing participation of a person [in] criminal acts conducted abroad, then we can assess [his or her] travelling and say that this is a criminal act. The same applies to self-training [for terrorist purposes].’

(Public prosecutor)

defence lawyers criticise the shifting of criminal liability towards not only travel, but even attempting, organising and facilitating it.

According to some respondents, the prohibited conduct in these cases is too distant from a potential future terrorist act. As a result, at the time of the travel itself, some of the elements required to constitute a crime might not be sufficiently formulated or clear. This increases the risk of prosecuting lawful travel and raises serious questions about respecting the principle of legality and the presumption of innocence. That is particularly grave when authorities presume that such travel has a terrorist purpose and act preventively, before the actual travel starts. A prosecutor therefore questions if terrorist travel is at all viable as a separate offence given that, in practice, sufficient evidence of the purpose usually only becomes available after the travel takes place.

## CASE-LAW

### Borderline constitutionality of criminalising travel

In Germany, the Federal Court of Justice ruled that criminalising an attempt to travel to another country for a terrorist purpose is not unconstitutional, given that departure from the country is often the last opportunity to stop potential perpetrators. However, criminalising the preparation of a preparatory offence is on the borderline of what is constitutionally permissible.\*

In Belgium, the Constitutional Court held that the provision of national law governing terrorist travel was sufficiently clear. The court noted that it would be difficult to establish criminal intent in these cases, but persons travelling abroad could foresee sufficiently whether or not they would fall within the scope of the provision based on their own motives for travelling.\*\*

\* Germany, Federal Court of Justice (Bundesgerichtshof), 3 StR 326/16, 6 April 2017.

\*\* Belgium, Constitutional Court (Cour constitutionnelle/Grondwettelijk Hof), Decision No 8/2018, 18 January 2018.

The abstract nature of the offence raises concerns among respondents. The offence becomes too vague if national law follows the logic of Article 13 of the directive and does not draw a clear link between travel and the intention to engage in a specific terrorist activity or with a specific terrorist group, some judges, defence lawyers and academics note.<sup>9</sup> A law enforcement officer specifically welcomes this, as it allows the prosecution of a single act of travelling, rather than membership of a permanent organisation. Other respondents raise concerns over the unforeseeable and arbitrary application of the offence. In a defence lawyer’s experience, even if an individual only has vague thoughts about somehow contributing to terrorist activities, this can constitute sufficient criminal intent.

The lack of a link with a specific terrorist offence also significantly lowers the threshold for intentionality and knowledge when it comes to facilitating travel. Simply helping someone to leave for Syria is a sufficient ground for prosecution, without having to prove their knowledge that the person is going to Syria to participate in the fighting, a judge says. According to this respondent, the directive is too ambiguous to restrict such arbitrariness, as it contains a requirement of intent but does not require a link to a specific offence.<sup>10</sup> Establishing a person’s knowledge of another person’s intent is difficult for any bona fide judge, an academic observes.

The unclear scope of the offence risks disproportionately limiting freedom of movement, as respondents in Germany, Greece and France highlight in particular. Some of them state that it can also affect the right to leave one's own country<sup>11</sup> and the right to return to one's own country.<sup>12</sup> A prosecutor sees a 'great risk of the offence violating the freedom of the individual' to travel and to move freely. It also precludes a person from changing their decision before engaging in harmful behaviour when reaching the destination, a law enforcement expert explains.

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**'Travelling to Syria, for example, even if there is an intent to join a criminal organisation, does not suffice – someone may decide to retreat once he arrives there. You cannot deprive him of the right to withdraw, even when he gets there. That is, he may want to travel for this purpose, but as soon as he arrives, he may not want to join and wants to go back instead. Which has also happened.'**

(Law enforcement officer)

#### CASE-LAW

### Criminalising preparation to travel for the purpose of terrorism

In Belgium, the Court of First Instance of Liège ruled that the offence of terrorist travel can only cover situations where the execution of the offence has commenced (e.g. by buying tickets for travel) or travel has already taken place. A mere expression of an intention to travel or the start of preparations (e.g. by saving money and searching for contacts) cannot be criminalised.\*

*\* Belgium, Court of First Instance Liège (Chambre des vacances), 19 July 2017, Revue de Jurisprudence de Liège, Mons et Bruxelles, Vol. 2017, No 29, pp. 1397-1398.*

In this context, respondents in some countries underline that, when persons are suspected of planning to travel for terrorist purposes, criminal law measures are seldom used in isolation. Instead, they are often accompanied by administrative measures such as travel bans, various forms of deprivation of liberty or confiscations of documents to prevent travel to conflict zones. Chapter 5 explores the fundamental rights impact of these administrative measures and of their use alongside criminal proceedings.

#### 3.1.2. Criminalising activities of legitimate actors

Criminalising travel has a potential impact on lawful activities more generally. It also has implications for those travelling to conflict zones for legitimate professional purposes, such as humanitarian organisations and journalists. The directive acknowledges this in provisions that aim to safeguard the freedom of the press (Article 23(2)) and the work of humanitarian organisations (recital 38).





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**'In most cases, [the authorities] probably do get it right, and they are not arresting well-known journalists travelling to Syria to cover what [Da'esh] is doing, but in some cases they do get it wrong just through this assumption of intent.'**

(Defence lawyer)

Most respondents note that such cases are rarely encountered in practice. Nevertheless, criminalising travel can have such an effect, a number of professionals highlight.

Staff of NGOs providing humanitarian support or certain journalists can be suspected when travelling to Turkey, because of their links to Kurdish organisations, a defence lawyer mentions. This indicates that investigating and prosecuting travel can also impact on freedom of association. It is difficult to determine terrorist intent based on whether a person travels to a certain country as a journalist or for a different purpose, a prosecutor adds.

Judges also generally acknowledge the need to assess this issue carefully. However, they mostly consider the possibility rather hypothetical and state that law enforcement and prosecution officials would identify such cases at an early stage. In some Member States, judges and prosecutors actually suggest that sometimes the defence abusively invokes humanitarian reasons, although it is usually easy to rebut such claims, as this type of defence is usually not very elaborate.

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**'That's what they all told us – they all went to do humanitarian work in Syria. They use some kind of training they have as nurses or whatever, but it doesn't stand up when you ask them about their job. I remember one who told me he had gone to Syria to look after medical patients [and operate a specific piece of medical equipment]. Unfortunately for him I know the topic well, I asked him three questions and it became clear that he had never seen the machine in his life.'**

(Judge)

Law enforcement respondents also generally confirm that they do not encounter such cases. However, law enforcement and public prosecutors in several Member States mention the absence of guidance to help them identify lawful activities and distinguish them from potential cases of terrorist travel. In this respect, some respondents in Belgium point to a protective clause of the Criminal Code which exempts organisations pursuing exclusively political, religious or other legitimate aims from the definition of 'criminal organisations'.<sup>13</sup>

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**'In my opinion, being a member of a humanitarian organisation or a media outlet does not legalise any activities.'**

(Judge)

The protection granted to these professions is in any case not absolute, some respondents from national authorities underline. While members of humanitarian organisations or journalists have the advantage of being able to provide proof of their activities, their profession does not suffice to legalise involvement in a criminal activity, a judge observes. The respondent draws an analogy to infiltrating a criminal organisation. A respondent in France makes a similar point, referring to applicable case-law, and points out that a journalist travelling abroad to infiltrate a terrorist organisation would fulfil the requirement of intent regardless of the difference in motive.

## IN BRIEF

### Interplay of counter-terrorism legislation and international humanitarian law

Most respondents did not raise the applicability of the directive in situations of armed conflict or its impact in the realm of international humanitarian law. Two defence lawyers, a judge and a prosecutor in different Member States did bring these up.

Recital 37 contains an international law 'exclusion clause', which states that activities of armed forces during periods of armed conflict that are covered by international humanitarian law are not to be treated as terrorist offences under the directive.

Some of the above respondents express concern about the unclear relationship between criminal law in the field of counter-terrorism, including travel and receiving training, and international humanitarian law. Courts in Member States have interpreted the exclusion clause differently. As a result, neither the defence nor the prosecution can clearly foresee whether or not engagement with certain groups in conflict zones falls under counter-terrorism legislation.\*

Furthermore, the directive appears to treat the issue differently from other relevant international instruments, namely UN Security Council Resolution 2178 (2014) and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.\*\*

As a result, Member States may find themselves under contradictory obligations to prosecute some forms of violence under counter-terrorism legislation or not, for example acts by insurgents against the armed forces of a non-EU country. This contradiction and resulting uncertainty also applies to travel to a conflict zone in potential preparation for such acts.

\* For cases from non-fieldwork Member States, see for example Scheinin, M., *'Is travel to Syrian warfare a terrorist crime? The Finnish case'*, *Verfassungsblog*, 8 May 2018.

\*\* Obligations to criminalise foreign terrorist fighters under the Security Council resolution also relate to their participation in the context of armed conflict. The additional protocol, in turn, defines terrorism through an annex that lists a number of pre-existing international instruments against terrorism. Many of them either do not apply to armed conflict or concern acts that in practice foreign terrorist fighters do not commit.

## 3.2. DETERMINING TERRORIST INTENT IN CASES OF TERRORIST TRAVEL

Article 9 of the directive requires a subjective element, i.e. the intended purpose of committing or contributing to the commission of a terrorist offence, participating in the activities of a terrorist group, or providing or receiving training for terrorism. This element of intent received significant attention during the debate on the introduction of the offence in Member States, including concerns that investigative practice, rather than law, would determine the scope of the offence.<sup>14</sup>

It is challenging to establish intent objectively and not arbitrarily, as practitioners interviewed confirm. That has implications for the presumption of innocence and the right of defence (Article 48 Charter and Article 6 ECHR), the prohibition of discrimination (Article 21 Charter and Article 14 ECHR), and freedom of thought, conscience and religion (Article 10 Charter and Article 9 ECHR). The application of the offence to women and children also affects the principle of legality and proportionality of criminal offences and penalties (Article 49 Charter and Article 7 ECHR) and the rights of the child (Article 24 Charter), many respondents highlight.

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**‘For example, there is information that X will travel to a war zone. It is difficult in the first stage to prove his passage to these zones because, for example, he may travel through a third country, such as Turkey, and no information will exist as to his final destination, such as tickets, etc. Who says he did not go anywhere else from Turkey? Even if evidence of his subsequent journey is found, it is difficult to prove his activity there.’**

(Law enforcement officer)

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**‘It is almost impossible to obtain direct evidence of the internal element, which means that indirect elements must be collected, and that is also difficult.’**

(Investigative judge)

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**‘Our experience is that getting evidence of intent when it comes to travel is enormously difficult.’**

(Public prosecutor)

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**‘In the case of terrorist travel, we might encounter elevated evidential difficulties. If no other criminal offence occurred – such as joining a terrorist organisation – proving any terrorist intent is rather difficult.’**

(Judge)

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**‘The intent is assumed through the objective facts of the case: travelling to Syria, entering a website meant for [Da’esh] members ... Which is kind of tricky, because you prove that someone did something, and then you prove intent using the same facts, same evidence.’**

(Defence lawyer)

### **3.2.1. Challenges in proving the element of intent**

Establishing terrorist intent is one of the most difficult issues when investigating and prosecuting terrorist and terrorism-related offences, a number of respondents across professional groups consider (see Sections 1.2.1, 2.2.1 and 4.2.1). It is all the harder with regard to travel, in comparison with other offences, because it is difficult to access evidence about the facts of the case, including the objective element, judges and law enforcement respondents underline. In particular, it is hard to verify information about individuals’ activities in conflict zones in non-EU countries, and to effectively cooperate with the authorities of some of these countries.

Certain Member States encounter foreign terrorist fighters primarily as transit countries. Some practitioners from there report challenges in accessing both evidence from non-EU countries and the necessary information from the country of origin. If they are to prosecute such activities, this risks opening cases, and potentially convicting individuals, with insufficient evidence.

The main challenge nevertheless relates to the difficulties in determining terrorist intent, which is the only factor differentiating travelling for the purpose of terrorism from regular travel. The challenge arises in particular when there is no evidence of a link to a terrorist organisation or another specific terrorist offence, some judges remark. Respondents across Member States emphasise the need for objective evidence of intent, but agree that such clear, objective evidence is seldom available.

This results in having to prove intent based on a combination of elements. Several law enforcement experts and judges point to, for example, luggage contents and certain equipment when a person is caught at an airport. A number of other respondents from the same professional groups nevertheless stress the need to rely primarily on communication and the content of social networks to collect indications of a person’s intent.

Particularly defence lawyers highlight that reliance on indirect evidence (or indications) of intent and its subjective assessment has a significant impact on the right to defence. It leads to a presumption of intent and places the burden of proof on the defendant, who has to provide a credible alternative to the interpretation of the circumstances that the investigating and prosecuting authorities present.

The authorities do not distinguish between the objective and subjective elements of the crime, another defence lawyer highlights. They often use a circular argument, assuming the terrorist intent of the travel based on the very fact that a person is travelling to, for example, Syria in the first place.<sup>15</sup> Some judges and public prosecutors, on the other hand, are rather of the opinion that courts are relatively strict when assessing intent in cases of travel, and the accused can be acquitted even if the case appears relatively clear to the prosecution.

In Member States that frequently use broader offences related to participation in a terrorist organisation to prosecute travel-related offences, in particular

Belgium and France, some practitioners mention additional concerns about the role attached to intent.

Some respondents in Belgium explicitly state that they do not perceive major challenges in proving intent, partly because digital evidence is available but also because travel is only very exceptionally prosecuted on its own and is usually prosecuted under or alongside participation in a terrorist organisation. That only requires proving an intent to support such a group, not to commit a specific terrorist offence.

