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## **COMMISSION STAFF WORKING DOCUMENT**

**Evaluation 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**

*Accompanying the document*

### **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**

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## Glossary

<i>Term or acronym</i>	<i>Meaning or definition</i>
The Directive	Directive (EU) 2017/541 on combating terrorism
The Framework Decision	Framework Decision 2002/475/JHA
Member States	Member States bound by the Directive, i.e. all Member States except Denmark and Ireland
The FRA	The Fundamental Rights Agency
The EESC	The European Economic and Social Committee
Terrorist offence	A terrorist offence as defined by Article 3 of Directive (EU) 2017/541 on combating terrorism
Offences related to a terrorist group	The offence of Article 4 of Directive (EU) 2017/541 on combating terrorism
Offences related to terrorist activities	The offences of Title III of Directive (EU) 2017/541 on combating terrorism, i.e. Articles 5-12.
Terrorism-related offences	Not an official legal category, but used here to refer to all the offences covered by Directive (EU) 2017/541.
The Council Decision	Council Decision 2005/671/JHA on the exchange of information and cooperation concerning terrorist offences
Adjudication	The legal process of deciding a case, often ending in either conviction or acquittal
Intent	Intent to perform a criminal act
CT-SIENA	A secure platform operated by Europol, which allows EU law enforcement, cooperating partners and cooperating states outside the EU to exchange information, including restricted content on counter-terrorism

## **1. INTRODUCTION**

### **1.1. GENERAL INTRODUCTION**

On 15 March 2017, the Parliament and the Council adopted Directive (EU) 2017/541 on combating terrorism<sup>1</sup> (hereafter “the Directive”). The Directive replaced Framework Decision 2002/475/JHA<sup>2</sup> (hereafter “the Framework Decision”) and was adopted to strengthen the EU legal framework in this field 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. Member States bound by the Directive<sup>3</sup> (hereafter “Member States”) are to criminalise conduct such as training and travelling for terrorism, as well as terrorist financing. These harmonised definitions of terrorist offences, and the minimum rules set by the Directive, serve 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 Directive also complements legislation on the rights for victims of terrorism. They are entitled to access to professional, specialist support services, immediately after an attack and for as long as necessary. Member States should have in place protocols and mechanisms to provide for efficient emergency response, including access to reliable information, thereby avoiding any additional suffering for victims of terrorism and their families. The deadline for incorporating the rules into national law was 8 September 2018.

In September 2020, the Commission adopted its report<sup>4</sup> assessing the extent to which the Member States have taken the necessary measures to comply with the Directive, pursuant to Article 29(1). The transposition report concludes that the Directive represents a comprehensive legal instrument, the transposition of which has led to a substantive strengthening of the Member States’ criminal justice approach to terrorism and the rights afforded to victims of terrorism. 23 Member States adopted new legislation in order to ensure transposition of the Directive. However, a number of transposition issues encountered by the Commission in one or several Member States pose a particular concern:

- 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

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

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

<sup>3</sup> All EU Member States, except Denmark and Ireland.

<sup>4</sup> COM(2020) 619 final, 30.9.2020.

- shortcomings in the transposition of specific provisions for victims of terrorism.

These transposition issues could affect the application of the Directive and are therefore taken into account throughout the evaluation. In addition, the Commission is currently further assessing the transposition of the Directive and has opened infringement procedures against 13 Member States, urging these Member States to ensure correct transposition of the Directive.

## **1.2 PURPOSE AND SCOPE OF THE EVALUATION**

Article 29(2) of the Directive requires the Commission to submit a report, by 8 September 2021, 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. Annex IV lists in detail the evaluation criteria and questions.

On the basis of the evaluation, the Commission shall, if necessary, decide on appropriate follow-up actions. In line with the Better Regulation guidelines, the Commission also takes this opportunity to assess the relevance, effectiveness, efficiency, coherence and EU added value. The Commission shall take into account the information provided by Member States under Decision 2005/671/JHA and any other relevant information regarding the exercise of powers under counter-terrorism laws related to the transposition and implementation of the Directive.

The evaluation criteria are assessed from the date of entry into force of the Directive, i.e. 20 April 2017, until June 2021. To assess the baseline situation, however, the temporal scope of the evaluation is from 2015 until June 2021. The Commission put forward its legislative proposal in 2015, which is why that year is taken as the baseline situation. During 2015 and the following year, the Framework Decision was in place, which was replaced and its provisions strengthened by the Directive. The functioning of the Framework Decision was last assessed with an implementation report in 2014<sup>5</sup> (for more details, please see section 2.3). The evaluation will cover the entirety of the Directive and all Member States that are bound by it. All EU Member States are bound by the Directive except for Denmark and Ireland, which did not take part in the adoption of the Directive. An external evaluation study was carried out by a contractor to support the Commission, following a call for services under a framework contract (for more information, please see Section 4.1).

The evaluation does not include other related interventions, as the Directive does not allow for delegated or implementing acts. However, Article 22 of the Directive amends Council Decision 2005/671/JHA on the exchange of information and cooperation concerning terrorist offences (hereafter “the Council Decision”). This amendment and any potential effects it has produced are therefore part of the evaluation. The Council Decision requires Member States to transmit certain information in relation to terrorist offences to Europol and Eurojust (Article 2(3)). In addition, Member States are required to make available any relevant information in relation to terrorist offences to the authorities of other interested Member States (Article 2(6)). Terrorist offences are defined in the Council Decision as the offences referred to in the Directive.

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<sup>5</sup> COM(2014) 554 final, 5.9.2014.

Another relevant intervention, which equally is not included in the evaluation, is the Terrorist Content Online Regulation<sup>6</sup>, which entered into force in June 2021. This Regulation, which sets measures to address the dissemination of terrorist content online, will apply alongside the Directive and will be evaluated by June 2024.

In addition to the legal obligation of Article 29(2) of the Directive, there is a political urgency to evaluate the Directive. As the Commission concludes in its Counter-Terrorism Agenda for the EU<sup>7</sup>, adopted in December 2020, the EU remains on high terrorist alert and the terrorist threat has evolved. Fully embedded in the Commission's EU Security Union Strategy<sup>8</sup> of July 2020, the Counter-Terrorism Agenda is the Commission's strategic framework to counter terrorism for the years to come, and aims to step up the fight against terrorism and violent extremism and boost the EU's resilience against terrorist threats. The Counter-Terrorism Agenda notes that the jihadist threat from or inspired by Daesh, al-Qaeda and their affiliates persists. Threats from violent right-wing and left-wing extremists are on the rise. The nature of attacks is also shifting. The vast majority of recent attacks have been carried out by individuals acting alone – often with limited preparation and easily available weaponry – targeting densely crowded or highly symbolic spaces. While single actor attacks are likely to remain prevalent, more sophisticated attacks cannot be excluded. The Counter-Terrorism Agenda therefore emphasises the need for the EU to be prepared for existing threats as well as to anticipate and prepare for emerging threats.

It is therefore timely and necessary to evaluate the functioning of the Directive and to what extent it is future-proof. On the basis of the evaluation, the Commission shall, if necessary, decide on appropriate follow-up actions. This could range from softer measures, such as providing guidance on applying the Directive, to harder ones, such as putting forward legislative proposals.

## **2. BACKGROUND TO THE INTERVENTION**

The Directive is the cornerstone of the Member States' criminal justice response to terrorism. It is a legal framework common to the Member States, gives a harmonised definition of terrorist offences, and serves as a benchmark for information exchange and cooperation between the competent national authorities. The Directive was, among others, adopted to take account of the evolution of the terrorist threat in the EU, and to fulfil legal obligations on the EU and Member States under international law, in particular in relation to the phenomena of foreign terrorist fighters and terrorist financing. Those addressed by the Directive are the Member States' authorities, who need to ensure full transposition and implementation of the Directive in their national framework.

### **2.1 CONTEXT**

Europol's so-called TE-SAT (Terrorism Situation and Trend) reports provide an overview of the terrorism phenomenon in the EU in a given year. At the time of writing this Staff Working Document, the latest information available from the TE-SAT reports

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<sup>6</sup> Regulation (EU) 2021/784 of 29 April 2021 on addressing the dissemination of terrorist content online, OJ L 172/79, 17.5.2021.

<sup>7</sup> COM(2020) 795 final, 9.12.2020.

<sup>8</sup> Communication from the Commission on the EU Security Union Strategy, COM(2020) 605 final, 24.7.2020.

concerned the year 2020<sup>9</sup>. For the terrorist threat picture, the evaluation has examined the years 2009-2020 to allow for the identification of longer-term trends. This examination shows several trends in terms of underlying ideologies and the nature of terrorist attacks.

Firstly, jihadist terrorism became an increasing threat to EU security, particularly since 2015. Nearly all fatalities from terrorist attacks in the EU since 2015 were caused by jihadist attacks. By contrast, although attacks specified as ethno-nationalist and separatist terrorism represented the largest proportion of all terrorist attacks, the number of such attacks has seen a significant decrease over the years. Extreme right-wing terrorism, extreme left-wing terrorism and anarchist terrorism, and single-issue terrorism have also been responsible for completed, failed and foiled attacks over the last years, with the overall numbers for these various forms of terrorism reported by Member States to Europol remaining more or less consistent<sup>10</sup>. These developments continued in 2020. This shows how multifaceted the threat is that the EU is facing.

Moreover, a notable trend in the nature of terrorism over the last decade has been the progressive erosion of structured terrorist networks, and, in their place, the emergence of self-radicalised lone actors and small (often semi-structured or quasi autonomous) cells planning and carrying out violent attacks on their own, often without direction from a larger organisation. Many completed or failed attacks were committed by lone actors or small terrorist cells. This trend applies to jihadist terrorism (in 2020, all completed jihadist terrorist attacks were carried out by lone actors), but is also relevant in relation to right-wing extremism, wherein the doctrine of the ‘leaderless resistance’ is used as justification for individuals to perpetrate violent attacks without direction from a group or a leader.

