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## A NEW CHAPTER IN THE EU COUNTERTERRORISM POLICY? THE MAIN CHANGES INTRODUCED BY THE DIRECTIVE 2017/541 ON COMBATING TERRORISM

### **Abstract:**

*Taking into account that terrorism has grown in recent years, the EU institutions decided to update the legal framework which provides for fighting this phenomenon. Consequently, the Council Framework Decision 2002/475/JHA was replaced by the EU Directive 2017/541 of the European Parliament and of the Council on combating terrorism, which should be implemented by the Member States by 8 September 2018.*

*This new act contains a long list of terrorist offences, offences related to a terrorist group, and offences related to terrorist activities. It also stipulates penal sanctions for terrorist offences and provides measures of protection, support and assistance for terrorism victims. This article is a commentary on these groups of provisions and compares them to the previously binding ones. Thus, it indicates the legal changes introduced by the Directive which have to be taken into account by the Member States while implementing it. The comparison of these new provisions with the previously binding ones is also helpful in answering the question posed in the title: Can the Directive 2017/541 be treated as a new chapter in combating terrorism by the European Union?*

**Keywords:** combating terrorism in the EU, Decision 2002/475/JHA, Directive 2017/541, foreign terrorist fighters, protection of terrorism victims, terrorist offences, the Council Framework

### **INTRODUCTION**

Although terrorism has always been a threat to both internal and external security, since 11 September 2001 combating this phenomenon has become an important task and at the same time a major challenge for the European Union. It has had a great impact

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on the European Union (EU)'s policies. Indeed, it is fair to say that counterterrorism is one of the fastest developing policy regimes within the EU.<sup>1</sup> In reaction to the World Trade Centre attacks in the US, on 21 September 2001 the European Council reiterated its strong support for the EU's counterterrorism activities by passing the first "plan of action" on "the European Policy to combat terrorism."<sup>2</sup> Due to its general nature, the Action Plan did little more than give a green light to various initiatives that had already been put on the agenda in the immediate response to the events of 9/11, but at the same time it represented the first step in reducing the ambiguity that surrounded the overall shape of the EU's renewed counterterrorism effort.<sup>3</sup> Following the dramatic events of the Madrid train bombing in March 2004 and the London bombings in July 2005, the EU decided to strengthen the general framework for its activities in this area. Consequently, the European Council adopted the Counterterrorism Strategy,<sup>4</sup> based on four strategic objectives (called "pillars") covering prevention, protection, pursuit, and response. In this way the EU wanted to show that it was going to cover all the stages important for fighting with terrorism, i.e. both before as well as after an attack, and at the level of structure as well as agency.<sup>5</sup> At the same time, the Counterterrorism Strategy underlined that the Member States had the primary responsibility for combating terrorism and that the EU could only add value to their actions by strengthening national capabilities, facilitating European cooperation, developing a collective capability, and promoting international partnership.<sup>6</sup> It should also be noted that according to the Counterterrorism Strategy document, terrorism is a criminal phenomenon that poses a serious threat to the EU's security. Thus, it was deemed a crime which demands a law enforcement response, but not a war-like aggression.<sup>7</sup>

As a result, the EU has adopted a criminal justice approach, according to which terrorism should be tackled through criminal law.<sup>8</sup> Such model appears more attractive to the Member States, which are not generally ready to allow the EU to interfere with the politically sensitive matters of internal and external security. Moreover, the criminal

<sup>1</sup> Ch. Eckes, *The Legal Framework of the European Union's Counter-Terrorist Policies: Full of Good Intentions?*, in: C. Eckes, T. Konstadinides (eds.), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, Cambridge University Press, Cambridge: 2011, p. 127.

<sup>2</sup> European Council, Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, SN 140/01, available at: <https://www.consilium.europa.eu/media/20972/140en.pdf> (accessed 30 June 2018).

<sup>3</sup> R. Bossong, *The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance*, 46(1) *Journal of Common Market Studies* 27 (2008), p. 35.

<sup>4</sup> The European Union Counterterrorism Strategy, 144469/4/05 REV 4, Brussels, 30 November 2005, available at: <https://bit.ly/2Hrz221> (accessed 30 June 2018).

<sup>5</sup> R. Bossong, *The EU's Mature Counterterrorism Policy – A Critical Historical and Functional Assessment*, LSE Challenge Working Paper, June 2008, p. 10.

<sup>6</sup> The European Union Counterterrorism Strategy, *supra* note 4, p. 4.

<sup>7</sup> See J. Monar, *The EU as an International Counterterrorism Actor: Progress and Constraints*, 30(2-3) *Intelligence and National Security* 333 (2015), p. 337.

<sup>8</sup> R. Coolsaet, *EU Counterterrorism Strategy: Value Added or Chimera?*, 86(4) *International Affairs* 857 (2010).

justice approach reflects the convictions of a number of Member States that have always taken a more integrated view on terrorism and is also in line with the approach the international community has moved toward more recently.<sup>9</sup> Consequently, the legal framework for combating terrorism by the EU is created by means of criminal law, adopted mainly within the Area of Freedom, Security and Justice (AFSJ) under the Lisbon Treaty. This article concentrates on the fight against terrorism based on these provisions, while leaving aside the international dimension realised through Common Foreign and Security Policy. The criminal law measures concerning the fight against terrorism are very numerous. However, the new EU Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism<sup>10</sup> (that replaced the Council Framework Decision 2002/475/JHA on combating terrorism<sup>11</sup>) is at the centre of all the acts which deal with this phenomenon. Not only does it define terrorist offences, but it also sets the minimum level of penal sanctions for terrorist offences and provides for measures of protection, support and assistance for terrorism victims.

