THE NEW EU DIRECTIVE ON COMBATTING TERRORISM: A CRITICAL APPRAISAL

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Abstract: The terrorist attacks in Paris during 2015 particularly prompted the European Commission to submit a proposal for a new Directive on combating terrorism in December 2015, which was fast – tracked and finally enacted in March 2017. The Directive aims to eliminate the possibilities for future impingement on fundamental human rights. The most important changes are the criminalization of travel of foreign terrorist fighters and curbing their finances, cyber-attacks and receiving training for terrorism. Added value represent the new rules on protection and support for the victims of terrorism. However, still some unclear wording remained which potentially leaves a leeway for the national authorities to engage in abusive practices in the practical application of the Directive. That's why the aim of this article is to give critical appraisal of the novelties introduced by this Directive and give an assessment whether they represent a *saut qualitatif vis-à-vis* the situation *ex ante*.

Keywords: European Union, counter-terrorism, human rights

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INTRODUCTION

The new Directive on Combating Terrorism (2017) represents the most significant legal instrument directed to address the dangers of contemporary terrorism by means of criminal law. In large extent, it represents continuation of the previous legal regime introduced back in 2002 by the Council Framework Decision 2002/475/JHA, important changes being the incrimination of travel of foreign terrorist fighters, providing and receiving training for terrorism and extended protection for the victims of terrorism acts. In this regard, the EU legislation applies the contemporary international standards and addresses the dynamic changes of the phenomenon of terrorism.

Namely, one research in 2016 showed that the number of FTF originating mostly from Belgium, France, Germany and the United Kingdom was between 3 922-4 294 individuals. Of those, around 30 % had already returned to their home countries (Van Ginkel &Entenmann: 2016).

However, recent Europol Report states that by the end of 2017 the number of people from European countries that joined ISIL was around 2 500. It is estimated that 1 500 FTFs returned on European soil and 1 000 were killed (Europol, 2018:26). Due to the embedded home-grown terrorism and the FTF, there was a pressing need for EU to adopt an effective counter-terrorism arsenal (Paunovic, 2018: 532-533).

Some authors argue that EU instead of narrowing down the net and smarter targeting of perpetrators of terrorist acts/plotters, is in fact widening the net. Case in point is the incrimination of preparatory acts required under the said Directive, which expands the culpability in the 'pre-crime space'. As a consequence, the number of potential perpetrators of terrorist acts which will fall under the remit of the new Directive increases. The latter occurs, despite the fact that maybe the most of them will remain in the preparatory stage and will not actually commit a criminal offence (Wensink, 2017:73).

The returnees from Syria pose a significant problem for several reasons: 1) they pose a security threat for the Member State whose nationals are; 2) their families are often involved (the phenomenon of "jihadi wives", their children who in some cases themselves have undergone military training), 3) the need for coordinating the prevention of radicalization, information exchange on EU level, criminal justice response and disengagement/deradicalisation and rehabilitation inside and outside prisons for convicted individuals (Scherrer, 2018).

That's why, the European Commission is planning to set up an EU Centre of Expertise for Victims of Terrorism, which will serve as a hub of expertise, guidance and support (European Commission: 2019a).

On the negative side, the Directive uses unclear wording when defining terrorist offences, which could lead to abusive practices by national authorities. In addition, it says that consulting terrorist websites can be a terrorist crime. This is particularly interesting because the French Constitutional Council ruled unconstitutional a similar provision in two occasions, most recently on 15 December 2017. According to the legislator, the continuous consultation of websites that contain material glorifying or inciting terrorism represents an offence. Exception was consultation of such web sites in good faith, for instance by researchers or professionals directed at informing the general public. The offence was punishable by a two-year prison sentence and a €30,000 fine. Interestingly, the French National Center for Scientific Research, retrieved names and coordinates of its researchers who consulted such terrorist websites in order to provide defence if the French police made any inquiries. The French Constitutional Council found that the provision was unconstitutional since it egregiously restricted freedom of communication (Houry, 2017).

Similarly, the Belgian Constitutional Court in March 2018 annulled articles 2, 3°, of the Law of 3 August 2016, considering several legal obligations, the most relevant being one included in Directive 2017/541/EU. Namely, contentious issue was the deletion of the condition that an action should pose a real risk to society in order to be qualified as an incitement to terrorism. In such way, national authorities enjoy too wide margin of interpretation, to assess when certain action poses a real risk. A possibility was inserted for direct or indirect incitement to commit a terrorist act, which is too vague (Roson, 2018), and contravenes the basic principles of legal certainty and proportionality. The aim of this article will be to give an overview of this new legal framework, its critical assessment and comparison with the previous one.