Other respondents consider this approach problematic. On the one hand, they argue that the limited use of the dedicated travel offence in Belgium illustrates that its introduction was a symbolic response to the phenomenon of foreign terrorist fighters rather than a necessary step. In their view, it indicates that the necessity and proportionality of introducing the offence were not genuinely assessed. At the same time, they state that reliance on the 'catch-all' offence, i.e. participation in a terrorist organisation, helps criminalise a wide range of behaviour based on a presumption of intent and undermines legal certainty.

Respondents in France voice a similar concern about using the offence of terrorist criminal conspiracy. Some state that intention is presumed in such cases and that any person who has travelled to Syria is considered to be part of a terrorist organisation. This raises questions about the application of the principles of legality and presumption of innocence, according to these respondents.

### **3.2.2. Particular impact on individuals belonging to specific groups**

In cases of terrorist travel, like other preparatory offences, respondents express concern that individuals may be more likely to be the target of criminal investigations because of personal characteristics such as religion or ethnicity. This infringes the principle of non-discrimination and on freedom of belief. This is because of the central role of intent in cases of preparatory activities, but also, specifically for this offence, because of the clear links drawn in the public and policy discourse between the criminalisation of terrorist travel, the phenomenon of foreign terrorist fighters and radical Islamism.

For example, when reviewing the draft legislation introducing the offence in 2014, the Belgian Council of State cautioned that the prerequisites for criminalisation are only met when there are concrete indications that the person travelled abroad to commit a terrorist offence. Those indications must be 'materialised or objectified without relying only on stereotypes based on the origin of the person, the religious convictions, the judiciary past of the suspect or the destination'.<sup>16</sup> Recital 39 of the directive clarifies that implementing criminal law measures under the directive should exclude any form of arbitrariness, racism or discrimination.



Respondents from different groups acknowledge that background and belief play a role in the assessment of intent in relation to preparatory offences, including travel. Judges, prosecutors and law enforcement officers mostly underline that religious affiliation is usually only one part of the overall jigsaw of evidence. Some prosecutors and investigative judges nevertheless observe that religious affiliation can act as an important signal, for instance in cases involving persons with previous criminal history.

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**'If you have someone who was absolutely not religious but known by the police for different kind[s] of crimes and then suddenly becomes religious, it is like an alarm. But if you on the other hand have someone who has always been religious, it will be perceived differently. So every case is different in this regard, and I would be very careful about that because we do not want to criminalise religion ... it is not the involvement in religion, even a very deep one, that makes a person suspicious. But in some cases, it is a real signal we need to pay attention to.'**

(Investigative judge)

This implies that a person's religious background may play a particular role at an early stage of investigations when evidence might not be available. If, for example, authorities decide to intercept a person who is attempting to travel to a conflict zone, this increases the risk of assuming intent based on one's own personal perception and beliefs concerning a person's religious background, a public prosecutor warns.

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**'There is a great risk with the new provisions, such as travelling for terrorist purposes, of violating the freedom of the individual because, in principle, everyone has the right to travel wherever they want and to move freely. And it is dangerous to assume intent and proof of an offence based on our personal perceptions and beliefs, and to characterise an act as a preparatory act of terrorism, which we do not comprehend and do not consider "normal behaviour".'**

(Public prosecutor)

Authorities presume that people travelling to Syria are part of a terrorist organisation, an academic argues, regardless of the existence of other possible explanations. Judges offer varying views. One confirms that, when people travel to Syria, they are indeed assumed to intend becoming involved in terrorism. Another warns against that attitude, stating that travel to conflict zones could be misinterpreted because of different beliefs that motivate people to travel, for example pilgrimage.

Several defence lawyers are of the opinion that ethnicity and religion influence the characterisation of intent strongly. One gives an example of a person's Kurdish ethnicity and participating in some Kurdish events becoming 'relevant' to the authorities as soon as the person travelled to certain countries. Some respondents from other professional groups indicate that, particularly in cases of travelling to Syria, intent is not determined on the basis of objective criteria.

Respondents in several Member States also observe that the offence of travel is not applied in the same manner to different types of terrorism. Although the wording of the law is neutral, travel by right-wing extremists (e.g. to another Member State for the purpose of attending training) would be prosecuted as an extremist offence and not a terrorist one, one respondent in Belgium notes. This could be considered discriminatory treatment, according to another Belgian respondent, as persons travelling to Syria for the same purpose would automatically be subject to a stricter approach, including automatic placement in pre-trial detention.

Likewise in Germany, although the overall focus of counter-terrorism work has shifted in the meantime, offences concerning travel in fact have been applied to travelling to Syria only, one respondent remarks.

### 3.2.3. Prosecution of women and children for travel-related offences

Fundamental rights concerns related to the offence of travelling for the purpose of terrorism and proving terrorist intent also arise with regard to families of foreign terrorist fighters, as well as women and children more generally.<sup>17</sup> Respondents in Belgium, Germany, Spain and France mention this in particular. They point to the impact on the rights of the child as well as the principle of legality.

Here too, the experiences of different Member States differ. A respondent from Germany notes that women only started to be prosecuted recently, whereas respondents from Belgium refer to a number of existing convictions.<sup>18</sup>

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**'The intention really comes [down] to a political appreciation ... From a legal point of view, this is very strange.'**

(NGO expert)

## Broader impact of counter-terrorism policies: repatriation of children from conflict zones

The fieldwork did not specifically explore the issue of repatriation of family members of foreign terrorist fighters, in particular children, from camps and detention facilities in conflict zones. Nevertheless, respondents in several Member States emphasised it as an urgent fundamental rights concern, and some of them referred to strong political resistance to allowing children who have travelled to Syria and Iraq to return to Europe.\*

Rather than relating it directly to the travel offence, respondents drew attention to this issue in the context of the overall policy response to the foreign terrorist fighter phenomenon that various international instruments, including the directive, have promoted.

*\* In this context, see for example UN (2019), 'Key principles for the protection, repatriation, prosecution, rehabilitation and reintegration of women and children with links to United Nations listed terrorist groups', April 2019; OSCE ODIHR (2020), 'Repatriation of "foreign terrorist fighters" and their families urgently needed to safeguard human rights and security, OSCE human rights head says', press release, 11 February 2020.*

In relation to women, some defence lawyers and academics refer in particular to a broad interpretation of intent that extends to partners of foreign terrorist fighters who travel to conflict zones without the intention to contribute to the activities and goals of a terrorist organisation. Respondents in Spain and France cite cases in which women were sentenced even if the court accepted that the purpose of their travel to the conflict zone had been different, for

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**‘There are also convergent testimonies of Da’esh making women that have travelled there take photos in veils and armed with rifles and send them home. This would also prevent them from travelling back. Does this constitute training?’**

(Defence lawyer)

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**‘A minor does not fully understand what terrorism means and that what he or she does, for example [undertaking] a journey, is part of the concept of terrorism, because he has very little life experience. In fact, it is very easy for minors to be manipulated in order to commit such acts, for example to join [a group] or make a journey with the ultimate goal not to commit terrorist acts but possibly with the purpose of gaining income and social inclusion.’**

(Investigative judge)

example to support their husbands or to protect their children from harm, and not to contribute to the activities of the terrorist organisation. This raises the question of legality, in particular whether the offence is applied in a foreseeable manner and as the directive and other international standards that led to its introduction intended, i.e. to criminalise foreign terrorist fighters.<sup>19</sup>

Unreliable evidence may further exacerbate this issue, and one defence lawyer questions the genuine nature of some material found online.

On the other hand, another respondent in France draws attention to a case where a woman was acquitted because the actual purpose of her travel was to bring her husband back. Likewise, a judge in another Member State underlines that relatives who travel to a conflict zone for this specific purpose either are acquitted or are not subject to criminal proceedings in the first place.

Defence lawyers also doubt if cases uphold the principle of legality when family members (typically parents) are incriminated for supporting presumed foreign terrorist fighters by sending them money or clothes, for example. Such cases relate only indirectly to the offence of travelling, but these respondents question if helping one’s relatives survive should be equated with supporting terrorism.

Some respondents also shared their experience of cases of travel in which children were accused. They note the difficulty of determining whether such children should be seen as perpetrators or as victims (see Section 1.5) and of establishing terrorist intent. In some juvenile cases, the real motivation might be seeking attention rather than any actual terrorist intent, an investigative judge observes. Another even concludes that young people should not be prosecuted for travel at all, as juveniles might not be sufficiently aware of the impact of their actions.

Many children who have travelled to conflict zones were misled by online content, a judge specialising in juvenile cases points out. Factors such as personal vulnerability and seeking adventure or recognition may play a role. That makes it necessary to carefully assess the degree of maturity in order to establish intent.

Some respondents in Belgium and France, on the other hand, state that children returning from Syria are prosecuted for offences related to terrorism, even if they were previously subjected to torture or other cruel treatment, or recruited by guru-like figures who abused their vulnerability to indoctrinate them to travel. Also in respect of some Member States not covered by the fieldwork, international bodies have noted insufficient protection against prosecution of teenage children forcibly recruited to terrorist groups.<sup>20</sup>

## Endnotes

- 1 Some examples of a more nuanced approach include criminalising outbound travel only (e.g. Germany, Criminal Code (*Strafgesetzbuch*), Art. 89a(2a)); exempting the country's own citizens from the criminalisation of inbound travel (e.g. Sweden, Act on criminal responsibility for public provocation, recruitment and training concerning terrorist offences and other particularly serious crime (*Lag [2010:299] om straff för offentlig uppmaning, rekrytering och utbildning avseende terroristbrott och annan särskilt allvarlig brottslighet*), 1 March 2020, Art. 5b); and not covering travel to the state of nationality or residence (e.g. Portugal, Law 52/2003, approving the Law to Combat Terrorism (*Lei n.º 52/2003, que aprova a Lei de combate ao terrorismo*), 22 August 2003, Art. 4(10) and (11)).
- 2 Europol, *European Union terrorism situation and trend report 2018*, p. 26. As an illustration, among the Member States that the fieldwork covered, Belgium reported to Eurojust the largest number of concluded court proceedings concerning travel between January 2015 and June 2020 (usually in combination with other offences), followed by Germany and France; Eurojust, *Terrorism Convictions Monitor*, issues 18–36. For recent estimates concerning Belgium, Germany, Spain, France and Sweden, as well as some Member States that the fieldwork did not cover, see also Europol (2021), *European Union terrorism situation and trend report 2021*, 22 June 2021, pp. 62–63.
- 3 Sweden, Swedish Security Service (Säkerhetspolisen), 'Fewer persons travel from Sweden to terrorist organisations' (*Färre reser från Sverige till terroristorganisationer*), 27 June 2017.
- 4 Germany, Criminal Code (*Strafgesetzbuch*), Art. 89a; Greece, Criminal Code (*Ποινικός Κώδικας*), Art. 187A(7); Hungary, Criminal Code (*Büntető törvénykönyv*), Art. 316/A(1); Spain, Criminal Code (*Código penal*), Art. 575(3); Sweden, Act on criminal responsibility for public provocation, recruitment and training concerning terrorist offences and other particularly serious crime (*Lag [2010:299] om straff för offentlig uppmaning, rekrytering och utbildning avseende terroristbrott och annan särskilt allvarlig brottslighet*), 1 March 2020, Art. 5b.
- 5 Belgium, Criminal Code (*Code pénal/Strafwetboek*), Art. 140sexies.
- 6 France, Criminal Code (*Code pénal*), Arts. 421-2-1 and 421-2-6.
- 7 See for example Luxembourg, Consultative Commission on Human Rights of the Grand Duchy of Luxembourg (Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg) (2015), *Opinion on Bill 6761 implementing certain provisions of Resolution 2178 (2014) of the United Nations Security Council and amending the Penal Code and the Code of Criminal Investigation (Avis sur le projet de loi 6761 portant mise en œuvre de certaines dispositions de la Résolution 2178 (2014) du Conseil de sécurité des Nations Unies et portant modification du Code pénal et du Code d'instruction criminelle)*, June 2015; similarly Poland, Commissioner for Human Rights (Rzecznik Praw Obywatelskich), *Opinion on the draft act on antiterrorism (Opinia do projektu ustawy o działaniach antyterrorystycznych)*, 19 May 2016.
- 8 UN Human Rights Council (2019), *Visit to Belgium – Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/40/52/Add.5, 8 May 2019, para. 23.
- 9 According to some authors, this missing requirement means that 'the entirely innocent act of travelling becomes a terrorist offence based on the manifestation of ill-defined terrorist purpose, which could consist of premature steps rather than concrete preparatory acts'; Gherbaoui, T. (2020), 'Criminalising foreign fighter travel in order to prevent terrorism in Europe: an illegitimate assault on human dignity?', in Paulussen, C. and Scheinin, M. (eds), *Human dignity and human security in times of terrorism*, The Hague, T.M.C. Asser Press, p. 253.
- 10 In non-fieldwork Member States, courts also had to provide an interpretation of whether or not there needs to be a link between the individual and a terrorist organisation in cases of planned terrorist travel. In 2017, Italy's Court of Cassation provided a restrictive interpretation; Italy, Court of Cassation (Corte di Cassazione), Section VI, **Decision No 14503 of 19 December 2017**.
- 11 Art. 12(2) of the International Covenant on Civil and Political Rights and Art. 2(2) of the ECHR. The ECtHR has ruled that, even in public order cases, any interference with the right to leave one's country must strike a fair balance between the public interest and the individual's right to leave; ECtHR, *Földes and Földesné Hajlik v. Hungary*, No 41463/02, 31 October 2006, para. 32; ECtHR, *Nalbantski v. Bulgaria*, No 30943/04, 10 February 2011, para. 66.
- 12 Art. 3(2) of Protocol No 4 to the European Convention on Human Rights.
- 13 Belgium, Criminal Code (*Code pénal/Strafwetboek*), Art. 324bis.
- 14 See for example Müller-Jacobsen, A. (2015), 'Statement on the draft law of the CDU/CSU and SPD parliamentary groups amending the prosecution of the preparation of serious violent offences endangering the state (GVVG-ÄndG) for the session of the Legal Committee of the German Bundestag on 23.03.2015' (*Stellungnahme zum Gesetzesentwurf der Fraktionen der CDU/CSU und SPD zur Änderung der Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten (GVVG-Änderungsgesetz - GWG-ÄndG) für die Sitzung des Rechtsausschusses des Deutschen Bundestages am 23.03.2015*).
- 15 Jurisprudence from some non-fieldwork Member States indicates that determining intent in such cases was already considered challenging before travelling for the purpose of terrorism became a specific offence in national law. In 2018, Helsinki District Court held that travelling with the intention of joining an opposition group in Syria could not be equated to an intention to commit acts of terrorism; Finland, Helsinki District Court (Helsingin käräjäoikeus/Helsingfors tingsrätt), R 17/8720, 24 January 2018.
- 16 Belgium, Chamber of Representatives of Belgium (Belgische Kamer van Volksvertegenwoordigers/Chambre des Représentants de Belgique), Draft law to strengthen the fight against terrorism (*Wetsontwerp tot versterking van de strijd tegen het terrorisme/Projet de loi visant à renforcer la lutte contre le terrorisme*), No 54 1198/001, p. 17. See also Blaise, N. and Delhaise, E. (2019), 'La répression des voyages à visée terroriste à l'aune des droits fondamentaux', *Journal des tribunaux*, Vol. 138, No 6763, p. 175.
- 17 A recent comparative study estimates that some 18 % of individuals from western Europe, the United Kingdom, the United States and Canada who travelled or attempted to travel to Syria or Iraq to join a terrorist group were women, with an average age of 21 years; Dawson, L. (2021), *A comparative analysis of the data on western foreign fighters in Syria and Iraq: Who went and why?*, International Centre for Counter-Terrorism, The Hague, February 2021.
- 18 Information about completed criminal proceedings that Member States submitted to Eurojust also indicates that convictions of women are more frequent in Belgium than in other fieldwork Member States; Eurojust, *Terrorism Convictions Monitor*, issues 18–36.
- 19 See for example UN Security Council, **Security Council Resolution 2396 (2017)**, 21 December 2017, S/RES/2396 (2017), para. 4, which calls upon Member States to distinguish suspected foreign terrorist fighters 'from other individuals, including their accompanying family members who may not have been engaged in foreign terrorist fighter-related offences'. See also UN High Commissioner for Human Rights (2019), *Protection of human rights and fundamental freedoms while countering terrorism*, 10 January 2019, para. 34.
- 20 UN Human Rights Committee (2018), *Concluding observations on the fourth periodic report of Bulgaria*, 15 November 2018.