The main aim of the article is to comment on these groups of provisions and to compare them to the previously binding ones. Such a comparison is necessary in order to indicate the legal changes foreseen by the Directive 2017/541 on combating terrorism (which have to be introduced by the Member States into their legislation in the process of its implementation). Taking into account its provisions, the following preliminary hypothesis can be formulated: The content of the Directive 2017/541 generally represents a continuation of existing legislation, but this act can contribute to combating the phenomenon of 'foreign terrorist fighters' within the EU, as it introduces new rules in this field based on international standards and it also extends the scope of protection for terrorist victims. Moreover, as this is a new form of the EU legislation (a Directive instead of a Council Framework Decision) it has a greater potential, in particular with regard to its direct effect. As a result, the first part of the article concentrates on the provisions of the Treaties on terrorism, including the legal basis for the new act, as it is important to explain why the previous Framework Decision has been replaced by the new Directive and what are the consequences of this change. The next section deals with the definition of terrorist offences, offences related to a terrorist group, and offences related to terrorist activities, with particular attention given to the provisions on counterterrorism financing and travel by "foreign terrorist fighters." The third part presents the penal sanctions for these offences as well as the jurisdictional rules. Finally, new measures of protection, support and assistance for terrorism victims are described.

<sup>9</sup> Eckes, *supra* note 1, pp. 150-151.

<sup>10</sup> Directive 2017/541/EU of the European Parliament and of the Council of 15 March 2017 on combating terrorism, [2017] OJ L 88.

<sup>11</sup> Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, [2002] OJ L 164. *See also* Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, [2008] OJ L 330.

## 1. THE TREATY PROVISIONS ON TERRORISM (INCLUDING THE AREA OF FREEDOM, SECURITY AND JUSTICE – TITLE V OF TFEU). THE LEGAL BASIS FOR THE DIRECTIVE

Under the Maastricht Treaty, preventing and combating terrorism was mentioned in Article K.1 among other “matters of common interest.” In other words, the EU counterterrorism policy could have been developed as part of the Member States cooperation in the field of Justice and Home Affairs (‘the third pillar’ of the EU). After the entry into force of the Amsterdam Treaty the old Article 29 of the Treaty of the European Union (TEU) continued to list the fight against terrorism as one of the primary objectives of Police and Judicial Co-operation in Criminal Matters (Title VI TEU).<sup>12</sup> Consequently, both the policy and legal acts adopted in this field were still under the regime of ‘the third pillar’, with all the constraints inherent in it (in particular, the exclusion of such acts as Regulations and Directives).

The primary instruments in the intergovernmental domain of Title VI TEU were decisions and framework decisions. The latter were comparable in their legal effects to EC Directives (as they bound the Member States only to the result to be achieved but left the choice of form and methods to the national authorities). However, by virtue of the Treaty they did not have direct effect (Article 34(2)(b) TEU). Therefore, the first anti-terrorism acts took the form of framework decisions without the direct effect. Moreover, they fell under the unanimity requirement in the Council, which not only delayed the adoption of acts but also had an impact on their content. It is also important to note that the European Parliament played a very limited role in the adoption of the framework decisions and other EU anti-terrorism measures, as it had mainly consultative powers in this field, while adequate parliamentary control should be regarded as very important when one takes into account that some of the EU measures have given rise to serious concerns about negative effects on civil liberties in the EU.<sup>13</sup> Finally, the Court of Justice did not enjoy full jurisdiction over the framework decisions combating terrorism and other acts adopted in this field. First of all, it had jurisdiction to make preliminary rulings on the interpretation or validity of framework decisions only when a Member State made a declaration under the (pre-Lisbon) Treaty on European Union indicating the circumstances in which the Court could exercise such a jurisdiction. Moreover, the European Commission could not bring enforcement proceedings against the Member States for failing to implement a framework decision or for implementing it incorrectly. However, the Court did have jurisdiction in relation to review of the legality of framework decisions in actions brought by a Member State or the Commission, and it could resolve disagreements between the Member States concerning their interpretation or application. Hence, it has been underlined that “the

<sup>12</sup> *Ibidem*, p. 8.