New criminal offences related to terrorism

The new 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 (Salerno, 2016, according to Maliszewska-Nienartowicz, 2017:192). In addition to the list of offences already contained in the said Framework Decision and its amendments in 2008**,** the new Terrorism Directive requires the Member States to criminalize also: 1) receiving training for terrorism, 2) travelling for the purpose of terrorism, 3) organising or otherwise facilitating travelling for the purpose of terrorism, 4) terrorist financing and other related offences (EP & Council, 2017: Arts:5-12). Aiding and abetting of offences described Articles 3 to 8, 11 and 12 is punishable. Inciting is punishable for offences in Articles 3 to 12 (Art.14).

Regarding public provocation to commit terrorist offence, there should be a prompt removal of such online content by the national authorities. This is valid when the site is hosted in their own territory, but also is applicable to content hosted on foreign servers. In the latter case, if the blocking is not possible, the access should be blocked for the users on their territory (EP & Council: 21).

Under the purview of Art.8 falls training for terrorism like obtaining knowledge, documentation or practical skills, self-study etc. Here, the *mens rea* will need to be that of a person receiving training with the intention of carrying out a terrorist offence (Hurley, 2018: 22-23). Low-tech attacks refer to the use of everyday tools and vehicles for violent ends (the attacks in Berlin, Barcelona and London with trucks/vans).

Most importantly, in order to address the overgrowing problem of foreign terrorists fighters and the returnees mostly from Syria, the Directive stipulates that travelling to a country outside the Union in order to committing, or contributing to the commission of, a terrorist offence or participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving of training for terrorism should be criminal offences *when committed intentionally*.

Member States should criminalize: 1) travelling to that Member State for the purpose of committing, or contributing to the commission of, a terrorist offence, for the purpose of the participation in the activities of a terrorist group, or for the purpose of the providing or receiving of training for terrorism; or alternatively 2) preparatory acts undertaken by a person entering that Member State with the intention to commit, or contribute to the commission of, a terrorist offence. Specific terrorist intent is required (Ibid.: Art.9(2)), which can be used as a criterion for distinguishing terrorist offences listed in Article 3(1) of the Directive from other offences (Maliszewska-Nienartowicz, 2017:193).

Any act of organisation or facilitation that assists any person in travelling for the purpose of terrorism, as referred to in Article 9(1) and Article 9(2) (a), knowing that the assistance thus rendered is for that purpose, is punishable as a criminal offence of *Organising or otherwise facilitating travelling for the purpose of terrorism*.

So far, some Member States in order to curb the activities of terrorist groups resorted to administrative measures like travel bans, exclusion orders, or assigned residence. Often these measures are substitution for formal criminal justice measures, particularly where prosecution would not hold due lack of evidence/circumstantial evidence, or when there is a danger to encroach upon traditional procedural guarantees under national criminal procedural law (Wensink et al, 2017: 63).

Recent Amnesty International Report states that overly – broad definitions and applications of counter-terrorism law can be detrimental to some rights and freedoms. Case in point is the Art 578 of the Spanish Penal Code which restricts the freedom of expression in Spain. Broadly and vaguely defined criminal offences like "glorifying of terrorism", "apology of terrorism" and the "humiliation of victims of terrorism" have been used by the prosecutors to fight political speech, particularly in cases when the "perpetrators" acted via social media platforms. Sentencing was pretty harsh: for instance, the singer César Strawberry to one year imprisonment and six years and six months' disqualification from the public sector; while, on 4 December 2017, 12 rappers of the group *La Insurgencia*, were sentenced to individual sentences to two years and a day in prison, 9 years disqualification from the public sector and a 4,800 Euro fine. Moreover, the aftershocks of such prosecutions in Spain were the promotion of climate of self-censorship and extreme cautiousness when expressing critical opinions online (Amnesty International, 2018:7-11). Also, the number of convictions rose sharply from 1 in 201, to 35 in 2016 and 31 in 2017 (Ibid: 2). Art.5 of the new Terrorism Directive seems to encourage national legislators to go down this road.

In comparison, US criminal law uses catch-all definitions for terrorist offences, while some EU Member States such as the UK, the Netherlands and Germany have all adopted approaches where specific terrorist offences are used, providing greater clarity and guidance as to the necessary elements for the given offences (Paulussen & Pitcher, 2018:16-19).

It can be contemplated that not always such clear delimitation will be possible. Furthermore, the extent of "seriously damaging" a country or an international organisation can be interpreted *stricto sensu* or *lato sensu*. Although these problems existed previously, the Directive does not offer any further clarification in comparison with the situation *ex ante*. In the criminal trial, the judge will determine whether there is compelling evidence under each of the subjective and objective elements of the particular criminal offence (Scheinin, 2019).