# 4

## RECEIVING TRAINING FOR TERRORISM

Article 8 of the directive builds on the criminalisation of the provision of training for terrorism under Framework Decision 2002/475/JHA. Prompted by UN Security Council Resolution 2178 (2014), it requires Member States to also criminalise receiving such training, i.e. instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of committing or contributing to the commission of a terrorist offence. Like other preparatory offences, which Chapters 2 and 3 cover, receiving training therefore consists of an otherwise lawful activity (receiving instruction or otherwise obtaining information or skills) that is considered criminal because of terrorist intent. According to recital 11 of the directive, receiving training also extends to perpetrators acting alone, i.e. lone wolves. Therefore, active self-study should be considered to constitute receiving training for terrorism.<sup>1</sup>

As a result, most Member States that had not previously criminalised self-study introduced it into the definition of the offence. This includes some Member States that the fieldwork covered, namely Belgium and Sweden. Greece had not previously criminalised receiving training at all and introduced the offence in response to the directive.<sup>2</sup> As in the case of the offence of travelling for the purpose of terrorism, France can criminalise receiving training under two provisions: either under the broadly defined offence of terrorist criminal conspiracy (i.e. participation in a terrorist group) or, since 2014, as a form of preparation of a terrorist offence under individual terrorist enterprise.<sup>3</sup>

In comparison with public provocation and terrorist travel, receiving training appears to be prosecuted less frequently in Member States, according to respondents.<sup>4</sup> Spain seems to have more experience with the prosecution of this offence, due to the existence of offences of indoctrination and self-indoctrination, which are related to training.

Given that Framework Decision 2002/475/JHA already criminalised providing training for terrorism, this chapter focuses specifically on the offence of receiving training for terrorism as one of the major changes that the directive introduced. It covers the respondents' experiences of the application of the offence as regards the impact on freedom of information and a variety of legitimate activities, the fundamental rights impact of the unclear scope of the offence and the central role that intent plays, as well as the concerns about the potential impact on the rights of individuals belonging to specific groups.

### 4.1. DIFFERENTIATING RECEIVING TERRORIST TRAINING FROM LEGITIMATE ACTIVITIES

Article 8 provides a non-exhaustive definition of activities that may constitute training for terrorism. Recital 11 appears to provide for a broader interpretation of its scope by introducing the concept of self-study. It also states that,

although merely visiting websites is not sufficient to constitute the crime, downloading materials from the internet can meet the criteria.

Taken together with the overall anticipatory nature of the offence, this ambiguity triggers concerns. The offence of receiving training for terrorism can have an impact on a variety of fundamental rights, the practitioners interviewed consider. This appears to confirm some of the issues raised during the discussions on introducing this offence into EU and national law.<sup>5</sup>

Concerns include compatibility with the principle of legality and proportionality of criminal offences and penalties, which encompasses also the requirements of precision, clarity and foreseeability (Article 49 Charter and Article 7 ECHR), and the presumption of innocence and the right of defence (Article 48 Charter and Article 6 ECHR). The offence can impact legitimate activities and infringe on freedom of expression and information (Article 11 Charter and Article 10 ECHR) and freedom of the arts and sciences (Article 13 Charter and Article 10 ECHR), both more broadly and in terms of the work of researchers and journalists. In this context, specific issues arise in relation to the interpretation of self-study of online content and the *sui generis* offence of self-indoctrination.

#### **4.1.1. Definition and scope of the offence of receiving training for terrorism**

As with regard to the offences of public provocation (see Section 2.1) and travelling for the purpose of terrorism (see Section 3.1), major concerns emerge over the definition and scope of the offence, and the ensuing risks of criminalising activities that are not of a terrorist nature. Criminal law is used preventively at a stage when an ordinary, lawful act could be interpreted as an offence, some respondents argue (see also Section 1.2.1). Defence lawyers and judges in particular are critical of this, stating that the principle of legality and presumption of innocence might not be respected.

Clearly establishing the facts of the case is challenging, particularly when it comes to receiving training online. One law enforcement officer, for example, mentions difficulties in tracking the distribution of materials through encrypted messaging applications or uploaded online, and in distinguishing between passively receiving such materials and actually reading them.

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**'In general, it is not easy to conduct an investigation on the internet. Regarding the person trained or the person looking to receive such training, it is not easy for us to find, for example, where and by whom this material was sent, or to make sure that this person actually received this material, so that we can provide evidence of the offence.'**

(Law enforcement officer)

Most judges and prosecutors argue that such an anticipatory approach is necessary to prevent attacks by radicalised individuals, particularly lone wolves. Some nevertheless acknowledge that there is a risk of disproportionate interference with the rights of the individual, in addition to a risk of jeopardising investigations by intervening too early.

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**'It is true that, because of this, the evidence can become weaker. If they try [to step in] too soon, it might end up in nothing, whereas doing it too late might mean that terrorist activities are already being initiated. Finding the right moment to intervene is a constant challenge for investigators.'**

(Judge)

In some Member States, respondents note that legality concerns are amplified by the manner in which the offence of receiving training is anchored in criminal law, and its resulting blurred scope. France, for example, regulates it as an act preparatory to a broadly defined terrorist offence.<sup>6</sup> In Belgium, a specific offence exists but training is nevertheless usually prosecuted under a catch-all offence of participation in a terrorist organisation (see also Section 3.2.1).<sup>7</sup> Some defence lawyers and academics warn that these approaches make the law less foreseeable. According to a respondent in France, criminalising even the very beginning of preparatory acts makes it ‘almost impossible for an act not to be characterised as a terrorist act’.

Concerns over the lack of clarity of the offence of receiving training have also been identified in some Member States that the fieldwork did not cover.<sup>8</sup>

#### CASE-LAW

### Receiving training for the purpose of self-defence

In some Member States, courts have limited the scope of the offence by applying a restrictive interpretation of the purpose of such training. Germany criminalises training as part of preparing a serious offence able to endanger the security of the state.\* The Federal Court of Justice clarified that, even if a person sympathises with a terrorist organisation, the offence does not cover mere training in the use of firearms if it is for the purpose of self-defence.\*\*

\* *Germany, Criminal Code (Strafgesetzbuch), Art. 89a.*

\*\* *Germany, Federal Court of Justice (Bundesgerichtshof), 3 StR 218/15, 27 October 2015.*



As with the offences of public provocation and travel, a suspicion of being involved in training, which for instance a person’s online activity can trigger, does not necessarily lead to (only) criminal investigations, some respondents highlight. It can also result in administrative measures, such as inclusion in a specific database. Chapter 5 looks in detail at these administrative measures, their use and their fundamental rights impact.

#### 4.1.2. Scope of self-study and self-indoctrination

The exact meaning and scope of the concept of self-study that the directive introduced is unclear, which risks affecting ordinary, lawful activities. When some Member States, including those outside the fieldwork, introduced the offence into national law, discussion took place on the principles of legality and proportionality of interference with freedom of information and belief. In Sweden, the government proposal acknowledged the potential restriction of freedom of information but considered that the general interest in preventing terrorist training justified it.<sup>9</sup>

If training also includes self-study but its precise limits remain undefined, as in the directive, it increases the risk of targeting individuals for innocent activities such as reading a book or possessing a manual, some of the professionals interviewed highlight. Commenting on that, a respondent in Germany refers to 'non-specific skills', objectively neutral actions such as attending university courses that can nevertheless fulfil the objective element of the offence. A defence lawyer also suggests that, in particular, visiting websites and downloading online content are specific in that they occur 'way before terrorist activities can begin to materialise', and therefore the existence of even a potential risk that an actual terrorist act will be committed is even less obvious than for other preparatory offences, such as travel.

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**'With the travel cases, there are good criteria in my view. In the [case of] visiting of internet pages, there are not ... I'm not sure if we can say that someone who is watching something on the internet is a person who is going to commit a terrorist attack ... Such a person ... is not as dangerous as criminal authorities believe.'**

(Defence lawyer)

#### CASE-LAW

##### Applying the criterion of danger to the offence of receiving training

Although the directive does not specifically require the existence of a risk that the training would result in committing a terrorist offence, courts invoked its absence in some cases, in order to avoid criminalising activities that do not have the potential to cause harm. In France, the Court of Cassation acquitted a man who was found in possession of documents and material for the manufacture of explosives, stating that the objects in question were not sufficiently capable of creating a danger to others.\*

\* *France, Court of Cassation, Criminal Division (Cour de cassation, Chambre criminelle), Decision No 18-80849 (Décision n° 18-80849), 23 January 2019.*

A particular situation arises in Spain. It criminalises not only receiving training on the methods or techniques listed in Article 8 of the directive but also being indoctrinated. The offence of self-indoctrination, introduced in 2015, encompasses accessing online content or possessing documents that are aimed at or suitable for inciting incorporation into or collaboration with a terrorist organisation.<sup>10</sup> Unlike the directive, it covers ideological content that is merely potentially capable of leading to one's radicalisation.

Although the offence clearly goes beyond the requirements of EU law, it is currently the most commonly prosecuted terrorist offence in Spain, respondents highlight. At the same time it overlaps significantly with other offences in Spanish law. This gives little clarity on whether a case will be prosecuted as self-indoctrination or rather, for example, glorification.<sup>11</sup>

## CASE-LAW

### Interpreting the scope of the offence of self-indoctrination

In 2017, the Spanish Supreme Court criticised the lack of clarity in the offence of self-indoctrination and its potential conflict with ideological freedom and the right to information. The court underlined that neither international nor EU law requires Spain to criminalise such behaviour. In a case concerning the posting of material promoting Da'esh on social media (see also Section 2.2.1), it overturned a conviction for self-indoctrination and convicted the defendant of glorification instead.\*

The National High Court later convicted another individual of indoctrination. The defendant had disseminated terrorist content and incited the commission of a crime, leading to the radicalisation of two young women. In this case, the court asserted that the offence of indoctrination actually also encompassed self-indoctrination and glorification.\*\*

\* Spain, Supreme Court, Criminal Chamber (Tribunal Supremo, Sala de lo Penal), **Supreme Court judgment 354/2017**, 17 May 2017.

\*\* Spain, National High Court (Audiencia Nacional), **Judgment 15/2018**, 11 May 2018.

No other Member State that the fieldwork covered criminalises to such a broad extent consulting radical content (see the box 'Case-law: Criminalisation of indoctrination as an infringement on freedom of expression and information'). The closest equivalent in the EU is the criminalisation in the Netherlands of possessing provoking terrorist content with the intent to share it publicly.<sup>12</sup> In Belgium, for example, the option of criminalising self-indoctrination was not implemented, as the authorities considered that intent would be too difficult to prove in such cases, some respondents noted.