Furthermore, foreign terrorist fighters travelling to and returning from conflict zones (mostly Syria and Iraq) posed a large risk to EU security. While the number of jihadists travelling from Europe has decreased since 2016, several jihadists are currently in detention in or near former conflict zones. A substantial number of foreign terrorist fighters from the EU remain unaccounted for.

## **2.2 DESCRIPTION OF THE INTERVENTION AND ITS OBJECTIVES**

The Directive entered into force in April 2017. The legislative proposal<sup>11</sup> was put forward by the Commission in December 2015, followed an accelerated procedure for its adoption without an impact assessment, and was formally adopted in March 2017 (for further details, see section 2.3). Annex V shows the intervention logic of the Directive in full detail.

As recital 4 of the Directive explains, the terrorist threat had grown and rapidly evolved in the years before adoption of the Directive. There was therefore a need to combat the changing nature and pattern of the terrorist threat (**need 1**). In addition, (returning) foreign terrorist fighters posed a heightened security threat to all Member States and had been linked to attacks and plots in several Member States. There was therefore a need to

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<sup>9</sup> For more information, please see here: <https://www.europol.europa.eu/tesat-report>. Please note that Europol relies on Member States’ reporting for the TE-SAT reports.

<sup>10</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 11-12.

<sup>11</sup> European Commission, 2015, Proposal for a Directive on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (COM(2015) 625 final). Available at: <https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:52015PC0625>

be better able to tackle this phenomenon, including through the further criminalisation of preparatory actions (**need 2**). Recital 9 notes that such offences related to terrorist activities are of a very serious nature and have the potential to lead to the commission of terrorist offences.

Explicitly combating terrorism on the internet was also necessary, to ensure that conduct is criminalised in online as in offline settings (**need 3**). Finally, there was a need to respond better to the specific needs of victims of terrorism and, more specifically, to further qualify these specific needs in accordance with the Victims' Rights Directive<sup>12</sup> (**need 4**).

To tackle these needs, the Directive sought to provide a common EU-wide understanding of what constitutes a terrorist offence and provide a baseline of measures to combat terrorism in light of the evolving and transnational nature of the terrorist threat. The Directive's **general objective** is to combat terrorism through criminal law. According to recital 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". More specifically, the Directive aims to:

- approximate the definition of terrorist offences, offences related to a terrorist groups and to terrorist activities, serving as a benchmark for information exchange and cooperation between competent national authorities (**specific objective**);
- 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 (**specific objective**), and;
- enhance measures of protection of, and support and assistance to, victims of terrorism (**specific objective**).

The expected impacts of the Directive are:

- strengthened security, including in relation to (returning) foreign fighters and the online sphere (**intended impact**), through further criminalisation of related conduct (**means**);
- enhanced capacity to deal with terrorist threats at an earlier stage (**intended impact**), through further criminalisation of offences related to terrorist activities which may have a preparatory character (**means**);
- enhanced cooperation and information exchange between Member States (**intended impact**), through further approximation of definitions and amendments to Council Decision 2005/671/JHA (**means**); and
- enhanced protection of, and support and assistance to, victims of terrorism (**intended impact**) through further specification of their needs (**means**).

These intended impacts are expected to materialise simultaneously, without an underlying chronology.

## 2.3 BASELINE AND POINTS OF COMPARISON

Due to the urgent need to adopt the Directive, an impact assessment was not carried out.

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<sup>12</sup> Directive 2012/29/EU, OJ L 315, 14.11.2012.



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. There was also an urgent need to integrate new international obligations into EU law<sup>13</sup>. The legislative proposal for a directive on combating terrorism was published on 2 December 2015.

During the baseline period examined for the evaluation (2015), the Framework Decision was in place. Its provisions represent the points of comparison for the Directive. There are various important differences between the Framework Decision (as amended in 2008), and the Directive. A few important examples are mentioned here, with a more detailed overview included in Annex VI. Firstly, the Directive expanded the list of offences related to terrorist activities. For example, the provisions covering traveling for the purpose of terrorism (Article 9) and the financing of terrorism (Article 11) were introduced. The Directive also criminalised the receiving of training for terrorism (Article 8). With the Directive, a new provision on measures against public provocation content online was also introduced (Article 21). Finally, the Directive specifies the needs of victims of terrorism and sets minimum rules for the assistance, support and protection they should receive, which was not specified by the Framework Decision.

In addition to considering differences in provisions, the evaluation considers the differing degrees of national transposition of the Framework Decision. Several reports were produced to evaluate the Framework Decision. For example, a report from 2007<sup>14</sup> observed several shortcomings in its transposition. This related to, among others, incomplete or incorrect transposition of the provisions covering terrorist offences and of offences relating to a terrorist group. Another implementation report in September 2014<sup>15</sup> identified potential concerns in the implementation of the legal framework, for example in relation to the criminalisation of indirect provocation and the recruitment of lone actors. Some of these issues have persisted in the transposition of the current Directive, which is further explained in section 3. The baseline situation that the current Directive is compared against is therefore one in which a legal framework was already in place where certain shortcomings had been attested. The Framework Decision has, however, never been comprehensively evaluated according to the Better Regulation guidelines, and was primarily assessed with respect to transposition requirements.

### **3. IMPLEMENTATION / STATE OF PLAY**

#### **3.1. DESCRIPTION OF THE CURRENT SITUATION**

The deadline to transpose the Directive expired on 8 September 2018. By this date, seven Member States<sup>16</sup> notified complete transposition of the Directive and two<sup>17</sup> notified shortly after. The Commission launched infringement procedures on 22 November 2018 against 16 Member States<sup>18</sup> for failing to communicate the adoption of national legislation transposing the Directive. By the end of 2020, these Member States had

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<sup>13</sup> 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.

<sup>14</sup> COM(2007) 681 final, 6.11.2007.

<sup>15</sup> COM(2014) 554 final, 5.9.2014.

<sup>16</sup> FR, DE, HU, IT, LV, SK, SE

<sup>17</sup> FI, NL

<sup>18</sup> AT, BE, BG, HR, CY, CZ, EE, EL, LT, LU, MT, PL, PT, RO, SL, ES

notified complete transposition of the Directive and all pending infringements for non-communication of national measures transposing the Directive were closed.

Most Member States bound by the Directive adopted new legislative measures or amended existing legislation in order to ensure full conformity with and transposition of the Directive: 23 Member States adopted new legislation (mostly amendments to pre-existing legislation, notably to the Criminal Code and Code of Criminal Procedure), while two Member States<sup>19</sup> notified pre-existing legislation in transposition of the Directive. As discussed in the introduction, the Commission concluded in its transposition report<sup>20</sup> that the transposition was overall satisfactory, but identified certain transposition issues regarding specific provisions of the Directive.

Building on the report, but also updating and complementing the information therein, the evaluation assessed the transposition and practical implementation of the Directive by Member States. The sections below go into more detail about the implementation of specific provisions of the Directive. The external study used a comparative overview in eight focus countries (Belgium, Bulgaria, France, Germany, Greece, Italy, the Netherlands and Spain) to provide more details as to how the Directive is being implemented in practice. In its selection of the eight Member States, the Commission considered the experience of the Member State in dealing with terrorism (historically or recently) and the type of terrorist threats faced, while ensuring a balanced geographical representation.

### **3.2 DEFINITION OF TERRORISM-RELATED OFFENCES**

Article 3 of the Directive requires Member States to ensure that certain intentional acts are criminalised as terrorist offences where committed with a terrorist aim: it does not just entail a requirement to criminalise specific acts, but also that such acts are labelled as terrorist offences in national legislation. Moreover, the Directive requires Member States to ensure that certain offences relating to a terrorist group and to terrorist activities are punishable as criminal offences when committed intentionally (Articles 4 to 12 of the Directive).

The evaluation, supported by the findings of the external study, finds that several Member States already had national provisions covering the definition of terrorist offences before the Directive entered into force. Nevertheless, 18 Member States adopted new measures in order to comply with the minimum requirements of the Directive relating to the definition of terrorism-related offences and 15 Member States adopted new legislation related to the sanctions applicable to those offences<sup>21</sup>.

In several Member States, the changes were mere adjustments or minor amendments to existing legislation (generally the Criminal Code), but in a few cases, more significant amendments were adopted (e.g. introduction of new offences). More specifically, the rules on terrorism-related offences triggered such amendments in six Member States<sup>22</sup>, while the provisions on sanctions led to significant changes in three Member States<sup>23</sup>. Evidence from eight selected focus Member States show that these provisions have been transposed by the Criminal Code in all these Member States, in combination with other

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<sup>19</sup> FR, IT

<sup>20</sup> COM(2020) 619 final, 30.9.2020.

<sup>21</sup> AT, BE, BG, CY, EE, EL, ES, FI, HR, LT, LU, LV, MT, PT, RO, SE, SI, SK (definitions); BE, CY, EE, ES, FI, HR, IT, LT, LU, LV, MT, NL, PT, RO, SE (sanctions).

<sup>22</sup> AT, CY, EL, FI, MT, SE.

<sup>23</sup> CY, FI, SE.

laws in four of those Member States<sup>24</sup>. Moreover, three Member states reported having adopted measures to strengthen existing sanctions<sup>25</sup>.

### **3.3 INVESTIGATION, PROSECUTION AND ADJUDICATION OF TERRORISM-RELATED OFFENCES**

Article 19 of the Directive requires Member States to establish jurisdiction over the offences referred to in Articles 3 to 12 and 14 in certain cases, allowing them, at the same time, to extend that jurisdiction to other specified cases. Article 20 requires Member States to ensure effective investigative tools for investigating or prosecuting terrorism, as well as that authorities freeze or confiscate, as appropriate, the proceeds derived from the commission or contribution to terrorism. Finally, Article 21 requires Member States to ensure the prompt removal (or, if not possible, blocking) of online content constituting a public provocation to commit a terrorist offence.