In order for an indictment for the terrorist offences defined in the new Terorist Directive to hold in court, specific terrorist intent should be proven. However, no political or ideological motives need to be proven, and in this way the work of the prosecutors is significantly facilitated, since it is particularly difficult to prove such motives in concrete criminal proceedings. So, on the plus side, the prosecutor is obliged to prove who did the terrorist act and how, but is not required to prove why the perpetrator did it (Borgers: 2012:69-71).

But another problem will be the 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."

The new Terrorism Directive takes into account the new technological developments, so the list of terrorist activities includes the use of radiological weapon and on illegal system and illegal data interferences (Directive 2013/40). The latter can be seen as an attempt to address the growing number of cyber-terrorist attacks. However, the wording is somewhat general and does not include specifics.

Under national criminal law, terrorist offences listed in Art.3 and Art.14 should be punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special intent required pursuant to Article 3. The maximum sentences for directing a terrorist group should not be less than 15 years imprisonment, and no less than 8 years for participation in the activities of a terrorist group. When the leader of the terrorist group threatened to commit the terrorist offences listed in Art.3 (1) of the Directive, the penalty should be not less than 4 years (Ibid. Art.15).

As a major innovation *vis-à-vis* the Council Framework Decision, the Directive requires special attention by the courts when sentencing perpetrators of offences which involve children.

The Directive requires adequate penalties for both natural and legal persons for any of the offences referred to in Articles 3 to 12 and 14 (Art.18).

The mitigating circumstances that should be taken into account by the courts are unchanged: the indicted person should help the authorities with the information which they would not otherwise have been able to obtain, helping them to:

prevent or mitigate the effects of the offence;

identify or bring to justice the other offenders;

find evidence; or

prevent further offences referred to in Articles 3 to 12 and 14. Cumulatively, the offender should renounce terrorist activities.

The rules on determining jurisdiction remain the same as in the Framework Decision. But, a new rule is inserted to ensure that an individual providing training for terrorist purposes can be prosecuted in the Member State where the training is received.

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. To this end, the Member States may have recourse to Eurojust in order to facilitate cooperation between their judicial authorities and the coordination of their action (Ibid: Art.19(3)). Also, the Directive calls for adequate investigative tools for national authorities investigating and prosecuting terrorist offences, and freezing or confiscation of proceeds and "… instrumentalities used or intended to be used in the commission or contribution to the commission" of terrorist offences (Ibid: Art.20).

Special rights for the victims of terrorism

Under the Directive, if there is a causal link between certain terrorist offence, and a harm/damage, every person has a right to compensation. This applies also to family members who have suffered harm as a result of that person's death.

In fact, the rights guaranteed by the new Terrorism Directive are complementary to those already guaranteed to all victims of crime under the Directive 2012/29/EU. Those are: assistance and support to victims of terrorism, protection of victims of terrorism and rights of victims of terrorism resident in another Member State. Under the new Directive, Member States shall ensure prompt availability of support services for the specific needs of victims of terrorism after they suffered terrorist attack and continue to provide them as long as necessary. These services ought to be confidential, free of charge, easily accessible to all victims of terrorism. For example, this support can be exercised via (but not limited to): emotional and psychological support; advice and information on any relevant legal, practical or financial matters, including facilitating the exercise of the right to information of victims of terrorism; support with claims regarding compensation for victims of terrorism available under the national law of the Member State concerned; adequate medical treatment, etc. For victims of terrorism, it is essential to make an individual assessment to identify specific needs. Therefore, this provision complements Article 22 of the Directive 2012/29/EU which obliges the EU Member States to ensure an individual assessment of victims to identify possible specific protection needs, including victims who have suffered considerable harm due to the severity of the crime.

In the immediate aftermath of the attack, physical care equals psychological care. Victims of terrorism attacks should be provided with safety, adequate shelter, immediate medical assistance, food and drink. This will particularly require adequately trained medical personnel as well adequate hospital capacity (Miller, 2002: 283-296).

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 (Murphy, 2016). 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.

Under the Directive, the competent authorities should pay particular attention 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. This provision is of immense importance when determining whether and to what extent victims should benefit from protection measures in the course of criminal proceedings.

In order to achieve this, 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. In order for these rights to be exercised, usually the perpetrator or the perpetrators of the terrorist acts should be apprehended and indicted (Steiger, 2009: 171).

For persons who become victims of crime when travelling to another EU country, it can be even more difficult to receive compensation (European Commission: 2019b). In this regard, 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.

The Preamble to the Directive suggests that Member States should set up a "single and updated website with all relevant information and an emergency support centre for victims and their family members providing for psychological first aid and emotional support."