## CASE-LAW

### Criminalisation of indoctrination as infringement on freedom of expression and information

In 2017, the Constitutional Council in France declared unconstitutional a provision of the Criminal Code that criminalised the visiting of websites inciting or glorifying terrorist acts, as well as a second proposal that made the criminalisation conditional upon the individual's identification with the terrorist ideology.\*

In its decisions, the Constitutional Council noted that the legislature intended to prevent the indoctrination of individuals with terrorist ideologies. However, it considered that the measures infringed on freedom of expression and information in an unnecessary, inappropriate and disproportionate manner.

\* France, Constitutional Council (Conseil constitutionnel), **Decision No 2016-611 QPC (Décision n° 2016-611 QPC)**, 10 February 2017; Constitutional Council (Conseil constitutionnel), **Decision No 2017-682 (Décision n° 2017-682)**, 15 December 2017.

#### 4.1.3. Criminalising activities of legitimate actors

Recital 11 states that collecting materials for legitimate purposes, such as academic or research purposes, is not subject to criminalisation under Article 8. This acknowledges that some individuals may have a justified professional interest in terrorism-related literature, websites or other sources of information. Such people might therefore more easily attract the attention of counter-terrorist authorities and even face criminal proceedings despite the absence of terrorist intent in their activities.<sup>13</sup>

Some respondents, particularly among defence lawyers, NGOs and academics, identify situations in which the offence of training for the purpose of terrorism can incriminate legitimate actors. The criminalisation of self-study can also affect the work of civil society organisations. Respondents in Spain highlight that the self-indoctrination offence can have an impact on journalists,

researchers and anyone else browsing the internet, given that reading any radical content can potentially lead to criminalisation.

Most law enforcement officers, prosecutors and judges, on the other hand, have not experienced researchers or journalists being investigated for terrorism, and they do not consider the risk high. A law enforcement officer observes that on websites that radicalised individuals frequent, one is more likely to encounter other undercover investigators than someone with a genuine research purpose. One investigative judge recalls a case where a journalist was arrested and detained on suspicion of involvement in a terrorist activity as a result of being 'in the wrong place at the wrong moment' but explains that mere interest in a topic does not amount to involvement in terrorist activities, and authorities can distinguish legitimate activities quickly.

In most Member States, some of the interviewed law enforcement officers, prosecutors and judges nevertheless consider that such situations can arise. Activities of legitimate actors may in some cases appear like receiving training for terrorism. A judge observes that such cases would be easy to recognise if they reached the trial stage but notes that it can be difficult for the police to establish this when investigating such cases, as the reasons why someone visits a certain website, for example, might still be unclear at that stage. A law enforcement officer in one Member State mentions that relevant law enforcement training highlights that specific professions may have a justified professional interest in the topic of terrorism, to ensure that, for example, journalists reporting on terrorism do not become linked to terrorist cases themselves.

While noting that the intention of the legislator is not to criminalise legitimate activities, an experienced respondent in France warns that there is no textual guarantee in the law, only judicial restraint. Legislation or case-law would be required to clarify more complex cases in which somebody claims to have a research purpose but goes too far, for instance into establishing contacts with a terrorist organisation, this respondent concludes.

## 4.2. DETERMINING TERRORIST INTENT IN CASES OF RECEIVING TRAINING FOR TERRORISM

Article 8 of the directive requires Member States to criminalise receiving training where it is received intentionally and for the purpose of committing, or contributing to the commission of, terrorist offences. The offence may encompass a variety of ordinary activities (see Section 4.1.1). Given this vague material scope, this subjective element plays a crucial role in distinguishing between lawful behaviour and crime. When they were transposing the offence into national law, this led to doubts in some Member States about the risk of creating a 'thought crime'.<sup>14</sup>

Establishing terrorist intent is one of the key challenges in investigating and prosecuting receiving training in its different forms, including self-study as well as the specific offence of self-indoctrination, practitioners interviewed confirm. It is also a source of major fundamental rights concerns. Besides freedom of expression and information (Article 11 Charter and Article 10 ECHR), the presumption of innocence and the right of defence (Article 48 Charter and Article 6 ECHR) and the principle of legality and proportionality of criminal offences and penalties (Article 49 Charter and Article 7 ECHR), it can also have an impact on freedom of thought, conscience and religion (Article 10 Charter and Article 9 ECHR) and the prohibition of discrimination (Article 21 Charter and Article 14 ECHR), owing to the role that an individual's background, including religion and ideology, can play in assessing intent.

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**'The police agents working on that topic are really, really careful and aware ... because they know that the terrorist provisions in the law are so broad that ... you could arrest many people, but that is of course not the idea of the law. ... So, do we have cases where journalists, researchers and other professions were affected? Yes, we do, but very few, and we can tell the difference very fast.'**

(Investigative judge)

#### 4.2.1. Challenges in proving the element of intent

Many respondents in all professional groups consider it a problem that intent becomes the sole factor determining whether a specific activity constitutes a crime or not (see also Sections 1.2.1, 2.2.1 and 3.2.1). In comparison with some other preparatory offences, the objective element of 'receiving instruction' can occur by means of a wide range of activities, including various forms of self-study. Some prosecutors and investigative judges therefore highlight the precariousness of determining intent and note that the inherently subjective nature of each case makes it difficult to establish objective criteria for assessing such cases.

Respondents from different professional groups offer diverging perspectives on the impact of this challenge on fundamental rights. A number of defence lawyers mention the risk of reversing the burden of proof and confounding the objective and subjective elements of the offence, contrary to the presumption of innocence. Some note that the activity itself, such as visiting a certain website, is often presented by the authorities as evidence of intent. Others warn that the authorities can interpret not only a person's online history or having read certain books but also statements and conversations in a manner that presumes terrorist intent.

Defendants' statements intercepted by wiretaps or on social media, for example, might not always be reliable evidence, as people often do not act as they pretend they might, one defence lawyer points out.

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**'In my opinion, [intercepted statements or social media posts] are no proof of training. There is a difference between what people say, when they are in Syria for example, and what they do. Some people ... might not actually train but are just afraid, so they claim that they are training with the others.'**

(Defence lawyer)

On the other hand, some law enforcement officers emphasise that the intent in cases of training is always carefully examined. One explains that, unless the police catch a person explicitly talking about their plans, they usually have to collect a lot of different elements to build a case. An example would be if a person visits a radical website and subsequently looks up instructions for making an explosive, while at the same time people around them testify that the person has changed their behaviour. Only taken together might these elements be sufficient to prove terrorist intent.

A judge recalls a case in which the authorities monitored a person for about a year on account of their reading radical material but only intervened once there was evidence of the person's decision to attack a religious building.

#### CASE-LAW

### Required degree of intent to commit a preparatory offence

In Germany, the necessary degree of intent in cases of preparatory offences has been the subject of jurisprudence, including in relation to training. In such cases, the Federal Court of Justice requires proof of 'firm determination' to commit an act of violence in order to criminalise otherwise objectively neutral acts.\*

\* Germany, Federal Court of Justice (Bundesgerichtshof), 3 StR 243/13, 8 May 2014; Federal Court of Justice (Bundesgerichtshof), 3 StR 218/15, 27 October 2015.

Freedom of information is particularly at stake when a criminal case is based on a person's visiting certain websites, as respondents including judges and prosecutors observe. According to a judge, a distinction needs to be made between cases in which someone visits websites out of curiosity and those in which there are progressive steps towards a terrorist act. A public prosecutor, however, notes that cases of visiting websites remain very difficult, as the authorities often need to rely on indications of intent rather than clear evidence. An investigative judge therefore believes that it would be 'extreme' to convict someone merely based on their online activity.

In the context of visiting websites, some respondents from different professional groups also draw attention to the particular difficulties arising in cases involving children and juveniles. According to a public prosecutor, watching videos of beheadings by terrorist organisations, while reprehensible, can be a result of youthful curiosity and not a sign of terrorist intent. Similarly, an investigative judge notes that there is a need to carefully identify the line between a youth going through puberty and 'a person already brainwashed and looking for comrades in arms'.

Certain Member States apply specific approaches to the offence that have a further impact on the determination of intent. Some countries use catch-all offences to deal with training and other preparatory activities, such as participation in a terrorist group in Belgium. Respondents there note with concern that there is no need to prove intent to commit a terrorist offence. The requirement is for the vaguer intent to support a terrorist group, not clearly defined, which requires less concrete proof.

In Spain, many respondents highlight the particular challenge of determining intent for the offence of self-indoctrination, without infringing on freedom of thought. Authorities deduce an individual's radicalisation from the radical nature of the material, thus confounding the subjective and objective elements, one respondent notes. In some of these cases, evidence of intent is inferred from an interaction with an undercover agent who might have been encouraging the individual.

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**'In my opinion, terrorist intent must be linked to an outcome, so that behaviour that is not harmful is not punished. For example, one should not punish someone who, as a hobby, deals with explosives and learns about them without ever having made or owned any himself.'**  
(Investigative judge)

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**'That could very much be just youthful curiosity, and in those cases we do not prosecute.'**  
(Public prosecutor)

## CASE-LAW

### Receiving training as evidence of participating in a terrorist group

One of the most prominent terrorism cases in Belgium concerned the Sharia4Belgium group. Among other activities, it radicalised a large number of young people and recruited them to travel to Syria. In the ruling, the Court of First Instance in Antwerp referred on multiple occasions to the fact that members received or actively sought training, which it viewed as indicating their membership of a terrorist organisation.\*

\* See *Belgium, Court of First Instance (Rechtbank eerste aanleg), Antwerp AC4 Case No AN351180, 11 February 2015.*

#### 4.2.2. Particular impact on individuals belonging to specific groups

Recital 39 of the directive states that the implementation of criminal law measures under the directive should exclude any form of arbitrariness, racism or discrimination. However, the combination of criminalising preparatory activities and the focus on addressing jihadist terrorism means that belonging to a certain group defined by ideology, ethnicity or religion can increase the likelihood of being suspected of involvement in terrorist training, or even be used to prove intent. That would infringe the principle of non-discrimination and on freedom of belief. As with other preparatory offences that this report discusses, concerns about that were expressed during the discussion on introducing this offence into national law in various Member States.<sup>15</sup>



Background or belief plays an important role in the assessment of intent to commit preparatory offences, including receiving of training, respondents confirm. Academics and civil society respondents in particular argue that personal, political or religious convictions and beliefs may be substituted for non-existent evidence, and that factors such as wearing a certain type of clothing or visiting a mosque can be interpreted as indications of intent. That increases the likelihood of criminalising otherwise ordinary activities that can be perceived as receiving training.

Some respondents express concern over how the practice of religion is interpreted as an element of radicalisation and therefore contributes to establishing intent, although law does not define radicalisation itself. This would imply that legally non-binding indicators of radicalisation can take precedence over freedom of belief and the principle of non-discrimination.

Some respondents agree that the risk of discrimination is particularly high in investigations of training, given the sheer variety of activities that may attract the interest of the authorities and be interpreted on the basis of a person's background. One academic stresses that for the authorities an Arabic-sounding name might be a key distinguishing factor between legitimate research and suspected terrorist activity.

Several judges, on the other hand, contend that intent is always assessed in its complexity, and a person's religion is merely one of the elements considered. Whether or not consulting jihadist websites is a crime therefore depends on the person as well as a variety of other elements. Some judges nevertheless emphasise that particular caution is necessary to avoid judging beliefs and criminalising religion in cases relating to receiving training.

