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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**based on Article 29(2) 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**

{SWD(2021) 324 final}

1. INTRODUCTION

On 15 March 2017, the European Parliament and the Council adopted Directive (EU) 2017/541 on combating terrorism¹ (hereafter “the Directive”). The Directive replaced Framework Decision 2002/475/JHA² (hereafter “the Framework Decision”) and was adopted to strengthen the EU legal framework by extending the crimes related to terrorism, providing police and prosecutors with the tools to prevent and combat terrorist offences and by better responding to the specific needs of victims of terrorism. For the Member States bound by the Directive³ (hereafter “Member States”), the Directive sets harmonised definitions of terrorist offences, and minimum rules concerning sanctions in the area of terrorist offences, offences related to a terrorist group and offences related to terrorist activities. This serves as a benchmark for cooperation and information exchange between national authorities. A common baseline within the EU also prevents the existence of legal loopholes that may be exploited by terrorists. The recent events in Afghanistan underlined once again the importance of having a robust framework to fight terrorism, including through criminal law.

The deadline for incorporating the rules into national law was 8 September 2018. In September 2020, the Commission concluded that the transposition of the Directive has led to a substantive strengthening of the Member States’ criminal justice approach to terrorism and the rights afforded to victims of terrorism⁴. However, the Commission encountered a number of transposition issues (please see Section 2 for more detail).

Article 29(2) of the Directive requires the Commission to submit a report to the European Parliament and the Council, assessing the added value of the Directive with regard to combating terrorism. The report shall also cover the impact of the Directive on fundamental rights and freedoms, including on non-discrimination, the rule of law, and the level of protection and assistance provided to victims of terrorism. In line with the Better Regulation guidelines⁵, the Commission has also taken the opportunity to assess the relevance, effectiveness, efficiency, coherence and EU added value of the Directive. These evaluation criteria are assessed from the date of entry into force of the Directive, i.e. 20 April 2017, until June 2021. As the Commission put forward its proposal for the Directive in 2015, this is the reference point used to assess the baseline situation.

The detailed findings of the evaluation, as well as the methodology used, is presented in a Commission Staff Working Document. The Regulatory Scrutiny Board was consulted on this Commission Staff Working Document on 14 July 2021. On 16 July 2021, it gave a positive opinion with recommendations for improvement, which were used to revise the document. The main findings of the evaluation are summarised in Section 3 of this report. On 1 July 2021, the Commission organised a dedicated workshop with Member States to discuss the next steps, which was also attended by Europol, Eurojust, and the EU Counter-Terrorism Coordinator’s office.

¹ Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, OJ L 88/6, 15.3.2017.

² Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164, 13.6.2002.

³ All EU Member States, except Denmark and Ireland.

⁴ COM(2020) 619 final, 30.9.2020.

⁵ SWD(2017) 350, 7.7.2017.

2. BACKGROUND

The Directive is the cornerstone of the Member States' criminal justice response to terrorism. It is a legal framework common to the Member States and serves as a benchmark for information exchange and cooperation. The Directive was, among others, adopted to take account of the evolution of the terrorist threat in the EU, and to fulfil legal obligations of the EU and Member States under international law⁶, in particular in relation to the phenomena of foreign terrorist fighters and terrorist financing. Initially, the Commission planned to conduct an impact assessment in 2015 and, if warranted, to present a legislative proposal in 2016. However, a series of terrorist attacks across France, Belgium, Denmark and Germany underlined the need to act without delay. Therefore, due to the urgency to adopt the Directive, an impact assessment was not carried out and the Commission proposal was published on 2 December 2015.

The Directive's general objective is to combat terrorism through criminal law. More specifically, the Directive aims to:

- approximate the definition of terrorist offences, offences related to a terrorist group and to terrorist activities, serving as a benchmark for information exchange and cooperation between competent national authorities;
- establish minimum rules concerning the definition of criminal offences and sanctions in the area of terrorist offences, offences related to a terrorist group and offences related to terrorist activities; and
- enhance measures of protection of, and support and assistance to, victims of terrorism.