<sup>13</sup> J. Monar, *The European Union's Response to 11 September 2001: Bases for action, performance and limits*, available at: <https://www.albany.edu/~rk289758/BCHS/col/JHA-TERRORISM-NEWARK.doc> (accessed 30 June 2018), p. 19.

pre-Lisbon anti-terrorism cooperation was founded on a mixed third and second pillar basis, which suffered not only from a mostly intergovernmental integration but also from gaps regarding the jurisdiction of the ECJ.”<sup>14</sup>

The Lisbon Treaty abolished “the pillar structure” of the EU and the Area of Freedom, Security and Justice became one of its internal policies. As a result, it is generally governed by the “community method”, which has had important consequences for the EU anti-terrorism measures. First of all, it allows for adoption in this field of such legal acts as Regulations and Directives with the direct effect (on the conditions given by the Court of Justice in its case-law). Secondly, the European Commission enjoys a monopoly on proposals.<sup>15</sup> The Commission can also bring proceedings for failure to fulfil an obligation against those Member States which do not comply with provisions concerning the AFSJ, for example by not implementing Directives or implementing them incorrectly. Thirdly, the unanimity in the Council is replaced by the qualified majority vote in this body, so the decision-making process is more flexible. Fourthly, the European Parliament has a greater oversight role on these matters, as well as full co-decisional powers,<sup>16</sup> and national parliaments – in addition to their role in the EU law-making (the examination of legislative proposals in the light of the subsidiarity principle) - take part in the evaluation mechanisms for the implementation of the Union policies within the Area of Freedom, Security and Justice in accordance with Article 70 TFEU. Finally, the jurisdiction of the Court of Justice covers all freedom, security and justice issues – it can give preliminary rulings without any restriction and rulings in proceedings for failure to fulfil an obligation (these new competences effectively began on 30 November 2014, following a five-year transition period). Therefore, it is worth underlining that the Court of Justice can have a significant impact on counterterrorism policy; among other things, it will be able to press reluctant Member States to implement measures adopted by the EU.<sup>17</sup>

It should also be noted that under the Lisbon Treaty terrorism is integrated within a great range of policies. Article 43 TEU, which regulates missions undertaken by the EU in the frames of Common Security and Defence Policy, provides that such missions “may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.” Article 222 TFEU on the solidarity clause refers to the legal obligation of both the Union and its Member States to act “jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster.” This provision is seen as both rather ambitious

<sup>14</sup> G. Gargantini, *European Cooperation in Counter-Terrorism and the Case of Individual Sanctions*, 3(3) Perspectives on Federalism 155 (2011), pp. 168-169.

<sup>15</sup> However, according to Article 76 TFEU “[t]he acts referred to in Chapters 4 and 5, together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted: (a) on a proposal from the Commission, or (b) on the initiative of a quarter of the Member States.” These chapters cover judicial cooperation in criminal matters and police cooperation.

<sup>16</sup> T. Renard, *EU Counterterrorism Policies and Institutions After the Lisbon Treaty*, Centre on Global Counterterrorism Cooperation, Policy Brief, September 2012, p. 1.

<sup>17</sup> *Ibidem*, p. 2.

and somewhat vague, but at the same time it has been observed that it “could bring a significant contribution to the global response of the EU alongside the efforts made at national level.”<sup>18</sup> It is interesting to note, however, that following the terrorist attacks in Paris on 13 November 2015, France did not invoke the solidarity clause but the mutual assistance clause of Article 42(7) TEU, which refers to “armed aggression” on the territory of a Member State. This can be explained by the fact that under this provision other Member States have to provide “aid and assistance by all the means in their power”, which is a stronger obligation than merely to act “jointly in a spirit of solidarity” as provided in Article 222 TFEU.

Other Treaty references to terrorism can be found in the provisions on the Area of Freedom, Security and Justice (Title V of TFEU). Article 75 TFEU provides for “a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains”, which should be defined by the European Parliament and the Council in order to prevent and combat terrorism and related activities. Article 88 TFEU refers to Europe’s mission, which includes supporting the Member States cooperation in preventing and combating terrorism. Finally, Article 83 TFEU provides for the adoption by the European Parliament and the Council of Directives establishing “minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension”, and expressly mentions terrorism as one example of such serious crimes. Directive 2017/541 on combating terrorism is based on this Treaty provision, which has certain procedural consequences and at the same time affects its scope and content.

First of all, it was adopted on the basis of the proposal from the European Commission and after taking into account the opinion of the European Economic and Social Committee. Moreover, the draft legislative act was transmitted to the national parliaments. Finally, the Directive was adopted in the ordinary procedure by both the European Parliament and the Council. Thus, it seems that Directive 2017/541 on combating terrorism was subject to a thorough parliamentary control, as not only did the European Parliament introduce certain amendments to the original version of the act, but also national parliaments examined its proposal in light of the subsidiarity principle. As far as its scope is concerned, it should be noted that measures based on the Title V TFEU are generally not binding for the United Kingdom, Ireland, and Denmark, although they can decide to take part in certain initiatives. However, this is not the case with regard to Directive 2017/541 on combating terrorism<sup>19</sup> and consequently it is

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<sup>18</sup> J. Keller-Noellet, *The Solidarity Clause of the Lisbon Treaty* in: E. Fabry (ed.), *Think Global – Act European: The Contribution of 16 European Think Tanks to the Polish, Danish and Cypriot Trio Presidency of the European Union*, Notre Europe, Paris: 2011, pp. 329 and 333.

<sup>19</sup> Recitals 41 and 42 of the preamble provide that “[i]n accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive and are not bound by it or subject to its application”; and “[i]n accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark

binding only for the remaining 25 Member States. It should be noted though that two of the above-mentioned states (Ireland and Denmark) will continue to be bound by the Council Framework Decision.