The evaluation, supported by the findings of the external study, finds that Articles 19 to 21 triggered legislative changes in less than half of the Member States. More specifically, 12 Member States adopted measures to comply with the provisions on the adjudication and investigation of terrorism-related cases (Articles 19 and 20) and ten did so to implement the obligation to block or remove provocation content online (Article 21)<sup>26</sup>. Some Member States<sup>27</sup> adopted changes in their national legislation to adapt them to the provisions of Article 21(1) on the removal of the content hosted outside the territory of the Member State.

Evidence from the eight focus Member States shows that these provisions are mainly transposed by the Criminal Procedural Code<sup>28</sup>, although other laws are also applicable, including the Criminal Code<sup>29</sup> or laws to counter terrorist-financing<sup>30</sup>. In all but one Member State<sup>31</sup>, measures have been adopted or amended in recent years to strengthen the investigation and prosecution of terrorism-related offences, but only in three Member States were they a consequence of the Directive<sup>32</sup>.

In seven of the eight focus Member States, pre-trial investigations are carried out by specialised units within law enforcement agencies, either dealing only with terrorist cases<sup>33</sup> or also with other types of serious crimes<sup>34</sup>. Some Member States have established specialised bodies within the Public Prosecutor's office<sup>35</sup> or the national courts<sup>36</sup>. In the case of Spain, the specialised bodies have long been established, whereas in France the specialised public prosecutor was established in 2019 as a result of the terrorist attacks. In Bulgaria, the specialised bodies are not responsible for all terrorism-related cases, but only for those against the State. In Belgium, however, pre-trial investigations are carried out by general bodies.

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<sup>24</sup> BG, DE, EL, NL

<sup>25</sup> BE, ES, NL

<sup>26</sup> BE, BG, EL, HR, HU, LT, LU, NL, PT, RO, SE, SK (Articles 19, 20); AT, BE, CY, CZ, DE, LU, MT, NL, RO, SE (Article 21).

<sup>27</sup> AT, CY, FI

<sup>28</sup> BE, BG, DE, EL, ES, NL

<sup>29</sup> EL, ES, NL

<sup>30</sup> EL

<sup>31</sup> BG

<sup>32</sup> DE, EL, NL

<sup>33</sup> EL, DE

<sup>34</sup> BG, ES, IT, NL

<sup>35</sup> ES, FR, BG

<sup>36</sup> ES, FR, BG

### 3.4 COOPERATION AND EXCHANGE OF INFORMATION

Article 22 of the Directive amends Articles 1 and 2 of Council Framework Decision 2005/671/JHA, requiring Member States to make accessible as soon as possible relevant information gathered by its competent authorities in the framework of criminal proceedings in connection with terrorist offences covered by this Directive to the competent authorities of another Member State where the information could be used in the prevention, detection, investigation or prosecution of terrorist offences.

The evaluation, supported by the findings of the external study, finds that Article 22 triggered amendments to national legislation in five Member States<sup>37</sup>, and most of the amendments had a limited scope, concerning the process of exchanging information. Moreover, evidence from the eight focus Member States (as explained in section 4) indicates that some Member States<sup>38</sup> adopted further measures to improve cooperation and information exchange in order to step up cooperation in light of recent attacks.

Furthermore, it was concluded that the main factors enhancing cooperation and information sharing are the participation in all relevant investigative channels for information sharing (such as Europol), as reported by 10 Member States<sup>39</sup>, and the presence of internal bodies to exchange information, as reported by six Member States<sup>40</sup>. Three others mentioned the importance of the implementation of information exchange channels such as CT SIENA<sup>41</sup>. Furthermore, 15 Member States reported already having measures in force prior to the entering into force of the Directive<sup>42</sup>.

The evaluation is not able to ascertain the frequency with which Article 22 is being applied in practice. The lack of relevant data on the amount of information exchanged within the Member States, as well as the different criteria for collecting and retaining information, does not allow for identifying trends in measuring the frequency of information exchange. Nevertheless, Member States have implemented measures to ensure that information is made available as soon as possible, both spontaneously and upon request, and that overall they are able to quickly and correctly identify the competent authorities of other Member States<sup>43</sup>. In terms of practical implementation, six Member States<sup>44</sup> reported that they have encountered problems when trying to send information to, or receive information from, the relevant authorities of other Member States. In addition, the case studies in eight Member States show that in some Member States, the Directive is deemed to have contributed to the strengthening of cooperation and exchange of information between Member States, and to have facilitated the process of cooperation and information exchange<sup>45</sup>.

### 3.5 VICTIM PROTECTION AND ASSISTANCE

The Directive complements legislation on the rights for victims of terrorism<sup>46</sup> and includes measures that respond more precisely to the needs of victims of terrorism: Title

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<sup>37</sup> AT, CY, EL, HR, HU

<sup>38</sup> BE, EL, FR

<sup>39</sup> IT, HU, ES, FI, LT, LV, PT, SE, SI, SK

<sup>40</sup> BG, CZ, EE, ES, FR, HU

<sup>41</sup> PT, RO, SK

<sup>42</sup> AT, BE, BG, CZ, DE, HR, HU, LT, LV, NL, PT, RO, SE, SI, SK.

<sup>43</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 35.

<sup>44</sup> FR, HR, HU, PT, RO, SK

<sup>45</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 41.

<sup>46</sup> Directive 2012/29/EU (OJ L 315/57, 14.11.2012) establishes minimum standards on the rights, support and protection of victims of crime

V of the Directive is dedicated to the protection and support of victims of terrorism, including the rights of victims of terrorism resident in another Member State. Article 24 of the Directive contains specific obligations for Member States with regard to the provision of assistance and support to victims of terrorism. Article 25 requires Member States to ensure that measures are available to protect victims of terrorism and their family members in accordance with Directive 2012/29/EU<sup>47</sup>, and Article 26 lists rights of victims of terrorism who are residents of a Member State other than that where the terrorist offence was committed.

The evaluation, supported by the findings of the external study, finds that the obligations established in Title V of the Directive led to the adoption of legislative measures in the majority of Member States: 16 Member States<sup>48</sup> adopted new legislative measures in order to transpose Title V of the Directive, of which six Member States<sup>49</sup> implemented changes that were of major significance. In some cases<sup>50</sup>, these concerned the provision of new types of support, such as the establishment or nomination of a national single contact point<sup>51</sup> and the launch of online information services or helplines<sup>52</sup>. The evidence also shows that, despite some challenges and gaps in the transposition of the provisions, most Member States comply in practice with the obligations of Articles 24 to 26.

To provide assistance and support services to victims of terrorism, many Member States combine services provided directly by the state and by NGOs<sup>53</sup>. In some cases, such services are almost fully provided by the state<sup>54</sup> or led by an NGO<sup>55</sup>. Among the Member States where the responsible entity is specialised in victims of terrorism<sup>56</sup>, two set them up recently, one as a result of the Directive<sup>57</sup> or following recent attacks.

Additionally, the external study also found that evidence from the eight focus Member States points to a link between the state of development of the system to assist and protect victims of terrorism and the experience in dealing with terrorist attacks. In this regard, three main groups can be distinguished: a) Member States with a long tradition in this area (France and Spain), where no new measures related to the Directive were adopted; b) Member States with more recent terrorism-related experience (Belgium, Germany and the Netherlands), which have strengthened their systems since 2015, mostly as a result of specific attacks (with the exception of some administrative measures in the Netherlands), and c) Member States with less terrorism-related experience, which have implemented measures as a result of the Directive, e.g., the appointment of a national contact person for victims of terrorism (Bulgaria). Moreover, it was concluded that good or innovative practices identified – adopted both before and after 2017 – usually stem from Member States that have experienced terrorist attacks, either historically or more recently.

Additionally, the evaluation also examined the practical implementation of assistance and

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<sup>47</sup> OJ L 315/57, 14.11.2012.

<sup>48</sup> AT, BG, CY, CZ, EE, EL, FI, HU, IT, LT, MT, NL, PT, RO, SE, SK

<sup>49</sup> CZ, EE, EL, HU, LT, MT

<sup>50</sup> AT, CZ, EL, FI, FR, IT, SE

<sup>51</sup> AT, BG, CZ, FI

<sup>52</sup> CZ, EE, SE

<sup>53</sup> For example, BE, DE, EL, ES, FR

<sup>54</sup> BG

<sup>55</sup> NL

<sup>56</sup> DE, EL, ES

<sup>57</sup> EL

support services to victims of terrorism and concluded that, overall, Member States have implemented the services required by the Directive, including general victim support, medical support following an attack, emotional and psychological support, the provision of advice and information, and assistance with claims regarding compensation<sup>58</sup>.

In most Member States, these services are provided in accordance with the provisions of the Victims' Rights Directive, but Member States have adopted different approaches in some areas. An example of this is the one-stop-shop solution<sup>59</sup> adopted in Member States such as France and Spain to provide advice and information to victims of terrorism<sup>60</sup>, or the activation of ad-hoc information and advice mechanisms set up after an attack takes place, such as the online information and advice centre in the Netherlands, or hotlines in France and Germany. Similarly, some Member States provide more far-reaching assistance and support services to victims of terrorism. For example, France and Spain grant medals to victims of terrorism and provide long-term psychiatric or psychosocial support (in the case of France, including to people not officially recognised as victims, for a period of two years). Financial compensation provided by the state to victims of terrorism is also provided in at least four of these Member States (France, Italy, Spain, Belgium), in some cases complemented by other financial support schemes, such as scholarships (e.g. Italy, Spain) or tax exemptions (e.g. inheritances from persons who have died as a result of terrorist acts is exempt from tax in France)<sup>61</sup>.