In 2020, the Commission assessed the transposition of the Directive in a report⁷, in which it identified some shortcomings. The Commission notably assessed that the functioning of the Directive would be enhanced by correct transposition at the national level. As mentioned in Section 1, several transposition issues were identified in the transposition report. Some key issues are:

- the incomplete or incorrect transposition of one or more of the terrorist offences listed in Article 3 of the Directive, including not qualifying the listed offences as terrorist offences, which impacts on the transposition of several other provisions;
- the lack of transposition of the element "contribute to the commission" in Articles 6, 7, 8, 9 and 11 of the Directive;
- the incomplete or incorrect transposition of Article 9 on travelling for the purposes of terrorism and Article 11 on terrorism financing, i.e. two of the new provisions introduced by the Directive; and
- shortcomings in the transposition of specific provisions for victims of terrorism.

The current evaluation presents a wider analysis of the functioning of the Directive, beyond mere transposition. The methodology used for the evaluation was a combination of desk research and field research. A wide range of stakeholders were consulted. These

⁶ In particular, obligations in relation to foreign terrorist fighters and terrorist financing: United Nations Council Security Resolution 2178, on foreign terrorist fighters (2014), the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (2015) and the Financial Action Task Force standards on terrorist financing.

⁷ COM(2020) 619 final, 30.9.2020.

included Member States' authorities responsible for the implementation of the Directive, different Directorates-General within the Commission, the European External Action Service, the Fundamental Rights Agency (hereafter "the FRA"), the European Union Agency for Law Enforcement Cooperation (hereafter "Europol"), the European Union Agency for Criminal Justice Cooperation (hereafter "Eurojust"), civil society including human rights organisations, academia and think tanks, and the general public. An external evaluation study was carried out to support the evaluation (hereafter "external study"). The external evaluation study was carried out by ICF Consulting Services Limited, following a call for services under a framework contract. The evaluation was conducted through a mixed methods approach and was informed by the triangulation of a variety of sources. In addition, on the request of the Commission, in April 2021 the FRA submitted a contribution to the Commission on the impact of the Directive on fundamental rights and freedoms. The FRA conducted interviews with 107 practitioners (defence lawyers, judges and investigative judges, law enforcement, public prosecutors, NGOs, and academia) for its research project. In the autumn of 2021, the FRA will publish a more detailed report that includes key findings and FRA opinions. Moreover, Eurojust provided a contribution focusing on provisions of the Directive used in recent prosecutions and convictions. The Commission had requested such a contribution to take into account the information provided by Member States under Decision 2005/671/JHA, as required by Article 29(2) of the Directive. Finally, at their own initiative, the European Economic and Social Committee (hereafter "EESC") conducted an independent evaluation of the Directive and produced an information report, which was also used as a source for the current evaluation⁸.

3. MAIN FINDINGS

In general, the assessment of the functioning of the Directive is positive. The Directive has functioned and largely achieved its objectives in the way that was expected. More specifically, on the basis of the aforementioned sources, the evaluation finds that:

- i. The scope and definitions of the Directive, as well as its minimum rules, are overall highly relevant. The evaluation also finds that the Directive is expected to remain relevant in the next years.
- ii. The Directive has achieved its objectives to a satisfactory extent. Nevertheless, there are certain factors that limit the effectiveness of the Directive, for example in relation to combating extreme right-wing terrorism.
- iii. There is no conclusive evidence on the exact costs for achieving the results of the Directive. Nevertheless, the costs associated with the implementation of the Directive appear to be low, whereas the majority of the stakeholders consulted indicated that the Directive generated some or significant improvements, such as enhanced legal clarity and enhanced cooperation.
- iv. The Directive is overall internally coherent. The evaluation also finds that the Directive is largely coherent with other relevant interventions, at national, EU and international level.
- v. In terms of EU added value, the evaluation finds that the Directive has generated added value beyond what could have been achieved unilaterally by Member

⁸ European Economic and Social Committee, Information report, Evaluation of the Directive on combating terrorism, SOC/675, 2021.

States or at the international level. It has also provided added value compared to the Framework Decision. The Directive has had clear added value with regard to combating terrorism. For the articles covering the rights of victims of terrorism (Articles 24 to 26), in relation to their EU added value stakeholders' views were slightly more divided, although their assessment was overall positive.