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**'The only difference between a terrorist's activity and that, for instance, of a researcher, would be being called Muhammad or Fatima, and having a good excuse for researching.'**

(Academic)

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**'Evidence should be carefully collected and complete to avoid being subject to misinterpretation. I believe there is such a risk for the new offences. For instance, one might think that someone belongs to an organisation because they read a certain book or visit specific websites and they present a "deviating" behaviour. I do not believe that this element could be considered as evidence. I cannot accept that one could be prosecuted based on such evidence, i.e. be prosecuted for their beliefs.'**

(Judge)

## Endnotes

- 1 The original proposal by the European Commission focused more narrowly on receiving training from another person. The inclusion of self-study under the scope of the offence was initially an option that Member States could make use of. See European Commission (2015), Proposal for a directive of the European Parliament and the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM(2015) 625 final, 2 November 2015, p. 17.
- 2 Belgium, Criminal Code (*Code pénal/Strafwetboek*), Art. 140quinquies; Greece, Criminal Code (*Ποινικός Κώδικας*), Art. 187A(5); Sweden, Act on criminal responsibility for public provocation, recruitment and training concerning terrorist offences and other particularly serious crime (*Lag om straff för offentlig uppmaning, rekrytering och utbildning avseende terroristbrott och annan särskilt allvarlig brottslighet*), Art. 5a. According to the European Commission, across the EU, only in Cyprus, Malta, Slovenia and Slovakia did the legislation not appear to include self-study as of April 2020; European Commission (2020), Report from the Commission to the European Parliament and the Council based on Art. 29(1) of 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, COM(2020) 619 final, 30 September 2020, p. 8.
- 3 France, Criminal Code (*Code pénal*), Arts. 421-2-1 and 421-2-6.
- 4 This appears also from available information on completed criminal proceedings that Member States shared with Eurojust; Eurojust, *Terrorism Convictions Monitor*, issues 18–36.
- 5 See for example Amnesty International, the International Commission of Jurists, and the Open Society Justice Initiative and the Open Society European Policy Institute (2016), 'European Commission's proposal for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism'.
- 6 France, Criminal Code (*Code pénal*), Art. 421-2-1 and Art. 421-2-6.
- 7 Belgium, Criminal Code (*Code pénal/Strafwetboek*), Art. 140.
- 8 In Poland, for example, the definition of training is not restricted to the methods or techniques that the directive lists. The offence of receiving it broadly covers 'engaging in training that may make the commission of [a crime of a terrorist character] possible'. Some legal experts therefore consider that a wide array of academic activities might now be subject to scrutiny for possible terrorist intent. See Mozgawa, M. (ed.) (2019), *Criminal Code: A commentary (Kodeks karny. Komentarz)*, LEX/el., remarks on Article 255a. Similarly in Luxembourg, the Consultative Commission for Human Rights considered that the lack of clarity and predictability of the provisions of national law raised problems with regard to the principle of legality, the presumption of innocence and the principle of proportionality; Luxembourg, Consultative Commission for Human Rights of the Grand Duchy of Luxembourg (Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg) (2015), *Opinion on Bill 6761 implementing certain provisions of Resolution 2178 (2014) of the United Nations Security Council and amending the Penal Code and the Code of Criminal Investigation (Avis sur le projet de loi 6761 portant mise en œuvre de certaines dispositions de la Résolution 2178 (2014) du Conseil de sécurité des Nations Unies et portant modification du Code pénal et du Code d'instruction criminelle)*, June 2015.
- 9 Sweden, Ministry of Justice (Justitiedepartementet), 'A more encompassing terrorism legislation' (*'En mer heltäckande terrorismlagstiftning'*), 22 February 2018. Similar debates took place in non-fieldwork Member States. In Finland, the Constitutional Law Committee of the Parliament raised the constitutional principle of legality, because the legislation lacked a requirement that would link participation in a training with a risk of actually committing a terrorist offence; Finland, Constitutional Law Committee of Parliament (Perustuslakivaliokunta), Statement 20/2018, Government Bill 30/2018 (*Perustuslakivaliokunta PeVL 20/2018 vp HE 30/2018 vp*).
- 10 Spain, Criminal Code (*Código penal*), Art. 575.2.
- 11 According to a recent study, the same facts can be considered to constitute membership of and/or collaborating with a terrorist organisation, recruitment, indoctrination, self-indoctrination, or glorification or justification of terrorism. As a result, 'multiple legal qualifications and accusations occur in the context of cases of jihadi/[Da'esh] terrorism (in 71 % of these types of cases) [which] jeopardises the principle of criminal legality and the right to a fair trial'; Rights International Spain (2020), *Legal standards on glorification: Case law analysis of the offence of glorification of terrorism in Spain*, p. 48.
- 12 Netherlands, Criminal Code (*Wetboek van Strafrecht*), Art. 132.
- 13 See also for example OSCE ODIHR (2018), *Guidelines for addressing the threats and challenges of 'foreign terrorist fighters' within a human rights framework*, ODIHR, Warsaw, pp. 39–40.
- 14 See for example German Parliament (Deutscher Bundestag), Parliamentary Minutes 16/202 (*Bundestags-Protokoll 16/202*), 2009, p. 21830. Among Member States that the fieldwork did not cover, in Finland, the government bill incorporating this offence clarifies that the person receiving training should have decided to commit one of the offences, which has to be concrete and sufficiently individualised. Enhancing one's general capacity to commit an offence is not enough. Finland, Government Bill 30/2018 on the revision of the Criminal Code, Chapter 10 of the Coercive Measures Act and Chapter 5 of the Police Act (*Hallituksen esitys eduskunnalle laeiksi rikoslain, pakkokeinolain 10 luvun ja poliisilain 5 luvun muuttamisesta HE 30/2018 vp*), p. 107.
- 15 For example, when Bulgaria introduced the offence of receiving training in 2015, the NGO Center for the Study of Democracy raised concerns that the term 'training', if not precisely defined, creates the risk of specific practices in the profession and teaching of Islamic religion being misidentified as terrorist and being prosecuted, affecting freedom of belief; Center for the Study of Democracy (Център за изследване на демокрацията) (2015), 'Statement on the draft amendment to the Criminal Code Act' (*'Становище относно проект на Закон за изменение и допълнение на Наказателния кодекс'*). Even before the increased focus on foreign terrorist fighters, concerns were raised over a disproportionate focus on specific groups within society, particularly persons with a migration background, when criminalising providing or receiving training for terrorism. See for example, in the Netherlands, Ten Voorde, J. M. (2012), 'Participating and cooperating in training for terrorism assessed against criteria for incrimination in the preliminary phase' (*'Het deelnemen en meewerken aan training voor terrorisme getoetst aan criteria voor strafbaarstelling in de voorfase'*), *Delikt en delinkwent*, Vol. 42, No 2, pp. 94–122.

# 5

## APPLICATION OF ADMINISTRATIVE MEASURES IN TERRORISM CASES

The directive is primarily a criminal law instrument. However, Article 28(1) lists regulations and administrative provisions, in addition to laws, among the means of transposition. Some provisions of the directive appear to envisage that Member States can put in place measures outside the scope of criminal law, such as those related to public provocation content online (Article 21) or non-criminal sanctions for legal persons (Article 18). In addition, relevant recitals of the directive mention a number of measures that the Member States should take, in particular to prevent and counter radicalisation (recitals 31-33).

The research furthermore indicates that, in some Member States, the introduction of administrative measures also accompanied the criminalisation of terrorist offences that the directive covers, including in relation to travel, training and public provocation. Some of these measures are applied as a consequence of criminal convictions for offences that the directive requires Member States to criminalise, such as post-sentence monitoring and movement restriction measures or deprivation of nationality. Others are used in a direct connection with the detection and investigation of such offences, in a preventive manner against persons suspected of radicalisation and of planning to commit an offence such as travelling for the purpose of terrorism. Others may have an impact on how Member States apply EU law in other fields, such as border management and returning illegally staying non-EU nationals when measures are taken on security grounds in the context of immigration legislation.

For example, in 2017, France transformed certain measures originally applied under the state of emergency during 2015-2017 into regular legislation, such as the possibility of imposing administrative controls and post-sentence individual monitoring measures or closing places of worship. The need to prevent incitement or glorification of terrorism was listed among the reasons.<sup>1</sup> Furthermore, the criminalisation of travel as a form of preparation for a terrorist offence in 2014 was accompanied by introducing administrative travel bans as a tool to prevent the departure of individuals suspected of planning to leave the national territory in order to participate in terrorist activities or travel to a terrorist training camp.

In Germany, the Act on the Federal Criminal Police Office was amended in 2017, introducing the possibility to impose residence requirements and contact bans, as well as electronic residence surveillance, in order to prevent training and travel.<sup>2</sup> Similarly, the creation of specific databases of foreign terrorist fighters in countries such as Belgium was inherently linked to the efforts to address travel- and training-related offences.<sup>3</sup>

Even where criminalising the specific offences did not lead directly to additional administrative measures, a number of Member States increased the application of existing measures, findings suggest.

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**'There is a rise in exorbitant powers of the administration in certain areas, and a lack of admission that these have become part of regular law. There is a denial on the part of the authorities in this respect.'**

(Academic)

Administrative measures used in this context are decided upon by the executive authorities, or with their close involvement when the measure is formally imposed by judicial decision, and subject to limited judicial review.<sup>4</sup> Imposing administrative measures in counter-terrorism presents risks to fundamental rights, as various human rights bodies and experts have noted.<sup>5</sup> The ECtHR has acknowledged that the limited safeguards accompanying such measures give rise to the risk of abuse, for example as regards house arrest, police supervision measures<sup>6</sup> or withholding travel documents.<sup>7</sup>

## AVAILABLE GUIDANCE

### OSCE guidelines on human rights-compliant responses to foreign terrorist fighters

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) issued *Guidelines for addressing the threats and challenges of 'foreign terrorist fighters' within a human rights framework* in 2018.\* It offers a series of recommendations for a human rights-compliant approach to addressing the flow and return of foreign terrorist fighters.

The guidelines cover criminal law responses and measures to prevent and counter violent extremism and radicalisation leading to terrorism. They also pay particular attention to the trend of increasing use of administrative measures in countering terrorism. They underline the need to ensure that administrative measures comply with fundamental human rights principles, including the principles of legality, necessity, proportionality and non-discrimination; are accompanied by stringent safeguards; and are not used to circumvent the protections of criminal law.

\* OSCE ODIHR (2018), *Guidelines for addressing the threats and challenges of 'foreign terrorist fighters' within a human rights framework*, ODIHR, Warsaw.

This chapter covers the respondents' experiences with the application of administrative measures and their impact on fundamental rights. It outlines the different types of measures applied in the counter-terrorism context. It focuses on their interplay with offences that the directive introduced or modified, along with the reduced safeguards accompanying them when they are imposed and implemented, and the challenges arising when seeking a remedy in court or submitting complaints through non-judicial avenues.

## 5.1. TYPES OF ADMINISTRATIVE MEASURES AND THEIR EFFECTS ON FUNDAMENTAL RIGHTS

The legal framework governing counter-terrorism in various Member States combines the use of criminal and administrative measures. A number of respondents have expressed concerns about its preventive character and the risks it poses to fundamental rights. Some note in particular that national law introduces or expands additional measures without assessing the effect of already existing ones, and their combined impact on fundamental rights.

The fieldwork indicates that competent authorities increasingly rely on administrative measures in counter-terrorism. In some cases, they are applied alongside or in place of criminal procedures and in others, they can supplement criminal sanctions. Only in a minority of fieldwork Member States do experiences with such measures appear to be limited; in these Member States, respondents do not consider their use to be a particular problem.

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**'The existing legal framework already intervened way upstream of the offence, and the evolution towards preventive criminal law moved even [further] forward ... through the intervention and development of a very preventive administrative framework.'**  
(Oversight expert)

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**'From the point of view of fundamental rights, it is necessary to pay particular attention today to the development of all these repressive measures of [an] administrative nature, which are multiplying and which have the purpose, if not the effect, of circumventing the guarantees of the criminal proceedings.'**  
(Judge)

A variety of administrative measures can be taken against (suspected) individuals and severely affect their fundamental rights, respondents across different professional categories observe. These include the right to liberty (Article 6 Charter and Article 5 ECHR), respect for private and family life (Article 7 Charter and Article 8 ECHR), freedom of thought, conscience and religion (Article 10 Charter and Article 9 ECHR), freedom of expression (Article 11 Charter and Article 10 ECHR), the principle of non-discrimination (Article 21 Charter and Article 14 ECHR) and freedom of movement (Article 45 Charter, as well as Article 3(2) of the Treaty on European Union and Article 21 of the Treaty on the Functioning of the European Union, and Protocol No 4 ECHR). In some cases, depending on the severity of the measure, they can also affect human dignity (Article 1 Charter), the right to life (Article 2 Charter and Article 2 ECHR), prohibition of torture and inhuman or degrading treatment or punishment (Article 4 Charter and Article 3 ECHR) and protection in the event of removal, expulsion or extradition (Article 19 Charter and Article 1 of Protocol No 7 ECHR).

The measures can be divided into four broad categories.

**Measures that aim to monitor sentenced or suspected individuals.** Authorities may impose administrative and supervisory control measures on people after they serve a prison sentence. The aim is to prevent further involvement in terrorist activities by ensuring they do not, for example, attempt to travel to a conflict zone, receive or give training, or incite or glorify terrorist acts.

In France, an individual administrative and supervisory control measure (*mesure individuelle de controle administratif et de surveillance*, MICAS) can be imposed.<sup>8</sup> That requires individuals upon release from prison to remain within the limits of the municipality if they are suspected to have links with terrorist organisations or to be likely to incite or glorify terrorist acts. Since this measure entails a restriction of movement, and obliges people to report to the police authorities, a number of respondents express concerns over the threshold for its application. In ECtHR jurisprudence, a lack of foreseeability of the law due to vague definitions of house arrest and police supervision is incompatible with the right of movement of citizens (Article 2 of Protocol No 4 ECHR).<sup>9</sup>

Furthermore, monitoring can also be more general, before or after a trial, through including an individual in databases at European level (e.g. the Schengen Information System) or national level. Belgium, for example, has expanded its database of foreign terrorist fighters to include other categories of persons as well.<sup>10</sup> Thus, not only persons who have been in or attempted to travel to conflict zones but also those who in the assessment of the authorities can be suspected of radicalisation are included in the databases.

France includes terrorist offenders in a database to prevent them from reoffending and to help identify perpetrators. The database automatically receives information on judicial decisions, stores it and communicates it to competent authorities.<sup>11</sup>

Inclusion in the databases assists in monitoring persons and preventing or at least restricting their activities (e.g. their movement), law enforcement officers in several Member States note. Other respondents note with concern that inclusion in such databases can prevent an individual from travelling or even entering certain facilities or lead to a withdrawal of certain licences and clearances, potentially resulting in loss of employment.<sup>12</sup>

Besides freedom of movement and potentially a variety of other rights, monitoring measures and inclusion in databases could impede the principle

of non-discrimination as well. The measures essentially affect individuals with an Islamic background, according to some academics and defence lawyers. Some oversight respondents observe that complaints brought to them concerning inclusion in such databases included allegations of their discriminatory use and erroneous inclusion of some individuals, leading to their being unjustly stopped and exposed to checks.

