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

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on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) The Union is founded on the universal values of human dignity, freedom, equality and solidarity, and respect for human rights and fundamental freedoms. It is based on the principles of democracy and the rule of law, which are common to the Member States.

(2) Acts of terrorism constitute one of the most serious violations of the universal values of human dignity, freedom, equality and solidarity, and enjoyment of human rights and fundamental freedoms on which the Union is founded. They also represent one of the most serious attacks on democracy and the rule of law, principles which are common to the Member States and on which the Union is based.

(3) Council Framework Decision 2002/475/JHA[(3)] is the cornerstone of the Member States' criminal justice response to counter terrorism. A legal framework common to all Member States, and in particular, a harmonised definition of terrorist offences, serves as a benchmark for information exchange and cooperation between the competent national authorities under Council Framework Decision 2006/960/JHA[(4)], Council Decisions 2008/615/JHA[(5)] and 2005/671/JHA[(6)], Regulation (EU) No 603/2013 of the European Parliament and of the Council[(7)], and Council Framework Decisions 2002/584/JHA[(8)] and 2002/465/JHA[(9)].

(4) The terrorist threat has grown and rapidly evolved in recent years. Individuals referred to as 'foreign terrorist fighters' travel abroad for the purpose of terrorism. Returning foreign terrorist fighters pose a heightened security threat to all Member States. Foreign terrorist fighters have been linked to recent attacks and plots in several Member States.

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In addition, the Union and its Member States face increased threats from individuals who are inspired or instructed by terrorist groups abroad but who remain within Europe.

(5) In its Resolution 2178 (2014), the UN Security Council expressed its concern over the growing threat posed by foreign terrorist fighters and required all Member States of the UN to ensure that offences related to this phenomenon are punishable under national law. The Council of Europe has, in this respect, adopted in 2015 the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.

(6) Taking account of the evolution of terrorist threats to and legal obligations on the Union and Member States under international law, the definition of terrorist offences, of offences related to a terrorist group and of offences related to terrorist activities should be further approximated in all Member States, so that it covers conduct related to, in particular, foreign terrorist fighters and terrorist financing more comprehensively. These forms of conduct should also be punishable if committed through the internet, including social media.

(7) Furthermore, the cross-border nature of terrorism requires a strong coordinated response and cooperation within and between the Member States, as well as with and among the competent Union agencies and bodies to counter terrorism, including Eurojust and Europol. To that end, efficient use of the available tools and resources for cooperation should be made, such as joint investigation teams and coordination meetings facilitated by Eurojust. The global character of terrorism necessitates an international answer, requiring the Union and its Member States to strengthen cooperation with relevant third countries. A strong coordinated response and cooperation is also necessary with a view to securing and obtaining electronic evidence.

(8) This Directive exhaustively lists a number of serious crimes, such as attacks against a person's life, as intentional acts that can qualify as terrorist offences when and insofar as committed with a specific terrorist aim, namely to seriously intimidate a population, to unduly compel a government or an international organisation to perform or abstain from performing any act, or to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation. The threat to commit such intentional acts should also be considered to be a terrorist offence when it is established, on the basis of objective circumstances, that such threat was made with any such terrorist aim. By contrast, acts aiming, for example, to compel a government to perform or abstain from performing any act, without however being included in the exhaustive list of serious crimes, are not considered to be terrorist offences in accordance with this Directive.

(9) The offences related to terrorist activities are of a very serious nature as they have the potential to lead to the commission of terrorist offences and enable terrorists and terrorist groups to maintain and further develop their criminal activities, justifying the criminalisation of such conduct.

(10) The offence of public provocation to commit a terrorist offence act comprises, inter alia, the glorification and justification of terrorism or the dissemination of messages or images online and offline, including those related to the victims of terrorism as a way to gather support for terrorist causes or to seriously intimidate the population.

Such conduct should be punishable when it causes a danger that terrorist acts may be committed. In each concrete case, when considering whether such a danger is caused, the specific circumstances of the case should be taken into account, such as the author and the addressee of the message, as well as the context in which the act is committed. The significance and the credible nature of the danger should be also considered when applying the provision on public provocation in accordance with national law.

(11) 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.

(12) Considering the seriousness of the threat and the need, in particular, to stem the flow of foreign terrorist fighters, it is necessary to criminalise outbound travelling for the purpose of terrorism, namely not only the commission of terrorist offences and providing or receiving training but also the participation in the activities of a terrorist group. It is not indispensable to criminalise the act of travelling as such. Furthermore, travel to the territory of the Union for the purpose of terrorism presents a growing security threat. Member States may also decide to address terrorist threats arising from travel for the purpose of terrorism to the Member State concerned by criminalising preparatory acts, which may include planning or conspiracy, with a view to committing or contributing to a terrorist offence. Any act of facilitation of such travel should also be criminalised.

(13) Illicit trade in firearms, oil, drugs, cigarettes, counterfeit goods and cultural objects, as well as trafficking in human beings, racketeering and extortion have become lucrative ways for terrorist groups to obtain funding. In this context, the increasing links between organised crime and terrorist groups constitute a growing security threat to the Union and should therefore be taken into account by the authorities of the Member States involved in criminal proceedings.