The main issues with the practical implementation of Article 24 concern challenges linked to the identification and registration of victims of terrorism, which some stakeholders from victims' associations underlined as persisting in some Member States. As highlighted in the EU Handbook on victims of terrorism<sup>62</sup>, accurate identification and registration of victims is crucial, as it allows for responding to their needs after the emergency response phase. One stakeholder clarified that the issue is twofold – on one hand, victims who are not badly injured often try to escape the place of the attack as soon as possible after the incident, and on the other hand, sometimes there are difficulties to identify whether a person is a victim, especially in large-scale attacks in open spaces.

On protection measures (Article 25), most Member States comply with the obligations established by the Directive and the Victims' Rights Directive, although different approaches exist across Member States. In Germany, for instance, the Federal Government Commissioner can act as an intermediary between victims and the authorities responsible for the criminal investigation, by setting up meetings during which victims can pose questions to the leaders of the investigation. In the Netherlands, a guidance document was developed, which describes the division of responsibilities, the operation of the protection system for victims (and their relatives) and elaborates on the practical protection measures in place<sup>63</sup>. No major implementation issues with the application of this article have been observed.

On assistance to and protection of cross-border victims of terrorism (Article 26), the

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<sup>58</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 35-36.

<sup>59</sup> Single-point-of-access services (whether offline or online) which act as the first point of contact for victims and either provide the services themselves or can refer the victim to the responsible body.

<sup>60</sup> CoE on Victims of Terrorism, 2020, EU Centre of Expertise for Victims of Terrorism, EU Handbook on Victims of Terrorism; German Presidency, 2020, Report on the state of play regarding support for victims of terrorism, particularly in cross-border situations (12744/20).

<sup>61</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 37.

<sup>62</sup> EU Centre of Expertise for Victims of Terrorism, EU Handbook on Victims of Terrorism, 2021.

<sup>63</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 37.

services provided by Member States are generally available to all victims of terrorism, irrespective of their nationality. In addition, the majority of Member States provide assistance and support to victims' resident on their territory, even if the terrorist offence was committed in another Member State. However, the evidence collected reveals that the provision of assistance and protection in cross-border cases is the most problematic area within Title V. Coordination in these cases is usually done through diplomatic channels or national contact points. However, there are obstacles hindering effective cooperation and coordination. In some Member States with experience of terrorist attacks, connections that were already established with competent bodies from other Member States greatly facilitated cooperation in cross-border cases. However, where this is not the case, the responsible bodies usually find it difficult to ensure adequate support due to the limited information they have on the situation in other Member States.

Another obstacle to effective cooperation between Member States in relation to cross-border victims is the 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<sup>64</sup>. This includes uncertainty on how to apply the standards from the General Data Protection Regulation. This is further discussed in Section 5.1.2<sup>65</sup>.

## **4. METHOD**

### **4.1 SHORT DESCRIPTION OF METHODOLOGY**

The evaluation aimed to analyse the implementation and application of the Directive in the Member States according to a number of specific criteria set out in the Commission's Better Regulation Guidelines (relevance, coherence, effectiveness, efficiency, and EU added value), as well the impact of the Directive on fundamental rights and freedoms, the rule of law and the level of protection and assistance provided to victims of terrorism.

A wide range of stakeholders were consulted as part of the evaluation. These included: Member States' authorities responsible for the implementation of the Directive, the Commission, the European External Action Service, the Fundamental Rights Agency (hereafter "the FRA"), Europol, Eurojust, civil society, academia and think tanks, and the general public. A more detailed description of the consultations is described in the Synopsis Report in Annex II.

The external evaluation study was carried out by ICF Consulting Services Limited (hereafter "ICF"), 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. A range of methodological tools and techniques were used. For more details on the methods and the stakeholder consultation, please see Annexes II and III of this Staff Working Document.

The evaluation was informed by thorough desk research of documentation available online or provided directly to either the Commission or ICF. ICF also conducted a mapping of the practical implementation of the Directive. As for evidence gathered through desk research during the course of the evaluation, 123 documents in the following categories were reviewed: EU legislative and policy documents, reports and documents by EU-level institutions and stakeholders, national sources, documents by international governmental and non-governmental organisations, and civil society

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<sup>64</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 38.

<sup>65</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 27.

sources and academic literature. The external study also produced a comparative overview of national findings in eight selected focus Member States (Belgium, Bulgaria, France, Germany, Greece, Italy, the Netherlands and Spain), providing more details on how the Directive is being implemented in practice.

As for field research, a comprehensive email questionnaire covering all the evaluation criteria and designed to be able to answer all the evaluation questions was used to target national authorities responsible for transposing and implementing the Directive, with the request to Member States to coordinate internally among relevant services. Almost all Member States (23 out of 25) filled out this questionnaire. Additionally, two targeted online surveys were used, one targeting counter-terrorism units in law enforcement agencies, and one designed for members of the judiciary and prosecutors dealing with terrorism-related cases. ICF received a total of 45 responses to the two surveys and the email questionnaire.

Furthermore, ICF held further targeted interviews with 41 stakeholders (see Annex II for more details). ICF also organised a webinar session on 26 April 2021, gathering national associations and other stakeholders representing the interests of victims of terrorism, via the EU Centre of Expertise for Victims of Terrorism. A total of 10 associations and stakeholders representing the interests of victims of terrorism in 7 Member States participated in this session.

In addition to the consultation activities carried out by ICF, the Commission organised two workshops. The first workshop, on 15 April 2021, was a stock-taking workshop, to which Member States' representatives as well as the Commission's inter-service steering group was invited. 57 representatives from 24 (out of the 25 concerned) Member States were present, with representatives from different relevant services, such as ministries of interior, ministries of justice, the judiciary, law enforcement and intelligence. DG HOME, ICF, the FRA and the European Economic and Social Committee (hereafter "the EESC") gave updates on the work they were carrying out, providing space for Member States to comment and provide feedback. The second workshop, on 1 July 2021, presented the preliminary findings to the Member States, Europol and Eurojust, with the purpose of confirming whether the findings are in line with the views of those responsible for implementing and applying the Directive.

Next to the targeted consultations, the Commission organised an internet-based public consultation<sup>66</sup>. 23 contributions were submitted through the online questionnaire during the consultation period from 24 March to 16 June 2021, which is used as anecdotal evidence. The contributions were published on the Commission website.

In addition, on the request of the Commission, in April 2021 the FRA submitted a contribution to the Commission on the impact on fundamental rights and freedoms of the Directive. For this purpose, the FRA conducted interviews with 107 practitioners (defence lawyers, judges and investigative judges, law enforcement, public prosecutors, NGOs, and academia) in seven selected focus Member States (Belgium, France, Germany, Greece, Hungary, Spain and Sweden). The FRA will publish a more detailed report that includes key findings and FRA opinions. Moreover, Eurojust provided a contribution focusing on provisions used in recent prosecutions and convictions for terrorist offences. Its contribution also contained a highly insightful overview of relevant case law. The Commission had requested such a contribution from Eurojust to be able to

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<sup>66</sup> [https://ec.europa.eu/eusurvey/runner/Combating\\_Terrorism](https://ec.europa.eu/eusurvey/runner/Combating_Terrorism)



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 EESC conducted an independent evaluation of the Directive and produced an information report, which was also used as a source for the current evaluation<sup>67</sup>.

The evaluation is thus based on a combination of extensive desk research and field research, legal analysis including relevant case law, and a wide variety of stakeholder feedback through consultations carried out by the external contractor, but also by the Commission, the FRA and the EESC. This made it possible to triangulate the findings of the evaluation.

There has been no methodological deviation from the evaluation roadmap<sup>68</sup>. A more elaborate description of the methodology applied and the stakeholder consultations are provided in Annexes II and III.

## **4.2 LIMITATIONS AND ROBUSTNESS OF FINDINGS**

Several limitations have impacted the breadth and quality of the evidence collected as part of the evaluation, to varying degrees affecting the robustness of some of the findings presented in this report. This section summarises the key methodological limitations. Further details are provided in Annex III.

### **4.2.1 Evidence on the practical implementation and the costs of implementation**

The mapping of the practical implementation of the Directive in all Member States and the case studies in eight Member States required a good understanding of the legislative framework in the Member States and the changes that were a result of the Directive. In most Member States, the evidence provided by stakeholders and publicly available sources was sufficient to draw evidence-based conclusions. However, this was not the case for a few Member States, which did not always provide sufficient evidence during the consultations for the external study.

In addition, the assessment of the extent to which the Directive is being applied equally to all types and forms of terrorism is exclusively based on stakeholder feedback due to the difficulties to obtain hard data to support it (i.e. if the Directive is not being applied to other types of terrorism they would not be reported as terrorist offences)<sup>69</sup>.

Consequently, this somewhat limited the ability of the external study to provide a complete assessment of how the Directive is being practically implemented across all Member States. This impacts particularly Chapter 3 on implementation. Specific examples given in this chapter stem from those Member States that provided sufficient input on their practical implementation. Nevertheless, this limitation was mitigated by several factors. The additional consultations and research carried out for the external study in the eight focus Member States partially mitigated the impact of this limitation, as it provides more detailed evidence of how the Directive may have impacted Member States with different experiences as far as countering terrorism and providing support to victims of terrorism concerns. The negative impact of this limitation is also mitigated by

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<sup>67</sup> European Economic and Social Committee, Information report, Evaluation of the Directive on combating terrorism, SOC/675, 2021.

<sup>68</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12545-Combating-terrorism-evaluation-of-EU-rules\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12545-Combating-terrorism-evaluation-of-EU-rules_en)

<sup>69</sup> Also to be noted in this context, is that the preceding Framework Decision has never been comprehensively evaluated according to the better regulation guidelines, and was primarily checked with regard to transposition requirements.

the fact that the Commission has very recently published its transposition report<sup>70</sup> and has consequently discussed this report in several Council working groups and with Member States bilaterally, thus enhancing its understanding and knowledge of the practical implementation within the Member States. In addition, Eurojust provided valuable information on the practical implementation of the Directive, by providing an overview of relevant case law. This information also illustrated the practical implementation and functioning of the Directive.