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**'If we do not find anything concrete, we contact the security authorities about the possibility of imposing potential administrative measures or measures under the Schengen Convention, [for example] discreet surveillance in cooperation with other Member States.'**

(Law enforcement officer)

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**'There was a note in the Schengen Information System that my client should be checked when travelling in a certain region to see whether there could be any indications [of planning to] join an armed unit there.'**

(Defence lawyer)

**Specific measures imposed as sanctions**, including the deprivation of nationality. Among those Member States that provide for the deprivation of nationality, most (including Belgium and France) have introduced the possibility of depriving a person of their nationality based on security considerations following a criminal conviction.<sup>13</sup>

Some countries have made it possible without a conviction. Among the fieldwork countries, this includes Germany, which adopted a law in 2019 that requires evidence of concrete participation in hostilities by a terrorist organisation abroad, but not necessarily a conviction for such activities.<sup>14</sup>

In Germany and France, administrative authorities impose the measure. In Belgium, courts take the decision at the request of the public prosecutor.<sup>15</sup> The specific conditions and offences permitting the authorities to deprive individuals of their nationality differ in each Member State, but offences associated with foreign terrorist fighters, such as travelling for the purpose of terrorism, can provide such grounds.<sup>16</sup> In Belgium, for example, the same legislation that criminalised terrorist travel as a specific offence in 2015 also expanded the list of terrorist offences based on which deprivation of nationality can be applied.<sup>17</sup>

Deprivation of nationality raises particular concerns among defence lawyers, academics and NGOs. They point to its severe consequences for fundamental rights and freedoms.

These respondents draw attention to the impact on the right to respect for private and family life (including the risk of separating families) but also to the prohibition of discrimination, given that the sanction primarily affects naturalised persons with dual (often EU and non-EU) nationality.<sup>18</sup> If one Member State applies the measure, the person often also loses their EU citizenship, further amplifying the impact on the individuals and their families.

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**'A development in this area, which I myself see as very problematic, is the withdrawal of citizenship ... There the legislator went too far.'**

(Academic)

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**'The whole debate on nationality and the deprivation of nationality sends a message to people that were not born in [a country], or even born in [this country] but to foreign parents, which is really an issue.'**

(NGO expert)

The risk of rendering a person stateless is an additional, particularly serious fundamental rights concern that legal experts and human rights bodies often highlight in the context of deprivation of nationality.<sup>19</sup> The respondents did not raise it, as none of the fieldwork Member States permits the deprivation of nationality if it would result in statelessness.

## CASE-LAW

### Identifying objective criteria for the deprivation of nationality

Belgium's Court of Appeal decided on the legality of deprivation of nationality in 2018.\* In this case, the prosecution asked the court to strip the leader of a national terrorist organisation of his Belgian nationality. He was sentenced for 12 years for, among other things, preaching hatred of non-believers, pursuing 'armed jihad', approving the use of force and committing aggressive acts against democracy and non-believers.

The court ruled that deprivation of nationality is not a criminal punishment but a measure of civil law. Therefore, it can be imposed without violating the *ne bis in idem* principle. The court added that deprivation of nationality is an exceptional measure, only justified in exceptional circumstances. It set out criteria for assessing, as the law prescribes, if the person in question failed to abide by the essential obligations of national citizenship: (1) the frequency, seriousness and period of violation of these obligations; and (2) an attitude that manifestly shows that the person is not prepared to accept or fulfil these obligations.

The person was therefore stripped of his nationality. His wife and children retained their Belgian nationality.

\* *Belgium, Court of Appeal of Antwerp, Rechtskundig weekblad 2019–2020, No 27, pp. 1070–1073.*

Respondents in Belgium also mention the freezing of assets. They say that blocking individuals' access to financial means may also have an impact on freedom of movement and the right to dignity. This measure can have dramatic consequences for individuals and their families and dependants as well as for organisations, and safeguards in place are insufficient or ineffective, some respondents assert. That is partly because national authorities keep asset-freezing lists secret.

**Measures imposing a restriction of movement on a suspected individual.** Various administrative measures can directly or indirectly restrict a person's movement. Some aim specifically at this goal. These include short-term detention to prevent, for example, travel to a conflict zone; house arrest; travel bans;<sup>20</sup> and confiscation of travel documents.

These measures target both EU and non-EU citizens. They are often used to prevent individuals from travelling to a conflict zone with the aim of participating in terrorist activities, covered by Article 9 of the directive. In Belgium, Germany, Greece and France, the respondents criticise their opacity. In other Member States, such measures either are not available or do not raise major concerns among the respondents.

Belgium, for instance, amended its Consular Code in 2019 to allow administrative authorities to refuse to provide an identity card or passport to an individual who might pose a risk to national security upon return, and those included in the terrorist fighters database.<sup>21</sup> In France, travel bans can last for 6 months when there is a risk that the person will travel for terrorist purposes. They can be renewed as long as the conditions for the ban are met.<sup>22</sup>

Besides affecting individuals' freedom of movement, these measures may also limit the right to liberty and the right to private and family life, among other rights.<sup>23</sup> According to the jurisprudence of the ECtHR, confiscating

a person's passport and not returning it might be incompatible with the right to private life (Article 8 ECHR).<sup>24</sup>

**Measures under immigration legislation** that aim to enforce departure from the territory of a Member State, such as expulsion measures, or prevent entry, such as entry bans. Courts can impose such measures as part of a criminal sentence. However, it is usually administrative authorities that impose them, on irregularly staying non-EU nationals. Furthermore, depending on the national legislation, administrative authorities may also apply these measures on grounds such as national security, public safety and public order.<sup>25</sup>

The use of expulsion measures against foreigners on security grounds is extensive and commonly accompanied by administrative detention, law enforcement experts, judges, academics and defence lawyers across the majority of fieldwork Member States testify. For example, Germany's Residence Act in 2005 introduced a specific legal provision to permit the deportation of persons representing a particular security threat. It remained unused for 12 years but was then put to use more than 20 times within 2 years between 2017 and 2019.<sup>26</sup>

Some respondents in Germany and Sweden express concerns that the countries' respective laws on aliens allow measures to be taken based on alleged involvement in terrorist activities, even against persons with no prior criminal convictions. One gives the example of a Muslim imam who was not investigated for a crime but was deported for posing a threat to society, under immigration law.

Entry bans are also frequently imposed on suspected individuals. They prevent entry not only to the Member State that issued them but to the entire territory of the EU and the Schengen area. This exacerbates the impact on the rights of individuals.<sup>27</sup>

These measures can affect the principle of non-discrimination, protection in the event of removal, expulsion or extradition, freedom of movement and the right to liberty. Indirectly, they could infringe on freedom of expression, freedom of belief, the right to life, prohibition of torture and inhuman or degrading treatment or punishment (since an individual may be sent back to a country where they may be exposed to such risks), and the right to family life.<sup>28</sup>

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**'If parents are expelled, this will certainly have an effect on children and young people.'**

(Academic)



## Broader impact of counter-terrorism policies: effect on funding and activities of NGOs

Besides administrative measures against persons suspected of or sentenced for involvement in terrorist activities, various respondents also draw attention to how public authorities increasingly use measures outside the remit of criminal law to monitor, regulate and in some cases suppress certain activities. This trend is linked to the overall political and public discourse throughout the EU that links the threat of terrorism with religion and immigration, as academics, NGOs and oversight experts in particular emphasise. The discussions on the need to adopt a legislative response to the phenomena of radicalisation and foreign terrorist fighters that accompanied the adoption and transposition of the directive helped reinforce this trend.

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**'It is difficult to specifically connect this to the legislation as such, but more the general climate, and perhaps also what the legislation signals ... So, there is definitely a dog-whistle approach to these measures, with government wanting to show that they are hard on these matters.'**  
(Oversight expert)

In this context, respondents mention in particular the funding and regulation of activities of NGOs.\* Sweden withdrew public funding from Muslim youth organisations because some of their members expressed undemocratic views. That led to public discussions and legal action.\*\*

In France, measures against terrorist financing have led to the blocking of financial transfers by NGOs, for example for humanitarian assistance projects in Syria.\*\*\* This corresponds to findings from FRA's consultation with human rights civil society organisations across the EU. \*\*\*\*

The impact of monitoring of financial transactions and other forms of state regulation was mentioned in other Member States too, including in relation to the rights to privacy and property. In Hungary, fighting international terrorism was given as one of the grounds for the legislation imposing restrictions on NGOs receiving funding from abroad. The CJEU declared it to be in breach of EU law – including the rights to privacy, protection of personal data and freedom of association – in 2020.\*\*\*\*\* According to some respondents, the Hungarian law is an example of a broader policy of associating terrorism with migration that also resulted in applying the extensive definition of terrorism in national law to a migrant who was convicted for an attempt to coerce the authorities into allowing asylum seekers to enter Hungary in 2015.\*\*\*\*\*

\* See also *UN Human Rights Council, Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders – Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/40/52, 1 March 2019.*

\*\* See also, for example, *Upsala Nya Tidning (2020), 'When the grant tap closes' ('På tiden att bidragskranen dras åt')*, 16 June 2020.

\*\*\* See also, for example, *Libération (2018), 'NGOs, collateral victims of the fight against terrorist financing' ('Les ONG, victimes collatérales de la lutte contre le financement terroriste')*, 25 April 2018.

\*\*\*\* *Of the 330 organisations that responded, 11 % had encountered difficulties in their work in 2020 due to counter-terrorism legislation or policy, and 12 % due to anti-money-laundering measures. See FRA (2021), Protecting civic space in the EU, Publications Office of the European Union, Luxembourg, p. 28.*

\*\*\*\*\* *CJEU, C-78/18, European Commission v. Hungary [GC], 18 June 2020.*

\*\*\*\*\* *Hungary, Regional Court of Appeals of Szeged (Szegedi Ítéltábla), Decision No Bf. II.324/2018/18., 20 September 2018.*

## 5.2. REDUCED SAFEGUARDS IN ADMINISTRATIVE PROCEEDINGS

Administrative counter-terrorism measures are accompanied by limited safeguards and risk circumventing the high procedural guarantees of criminal law, as international organisations and academics have emphasised.<sup>29</sup> The respondents confirm this and raise concerns in particular with respect to the principle of legality (Article 49 Charter and Article 7 ECHR), prohibition of discrimination (Article 21 Charter and Article 14 ECHR), the right to an effective remedy and a fair trial (Article 47 Charter and Article 6 ECHR), and the presumption of innocence and the right of defence (Article 48 Charter and Article 6 ECHR).

### 5.2.1. Lack of procedural guarantees

In principle, decisions taken under criminal law come with strict procedural guarantees. Recital 36 of the directive reiterates the Member States' obligations with regard to the procedural rights of suspects or accused persons in criminal proceedings (see Chapter 1).

This is not necessarily the case for administrative measures, the findings show. Many respondents including NGOs, defence lawyers, oversight bodies and judges acknowledge that administrative measures lack procedural guarantees. This impairs fundamental rights, namely the right to a fair trial, the right to be defended and the requirement of due process.



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**'Imagine [that any time after release from prison] police can come to you, interrogate you, visit your house, sometimes they even say "Can you show me your car, please?" and people just say "Yes" because they don't want the police to stay too long at their house, otherwise the neighbours are going to ask questions. So they say "Yes" to everything and you cannot have access to what is going to be written about you, your situation, which is extremely problematic.'**

(Defence lawyer)

First, respondents point out issues of transparency, burden of proof and adversarial processes related to the specific nature of administrative proceedings. Preventive administrative measures are commonly based on intelligence information, or on information collected in a manner that does not allow the affected individuals to understand the scope, purpose and potential measures that could be adopted as a result, the fieldwork showed.

This includes, for example, intelligence statements ('white notes'), which France has used since implementing the state of emergency.<sup>30</sup> The defence has limited or no access to them. Defence lawyers, NGOs and academics criticise the lack of transparency of such information that prevents individuals from challenging the decisions. That is an increasing problem in view of the content of these notes. Their content reveals a strong reliance on indicators of religious conviction that are unrelated to terrorism, according to one respondent. That shows a worrying tendency to substitute the exercise of religion for an indication of risk.

Violating the terms of administrative measures can have severe consequences for the persons, including a criminal sentence, an academic warns. That amplifies the concerns about relying on opaque information when imposing them in the first place.

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**'[There is a] vicious cycle, which means that some people end up in prison for having violated administrative measures, which themselves had been taken on the basis of intelligence information.'**

(Academic)

Even if administrative judges are involved in imposing the measures or as appeal bodies, the obscurity of the data prevents the individuals from challenging the evidence, some respondents add (see also Section 5.3).

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**'Even when [the individual] asks us to be informed of the reasons for imposing the administrative measure, [he or she] is not informed of that content, because it is classified, the information on the basis of which the measure is taken. This is forwarded to the courts, which take into account the entire file, and have access to all the information, but the applicant has no access to the file and the information, except to the decision itself imposing the measures themselves [and] does not receive a summary of information used [to impose the measures] or any other information regarding them.'**

(Law enforcement officer)

In addition, whereas individuals are presumed innocent in criminal proceedings, the burden of proof is reversed in administrative proceedings, an oversight expert and a defence lawyer in different Member States note. Individuals must prove that they are not dangerous. In combination with the difficulties of challenging claims based on intelligence information, this raises serious concerns about the risk to individual liberties, an oversight expert states.

Second, access to a lawyer appears to be difficult in practice. Individuals face challenges in access to legal aid, several defence lawyers and academics in different Member States note. They may relate to the lack of information about their rights, or the prohibitive costs and length of the procedure.

### **5.2.2. Lower requirements for imposing administrative measures**

It is overall easier to adopt measures in administrative procedures than in criminal procedures, respondents across professional groups note. Two main points have demonstrated this in the fieldwork.