- vi. While the Directive has had an impact on fundamental rights and freedoms, the limitations largely meet the requirements of necessity and proportionality. Overall, most stakeholders consulted for the external study did not consider the implementation of the Directive to be problematic from a fundamental rights perspective. However, some issues have been identified as having the potential to create tension with the requirements of necessity and proportionality, of which some are linked directly to the scope of the Directive, while others are only indirectly linked to it (e.g. procedural rights of terrorist suspects). Despite safeguard measures in place in the Member States to prevent discrimination, some stakeholders criticised counter-terrorism measures, including those covered by the Directive, for potentially leading to adverse effects for groups that are at heightened risk of facing discrimination and racism.
- vii. Likewise, the Directive has had a limited impact on the rule of law and has overall not had a problematic impact in this regard. Nevertheless, some concerns have been raised in relation to the process for adoption of the Directive (i.e. without impact assessment) and its legal clarity, as well as on proving terrorist intent and foreseeability, and impact on lawful activities. Despite these concerns, the overall negative impact of these issues was found to be limited.
- viii. Overall, the Directive had a positive impact on the level of assistance and protection provided to victims of terrorism. The obligations established in Articles 24 to 26 of the Directive have led to the adoption of measures concerning the protection, support and rights of victims of terrorism in many of the Member States. However, in the practical implementation of these articles, several stakeholders identified issues with regard to the provision of assistance and protection to cross-border victims. These issues with the practical implementation reduce the positive impact the Directive overall has on the level of assistance and protection provided to victims of terrorism.

Despite the overall positive assessment, there are several issues limiting the functioning of the Directive:

Firstly, several national authorities and judges reported **difficulties in proving terrorist intent**. Intent is an important element for the provisions of the Directive. The main challenge is linked to factual circumstances rather than a need for further clarification of the term 'intentional act' contained in the Directive. More specifically, the issues relate mostly to the gathering of evidence, especially when that evidence is located outside the national territory, a circumstance which is common in the context of the Directive. Likewise, in relation to the offences on travelling for the purpose of terrorism (Articles 9-10), national authorities and representatives from the judiciary and prosecutors reported difficulties to establish the subjective element of terrorist intent, as well as that collecting evidence to prove such intent is difficult in practice.

In addition, there are indications that even though the Directive applies to all forms of terrorism, in reality some Member States find it **challenging to classify violent extreme**

right-wing acts as acts of terrorism. Eurojust facilitated discussions with the Member States to identify the exact challenges. Addressing this issue is important not only to enhance the effectiveness of the Directive, but also crucial to ensure that the Directive is applied in a non-discriminatory manner. The main recurring issue relates to the difficulty to prove the terrorist intent of an action carried out by a right-wing extremist group or a lone actor. The lack of evidentiary information proving the terrorist intent, which is a requirement in the Directive and national legislations for an act to qualify as a terrorist offence, was presented as one of the main obstacles to use counter-terrorism legislation in the investigation and prosecution of right-wing extremist offences.

Another challenge identified by judicial practitioners participating in Eurojust's workshops relates to the particularities of the violent right-wing extremist scene. Groups and movements advocating extreme right-wing views and ideology are characterised by the heterogeneity of their supporters and followers, by numerous interconnections between present-day organisations and long-existing extreme right-wing groups and by the variety of potential targets. In this context of mixed ideologies and blurred lines between movements, judicial authorities may experience difficulties in considering prosecution on charges of participation in the activities of a terrorist group, which requires that a clear link can be established between the suspect and the organisation.

The evaluation identified some **provisions that might benefit from clarification.** For example, in relation to terrorist offences (Article 3), some Member States reported difficulties in determining criteria to establish that an act “may seriously damage a country or an international organisation” (Article 3(1)). In addition, several stakeholders pointed out that the definition of terrorist group in the Directive fails to take into account the changing nature and loosening of the structure of terrorist groups. As regards the structure of these groups, the definition in the Directive presumes a certain degree of organisation that is not often the case, according to several stakeholders. The stakeholders noted primarily a lack of clarity on the level of participation required in the terrorist group and how such participation is defined.