Similarly, the assessment of the impact of the Directive on fundamental rights is limited by the fact that Member States do not regularly monitor this aspect. Even in Member States where this is done, the assessment relates to wider counter-terrorism measures, making it difficult to disentangle the exact impact of the Directive from that of other measures. This point is reflected in section 5.7 on fundamental rights. Given the absence of hard data on fundamental rights issues, the evaluation reflects mostly the views of a wide variety of stakeholders.

Finally, another evaluation criteria for which the lack of data has been limiting is the assessment of the efficiency of the Directive. There are multiple reasons for the lack of quantitative data on the costs related to the implementation of the Directive, namely:

- Incremental costs are not monitored and reported as a separate item in national budgets or financial reports;
- A multitude of institutions involved in the implementation of the Directive, with no central entity that compiles and reports on related costs for all authorities involved;
- Multiple types of implementation costs: while some of the costs may be possible to account for, others cannot be clearly distinguished from the regular costs;
- Shared resources in many organisations, e.g. a unit monitoring online terrorist content would also handle other online crimes; agencies supporting victims of terrorism may also support victims of other crimes;
- Scale of counter-terrorism costs, which in many Member States represent a relatively small portion of their regular activities. As a result, the cost of counter-terrorism activities is not budgeted or reported separately, although a few exceptions were identified.

Section 5.3 on efficiency explains how these limitations were mitigated. In short, the external study quantified the costs of implementing the Directive to the extent possible, and compared these against the benefits of the Directive as reported by stakeholders.

#### **4.2.2 Low response rate from some stakeholders targeted by the stakeholder consultation**

The comprehensive questionnaire, which was aimed to capture the entire breadth of the evaluation, was filled out by 23 of the 25 Member States and provides a robust basis for the evaluation. The external study has been successful in getting the views of all relevant types of stakeholders. This means that although the response rate was lower than hoped, especially for the targeted online surveys, the balancing of different stakeholders views can still be adequately done on the basis of the feedback received. In addition, next to the external study, the Commission had two additional sources of information to rely on: the contributions from the FRA and from Eurojust. On top of the external study, the FRA

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<sup>70</sup> COM(2020) 619 final, 30.9.2020.

also consulted relevant stakeholders. Eurojust has also held and reported on meetings, during which practitioners commented on the relevance and usefulness of the Directive<sup>71</sup>. These are all important sources of information, next to the external study.

For the external study, the response from stakeholders was lower than expected, especially for the targeted consultations through online surveys. As these targeted consultations targeted in particular members of the judiciary and prosecutors dealing with terrorism-related cases, this means that, comparatively, the evaluation relies on richer input from national authorities responsible for transposing and implementing the Directive, which were consulted through a comprehensive email questionnaire. The external study reports that a short timeline to carry out the consultations, combined with some initial delays in the launch of the surveys and the wide range of stakeholders involved in the implementation of the Directive at national level (and regional in some cases), led to significant delays in the organisation of the first interviews. Other factors (e.g. interviewees affected by COVID-19, holiday period) resulted in further delays on the part of the stakeholders to contribute to the external study.

The external study also reports that stakeholder fatigue appears to have limited the interest and availability of some of these specific stakeholders to contribute to the study. For example, another evaluation of the same Directive was carried out simultaneously by the EESC (referenced in this document as an additional source of information), at their own initiative. This meant that the same stakeholders were requested to provide similar feedback for two different evaluations within a brief period of time.

## **5. ANALYSIS AND ANSWERS TO THE EVALUATION QUESTIONS**

### **5.1 RELEVANCE**

#### **Summary findings – relevance**

The scope and definitions of the Directive, as well as its minimum rules, are overall highly relevant. This finding was supported by a large majority of the stakeholders consulted. The relevance has been considered against the main terrorist trends in the EU. In relation to the expected relevance in the coming years, the evaluation finds that the Directive is expected to remain relevant in the next years. Both for the relevance in the reference period, as well as the relevance in the coming years, some minor gaps are identified, in particular in relation to the provisions on victims of terrorism.

The evaluation's findings on relevance are in line with the EESC's evaluation of the Directive, which concludes that "its relevance and usefulness are widely recognised by the civil society organisations and public authorities that were consulted"<sup>73</sup>.

#### **5.1.1 Relevance of the scope and definitions of the Directive**

This sub-section examines the relevance of *what* the Directive covers, i.e. its scope and

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<sup>71</sup> Eurojust Expert Workshops on Violent Right-Wing Extremism and Terrorism – Summary of the Discussions, April 2021, page 2.

<sup>72</sup> [2021\\_04\\_summary\\_of\\_expert\\_workshops\\_on\\_right\\_wing\\_extremism\\_updated.pdf \(europa.eu\)](#).

<sup>73</sup> Eurojust contribution to the evaluation of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, 2021, page 14.

<sup>74</sup> European Economic and Social Committee, Information report, Evaluation of the Directive on combating terrorism, SOC/675, 2021, para. 3.1.

definitions. The evaluation finds that the scope and the definitions of the Directive were overall suitable, and fit for purpose considering the main current terrorist trends in the EU, although it identified minor gaps in light of the changing nature and pattern of the terrorist threats faced by the Member States (which is outlined in the introduction).

Stakeholders involved in the implementation of the Directive and the investigation and prosecution of terrorism in Member States generally deem the scope and definitions of the Directive to be suitable and adapted to the current terrorist trends. The scope was positively assessed by a great majority of counter-terrorism units and members of the judiciary. National authorities also considered the scope adequate, as nearly all of the respondents to the questionnaire carried out for the external study indicated that they could not identify any gaps and that there were no unnecessary provisions.

Across these three groups of stakeholders, the great majority of those who participated in the surveys indicated that the definitions contained in Articles 3-12 are still fit for purpose and adapted to the changing nature and pattern of terrorist threats, an opinion that was shared by international organisations consulted. A majority of national authorities and members of the judiciary find the scope of Article 3 (which is the core of the Directive as it covers terrorist offences) to be “just right”, with only a small minority stressing that the definition is too narrow. The definitions are also considered to be complete; when asked whether other terrorism-related offences should be included, all counter-terrorism units answering to the survey indicated that there was no need<sup>74</sup>. This view was echoed by a respondent to the public consultation, representing an NGO, who held the view that “the definition provided in Article 3 seems to offer a comprehensive basis for countries to prosecute all types of terrorist offences ... However, while delivering a solid framework, Article 3 leaves the Member States enough room to adopt a definition that corresponds to their sensitivity”.

Nevertheless, some members of the judiciary, as well as a small number of national authorities, identified minor gaps. For example, these stakeholders saw scope to include in the Directive’s definitions activities such as collecting data and information regarding targets, or to consider also to make more explicit the notions of “extremism” and “lone actor terrorism”. A respondent to the public consultation held the view that food security should be more explicitly covered by Article 3(1)(h), although they also noted that attacks on the food chain may qualify as a “fundamental natural resource” in line with Article 3(1)(h). Some scholars and other stakeholders (mainly non-governmental organisations) were more critical and held the view that the definitions of the Directive are too broad and leave a wide margin of discretion for Member States when transposing and implementing the Directive<sup>75 76</sup>. The FRA also noted this in relation to certain specific offences<sup>77</sup>. This is further discussed in section 5.8.

Finally, a small number of members of the judiciary, prosecutors and national authorities noted that Article 3 might not have adequately addressed the problem of small-scale terrorist offences, as it requires that terrorist offences “may seriously damage a country or an international organisation”. Likewise, a small number of stakeholders from the judiciary and national authorities noted that the definition of “structured group” (Article 2(3)) might have failed to capture the progressively loosening structure of terrorist

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<sup>74</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 19.

<sup>75</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 21.

<sup>76</sup> European Network Against Racism, Suspicion, discrimination and surveillance, 2021, page 15.

<sup>77</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 2.

groups<sup>78</sup>. Furthermore, some experts held the view that there is a lack of clarity around the level of participation that is required to establish participation in the activities of a terrorist group (Article 4)<sup>79</sup>, which could affect the relevance of the provision.

### **5.1.2 Relevance of the minimum rules on criminal offences and sanctions in the area of terrorism, and the measures of protection of and support to victims of terrorism**

This sub-section examines the relevance of *how* the Directive covers the offences included in its scope, i.e. its minimum rules. The evaluation finds that the minimum rules laid down by Titles I-IV (Articles 1-23) are suitable and fit for purpose considering the main terrorist trends and the changing nature and pattern of terrorist threats faced by Member States. The evaluation also finds that the Directive is relevant to address the needs of victims of terrorism, although some gaps and challenges have been identified.

In 2019, the Council of the EU noted that, in general, minimum rules within the EU substantial criminal law facilitate the application of the principle of mutual recognition by approximating the definition of certain offences and sanctions<sup>80</sup>. More specifically, national authorities acknowledged the overall relevance of the minimum rules contained in the Directive to counter terrorism in the current context<sup>81</sup>.

The Directive contributes to countering terrorism by setting a basis for cooperation and information exchange, which will be further explained in section 5.5. Cross-border cooperation and information exchange is crucial to combat terrorism, as terrorists do not usually operate or stay in only one Member State. It is therefore crucial that relevant information is transmitted as soon as possible to other relevant Member States. For the information to flow smoothly and rapidly, and for all Member States to be able to act on the received information, it is crucial that there is a common legal understanding within the EU of what constitutes a terrorist offence. By setting harmonised definitions and minimum rules, the Directive allows for precisely this information exchange.