(14) Directive (EU) 2015/849 of the European Parliament and of the Council[(10)] establishes common rules on the prevention of the use of the Union's financial system for the purposes of money laundering or terrorist financing. In addition to this preventive approach, terrorist financing should be punishable in the Member States. 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,

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such as the recruitment and training, or travel for the purpose of terrorism, with a view to disrupting the support structures facilitating the commission of terrorist offences.

(15) The provision of material support for terrorism through persons engaging in or acting as intermediaries in the supply or movement of services, assets and goods, including trade transactions involving the entry into or exit from the Union, such as the sale, acquisition or exchange of a cultural object of archaeological, artistic, historical or scientific interest illegally removed from an area controlled by a terrorist group at the time of the removal, should be punishable, in the Member States, as aiding and abetting terrorism or as terrorist financing if performed with the knowledge that these operations or the proceeds thereof are intended to be used, in full or in part, for the purpose of terrorism or will benefit terrorist groups. Further measures may be necessary with a view to effectively combating the illicit trade in cultural objects as a source of income for terrorist groups.

(16) The attempt to travel for the purpose of terrorism, to provide training for terrorism and to recruit for terrorism should be punishable.

(17) With regard to the criminal offences provided for in this Directive, the notion of intention must apply to all the elements constituting those offences. The intentional nature of an act or omission may be inferred from objective, factual circumstances.

(18) Penalties and sanctions should be provided for natural and legal persons being liable for such offences, which reflect the seriousness of such offences.

(19) When recruitment and training for terrorism are directed towards a child, Member States should ensure that judges can take this circumstance into account when sentencing offenders, although there is no obligation on judges to increase the sentence. It remains within the discretion of the judge to assess that circumstance together with the other facts of the particular case.

(20) Jurisdictional rules should be established to ensure that the offences laid down in this Directive may be effectively prosecuted. In particular, it appears appropriate to establish jurisdiction for the offences committed by the providers of training for terrorism, whatever their nationality, in view of the possible effects of such conducts on the territory of the Union and of the close material connection between the offences of providing and receiving training for terrorism.

(21) To ensure the success of investigations and the prosecution of terrorist offences, offences related to a terrorist group or offences related to terrorist activities, those responsible for investigating or prosecuting such offences should have the possibility to make use of effective investigative tools such as those which are used in combating organised crime or other serious crimes. The use of such tools, in accordance with national law, should be targeted and 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. Such tools should, where appropriate, 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.

(22) An effective means of combating terrorism on the internet is to remove online content constituting a public provocation to commit a terrorist offence at its source. Member States should use their best endeavours to cooperate with third countries in seeking to secure the removal of online content constituting a public provocation to commit a terrorist offence from servers within their territory. However, when removal of such content at its source is not feasible, mechanisms may also be put in place to block access from Union territory to such content. The measures undertaken by Member States in accordance with this Directive in order to remove online content constituting a public provocation to commit a terrorist offence or, where this is not feasible, block access to such content could be based on public action, such as legislative, non-legislative or judicial action. In that context, this Directive is without prejudice to voluntary action taken by the internet industry to prevent the misuse of its services or to any support for such action by Member States, such as detecting and flagging terrorist content. Whichever basis for action or method is chosen, Member States should ensure that it provides an adequate level of legal certainty and predictability for users and service providers and the possibility of judicial redress in accordance with national law. Any such measures must take account of the rights of the end users and comply with existing legal and judicial procedures and the Charter of Fundamental Rights of the European Union (the Charter).

(23) The removal of online content constituting a public provocation to commit a terrorist offence or, where it is not feasible, the blocking of access to such content, in accordance with this Directive, should be without prejudice to the rules laid down in Directive 2000/31/EC of the European Parliament and of the Council[(11)]. In particular, no general obligation should be imposed on service providers to monitor the information which they transmit or store, nor to actively seek out facts or circumstances indicating illegal activity. Furthermore, hosting service providers should not be held liable as long as they do not have actual knowledge of illegal activity or information and are not aware of the facts or circumstances from which the illegal activity or information is apparent.

(24) To combat terrorism effectively, efficient exchange of information considered to be relevant by the competent authorities for the prevention, detection, investigation or prosecution of terrorist offences between competent authorities and Union agencies, is crucial. Member States should ensure that information is exchanged in an effective and timely manner in accordance with national law and the existing Union legal framework, such as Decision 2005/671/JHA, Council Decision 2007/533/JHA[(12)] and Directive (EU) 2016/681 of the European Parliament and of the Council[(13)]. When considering whether to exchange relevant information, national competent authorities should take into account the serious threat posed by terrorist offences.

(25) To strengthen the existing framework on information exchange in combating terrorism, as set out in Decision 2005/671/JHA, Member States should ensure that relevant information gathered by their competent authorities in the framework of criminal proceedings, for example, law enforcement authorities, prosecutors or investigative judges, is made accessible to the respective competent authorities of another Member State to which they consider this information could be relevant. As a minimum, such