As it was mentioned above, measures adopted on the basis of Article 83 TFEU contain only minimum rules concerning the definition of criminal offences and sanctions. This can explain why the main provisions of the Directive concentrate on the definitions of terrorist offences, offences related to a terrorist group, and offences related to terrorist activities (Articles 5-12 of the Directive 2017/541), as well as sanctions (Articles 13-18 of the Directive 2017/541). Further issues include jurisdiction and prosecution, investigative tools and confiscation, measures against content constituting public provocation online, amendments to Decision 2005/671/JHA, and last but not least the special provision on fundamental rights and freedoms that should not be affected by the Directive. It also contains a separate title on measures of protection, support and assistance for terrorism victims (Articles 24-26 of the Directive 2017/541), and final provisions on transposition, reporting, and entry into force (Articles 27-31 of the Directive 2017/541). The Directive should be implemented by 8 September 2018, and since it is based on the minimum harmonisation principle, the Member States can set more stringent requirements.

## 2. THE DEFINITIONS OF TERRORIST OFFENCES, OFFENCES RELATED TO A TERRORIST GROUP, AND OFFENCES RELATED TO TERRORIST ACTIVITIES

The provisions of Directive 2017/541 on combating terrorism take into account both the evolution of terrorist threats and the legal obligations of the Union and the Member States under international law. Accordingly, the definitions of terrorist offences, of offences related to a terrorist group, and of offences related to terrorist activities are extended in order to more comprehensively cover conduct related to foreign terrorist fighters and terrorist financing. “These forms of conduct should also be punishable if committed through the internet, including social media” (recital 6 of the Directive preamble). Terrorist offences are defined with reference to the same elements as previously provided in the Council Framework Decision 2002/475/JHA: two objective elements (intentional acts defined as offences under national law which may “seriously damage a country or an international organisation”<sup>20</sup>), and a subjective one (offences committed

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annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.”

<sup>20</sup> On the basis of the Council Framework Decision it was usually assumed in the literature that the phrase “which, given their nature or context, may seriously damage a country or an international organisation” should be regarded as an objective requirement for qualifying punishable behaviour as a terrorist offence. However, other interpretations of this phrase are also possible – see M.J. Borgers, *Framework Decision on Combating Terrorism: Two Questions on the Definition of Terrorist Offences*, 3(1) *New Journal of European Criminal Law* 68 (2012), p. 69-71.

with the aim of: seriously intimidating a population, or unduly compelling a government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation). It should also be noted that the Directive sets out a three-part definition of terrorism, consisting of: (i) the context of the action; (ii) the aim of the action; (iii) the specific acts being committed.<sup>21</sup>

The list of the acts which the Member States are required to incriminate under their national law is provided in Article 3(1).<sup>22</sup> Thus, ten categories of behaviour are taken into account that, if committed intentionally, can be considered terrorist offences. It should be noted that two changes have been introduced into this list. The first concerns point f, where radiological weapon is taken into account. The second is connected with the inclusion of a new provision (point i) on illegal system and illegal data interferences, referred to in the Directive 2013/40 of the European Parliament and of the Council on attacks against information systems.<sup>23</sup> Both changes take into account technological progress. The provision on illegal system interference can also be considered as an attempt to regulate cyberterrorism, although in a very general way. Thus, Directive 2017/541 on combating terrorism does not contain striking changes in relation to the list of the acts which the Member States are required to incriminate under their national law. This is also connected with the fact that this list covers all terrorist acts prohibited by international conventions on terrorism.<sup>24</sup>

<sup>21</sup> With reference to the provisions of the Council Framework Decision, see M.E. Salerno, *Terrorism in the EU: An Overview of the Current Situation as Reported by Europol*, available at: <https://bit.ly/2H24qEV> (accessed 30 June 2018), p. 2; and S. Peers, *EU Response to Terrorism*, 52(1) *The International & Comparative Law Quarterly* 227 (2003), p. 229.

<sup>22</sup> “Member States shall take the necessary measures to ensure that the following intentional acts, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation, are defined as terrorist offences where committed with one of the aims listed in paragraph 2: (a) attacks upon a person’s life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage-taking; (d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons; (g) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (i) illegal system interference, as referred to in Article 4 of Directive 2013/40/EU of the European Parliament and of the Council in cases where Article 9(3) or point (b) or (c) of Article 9(4) of that Directive applies, and illegal data interference, as referred to in Article 5 of that Directive in cases where point (c) of Article 9(4) of that Directive applies; j) threatening to commit any of the acts listed in points (a) to (i).”

<sup>23</sup> Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, [2013] OJ L 218.

<sup>24</sup> E. Dumitriu, *The E.U.’s Definition of Terrorism: The Council Framework Decision on Combating Terrorism*, 5(5) *German Law Journal* 585 (2004), p. 595.

The second objective element in the definition of terrorist offences refers to their effective or potential consequences, i.e. serious damage to a country or an international organisation. This ensures a differentiation of terrorist offences from less serious offences constituted by the same material element<sup>25</sup> and therefore should be treated as an important part of the definition contained in the new Directive. However, in some cases it can be difficult to ascertain the degree of endangerment connected with specific behaviour. Moreover, the phrase “may seriously damage a country or an international organisation” is rather vague and can be interpreted in different ways – more strictly or more flexibly depending on the circumstances. These problems have already been pointed out with relation to the Council Framework Decision 2002/475/JHA, but no changes have been introduced to this element of the definition of terrorist offences.