Stakeholders representing national authorities, counter-terrorism units and the judiciary expressed positive opinions on the relevance of the minimum rules on the different criminal offences covered in Titles I-IV (Articles 1-23). On sanctions (articles 15-18), also the great majority of national authorities held the opinion that the provisions on sanctions for natural and legal persons were adequate and fit for purpose and did not present specific gaps or issues in terms of their relevance. Only one national authority from one Member State pointed to differences in the implementation by different Member States and concluded that this shows that the minimum rules leave too much space for Member States. In addition, one member of the judiciary stated that the minimum rules on definitions and sanctions were not relevant. A few stakeholders noted that the relevance of the Directive would be stronger if the minimum rules were strengthened for certain provisions. For example, one national authority from one Member State noted that Article 21 on measures against public provocation content online could be strengthened to increase its relevance, and the relevance of the Directive as a whole within the online context.

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<sup>78</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 21.

<sup>79</sup> International Commission of Jurists, 2019, Justice Project, Implementing the EU Directive 2017/541 on combating terrorism, Report on the European Transnational Roundtables conducted in 2019.

<sup>80</sup> Austrian Presidency of the Council, 2019, The way forward in the field of mutual recognition in criminal matters (9317/19).

<sup>81</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 23.

The evaluation also assessed in more detail the minimum rules contained in Title V (Articles 24-26), which seek to ensure that Member States provide a minimum level of support, assistance and protection services that address the specific needs of victims of terrorism. Most stakeholders representing national authorities, counter-terrorism units and the judiciary, as well as two international stakeholders, considered these rules to be relevant and equipped to address the current needs of victims of terrorism. The opinion among victims' associations was slightly more divided; among the four associations who specifically commented on the relevance of the Directive, three assessed it positively, while another disagreed<sup>82</sup>.

Despite the overall positive assessment of the relevance of the minimum rules of the Directive, the evaluation found some gaps related to the needs of victims of terrorism. Five main categories of needs of victims of terrorism have been identified at the EU level: recognition and respect, support and information, protection, access to justice, and compensation and restoration<sup>83</sup>. Most categories of needs are covered – directly or indirectly – by the Directive, except for the need for recognition and respect. This is a significant change compared to the baseline situation, in which the needs of victims of terrorism were not captured by the Framework Decision. In relation to the need for recognition and respect, it should be noted that Article 1 of the Victims' Rights Directive (which applies to all victims of all crime, including victims of terrorism), holds that "Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner". Nevertheless, victim's associations working with victims of terrorism in Spain found it problematic that the Directive does not cover the humiliation of victims, as this would enhance the protection and recognition of victims of terrorism, and would prevent secondary victimisation<sup>84</sup>. The Spanish criminal law does criminalise the humiliation of victims, which is considered by the FRA to potentially increase the risk of arbitrarily limiting the freedom of expression<sup>85</sup>.

Another potential gap identified by stakeholders is the lack of guidance on the organisation and set-up of memorials. Some victim support associations held the view that this will also enable the recognition of victims of terrorism<sup>86</sup>.

Finally, in many terrorist attacks, people of different nationalities fall victim. In this cross-border context, the EU Strategy on victims' rights (2020-2025) underlines the importance of cooperation between national authorities and victim support organisations<sup>87</sup>. The rights of victims of terrorism resident in another Member State (Article 26), which are newly included in the legal framework compared to the baseline situation, therefore are particularly relevant, but, according to some stakeholders, not sufficient to ensure an adequate level of protection of cross-border victims in all Member States. Some victim support associations identified a lack of specific rules or minimum standards on how Member States should communicate information on victims in cross-border cases, for example through single contact points<sup>88</sup>. This was also identified by the

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<sup>82</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 24.

<sup>83</sup> EU Centre of Expertise for Victims of Terrorism, EU Handbook on Victims of Terrorism, 2021; European Parliament, How can the EU and the Member States better help victims of terrorism?, 2017.

<sup>84</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 26.

<sup>85</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 15.

<sup>86</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 26.

<sup>87</sup> Communication from the Commission – EU Strategy on victims' rights (2020-2025), COM(2020) 258 final, 24.6.2020.

<sup>88</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 27.

EESC, which notes that “the fate of foreign victims is a real concern, given the significant differences between arrangements for providing assistance and judicial procedures in the EU, especially in terms of victims having access to the necessary information in their own language”<sup>89</sup>.

### **5.1.3 Relevance of the Directive in the coming years**

The evaluation finds that the Directive is expected to remain relevant in the next years. In December 2020, the Commission set out the threat picture in its Counter-Terrorism Agenda<sup>90</sup>, which is in line with the picture that emerges from the six-monthly papers of the EU’s Intelligence and Information Centre. Next to the trends identified in the Counter-Terrorism Agenda for the EU (as outlined in the introduction), the external study identified two additional trends in the terrorist threat that it expects to continue in the coming years, in particular:

- Current terrorist organisations feature a more flexible and loose structure than old networks. Furthermore, offences carried out by lone actors can be even more difficult to predict;
- Terrorist organisations have become more resilient to law enforcement, which is linked to the increasingly loose structure of terrorist organisations, which makes detection more difficult<sup>91</sup>.

The evaluation finds that the Directive constitutes a solid legal instrument with a high degree of relevance given these current trends, which it expects to continue in the coming years. Some stakeholders highlighted challenges in tackling violent right-wing extremism and terrorism<sup>92</sup>, which is further discussed in section 5.2.3. A respondent to the public consultation, representing an NGO, held the view that “issues that could be considered for a revision are the inclusion of provisions dealing with the need of Member States to take appropriate measures against radicalisation and for the development of more effective reintegration measures, as well as on further strengthening the framework on combatting the financing of terrorism in light of new technologies”.

In relation to the needs of victims of terrorism, national authorities consulted generally expect the Directive – in terms of scope, definitions and minimum rules – to remain relevant to the needs of victims of terrorism. In contrast, the few victims’ associations that specifically commented on this showed a more divided opinion. Two associations questioned the relevance of the Directive in the coming years, while one argued that although there are aspects that could be improved, the Directive is expected to remain relevant and is generally adequate to meet the needs of victims of terrorism.

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<sup>89</sup> European Economic and Social Committee, Information report, Evaluation of the Directive on combating terrorism, SOC/675, 2021, para. 3.4.

<sup>90</sup> COM(2020) 795 final, 9.12.2020.

<sup>91</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 28; these expectations were confirmed by counter-terrorism experts in a validation workshop organised by ICF.

<sup>92</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 29.

## 5.2 EFFECTIVENESS

### **Summary findings – effectiveness**

The Directive has achieved its objectives to a satisfactory extent. Overall, the Directive seems to be equally applied to all forms of terrorism, which is important given the current and evolving threat picture. Nevertheless, there are certain factors that limit the effectiveness of the Directive, for example in relation to combating extreme right-wing terrorism.

#### **5.2.1 Achievement of the objectives**

The general objective of the Directive is to combat terrorism through criminal law. The specific objectives are to:

- approximate the definition of terrorist offences, offences related to a terrorist groups 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.

This subsection assesses to what extent two specific objectives were achieved. The third specific objective, related to victims of terrorism is assessed separately in section 5.8 for the sake of clarity, as Article 29(2) of the Directive requires the Commission to explicitly report on the impact the Directive has had on the level of protection and assistance provided to victims of terrorism.

##### **5.2.1.1 Approximating the definition of terrorist offences, offences related to a terrorist groups and to terrorist activities, serving as a benchmark for information exchange and cooperation between competent national authorities**

The intended impact of this specific objective is to enhance cooperation and information exchange between Member States through the approximation of definitions. The evaluation finds that in terms of approximating the definition of terrorist offences, the Directive has achieved progress as compared to the baseline situation under the preceding Framework Decision.

Article 3 (terrorist offences) and Article 4 (offences related to a terrorist group) of the Directive are similar to their preceding provisions of the Framework Decision, except for Article 3(1)(i) of the Directive. Accordingly, the offences defined in Articles 3 and 4 had already been approximated to some extent before the adoption of the Directive. However, the great majority of national authorities and counter-terrorism units indicated that Articles 3 and 4 of the Directive have approximated the definition of terrorist offences and offences related to a terrorist group at least “to some extent”, which suggests that the Directive has provided some degree of improvement in relation to the baseline situation when the Framework Decision was in place.

The Directive achieved its objective also in approximating the offences related to terrorist activities (Articles 5 to 12), as reported by the great majority of respondents from national authorities and the judiciary. For instance, one national authority from one



Member State pointed out that offences related to terrorist activities are defined in a sufficiently precise way to express the various ways of committing such offences. Another national authority from one Member State noted that there is considerable approximation for the offences of Title III of the Directive and especially the offences in Articles 8 to 11, since the Framework Decision did not yet contain these offences, or not in full. Furthermore, the Directive triggered legislative changes in 23 Member States, as explained in section 3<sup>93</sup>. These are important changes compared to the baseline situation.

It is important to note, however, that the Directive only sets minimum rules. Some Member States have opted to go beyond this minimum, which has led to a fragmented implementation across the Member States (see section 3). In addition to the room left for Member States to go beyond the minimum requirements set by the Directive, Member States identify challenges in relation to proving terrorist intent, which is discussed in section 5.2.3 as a factor limiting the effectiveness of the Directive. These challenges have potentially hindered the full potential of the Directive to further approximate the definitions of offences related to terrorist activities.

As for the intended impact to enhance cooperation and information exchange between Member States, evidence from the stakeholder consultation carried out for the external study suggests that Article 22 of the Directive has had some impact in terms of facilitating the exchange of information between counter-terrorism organisations in different Member States. The case studies in eight Member States show that, in four of those Member States (Belgium, Germany, Italy and Spain), the Directive is deemed to have contributed to the strengthening of cooperation and exchange of information between Member States, in combination with other EU-level tools. In Germany, stakeholders clarified that while the number of exchanges has not varied since 2017, the Directive has facilitated the process of cooperation and information exchange. The other Member States acknowledged that cooperation has improved in the last years, but whether this is due to the Directive is either questioned (Bulgaria) or rejected (France, Greece, the Netherlands). In addition, and not just related to Article 22 but to the Directive in general, most stakeholders from national authorities and victims' associations believe that the Directive has facilitated overall cooperation between authorities and entities providing specialist support to victims between Member States.