A good example in this regard is the UK, where clear information to victims of terrorism through a dedicated website is available at: https://victimsofterrorism.campaign.gov.uk/. Here, links to the wide range of services offered to victims of terrorism in UK are offered, like: access helplines and support services, access to NHS mental health and medical support, advice on supporting children, information for affected foreign nationals, access to charitable funds, advice on handling media attention, advice on your rights to compensation and welfare benefits etc. Similar website exists in Ireland, but with no specific reference to the rights of victims of terrorism (https://crimevictimshelpline.ie).

But merely two years after the adoption of the Directive, a Special Report to the European Commission noted the need for improvements of the status of the victims of terrorism: the need for recognition and respectful treatment, access of information, accessible medical, social and psychological care (Milquet, 2019).

This Report calls for an adoption of and EU wide Victims Rights Strategy. The key shift should be on the victims' *rights*. Namely, today victims of violent crimes have only a mere right to the schemes of compensation available in the Member States, and often there is no adequate compensation (if at all). The new right to compensation should entitle to seek total compensation either from the offender or by the state.

Moreover, the Report requires introduction of the concept of "reparation". The latter should embrace all harm suffered (physical, psychological and financial), but also recognition, reparation, rehabilitation and building resilience (Milquet, 2019:32). Other innovations proposed for the new Strategy include establishing a EU Victims' Solidarity Fund, EU Victims' Rights Coordinator, special status for victims of terrorism, the right of cross-border victims to seek compensation in their country of residence, emergency payments, etc.

CONCLUSION

Evidently, the new Terrorism Directive makes only incremental changes to the legal regime that existed previously. Most notably, separate criminal offences of receiving training for terrorism, travelling for the purpose of terrorism or organizing/ facilitating such travel and terrorist financing are introduced. These incriminations raise serious doubts about their justifiability, since they pose serious impediment to the free movement of persons, which is guaranteed not only by EU Law, but also by several international instruments. There are no specific indicators for the Member States how to assess whether particular travel abroad is for the purpose of terrorism. There is no requirement for red-flagging persons suspected for links with terrorist activities or already indicted or sentenced for terrorist offences in the SIS (like the U.S. Terrorist Screening Database), nor for regular reporting by financial institutions for the trading activities of organized crime groups whose proceeds often end up financing terrorists. The Directive does not contain any benchmarks for flagging suspicious financial transactions into single database by entities that can have links with organized crime and/or terrorist groups. Another problem is the introduction of terrorism incitement offences, which can be at odds with the freedom of expression enshrined in Art.10 ECHR. *One-size-fits–all* approach by the national authorities in the process transposition can undoubtedly be detrimental to the latter. Too broad or vague definitions of terrorist offences cannot pass the test of proportionality and fairness. This was shown by the abovementioned extremely harsh prosecutions and convictions in Spain, and the decisions by the French and Belgian Constitutional Courts. That's why, precise definitions should be used, where particularly the public provocation to commit terrorist acts (including via social media) would be punishable, in order to reduce the possibility for abuse by national authorities. In this regard, EU legislator is rapidly moving from the *actus reus* itself, to the early preparatory stages of the particular offence. Case in point is Art.13 of the Directive, which does not require actual terrorist act to be committed in order the said offence to exist. The latter raises particular concern, since the EU Directive goes beyond the requirements set by UN and CoE instruments in this regard. Moreover, UN Special Rapporteur for freedom of opinion and expression stated that such public provocation should be directly causally responsible for increasing the actual likelihood of a terrorist act occurring. There is no reference in the Directive for the need for *sufficiently imminent and serious* danger that terrorist offences could be committed in order particular message inciting them to be punishable. The Directive also lacks effective set of legal remedies for persons or entities whose rights and freedoms will be potentially infringed by state authorities when exercising their counterterrorism powers, and does not provide sufficient guarantees that the use of the latter will be proportionate and ensure respect for fundamental due process rights. So, national legislators must ensure adequate precision, legal predictability and credible legal safeguards. We will see how this will play out in the national courts in concrete criminal cases.

Maybe the most significant step forward is the new rights for the victims of terrorism which are specifically tailored. The establishment of the EU Centre of Expertise for Victims of Terrorism represents a further step forward in this regard. However, the presented Report to the European Commission by Special Counsel Milquet earlier this year identified many other points where the rights of victims of crime, including victims of terrorism should be improved. Also, series of obstacles to the effective exercise of these rights were identified both on EU and national level. The proposed establishment of EU Solidarity Fund for Victims of Terrorism, EU Coordinator for victims' rights and the rights-based approach that will make the state a duty-bearer towards the persons living under its jurisdiction will most certainly finalize the whole framework on the victims' rights in future. It is too early to assess whether amendments to the Directive will be introduced in order to remedy the noted deficiencies.

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