Directive 2017/541 also requires a specific terrorist intent,<sup>26</sup> which can be treated as a criterion making it possible to distinguish the terrorist offences listed in Article 3(1) from other offences. It should be noted though that political or ideological motives do not form part of the definition of terrorist offences.<sup>27</sup> “A key aspect is that it can be established *that* the offender intends to seriously intimidate a population and so on, but not *why* he is pursuing that objective.”<sup>28</sup> This element of the definition has not been changed by the Directive, so it allows a court to regard an act as a terrorist offence without establishing its underlying motive. Generally, the provisions on terrorist offences appear to be sufficient to cover all the activities dangerous for a country or an international organisation. By stressing the intent, while leaving aside the motive, they seem to provide a correct solution (as the former one is easier to be proved in a court). The negative aspect is that the Directive (similarly to the Council Framework Decisions) uses unclear wording in the definition of terrorist offences. This concerns not only the objective element concentrating on the consequences of an offence, but also the specific terrorist aims and the list of the acts which the Member States are required to incriminate under their national law. Consequently, it is difficult to foresee how certain general terms will be interpreted in practice, e.g. phrases like “seriously destabilising or destroying”, “extensive destruction” or “major economic loss.”

Article 4 of the Directive concentrates on offences relating to a terrorist group, which is defined as “a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences.”<sup>29</sup> Directing such a group as well as participating in its activities, including supplying information or material resources or

<sup>25</sup> *Ibidem*.

<sup>26</sup> Article 3(2) lists these aims: (a) seriously intimidating a population; (b) unduly compelling a government or an international organisation to perform or abstain from performing any act; (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

<sup>27</sup> Borgers, *supra* note 20, p. 76.

<sup>28</sup> *Ibidem*, p. 77.

<sup>29</sup> Article 2(3) of the Directive. This provision further explains that “‘structured group’ means a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership, or a developed structure.”

funding its activities in any way, are punishable as criminal offences. However, in order to avoid sanctioning all individuals associated with the group, Article 4(b) of the Directive (similarly to the Council Framework Decision) requires that the person accused of an offence relating to a terrorist group has acted with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group. Thus a subjective element, difficult to prove in practice, is included in the offence's definition.<sup>30</sup> On the other hand, the offence of participating in the activities of a terrorist group is not limited to contributions that have an actual effect on the commission of a principal criminal offence.

Offences related to terrorist activities include: public provocation to commit a terrorist offence (whether online or offline – Article 5); recruitment for terrorism (Article 6); providing training for terrorism (Article 7); receiving training for terrorism (Article 8); travelling for the purpose of terrorism (Article 9); organising or otherwise facilitating travelling for the purpose of terrorism (Article 10); terrorist financing (Article 11); other offences related to terrorist activities (Article 12<sup>31</sup>). Hence, in comparison to the Council Framework Decision 2002/475/JHA on combating terrorism, as amended in 2008,<sup>32</sup> the list of the offences related to terrorist activities has been extended to cover further activities of a preparatory nature, such as receiving training for terrorism, and travelling, organising, or otherwise facilitating travelling for the purpose of terrorism. Moreover, terrorist financing has been included in this long list.

These new provisions of the Directive are largely based on international standards in the field of counterterrorism finance and of travel by “foreign terrorist fighters.” It should be noted that in its Resolution 2178(2014) the Security Council of the United Nations has obliged all States to prevent the recruiting, transporting or equipping, and the financing of foreign terrorist fighters' activities. They are defined as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.”<sup>33</sup> The Resolution also provides that offences related to foreign terrorist fighters, such as travelling to another State for terrorism purposes, financing or organising funds for such travels, and providing or receiving terrorist training should be criminalised in national legislation.

Consequently, Articles 9 and 10 of the EU Directive require the Member States to create the offences of travelling abroad for terrorism and of organising or facilitating such travel – Member States must take the necessary measures to punish all such actions

<sup>30</sup> Dumitriu, *supra* note 24, p. 598.

<sup>31</sup> They include: aggravated theft with a view to committing one of the offences listed in Article 3; extortion with a view to committing one of the offences listed in Article 3; drawing up or using false administrative documents with a view to committing one of the offences listed in points (a) to (i) of Article 3(1), point (b) of Article 4, and Article 9.

<sup>32</sup> Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, [2008] OJ L 330.

<sup>33</sup> UN Security Council, Security Council resolution 2178 (2014) on threats to international peace and security caused by foreign terrorist fighters, 24 September 2014, S/RES/2178 (2014), available at: <http://www.refworld.org/docid/542a8ed74.html> (accessed 30 June 2018).

as criminal offences when committed intentionally. However, the act of travelling to another country should be criminalised only if it can be demonstrated that the intended purpose of that travel was to commit, contribute to or participate in terrorist offences, or to provide or receive training for terrorism. Article 8 also provides for a new offence – to receive training for terrorism – that aims to capture those individuals that may “self-radicalise” and train themselves using materials available on the internet or elsewhere.<sup>34</sup> Such activities should be carried out with regard to a terrorism purpose and with an intention to commit a terrorist offence. In relation to terrorist financing it is observed that “criminalisation should cover not only the financing of terrorist acts, but also the financing of a terrorist group, as well as other offences related to terrorist activities, such as the recruitment and training, or travel for the purpose of terrorism (...)”<sup>35</sup> Thus, the Member States should adopt measures which will extend the scope of the criminalisation of this offence. This is a very important provision, as both the prevention and criminalisation of the financing of all activities connected with terrorism are essential to effectively combat this phenomenon.