One member of the judiciary in Italy noted that the Directive, together with other European directives, has brought a clear benefit and enhanced the effectiveness of cooperation and exchange of information between the police and the magistrates of the Member States. This has been noted also in the interviews with international stakeholders, who pointed out how the adoption of a common lexicon on combating terrorism at an EU level increased the effectiveness of the exchange of information amongst Member States and international organisations<sup>94</sup>.

#### **5.2.1.2 Establishing 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**

The intended impact of the specific objective to establish minimum rules is to strengthen security and enhance the capacity to deal with terrorist threats at an earlier stage. The evaluation finds that in terms of establishing minimum rules and achieving the intended impact, the Directive has made progress as compared to the baseline situation under the

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<sup>93</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 39.

<sup>94</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 41.

preceding Framework Decision, although there are factors limiting the effectiveness of the Directive, which are further discussed in section 5.2.3.

The functioning of the Directive relies on its transposition into national law, and so does the establishment of minimum rules in practice. The analysis of the implementation in the eight focus Member States of the external study reveals that, while some of the transposition gaps identified in the Commission's transposition report<sup>95</sup> have been addressed or can be considered to be minor, some transposition issues in certain Member States are more serious and remain. More generally, the Commission identified transposition issues in all Member States in its 2020 transposition report. Some of these issues are further explained in section 3. This impacts negatively the establishment of minimum rules and the setting of a common baseline, and could potentially affect the ability of authorities to effectively investigate and prosecute terrorism-related cases<sup>96</sup>.

The general objective of the Directive is to combat terrorism through criminal law, i.e. through effective investigation, prosecution, adjudication and sentencing of the offences covered by the Directive. If the specific objective of establishing minimum rules is achieved, it was expected that that should positively impact Member States' ability to investigate, prosecute, adjudicate and sentence the offences covered by the Directive.

However, half of the national authorities consulted reported that the Directive has had no impact on their ability to investigate terrorism-related offences, while one third considered that the Directive made investigation somewhat or significantly easier. Just under half of the national authorities indicated that the Directive has had no impact on their ability to prosecute terrorism-related offences – a notable minority indicated that the Directive has made prosecution somewhat or significantly easier. Just over half the national authorities reported that the Directive has had no impact on adjudication of terrorism-related offences – and a minority indicated that the Directive made adjudication somewhat or significantly easier. The impact of the Directive on sentencing is covered below. These findings are to a certain extent unexpected, especially in light of the strong relevance of the Directive reported under section 5.1. Accordingly, section 5.2.3 covers factors that limit the effectiveness of the Directive.

The evaluation examined also the effectiveness of Article 21 of the Directive, covering measures against public provocation content online. The majority of respondents agreed that the minimum rules set by Article 21 (and corresponding national provisions) has been effective in ensuring that online terrorist content is promptly removed or blocked. However, some issues that are external to the Directive have been identified that limit the effectiveness of this provision, for example in relation to national transposition issues<sup>97</sup>. The EESC notes that the stakeholders it consulted also expressed satisfaction with the effects of Article 21, and that “messages directly calling for violence are also removed from commonly accessible sites and networks, which is a major step forward”<sup>98</sup>.

As for the minimum rules on sanctions, the evaluation finds that the Directive achieved its objective by harmonising the minimum rules on sanctions across the Member States, as for example evidenced by the fact that several Member States introduced or amended

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<sup>95</sup> COM((2020) 619 final, 30.9.2020.

<sup>96</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 39.

<sup>97</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 40-41.

<sup>98</sup> European Economic and Social Committee, Information report, Evaluation of the Directive on combating terrorism, SOC/675, 2021, para. 4.2.1.

their rules on penalties to ensure better alignment with the minimum rules. Overall, the Commission's 2020 transposition report identified only a limited number of transposition issues in relation to the provisions on sanctions<sup>99</sup>. There are, however, significant differences in the sanctions and penalties applicable in the different Member States, which should be understood in light of the fact that the Directive only sets minimum rules. For example, some Member States envisage a possibility for revoking citizenship as a sanction for terrorism-related offences<sup>100</sup>. This does not impact the achievement of the objective, as the objective is not harmonisation but rather setting a baseline throughout the EU. Nevertheless, it is important to note that fundamental rights safeguards are in place (as discussed in section 5.7) and Member States remain bound by the Charter of Fundamental Rights of the EU (hereafter "the Charter") when they go beyond the minimum rules of the Directive.

### **5.2.2 Equal application among different forms of terrorism**

Section 3 focuses on the implementation of the Directive in practice. The current subsection focusses on whether the Directive has been applied proportionately among different forms of terrorism. This is important for achieving the general objective of combating terrorism through criminal law, knowing that the forms of terrorism in the EU are diffuse, as described in the introduction.

Too limited data is available to draw robust conclusions on whether the Directive has been applied equally to all forms of terrorism. The number of arrests and verdicts per type of terrorism seem to reflect the trends in terrorism identified by the external study. Likewise, national stakeholders and international organisations consulted also assessed that in general, the Directive adequately covers all forms of terrorism.

Nevertheless, figures on the number of cases investigated and adjudicated, per type of terrorism, shows that the representation of extreme right-wing terrorism for adjudication is significantly lower than for investigations. A potential explanation for this is that many of these cases are initially categorised as terrorism during the investigation phase, but eventually reclassified as other types of crime (e.g., hate crime) during later stages in the criminal justice process. This observation is in line with the feedback provided by a number of international governmental and civil society organisations interviewed, who referred to the difficulties to agree on a common understanding of extreme right-wing terrorism and expressed concerns about the adequateness of the Directive to tackle this specific type of terrorism<sup>101</sup>. A respondent to the public consultation representing an NGO also noted that right-wing extremist acts are often treated as "hate crimes". This issue is further discussed in section 5.2.3.

### **5.2.3 Factors that contribute to or limit the effectiveness of the Directive**

There are several factors that contribute to the effectiveness of the Directive. The first factor that significantly contributes to the effectiveness of the Directive, is that it applies equally to all forms of terrorism, regardless of underlying ideology. In that way, it could be used to combat all forms of terrorism. In this respect, Eurojust reported that in expert workshops, reference was also made to the Directive and to some additional terrorist offences introduced, "which can be used to initiate investigations on offences perpetrated by right-wing extremist groups. In relation to the Directive, it was stressed that its implementation will help achieve a more coherent approach in prosecuting all types of

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<sup>99</sup> COM(2020) 619 final, 30.9.2020, pages 12-13.

<sup>100</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 42.

<sup>101</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 33.

terrorism”<sup>102</sup>. However, the issue of classifying extreme right-wing violent acts as acts of terrorism is further discussed below.

According to a national authority from one Member State, mutual recognition tools, as well as EU mechanisms to improve judicial and police cooperation and other instruments adopted in recent years that seek (directly or indirectly) to facilitate the investigation and prosecution of terrorist offences<sup>103</sup> contribute to the effectiveness of the Directive<sup>104</sup>.

Finally, on Article 21, the fact that several Member States address and attempt to tackle terrorist content together with other illegal content online, positively impacts the effectiveness of the Directive. Further enhancement of the effectiveness of the Directive is likely to occur with the new Regulation on terrorist content online<sup>105</sup>.

There are also several factors limiting the effectiveness of the Directive. Section 5.2.1.2 showed that a significant number of the national authorities consulted reported that the Directive has had no impact on their ability to investigate, prosecute or adjudicate terrorism-related offences. The first factor that limits the effectiveness of the Directive relates to proving terrorist intent. Intent is an important element for the provisions of the Directive. For Article 3 on terrorist offences, it is the terrorist aims laid down in Article 3(2) that distinguish a terrorist offence from a “regular” offence. For example, if terrorist intent is established, a murder may be classified as a terrorist offence. Intent is also important for the offences related to terrorist activities, which according to the Directive require that the offence is committed intentionally.

Several Member States reported challenges in proving terrorist intent. This issue is further discussed and explained in section 5.7.3. For example, in relation to the offences on travelling for the purpose of terrorism (Articles 9-10), national authorities and representatives from members of the judiciary and prosecutors reported difficulties to establish the subjective element of the terrorist intent, as well as the fact that the collecting evidence to prove such intent is difficult in practice<sup>106</sup>.

Another factor limiting the effectiveness of the Directive is that it is often difficult to obtain evidence when prosecuting individuals suspected of traveling for terrorist purposes. Each Member State has its own material and procedural laws on gathering, admissibility and exclusion of evidence in criminal proceedings. When preparing a criminal case against a person being charged with travelling for terrorist purposes, a wide variety of information could be collected and made admissible as evidence by the authorities. However, obtaining such evidence may be complicated because of the cross-border characteristics of related crimes, despite the efforts that have already been made to strengthen the cooperation mechanisms among and between Member States and specific European agencies such as Europol and Eurojust.

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<sup>102</sup> Eurojust Expert Workshops on Violent Right-Wing Extremism and Terrorism – Summary of the Discussions, April 2021, page 2. [https://www.eurojust.europa.eu/sites/default/files/Documents/pdf/2021\\_04\\_summary\\_of\\_expert\\_workshops\\_on\\_right\\_wing\\_extremism\\_updated.pdf](https://www.eurojust.europa.eu/sites/default/files/Documents/pdf/2021_04_summary_of_expert_workshops_on_right_wing_extremism_updated.pdf).