Despite the overall positive impact that the Directive has had on the level of **assistance and protection provided to victims of terrorism**, several challenges have been identified. The plight of cross-border victims of terrorism is particularly evident throughout the evaluation. Cross-border victims of terrorism rely on swift and adequate cooperation between the Member States. However, there are obstacles hindering such effective cooperation and coordination. For example, not all Member States have designated single contact points, which Council Conclusions have called for in 2018⁹ and which would facilitate significantly the implementation of Article 26 of the Directive. In addition, there is a lack of a secure tool for exchanging information on individual situations, both in the aftermath of the attack or during the longer-term follow-up. Such issues reduce the positive impact of the Directive on the level of assistance and protection provided to victims of terrorism. Overall, the Directive has had a lower impact on the protection and assistance provided to victims of terrorism, and in particular cross-border victims, than expected.

⁹ Council Conclusions on victims of terrorism from 2018 (9719/18) call on Member States to set up a national Single Contact Point for victims of terrorism. This call has been repeated in the 2019 Council Conclusions on victims' rights (2019/C 422/05).

4. CONCLUSIONS AND FOLLOW-UP ACTIONS

As discussed in Section 2, the Commission identified some transposition shortcomings in its 2020 report¹⁰. The Commission is currently further assessing the transposition of the Directive into national law. If conformity issues are found and national legislation is not fully in line with the Directive, the Commission may launch **infringement procedures**. The Commission started this process in June 2021, when it opened infringement procedures against four Member States, urging these Member States to ensure correct transposition of the Directive. In July 2021, the Commission opened further infringement procedures against five Member States. In September 2021, it opened further infringement procedures against four Member States.

In addition to the findings of the transposition report, the evaluation has identified the issues that could be mitigated by the measures referred to below.

4.1. Terrorist intent and evidence gathering

The first challenge is reported difficulties in proving terrorist intent. This is to a large extent due to the difficulty to gather evidence, especially when that evidence is located outside the national territory, a circumstance which is common in the current context. For these issues relating to the gathering of evidence outside of the national territory, and more particularly in conflict areas, the Commission and the EEAS are **supporting Member States' use of battlefield information** to identify, detect and prosecute returning foreign terrorists fighters through the establishment of best practices, the exchange of information as well as project financing. Moreover, in September 2020, Eurojust published its Memorandum on Battlefield Evidence¹¹. The Memorandum gives an overview of experiences of using battlefield evidence in criminal proceedings. It also addresses challenges identified and ways to overcome them, as well as measures to strengthen information exchange. The Commission encourages Member States to make full use of the information gathered in this Memorandum. Likewise, the Commission calls on the Member States to apply the insights from the Genocide Network's report on cumulative prosecution of foreign terrorist fighters for core international crimes and terrorism-related offences¹². The Commission also encourages Member States to make use, where appropriate, of battlefield information on suspected terrorists, including that received by trusted third States, for creating alerts in the Schengen Information System and to cross-check battlefield information where appropriate with other relevant databases and information sources (e.g. the Schengen Information System, Passenger Name Record, Europol Information System, Interpol databases and EURODAC), in full compliance with legal provisions on the use of these databases and information systems. The use of battlefield evidence can be a crucial tool for ensuring that also foreign terrorist fighters are brought to justice, and do not evade prosecution because their crimes were committed in a place where it is difficult to access evidence. It is important to recall that the present Directive was notably adopted to better tackle the phenomenon of foreign terrorist fighters. The Commission finally requests the Member States to make use of the European Counter-Terrorism Register at Eurojust to identify links between counter-terrorism cases early and to seek Eurojust's support in the coordination of parallel prosecutions.

¹⁰ COM(2020) 619 final, 30.9.2020.

¹¹ [Eurojust Memorandum on Battlefield Evidence | Eurojust | European Union Agency for Criminal Justice Cooperation \(europa.eu\)](#)

¹² [Cumulative prosecution of foreign terrorist fighters for core international crimes and terrorism-related offences | Eurojust | European Union Agency for Criminal Justice Cooperation \(europa.eu\)](#)

Moreover, it is important to note that in December 2020, the Commission proposed to **strengthen the mandate of Europol**. Such a strengthened mandate will help Europol cooperate more effectively with private parties, notably in situations where private parties hold relevant information, but have difficulties in identifying the Member States concerned. In those cases, private parties can share the relevant information with Europol, which will identify and inform the Member States concerned. This will help Member States to access information that could be useful for the investigation, prosecution, adjudication or sentencing of offences covered by the Directive.