Apart from the changes in relation to these subsidiary offences, the Directive is aimed at widening the scope of ‘aiding or abetting, inciting and attempting’ to include a broader range of offences.<sup>36</sup> It extends the criminalisation of incitement to all offences (Article 14(2) of the Directive). Similarly, aiding and abetting is punishable in relation to almost all offences (only travelling and organising or otherwise facilitating travelling for the purpose of terrorism are excluded from the scope of Article 14(1) of the Directive). Finally, the criminalisation of an attempt is extended to all offences, including travelling abroad for terrorist purposes and terrorist financing, with the exception of receiving training and organising or otherwise facilitating travel abroad.<sup>37</sup> These provisions refer to

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<sup>34</sup> C.C. Murphy, *The Draft EU Directive on Combating Terrorism: Much Ado about What?*, available at: <http://eulawanalysis.blogspot.com/2016/01/the-draft-eu-directive-on-combating.html> (accessed 30 June 2018). Recital 11 of the Directive preamble explains that: “Criminalisation of receiving training for terrorism complements the existing offence of providing training and specifically addresses the threats resulting from those actively preparing for the commission of terrorist offences, including those ultimately acting alone. Receiving training for terrorism includes obtaining knowledge, documentation or practical skills. Self-study, including through the internet or consulting other teaching material, should also be considered to be receiving training for terrorism when resulting from active conduct and done with the intent to commit or contribute to the commission of a terrorist offence. In the context of all of the specific circumstances of the case, this intention can for instance be inferred from the type of materials and the frequency of reference. Thus, downloading a manual to make explosives for the purpose of committing a terrorist offence could be considered to be receiving training for terrorism. By contrast, merely visiting websites or collecting materials for legitimate purposes, such as academic or research purposes, is not considered to be receiving training for terrorism under this Directive.”

<sup>35</sup> Recital 14 of the Directive preamble.

<sup>36</sup> S. Wittendorp, *What’s in a definition? Is the proposed EU Directive on Combating Terrorism still about terrorism?*, available at: <https://bit.ly/2qyAVR4> (accessed 30 June 2018).

<sup>37</sup> See Article 14(3) of the Directive, which provides for the criminalisation of the attempt in relation to “an offence referred to in Articles 3, 6, 7, Article 9(1), point (a) of Article 9(2), and Articles 11 and 12, with the exception of possession as provided for in point (f) of Article 3(1) and the offence referred to in point (j) of Article 3(1).”

preparatory and subsidiary activities, but they should be treated (with a few exceptions) in the same way as the terrorist offences. In this way the Directive introduces a set of rules which is supposed to counteract all actions connected with terrorism, even if they are of an ancillary nature.

On the whole, it can be seen that with regard to the definition of terrorism most of the changes introduced by the Directive concern offences related to terrorist activities (mainly via the extension of their scope). Similarly, the scope of aiding or abetting, inciting and attempting has been extended and they should be punishable in relation to a broader range of offences. This shows an increasing interest in anticipatory action – by introducing ancillary and facilitative offences, authorities can intervene early on in order to prevent violent attacks before they materialise.<sup>38</sup> However, such an approach is not unproblematic, as preparatory and subsidiary activities may or may not lead to the commitment of a terrorist offence. “Acting in anticipation, which ancillary and facilitative offences make possible, thus raises the question of exactly what standard of evidence applies in convicting suspects and the effect this has on fundamental rights.”<sup>39</sup> Therefore, after much discussion on this question a special clause on fundamental rights and freedoms has been included. It also refers to freedom of the press and other media (Article 23). Moreover, the Directive underlines the importance of freedom of expression and opinions - it clearly indicates that “the expression of radical, polemic or controversial views in the public debates” is outside its scope (recital 40 of the preamble). It is also stressed that “the notion of intention must apply to all the elements constituting [criminal] offences” (Recital 17 of the preamble). These provisions are seen as the positive side of the Directive from the perspective of the protection of fundamental rights, and it has been observed that “if it was duly transposed and implemented in this regard, some mistakes made in the past would not be made in the future.”<sup>40</sup>

### 3. PENAL SANCTIONS FOR TERRORIST OFFENCES AND JURISDICTIONAL RULES

The Directive provides penal sanctions for both natural and legal persons. The first group of these provisions remains practically unchanged, with the general requirement that all the offences prohibited by this act (including facilitative offences such as aiding or abetting, inciting, and attempting) should be punished by “effective, proportionate and dissuasive criminal penalties, which may entail surrender or extradition” (Article 15(1) of the Directive).<sup>41</sup> However, there is one additional provision in the framework

<sup>38</sup> Wittendorp, *supra* note 36.

<sup>39</sup> *Ibidem*.

<sup>40</sup> A. Ollo, *Can we ensure EU terrorism policies respect human rights?*, available at: <https://edri.org/can-we-ensure-eu-terrorism-policies-respect-human-rights/> (accessed 30 June 2018).