First, administrative proceedings operate with lower standards of proof. They allow evidence that, depending on the Member State, would be either not permissible or not considered sufficient in criminal proceedings, defence lawyers in particular but also some law enforcement officers report. This includes intelligence information, which, as pointed out above, is difficult to challenge because it is not transparent. Some measures are also based on unverified denunciations, respondents note.

Second, administrative measures appear to be imposed on the basis of vague criteria that leave significant room for arbitrariness, respondents observe. A judge notes in particular the unclear basis for the assessment of the risk posed by the individual to national security.

Another respondent highlights the extremely vague criteria of dangerousness upon which administrative measures are based, for example for imposing MICAS in France. In France, house arrest is usually imposed after a prison sentence. In one case, the court had actually acquitted the defendant but, because of his suspected involvement in terrorism, he had spent his protracted pre-trial detention in the terrorist wing of the detention centre, one respondent in France mentions. That resulted in his being considered radicalised and put under house arrest.

Some respondents perceive the assessment of risk and of the need for administrative measures as arbitrary. Such measures have been extended beyond the original scope to, for example, environmental, animal rights or left-wing activists, they say. A respondent in France refers to monitoring and house searches being widely used during the state of emergency. These may affect rights to privacy, freedom of movement, freedom of assembly and freedom of expression.

Establishing the degree of suspicion concerning the existence of a link with a terrorist individual or organisation can also be arbitrary, some defence lawyers in different Member States report. One law enforcement officer confirms that simple suspicion is generally sufficient to impose a measure. In Belgium, assets were frozen quasi-automatically when individuals were suspected of having a link with the Kurdistan Workers' Party (PKK), and the authorities did not particularly look for additional elements, a respondent mentions as an example.

This affects the principle of legal certainty. In another Member State, a judge expresses concerns about unclear assessment criteria and potential discriminatory practices, noting that religion plays a strong role in imposing the measures.

These lower and less clearly defined requirements for imposing administrative measures result in their being used as an alternative to criminal procedures, circumventing the constraints linked to criminal processes, NGOs, oversight experts and defence lawyers argue.

Respondents give examples of administrative procedures being used to force non-EU nationals to leave the country. They had not been subject to criminal proceedings or had even been acquitted, yet were subsequently deported based on the same arguments that a court had considered insufficient in a criminal procedure. Some law enforcement officers confirm this.

In other cases, administrative procedures were used to search the houses of suspected individuals or close the places of worship of groups against whom there was insufficient evidence to start criminal investigations. When these measures are applied to persons because of their suspected involvement

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**'It is always like that: what is possible will also be used [by the police].'**  
(NGO expert)

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**'These measures are taken against people who are suspected by the authorities, but against whom [the authorities] do not have enough elements to start criminal proceedings, even though there are offences that allow [them] to target behaviours well upstream of the preparation of an offence.'**  
(Oversight expert)

in offences that the directive covers, this necessarily raises questions about the effective application of the safeguards that EU law lays down and about the implications for the rights of individuals.

### 5.3. ACCESS TO AN EFFECTIVE REMEDY AND EFFECTIVENESS OF EXTERNAL OVERSIGHT

Administrative measures in the context of counter-terrorism can lead to severe restrictions of fundamental rights.<sup>31</sup> For that reason, they need to be accompanied by safeguards against arbitrariness.<sup>32</sup> This includes the possibility of having the measure reviewed.<sup>33</sup>

Article 47 of the Charter and Article 6 of the ECHR guarantee the right to an effective remedy. Article 47 of the Charter extends beyond criminal procedures and covers all types of procedures, including administrative ones. Practitioners interviewed raise concerns that this right is not effectively guaranteed in practice and that it is often hard to access non-judicial avenues to submit complaints against counter-terrorism measures.

In theory, an effective remedy should be available for administrative decisions. This means that one can bring complaints before an administrative judge. However, in practice, many defence lawyers, oversight bodies, NGOs and academics agree that it is difficult, and according to some nearly impossible, to challenge an administrative decision.

#### FRA ACTIVITY

## Focus on surveillance by intelligence services

The impact of surveillance by intelligence services on fundamental rights was the subject of FRA research requested by the European Parliament that resulted in two reports, the first providing a legal analysis of the situation across the EU (2015),\* and the second focusing on fundamental rights safeguards, oversight and remedies (2017).\*\*

The FRA surveillance reports focused on the activities of intelligence services in the context of large-scale surveillance (or ‘general surveillance of communications’). They did not address the investigation of concrete offences by law enforcement authorities. The present report, on the other hand, looks at how authorities use information from intelligence services – among other sources – when conducting criminal and administrative proceedings in terrorism cases in relation to conduct that the directive covers. It does not examine the actual work of these services.

The analysis of issues of remedies and oversight (Section 5.3) does not cover the activities of intelligence services. However, some issues arise in both contexts, for example the effectiveness of remedies against measures that had not been communicated to the individual or the capacity of oversight bodies to effectively scrutinise certain measures.

\* *FRA (2015), Surveillance by intelligence services: Fundamental rights safeguards and remedies in the EU – Volume I: Member States’ legal frameworks, Publications Office of the European Union, Luxembourg.*

\*\* *FRA (2017), Surveillance by intelligence services: Fundamental rights safeguards and remedies in the EU – Volume II: Field perspectives and legal update, Publications Office of the European Union, Luxembourg.*

Some respondents admit that things have improved: in the past, an administrative judge would have quasi-automatically confirmed any decision. A few others even talk about very effective remedies, as courts can suspend certain administrative measures such as passport confiscation.

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**'[There has been a] rather positive evolution between 2014 and today on the control of the administrative judges on the measures. We start from very far. At the beginning, there was almost a refusal to examine the administrative anti-terrorist measures.'**

(Academic)

Regarding the overall form of the procedure, issues include the limited nature of the scrutiny and grounds for review. Individuals cannot challenge some measures before courts because they have not been informed about them, defence lawyers and law enforcement officers point out. This includes decisions on listing an individual in a database, and travel restrictions. Individuals learn about travel restrictions only at border control and will be able to contest them only at that moment, a defence lawyer notes.

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**'This kind of administrative measure happens every day now; very few people are reporting it and when they report it, it's so complicated to give them an answer or to even find a judge who will do some review, that I can say I think that there is no effective review, to remedy those interferences with fundamental rights.'**

(Defence lawyer)

It appears to be difficult to seek remedy against monitoring and surveillance measures directly from the authority that imposed them, even if the person becomes aware of them.

Inclusion in a database can expose a person to special scrutiny on various occasions. It will never be revealed whether the individual is included in a database or not, even to external oversight bodies to which an individual can submit a complaint, respondents in Belgium add. Even if security reasons justify that approach, this seriously affects the fundamental right to an effective remedy.

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**'Let us assume the authorities observe you and you have noticed this or believe [they] are observing you. You write or call them and there is either no answer or you get the message "Do not call again." There is no transparency.'**

(Defence lawyer)



Furthermore, authorities may apply informal measures that are inherently excluded from any review, oversight experts and defence lawyers in several Member States observe. Examples include informal monitoring of places of worship and oral warnings given to individuals suspected of becoming radicalised.<sup>34</sup>

In addition to the limited grounds for review, respondents in some countries consider it problematic that control by administrative judges is only done *a posteriori* and not *a priori*.<sup>35</sup> The limited nature of the review has attracted criticism from respondents in France. They note that two types of remedies can be brought before the administrative courts: recourse for excessive powers and an interim suspension.

Both, however, raise challenges. On the one hand, the case for an interim suspension is considered extremely difficult to prove. On the other, obtaining recourse for excessive powers takes a long time and thus loses effectiveness. Using the example of MICAS, a respondent notes that, in practice, by the time an individual is heard on an existing measure, a new one may have been adopted.

## CASE-LAW

### Balancing security interests and individual rights when challenging administrative measures

In 2018, the French Constitutional Council declared that certain provisions of the Internal Security Code, as amended by the law strengthening international security and the fight against terrorism, were unconstitutional.\* One provision concerned remedy against a decision by the Minister of the Interior to limit the movements of a person liable to pose a serious threat to public order and safety in relation to terrorism. The law granted the right to challenge the decision within 1 month only but gave the administrative court up to 2 months to issue its ruling.\*\* The court ruled that this was 'manifestly unbalanced' and did not take into consideration the rights of the person concerned.\*\*\*

\* France, Law 2017-1510 of 30 October 2017 reinforcing internal security and the fight against terrorism (Loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme).

\*\* France, Internal Security Code (Code de la sécurité intérieure), Arts. 228-1 and 228-2.

\*\*\* France, Constitutional Council (Conseil Constitutionnel) (2018), Decision No 2017-691 QPC, 16 February 2018, para. 18.

'The administrative proceedings do not provide for such a thing, i.e. to receive information about their rights and free legal assistance automatically. There are guarantees but there are suffocating [administrative] deadlines which if missed lead to adverse results ... 99 % of remedies and appeals are rejected, as the public interest in security prevails and is used as an argument in the context of a general assessment and, essentially, the burden of proof is reversed to the detriment of the person concerned, who must prove that he does not pose a security risk.'

(Defence lawyer)

Regarding specific elements of the procedure, respondents essentially highlight issues linked to evidence and legal assistance. As noted above, administrative measures are commonly based on intelligence information, namely reports by the intelligence services. That already poses difficulties during the proceedings introducing the measure.

The lack of access to the grounds justifying the threat also makes it impossible to challenge the decision in court, say defence lawyers. A law enforcement officer confirms this. An oversight expert refers to a case of the deportation of a non-EU national. The lawyer claimed to have had no opportunity to review or challenge the decision because there was no access to the underlying evidence originating from intelligence services.

The ECtHR has acknowledged that the lack of access to documents on which an expulsion decision is based prevents individuals from exercising their procedural rights.<sup>36</sup>

In addition, even the court deciding on the remedy might not be in a position to make an informed decision. In some countries (e.g. Greece), respondents state that the court has access to the information underlying the administrative decision. In others (e.g. Sweden), this is not the case, respondents say. This frustrates the individual's right to a fair trial and due process, and consequently to an effective remedy.

Finally, some academics and defence lawyers note the lack of transparency and access to information on the available legal remedies and legal assistance. It is challenging to obtain an overview of the different avenues an individual can use to challenge administrative measures and the support that can be offered to do so, according to these respondents. This will likewise consequently affect the right to an effective remedy before a tribunal.

Besides the hurdles to the provision of an effective remedy by courts, limited possibilities also appear to be available when it comes to submitting complaints via non-judicial avenues to organisations such as ombuds institutions, other national human rights institutions or specialised oversight bodies about administrative measures and other measures taken outside criminal proceedings. This appears to be part of a wider issue of limited involvement of such bodies in counter-terrorism measures, in particular in overseeing them and providing an effective remedy. That is due to challenges relating to their mandates, powers or access to classified information.<sup>37</sup>

In some Member States, for example, ombuds institutions are equipped with a robust mandate to deal with complaints on such administrative matters. This is the case in Spain and France, for instance. Other Member States do not have such a body or explicitly exclude counter-terrorism matters from its mandate.

In other Member States, different bodies share such powers based on a regional or sectoral division of competencies. That can lead to gaps in jurisdiction, the absence of a comprehensive overview of the different issues and a lack of clarity for potential complainants, some respondents argue. Some oversight experts consider that the low numbers of complaints and enquiries that they receive might be because the public is not sufficiently aware that their oversight bodies have powers in this area.

Even when specialised oversight bodies have a mandate in specific areas where counter-terrorism measures may have a significant impact, they are also differently equipped to scrutinise those measures and deal with potential complaints. That affects the overall effectiveness of the oversight mechanism. Some bodies have powers tailored to the specific nature of their task, such as monitoring the use of surveillance by law enforcement. Others might not have a mandate to review actual decisions, or might not have the access they need to all information that could be relevant. That especially applies to equality bodies that have the authority to deal with cases of alleged discrimination and would be otherwise well placed to assess the impact of counter-terrorism measures in this field.

Despite these limitations on their remedial powers in particular, the nature of their work generally places oversight bodies in a unique position to assess the fundamental rights impact of counter-terrorism legislation and measures. They can provide governments and legislators with important expertise in relation to new legislative initiatives. However, the expedited procedure that is often applied in these cases and the volume of legislative changes adopted over a short time often preclude effective use of this expertise, some oversight experts and academics state.