4.2 Enhancing legal clarity

In addition, some of the stakeholders consulted held the view that certain provisions of the Directive might benefit from additional clarifications, without a need for any legal amendments. The external study recommends the Commission to adopt non-regulatory guidance for Member States on the interpretation of Articles 1 – 14 of the Directive. The need for such guidance was discussed with Member States in the workshop on 1 July 2021, which was also attended by Europol, Eurojust, and the EU Counter-Terrorism Coordinator's office. All Member States that intervened were unanimous in their opinion that the Directive is sufficiently clear and that they have no need for non-regulatory guidance. They also pointed out that interpreting legislation is the sole competence of the judiciary. Nevertheless, the evaluation showed that other stakeholders, e.g. some members of the judiciary and prosecutors, see scope for further clarification of certain provisions. The Commission therefore notes that its **opening of infringement procedures** (as referenced above) will also lead to enhanced legal clarity, as it clarifies the correct interpretation of the Directive. It is important to note that only the Court of Justice of the EU (CJEU) is competent to interpret EU law authoritatively.

4.3 Combating violent right-wing extremism

The evaluation also found that some Member States find it challenging to qualify violent extreme right-wing acts as acts of terrorism. Addressing this issue is important not only to enhance the effectiveness of the Directive, but is also crucial to ensure that the Directive is applied in a non-discriminatory manner. The main recurring issue relates to the difficulty to prove the terrorist intent, in combination with the particularities of the right-wing extremist scene. A better use of existing evidence could partially mitigate the difficulty to prove terrorist intent. This could for example be done through a stronger mandate of Europol, which will help it cooperate more effectively with private parties and to get information from private parties to relevant Member States.

There is also a need for a better understanding of the violent right-wing extremist scene, and in particular the specificities of violent right-wing extremist groups.

The Commission is working on **an overview of actions to address violent right-wing extremism in the Member States**. These will be contained in a working document that will be shared with the Member States in the autumn of 2021. It will include an overview of violent extremist groups and associated symbols at national level. This overview will aim to reach a better situational understanding of the phenomenon of right-wing extremism across the EU and to offer recommendations towards common approaches and activities.

In addition the EU Internet Forum, which brings together governments, Europol and technology companies to inter alia counter terrorist and violent extremist content online,

is working on a “**knowledge package**”. This “knowledge package” consists of a list of violent right-wing extremist and terrorist groups, symbols and manifestos that aim to provide guidance to tech companies in their content moderation efforts.

All this ongoing work holds great potential in creating a better understanding of violent right-wing extremism and terrorism, and should be brought more systematically to the attention of authorities responsible for investigating, prosecuting, adjudicating and sentencing terrorism offences. The Commission therefore proposes to hold a **meeting on the application of counter-terrorism legislation to violent right-wing extremist acts** at the end of 2021. The aim of such a meeting, which could potentially be organised as a Eurojust meeting, would be to bring different stakeholders working on similar issues together, and explore the scope for further cooperation in the future.

4.4 Better protection of and support to victims of terrorism

Finally, the evaluation finds that the Directive had a lower impact on the protection and assistance provided to victims of terrorism than expected, in particular on cross-border victims of terrorism. The Commission strongly urges Member States to designate single contact points for victims of terrorism, which the Council called for in 2018¹³, and which would significantly facilitate the implementation of Article 26 of the Directive. Currently, 17 of the 25 Member States covered by the Directive have done so¹⁴. The European Network on victims’ rights (ENVR)¹⁵ plays a central role in organising cooperation between the single contact points. The network of single contact points is integrated within the structures of the ENVR. The external study recommends the Commission to consider proposing an obligation to establish such single contact points.