<sup>41</sup> Article 15 predicts further that: “2. Member States shall take the necessary measures to ensure that the terrorist offences referred to in Article 3 and offences referred to in Article 14, insofar as they relate to

of penalties for natural persons which aims at protecting children's interests. The Member States should take the necessary measures to ensure that when the recruitment for terrorism or providing training for terrorism is directed towards a child, this may, in accordance with national law, be taken into account when sentencing (Article 15(4) of the Directive), although there is no obligation on judges to increase the sentence. It remains within the discretion of the judge to assess that element together with the other facts of the particular case.<sup>42</sup> Moreover, the circumstances that can be taken into account by the Member States in order to reduce the penalties are regulated in the same way as in the Council Framework Decision. Finally, provisions on the liability of legal persons and sanctions for their activities are unchanged.<sup>43</sup> It should therefore be noted that, although the Directive has extended the scope of offences related to terrorist activities (receiving training for terrorism, travelling and organising or otherwise facilitating travelling for the purpose of terrorism, terrorist financing), it does not provide for sanctions which should be introduced in relation to them by the Member States. They are taken into account only in the framework of the general requirement that all the offences prohibited by this act should be punished by "effective, proportionate and dissuasive criminal penalties." It would seem that leaving to the Member States the general choice of sanctions for offences related to terrorist activities is not the right solution. It can lead to the adoption of different penalties and consequently, weaken the effective fight with such offences within the European Union.

The provisions on jurisdiction and prosecution also remain unchanged,<sup>44</sup> with one notable exception. The Directive includes a new rule on jurisdiction to ensure that an individual providing training for terrorist purposes can be prosecuted in the

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terrorist offences, are punishable by custodial sentences heavier than those imposed under national law for such offences in the absence of the special intent required pursuant to Article 3, except where the sentences imposed are already the maximum possible sentences under national law. 3. Member States shall take the necessary measures to ensure that offences listed in Article 4 are punishable by custodial sentences, with a maximum sentence of not less than 15 years for the offence referred to in point (a) of Article 4, and for the offences listed in point (b) of Article 4 a maximum sentence of not less than 8 years. Where the terrorist offence referred to in point (j) of Article 3(1) is committed by a person directing a terrorist group as referred to in point (a) of Article 4, the maximum sentence shall not be less than 8 years."

<sup>42</sup> Recital 19 of the Directive preamble.

<sup>43</sup> They should be effective, proportionate and dissuasive and include criminal or non-criminal fines. They can also include: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; (d) a judicial winding-up order; and (e) temporary or permanent closure of establishments which have been used for committing the offence.

<sup>44</sup> According to Article 19(1): "Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3 to 12 and 14 where: (a) the offence is committed in whole or in part in its territory; (b) the offence is committed on board a vessel flying its flag or an aircraft registered there; (c) the offender is one of its nationals or residents; (d) the offence is committed for the benefit of a legal person established in its territory; (e) the offence is committed against the institutions or people of the Member State in question or against an institution, body, office or agency of the Union based in that Member State. Each Member State may extend its jurisdiction if the offence is committed in the territory of another Member State."

Member State where the training is received. However, “when an offence falls within the jurisdiction of more than one Member State and when any of the Member States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State” (Article 19(3) of the Directive). It also provides that in such a situation the Member States can turn to Eurojust, which will facilitate the cooperation between their judicial authorities and the coordination of their actions.

The Directive contains separate provisions on investigative tools and confiscation (Article 20). The former should be similar to those used in organised crime or other serious crime cases, and they should be proportionate and well targeted;<sup>45</sup> while the latter relates to “the proceeds derived from and instrumentalities used or intended to be used in the commission or contribution to the commission of any of the offences referred to in this Directive.” It should also be mentioned that the Member States are to take the necessary measures to ensure the prompt removal of online content constituting a public provocation to commit a terrorist offence that is hosted in their territory, or to block access to it, while ensuring transparency and adequate safeguards as well as the possibility of judicial redress (Article 21). Thus, the Directive places an obligation on the Member States and their authorities to respond immediately to any online provocation to commit terrorist offences, which may play an important role in their prevention.

#### 4. MEASURES OF PROTECTION, ASSISTANCE, AND SUPPORT FOR TERRORISM VICTIMS

The provisions on terrorism victims have been extended to cover not only their protection but also support services and their rights in cross-border situations. Generally, they are intended to supplement those contained in the Directive 2012/29/EU on victims of crime.<sup>46</sup> As a result the definition of victims of terrorism is based on this act and it covers:

a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, insofar as that was directly caused by a terrorist offence, or a family member of a person whose death was directly caused by a terrorist offence and who has

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<sup>45</sup> Such tools include, for example, the search of any personal property, the interception of communications, covert surveillance including electronic surveillance, the taking and the keeping of audio recordings, in private or public vehicles and places, and of visual images of persons in public vehicles and places, and financial investigations. Their use should take into account the principle of proportionality and the nature and seriousness of the offences under investigation and should respect the right to the protection of personal data – recital 21 of the Directive preamble.

<sup>46</sup> Directive of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, [2012] OJ L 315.

suffered harm as a result of that person's death. Family members of surviving victims of terrorism (...) have access to victim support services and protection measures.<sup>47</sup>

In other words, the status of the family members of victims of terrorism is clarified: family members of victims whose death was the result of terrorist offences are assimilated with victims and can benefit from the same rights,<sup>48</sup> while family members of surviving victims just have access to the same rights.