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**'If the police wrestle you down but do so in a polite fashion, it is not covered by our mandate.'**  
(Oversight expert)



## Endnotes

- 1 France, Law 2017-1510 of 30 October 2017 reinforcing internal security and the fight against terrorism (*Loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme*), Arts. 2-4.
- 2 Germany, Federal Criminal Police Office Act (*Bundeskriminalamtsgesetz*), Arts. 55 and 56.
- 3 Belgium, Royal Decree of 21 July 2016 on the common database Terrorist Fighters (*Koninklijk besluit van 21 juli 2016 betreffende de gemeenschappelijke gegevensbank Terrorist Fighters/Arrêté royal de 21 juillet 2016 relatif à la banque de données commune Terrorist Fighters*).
- 4 Boutin, B. (2017), 'Administrative measures in counter-terrorism and the protection of human rights', *Security and Human Rights*, Vol. 21, Nos 1-2, p. 129.
- 5 See for example UN, Office of the High Commissioner for Human Rights, 'France: UN expert says new terrorism laws may undermine fundamental rights and freedoms', press release, 23 May 2018; OSCE ODIHR (2018), *Guidelines for addressing the threats and challenges of 'foreign terrorist fighters' within a human rights framework*, ODIHR, Warsaw, p. 9; Vermeulen, G. and De Bondt, W. (2008), 'Finding the right balance between effective measures and fundamental human rights guarantees', *Revue internationale de droit penal*, Vol. 79, pp. 379-402.
- 6 ECtHR, *De Tommaso v. Italy* [GC], No 43395/09, 23 February 2017.
- 7 ECtHR, *İletmiş v. Turkey*, No 29871/96, 6 December 2005.
- 8 France, Law 2017-1510 of 30 October 2017 reinforcing internal security and the fight against terrorism (*Loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme*), Art. 3.
- 9 ECtHR, *De Tommaso v. Italy* [GC], No 43395/09, 23 February 2017.
- 10 Belgium, Royal Decree of 21 July 2016 on the common database Terrorist Fighters (*Koninklijk besluit van 21 juli 2016 betreffende de gemeenschappelijke gegevensbank Terrorist Fighters/Arrêté royal de 21 juillet 2016 relatif à la banque de données commune Terrorist Fighters*).
- 11 France, Code of Criminal Procedure (*Code de procédure pénale*), Art. 706-25-3 and following.
- 12 The ECtHR considered that dismissal from employment based on mere allegations of affiliation with a terrorist organisation affected private life and stigmatised the person when searching for new employment. The lack of adequate judicial review meant that there was insufficient protection against arbitrary interference. ECtHR, *Pişkin v. Turkey*, No 33399/18, 15 December 2020, paras. 179-188 and 216-229.
- 13 Other Member States applying this approach include, for example, Denmark, Italy and Finland.
- 14 Germany, Third Amendment to the Act on Nationality (*Drittes Gesetz zur Änderung des Staatsangehörigkeitsgesetzes*), 4 August 2019. In the Netherlands, deprivation of nationality can be based on a conviction for a terrorist offence but also on the ground of 'interest of national security'; Netherlands, Act No 268, Dutch Citizenship Act (*Rijkswet op het Nederlanderschap*), 19 December 1984, Art. 14. According to some observers, using the measure against persons who have not been prosecuted can not only reduce the applicable safeguards but also lead to conflict with other international law obligations and result in impunity, either by removing nationality as the jurisdictional link that would make it possible to prosecute alleged acts of terrorism committed abroad, or by preventing the perpetrator from returning to the country where they may be prosecuted if the deprivation of nationality takes place *in absentia*. See for instance Paulussen, C. and Scheinin, M. (2020), 'Deprivation of nationality as a counter-terrorism measure: a human rights and security perspective', in Institute on Statelessness and Inclusion (ed.), *The world's stateless - Deprivation of nationality*, pp. 223-226.
- 15 Bolhuis, M. P. and van Wijk, J. (2020), 'Citizenship deprivation as a counterterrorism measure in Europe: possible follow-up scenarios, human rights infringements and the effect on counterterrorism', *European Journal of Migration Law*, Vol. 22, No 3, p. 350.
- 16 In this context, Bolhuis and van Wijk speak of 'renewed interest in citizenship deprivation as a policy measure' prompted by the travel of foreign terrorist fighters from European countries to Iraq and Syria; *ibid.*, p. 339.
- 17 Belgium, Act reinforcing the fight against terrorism (*Loi visant à renforcer la lutte contre le terrorisme/Wet tot versterking van de strijd tegen het terrorisme*), 20 July 2015, Arts. 2 and 7.
- 18 For example, the Parliamentary Assembly of the Council of Europe brought attention to the right to nationality as a 'right to have rights', and the effect that deprivation of it may have not only in terms of statelessness but also on the right to respect for private and family life, and on the right to non-discrimination of naturalised citizens; Council of Europe, Parliamentary Assembly (2019), Resolution 2263 (2019), 'Withdrawing nationality as a measure to combat terrorism: a human-rights compatible approach?', 26 January 2019.
- 19 See for example Jaghai, S. and van Waas, L. (2020), 'Stripped of citizenship, stripped of dignity? A critical exploration of nationality deprivation as a counter-terrorism measure', in Paulussen, C. and Scheinin, M. (eds), *Human dignity and human security in times of terrorism*, T.M.C. Asser Press, The Hague, p. 170.
- 20 Beyond the fieldwork Member States, see for example the Netherlands, *Temporary Act on Counterterrorism Administrative Measures (Wet bestuurlijke maatregelen terrorismebestrijding)*, Art. 3.
- 21 Belgium, Act amending the Act of 21 December 2013 on the Consular Code and the Act of 10 February 2015 on the automated processing of personal data required for Belgian passports and travel documents (*Loi portant modification de la loi du 21 décembre 2013 portant le Code consulaire et de la loi du 10 février 2015 relative aux traitements automatisés de données à caractère personnel nécessaires aux passeports et titres de voyage belges/Wet tot wijziging van de wet van 21 december 2013 houdende het Consulaire Wetboek en van de wet van 10 februari 2015 met betrekking tot geautomatiseerde verwerkingen van persoonsgegevens die noodzakelijk zijn voor de Belgische paspoorten en reisdocumenten*), 3 July 2019.
- 22 France, Internal Security Code (*Code de la sécurité intérieure*), Art. L224-1.
- 23 See for example Charbord, A. and Ní Aoláin, F. (2019), *The role of measures to address terrorism and violent extremism on closing civil space*, University of Minnesota, pp. 12-13.
- 24 ECtHR, *İletmiş v. Turkey*, No 29871/96, 6 December 2005, paras. 47-49.
- 25 See for example Office of the United Nations High Commissioner for Human Rights (2008), 'Human rights, terrorism and counter-terrorism', Factsheet No 32, July 2008, p. 24.
- 26 Kullick, A. (2019), 'Gefahr, "Gefährder" und Gefahrenabwehrmaßnahmen angesichts terroristischer Gefährdungslagen', *Archiv des öffentlichen Rechts*, pp. 176-219.
- 27 See for example Austria, Alien Police Act (*Fremdenpolizeigesetz 2005*), Art. 53; Cyprus, Law on the combating of terrorism and on the protection of victims (*Ο περί της Καταπολέμησης της Τρομοκρατίας και Προστασίας των Θυμάτων Νόμος του 2019*) N. 75(I)/2019, Art. 21; Czech Republic, Act on the residency of foreign nationals in the Czech Republic (*zákon o pobytu cizinců na území České republiky*), Art. 9.

- 28 In relation to the risk of ill-treatment in the country of origin in cases of expulsion of persons associated with terrorism, see ECtHR, *Chahal v. the United Kingdom*, No 22414/93, 15 November 1996, para. 106.
- 29 OSCE ODIHR (2018), *Guidelines for addressing the threats and challenges of 'foreign terrorist fighters' within a human rights framework*, Warsaw, ODIHR, p. 47; European Parliament, Committee on Civil Liberties, Justice and Home Affairs (2017), *EU and Member States' policies and laws on persons suspected of terrorism-related crimes*, Policy Department for Citizens' Rights and Constitutional Affairs, Brussels, p. 49; Rafik, M. (2020), 'Using administrative powers in order to combat terrorism brings down the democratic constitutional state', *Opinio Juris*, 22 October 2020. The UN Security Council's Counter-Terrorism Committee Executive Directorate in its report on the implementation of Resolution 2178 (2014) recommended using administrative measures only where 'it would not be appropriate to bring terrorism related charges'; UN Security Council, Counter-Terrorism Committee Executive Directorate (2016), 'Implementation of Security Council resolution 2178 (2014)', para. 155.
- 30 On the role of these intelligence statements in administrative decisions, see France, Council of State, Administrative Jurisdiction Division (Conseil d'Etat, Section du Contentieux), *Case No 394990*, 11 December 2018.
- 31 See also OSCE ODIHR (2018), *Guidelines for addressing the threats and challenges of 'foreign terrorist fighters' within a human rights framework*, ODIHR, Warsaw, p. 46; Council of Europe, Commissioner for Human Rights (2016), 'Human rights in Europe should not buckle under mass surveillance'; UN Human Rights Council (2014), *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/28/28, 19 December 2014, paras. 33 and 52.
- 32 See for example ECtHR, *K2 v. the United Kingdom*, No 42387/13, 7 February 2017, para. 50.
- 33 The ECtHR ruled that, when restrictions are imposed on access to information used to justify expulsion due to security concerns, these should not negate the procedural protection provided under Art. 1 of Protocol No 7 ECHR, which includes the right to a review of the case; ECtHR, *Muhammad and Muhammad v. Romania*, No 80982/12, 15 October 2020.
- 34 See also the report of the European Network Against Racism, which collects evidence and testimonies about experience of the application of various formal and informal measures in selected European countries, European Network Against Racism (2021), *Suspicion, discrimination and surveillance: The impact of counter-terrorism law and policy on racialised groups at risk of racism in Europe*.
- 35 See also UN Human Rights Council (2019), *Visit to France – Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/40/52/Add.4, 8 May 2019, para. 45.
- 36 ECtHR, *Muhammad and Muhammad v. Romania*, No 80982/12, 15 October 2020, paras. 203–206. In another case, the ECtHR ruled that authorities' refusal to renew the applicant's passport, not based on any proceedings or a conviction, violated the right to private and family life; ECtHR, *Paşaoğlu v. Turkey*, No 8932/03, 8 July 2008, paras. 45–56.
- 37 See also FRA (2015), *Surveillance by intelligence services: Fundamental rights safeguards and remedies in the EU – Volume I: Member States' legal frameworks*, Publications Office of the European Union, Luxembourg; FRA (2017), *Surveillance by intelligence services: Fundamental rights safeguards and remedies in the EU – Volume II: Field perspectives and legal update*, Publications Office of the European Union, Luxembourg.

# In conclusion

This report examines the fundamental rights impact of Directive (EU) 2017/541 on combating terrorism. It draws on observations by practitioners who have experience with its practical application and by experts with in-depth knowledge in this field. They comprise judges, defence lawyers, public prosecutors, law enforcement officers, experts from NGOs and academia, and oversight experts in seven Member States.

The findings focus on specific provisions of the directive that have introduced changes from the preceding 2002 framework decision on combating terrorism. They show that the application of the directive has an impact on a number of fundamental rights, including in particular the right to liberty and security; respect for private and family life; protection of personal data; freedom of thought, conscience and religion; freedom of expression and information; freedom of assembly and association; freedom of the arts and sciences; prohibition of discrimination, including on the grounds of ethnic origin, religion or belief; the rights of the child; freedom of movement and of residence; the right to an effective remedy and to a fair trial; the presumption of innocence and the right of defence; and the principles of legality and proportionality of criminal offences and penalties. A number of the findings concerning fundamental rights-related challenges arising in connection with the application of the directive are relevant also from a broader perspective for assessing the impact of counter-terrorism legislation and policies more generally, with respect to related developments at both EU and Member State levels.

The directive newly introduced or modified offences such as travelling for the purpose of terrorism, receiving training for terrorism and public provocation to commit a terrorist offence. Investigating, prosecuting and trying them give rise to new challenges, the findings show. The findings show that the new legislation has also reinforced some of the issues that practitioners experienced in the past due to the broad definitions of terrorist offences in the EU law that preceded the directive.

The offences that this report discusses are based on a combination of terrorist intent with ordinary behaviour such as using online communication channels, consulting written or online material, or travelling. This reduces legal clarity and foreseeability about what might be considered activities related to terrorism, and therefore opens up the risk of interfering with a range of corresponding fundamental rights and freedoms.

The need to prove the presence of terrorist intent is a key challenge both for successfully prosecuting the offences and for ensuring that objective criteria are applied and individuals are not incriminated on the basis of assumptions made, for example, because of someone's religious conviction.

The focus on such preparatory offences aims to prevent actual terrorist attacks. However, it also has an impact on applying safeguards in criminal proceedings, such as those related to the collection and use of evidence and the practical application of investigative tools, among other issues.

Applying the directive to criminal proceedings also appears to go hand in hand with an enhanced use of administrative measures in practice. This leads to additional fundamental rights challenges, such as with regard to access to an effective remedy.

The directive pursues the important aim of helping Member States address the threat of terrorism. At the same time, counter-terrorism legislation, policies and other measures inherently affect fundamental rights.

Practitioners dealing with counter-terrorism matters work in a particularly challenging environment. They have extraordinary responsibility, including preventing the risk of actual terrorist attacks, and they can apply invasive measures at different stages of criminal proceedings, from detection to possible post-release measures.

Many practitioners across professional groups appear to be aware that applying counter-terrorism legislation and related measures, including administrative procedures, can significantly affect fundamental rights. As a result, practitioners need to interpret them restrictively and proportionately to their aim. Practitioners need adequate tools and guidance to help them do so and contribute to a harmonised approach across the EU.

At the same time, the findings clearly indicate that a variety of fundamental rights challenges arising in the application of the directive have their roots in national and EU legislation, including in the directive itself. These include the definitions the directive uses and the preparatory nature of some of the offences, such as travelling for the purpose of terrorism, receiving training for terrorism and public provocation to commit a terrorist offence.

This report therefore provides evidence-based advice to help policymakers at both EU and Member State levels assess the fundamental rights impact of the directive and consider the need for further action in this area to ensure that fundamental rights – which underpin EU law – are upheld in practice.

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## PROMOTING AND PROTECTING YOUR FUNDAMENTAL RIGHTS ACROSS THE EU —

This report examines the EU's main criminal law instrument in the field of counter-terrorism, Directive (EU) 2017/541. Specifically, it 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.

The report is based on fieldwork in Belgium, France, Germany, Greece, Hungary, Spain and Sweden, and on evidence collected through desk research on the relevant legal and institutional framework. It provides valuable insights on the impact of counter-terrorism measures on human rights.



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