Generally, these issues are not newly identified by this evaluation, and there are already several EU initiatives to enhance the assistance and protection provided to victims of terrorism. Important, and listed as a key action in the EU Strategy on victims’ rights (2020-2025)¹⁶, is the two year pilot project on the EU Centre of Expertise for Victims of Terrorism¹⁷. The EU Centre of Expertise for Victims of Terrorism assists the Member States in the implementation of EU rules on the rights of victims of terrorism by producing handbooks, organising training events and by acting as the EU level Hub of expertise on all issues relevant for victims of terrorism. In particular, it facilitates the exchange of information and knowledge between Member States in the field of rights of victims of terrorism. The external study recommends the continuation of the activities of the EU Centre of Expertise for Victims of Terrorism.

The external study identified a potential need to produce a document on all the obligations related to victims imposed by the Directive and the Victims’ Rights

¹³ Council Conclusions on victims of terrorism from 2018 (9719/18) call on Member States to set up a national Single Contact Point for victims of terrorism. This call has been repeated in the 2019 Council Conclusions on victims’ rights (2019/C 422/05).

¹⁴ Belgium, Bulgaria, Croatia, Czechia, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Slovakia, Spain and Sweden.

¹⁵ The European Network on Victims’ Rights (ENVR) provides for a forum of national experts created under an EU grant who exchange best practices and discuss victims’ rights, including rights of victims of terrorism. For more information, see: <https://envr.eu/>.

¹⁶ Communication from the Commission – EU Strategy on victims’ rights (2020-2025), COM(2020) 258 final, 24.6.2020.

¹⁷ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/protecting-victims-rights/eu-centre-expertise-victims-terrorism_en

Directive¹⁸. Such guidance should build on the already existing EU Handbook on victims of terrorism¹⁹, produced by the EU Centre of Expertise for victims of terrorism and published by the Commission in January 2021²⁰. The external study also recommends the Commission to offer guidance on e.g. the organisation of memorial services and the identification and registration of victims in the aftermath of an attack. Such guidance could also cover the interpretation of victims' rights.

Similarly in the workshop on 1 July 2021, Member States pointed to different needs, such as a **further exploration of good practices and challenges** in different Member States, the **development of a protocol** for steps to take after an attack, and the **development of a secure tool** to exchange information on individual victims in full compliance with the General Data Protection Regulation²¹ and the Law Enforcement Directive²². Member States also agreed on the high importance of the single contact points, and the need for regular meetings within the European Network on victims' rights. The Commission will consider all these suggestions, including offering guidance, hold further targeted discussions with relevant stakeholders, and take swift and concrete action to improve the situation of victims of terrorism.

¹⁸ Directive 2012/29/EU, OJ L 315, 14.11.2012.

¹⁹ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/protecting-victims-rights/eu-centre-expertise-victims-terrorism_en#documents

²⁰ In addition, the EU Centre will produce a national handbook on rights of victims of terrorism for each EU Member State.

²¹ Regulation (EU) 2016/679, OJ L 119/1, 4.5.2016.

²² Directive (EU) 2016/680, OJ L 119/1, 4.5.2016.

KEY ACTIONS

The Commission will:

- Continue to assess the transposition of the Directive and, where necessary, open infringement procedures, which will enhance legal clarity.
- Continue to support Member States' use of battlefield information.
- Present an overview of actions to address violent right-wing extremism in the Member States.
- Hold a meeting on the application of counter-terrorism legislation to violent right-wing extremist acts, bringing all the relevant stakeholders together.
- Present a proposal to improve the use of the European Judicial Counter-Terrorism Register at Eurojust, to identify links between counter-terrorism cases early and to seek Eurojust's support in the coordination of parallel prosecutions.
- Consider all proposals on better protection of and support to victims of terrorism, and take swift and concrete action to improve the situation of victims of terrorism.

Member States are urged to:

- Make full use of existing sources of information, such as Eurojust's Memorandum on Battlefield Information and the Genocide Network's report on cumulative prosecution of foreign terrorist fighters for core international crimes and terrorism-related offences.
- Cross-check battlefield information on suspected terrorists received by trusted third States as much as possible with other relevant databases and information sources.
- Establish single contact points for victims of terrorism, if not established yet.