Apart from the previously provided general obligation of the Member States to ensure that prosecution of offences covered by the Directive is not dependent on a report made by a victim of terrorism or other person subjected to the offence, the Directive includes extensive provisions on assistance and support services for terrorism victims. Their aim is to take into account the specific needs of terrorism victims, and they should be confidential, free of charge, easily accessible, available both immediately after a terrorist attack and later, for as long as necessary. They should include in particular: emotional and psychological support, such as trauma support and counselling; provision of advice and information on any relevant legal, practical or financial matters and assistance with claims regarding compensation for victims of terrorism available under the national law of the Member State concerned (Article 24(3) of the Directive). Moreover, the Member States should ensure adequate medical treatment for victims of terrorism as well as the access to the legal aid in accordance with Article 13 of Directive 2012/29/EU. Undoubtedly, these provisions require quite a significant commitment of resources on the part of the Member States' health services, the funding of which may prove a challenge in practice.<sup>49</sup> However, this medical support is a very important element in the process of terrorism victims' recovery. Similarly, the legal aid which should be provided by the Member States requires additional costs, but it also seems indispensable in the framework of the support services for terrorism victims.

Protection measures cover both victims of terrorism and their family members and are subject to the provisions of Directive 2012/29/EU. It is underlined that "when determining whether and to what extent they should benefit from protection measures in the course of criminal proceedings, particular attention shall be paid to the risk of intimidation and retaliation and to the need to protect the dignity and physical integrity of victims of terrorism, including during questioning and when testifying." Thus, the Directive on combating terrorism takes into account dangers to which the victims and their family members are exposed, in particular their potential intimidation and retaliation. In some cases, special protection by the police or other security services could be necessary, especially where the terrorism victims are important witnesses in criminal proceedings concerning an act of terrorism. The Directive also underlines the need to protect the dignity and physical integrity of such persons and this requirement

<sup>47</sup> Recital 27 of the preamble of the Directive on combating terrorism.

<sup>48</sup> S. Voronova, *Combating terrorism*, Briefing EU Legislation in Progress, September 2017, available at: <https://bit.ly/2ykSY2V> (accessed 30 June 2018), p. 7.

<sup>49</sup> See Murphy, *supra* note 34.

should be provided for by the Member States, notably in relation to the national authorities that question terrorism victims, such as the police, prosecutor's offices, or courts. Finally, the Directive acknowledges the cross-border dimension of terrorist attacks and the need to ensure both access to information and the available support services in the Member State where the terrorist offence was committed as well as assistance and support services in the victim's home Member State. Hence, terrorism victims' rights in cross-border situations are also taken into account.

## CONCLUSIONS

By means of Directive 2017/541 the European Union has introduced several important changes to its previously existing provisions on combating terrorism. Accordingly, the following terrorist activities are made punishable: illegal system interference and illegal data interference (cyber-attacks), when they are committed against a critical infrastructure information system; receiving training for terrorism; travelling and organising or otherwise facilitating travelling for the purpose of terrorism and terrorist financing. In relation to public provocations to commit terrorism, the Member States are required to remove such online content or to block access to it. Thus, most of these changes concern offences related to terrorist activities and are influenced by international standards, such as Resolution 2178(2014) of the Security Council of the United Nations and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism. The Directive also extends the criminalisation of aid, abetment, incitement and attempt to a broader range of offences. Moreover, it introduces new provisions on the protection of victims of terrorism, including the requirement for a comprehensive response to their specific needs (assistance and support services, not only in the country where the attack was committed but also in that of the victims' residence). Other changes include: a specific clause on fundamental rights and freedoms; a special provision on the recruitment and training for terrorism directed towards a child, to be taken into account in sentencing; effective investigative tools, which should be targeted and proportional; and freezing and confiscation of the proceeds of terrorist offences.<sup>50</sup>

The analysis of all of these provisions confirms that, as regards its content, the Directive 2017/541 cannot be treated as a completely new chapter in combating terrorism by the EU. It is rather a continuation based on the provisions previously adopted in this field. The majority of the Directive's provisions can already be found in the Council Framework Decision (as amended in 2008). However, it takes into account international standards in the field of counterterrorism financing and travel by "foreign terrorist fighters", which can be treated as a further step in combating this phenomenon. It should be underlined that its implementation by the EU Member States at the same time meets the requirements provided for by the Resolution 2178

<sup>50</sup> See Voronova, *supra* note 48, p. 11.

(2014) of the Security Council of the United Nations. Moreover, the Directive may contribute to better protection of terrorism victims, as it extends its scope. In this field, the Directive applies an approach based on the protection of human rights. Not only does it require that support and assistance services should take into account the specific needs of terrorism victims, but it also refers to the necessity to protect their dignity and physical integrity. Finally, there is no doubt that as a new form of the EU legislation in the framework of counterterrorism policy (i.e. a Directive instead of a Council Framework Decision), it can play a larger role in practice, at least with respect to two aspects: its provisions will have direct effect under the conditions provided in the case-law of the Court of Justice, and the process of its implementation will be supervised by both the European Commission and the Court.