<sup>103</sup> For example, the Passenger Name Record Directive, the Anti-Money Laundering Directive, the European Investigation Order Directive, Eurojust’s work, the work of Europol’s Internet Referral Unit and the use of systems such as SIENA.

<sup>104</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 45.

<sup>105</sup> Regulation (EU) 2021/784 of 29 April 2021 on addressing the dissemination of terrorist content online, OJ L 172/79, 17.5.2021.

<sup>106</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 34.

Often, the main evidence in cases of travelling for terrorist purposes is digital evidence sourced from various digital media<sup>107</sup>. A successful conviction based on this evidence may be hindered if some essential information is transmitted via encrypted messaging or if the digital information is not presented in a legally recognisable form. The notion of terrorist intent also appears to be difficult to prove in the case of digital evidence, as the information found must constitute evidence following procedural requirements, and in national criminal proceedings, charges based on such evidence are usually dismissed. These practical elements can, and indeed do, impact the extent to which the Directive can be effective in strengthening security, including in relation to (returning) foreign fighters, which is an intended impact of the Directive<sup>108</sup>.

As discussed above, there are some indications that in reality, it proves more difficult to classify extreme right-wing violent acts as acts of terrorism. Several stakeholders confirm this issue. The FRA, for example, notes that in certain Member States “although the legal provisions are not inherently discriminatory, measures to detect and prosecute public provocation may disproportionately affect certain groups [and] this is particularly visible in comparison with right-wing extremism, where similar conduct is not prosecuted in the same manner as jihadist cases are”<sup>109</sup>. One of the examples given by the FRA is in relation to Article 9 of the Directive, which covers traveling for the purpose of terrorism. Respondents in several Member States observe that the offence of travel is not applied in the same manner to different types of terrorism. For example, in one Member State, travel of right-wing extremists (e.g. to attend training in another Member State) would be prosecuted as an extremist offence and not a terrorist one<sup>110</sup>. Similarly, the European Network Against Racism notes that legal systems struggle with classifying extreme right-wing acts as acts of terrorism<sup>111</sup>.

The issue of potential unequal application of the Directive is further explored in section 5.6 on fundamental rights. Relevant for the current section is that Eurojust has identified certain causes for this difficulty. 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 set out as 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. Even in the most serious cases, where attacks resulting in human casualties took place, investigations were carried out under criminal law provisions on murder, as the terrorist intent could not be proved<sup>112</sup>. The difficulty of proving the terrorist intent of a crime motivated by a right-wing extremist ideology was not only mentioned in relation to lone actors. An example was also given of a recent court decision that sentenced members of a neo-Nazi organisation to several years’ imprisonment on counts of participation in a criminal organisation, as the terrorist intent of the crimes could not be established<sup>113</sup>.

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<sup>107</sup> EJTN, 2019, THEMIS 2019 Semi-final A: EU and European Criminal Procedure, 2019, Combating traveling for terrorist purposes - real life or just a fantasy?

<sup>108</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 40.

<sup>109</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 15.

<sup>110</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 19.

<sup>111</sup> European Network Against Racism, Suspicion, discrimination and surveillance, 2021, page 16.

<sup>112</sup> Eurojust contribution to the evaluation of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, 2021, page 14-15.

<sup>113</sup> Eurojust contribution to the evaluation of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, 2021, page 15.

Another challenge identified by judicial practitioners participating in Eurojust's workshops relates to the particularities of the 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 old extreme right-wing groups and by the variety of potential targets. In this context of mixed ideologies or adherences 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 incriminated organisation. This difficulty is reinforced by the fact that, unlike other forms of terrorism, there is currently no extreme right-wing organisation designated as terrorist organisation at EU level<sup>114</sup>.

This difficulty was also identified by an EU citizen who responded to the public consultation and noted that the Directive focused too much on the threat from foreign terrorist fighters, which risks "a discriminatory application of anti-terrorism measures (for example: not focussing on right-wing terrorism)". Eurojust has facilitated discussions on how to mitigate this limiting factor and in these discussions, several terrorist offences introduced by the Directive were specifically pointed out as relevant for initiating investigation and prosecution of right-wing extremist crimes. The first offence concerns the participation in the activities of a terrorist group (Article 4). The second offence mentioned refers to the financing of terrorism (Article 11), based on which investigations into right-wing extremists can be initiated. Finally, reference was made to the provisions introduced by the Directive concerning the aims of terrorist offences (Article 3(2)), in particular those acts of violence defined as seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country, which was presented by a representative of a judicial authority as of growing importance to initiate investigations into right-wing extremist crimes<sup>115</sup>.

### 5.3 EFFICIENCY

#### **Summary findings – efficiency**

There is no conclusive evidence on the exact costs for achieving the results of the Directive. A lack of available quantifiable data from the Member States makes it difficult to carry out a detailed assessment of the Directive's regulatory burden. 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. In addition, the evaluation has not found any scope for simplifying or reducing the administrative burden of implementing the Directive.

#### **5.3.1 Costs and benefits linked to the implementation of the Directive**

Based on limited quantitative data on implementation costs (a limitation further explained in Section 4), it appears Member States incurred varying levels of costs in implementing the Directive, with a majority of Member States making 'medium'

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<sup>114</sup> Eurojust contribution to the evaluation of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, 2021, page 15.

<sup>115</sup> Eurojust contribution to the evaluation of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, 2021, page 14.

efforts<sup>116</sup>.

Member States were divided into three groups to enable an estimate of efforts in implementing the Directive, which is outlined below. Due to the lack of detailed and comparable data on implementation costs for all Member States and for the EU as a whole, a combination of variables has been used to define the level of expenses incurred by Member States. The main factor taken into consideration in estimating the costs for Member States is the level of changes introduced by each Member State to comply with the requirements of the Directive.

The estimates applied for the three groups of Member States in the mapping relate to five areas:

- legislative compliance;
- investigation and prosecution;
- removing or blocking public provocation content online;
- cooperation and exchange of information;
- protection of and support to victims of terrorism.

Among these costs, several national authorities pointed out that costs related to investigation and prosecution, and to victim support represent the highest expense. Therefore, in calculating the index for the efforts dedicated to implementing the provisions of the Directive, efforts in the areas of investigation and prosecution and victim support have been assigned a higher weight than the other three areas listed above. As a result, three groups of Member States were identified:

- Member States with low costs (where little or no change was triggered by the Directive);
- Member States with medium costs (where some adjustments in legislation and counter-terrorism practices were implemented);
- Member States with higher than average costs (where certain changes were implemented, mostly because similar legislation to the Directive was not in place).

None of the Member States indicated that they had invested significant efforts or incurred significant costs in implementing the Directive, and naturally, there are also no Member States that had no costs whatsoever (even those that had already legislation in place similar to the Directive). It can therefore be inferred that all Member States incurred small to moderate costs<sup>117</sup>.

There are seven Member States that reported relatively low efforts in implementing the Directive (Finland, France, Italy, Latvia, Poland, Slovenia, and Spain). This includes Member States that have experienced limited or no terrorist attacks, and Member States where terrorist attacks have occurred in the near or more distant past. The explanation is that Member States with experience in dealing with terrorist threats had developed adequate legislation and institutional structures prior to the adoption of the Directive, while Member States where little terrorist threats have been detected did not prioritise as much investments in measures implementing the provisions of the Directive. It should be noted that most of the Member States with a low level of terrorist threats reported

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<sup>116</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 46.

<sup>117</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 46.

relatively higher costs for legislative efforts triggered by the Directive, but very low costs in the implementation of practical measures for enhancing investigation, prosecution, cooperation and support of victims. This can be explained by the fact that they did typically not have legislation in place and thereby transposing and implementing the Directive had relatively higher costs. At the same time, as the terrorist threat seems lower in these Member States, it follows that the ongoing costs for investigations, prosecution, cooperation and victim support is very low.

13 Member States (Austria, Belgium, Bulgaria, Croatia, Czechia, Estonia, Germany, Hungary, Luxembourg, Portugal Romania, Slovakia, and the Netherlands) reported medium level of efforts to make adjustments in their legislation and to introduce practical measures implementing the provisions of the Directive. Several Member States reported that they invested relatively high level of efforts in legislative changes in compliance with the Directive. Other Member States reported relatively higher costs in implementing measures in victim support or in combating provocation content online.

Five Member States (Cyprus, Greece, Lithuania, Malta, and Sweden) reported relatively high level of efforts in implementing the Directive. In particular, the Member States in this group invested higher than average efforts in victim support and in legislative changes to comply with the provisions of the Directive<sup>118</sup>.

Next to this estimate of efforts in implementing the Directive, the evaluation obtained some data on implementing costs in some of the Member States. While the evidence is incomplete to make any EU-wide conclusions, these data can be used to illustrate the level of public expenses dedicated to counter-terrorism measures before and after the Directive was adopted. The areas where most data is available is the protection of and support to victims of terrorism.

The number of victims of terrorism in Spain for the period 2015-2019 was 503, and the amount spent on supporting victims of terrorism was EUR 50.2 million. The example of Spain illustrates that the level of spending is highly dependent on the number of terrorism cases and victims: the costs incurred in the years prior to the adoption of the Directive were actually much higher than in the period after, simply because more victims were identified and supported in the earlier period (426 victims for the period 2015-2017, compared to only 77 victims in the period 2018-2019, and costs were respectively 36.0M and 14.2 M EUR). The average amount spent for one victim was about EUR 100,000.

In Finland, in implementing the Directive an annual additional state subsidy of EUR 500,000 to 570,000 has been assigned to Victim Support Finland. Austria reported an increase of 30 full-time equivalent staff in the public prosecution office to combat terrorism, cybercrime and hatred online. The cost for these new posts was EUR 1.6 million in 2020 and EUR 3.5 million in 2021. However, it was also pointed out that this staff would not work exclusively on counter-terrorism cases. Greece established a Department for support of victims of terrorism within the Ministry of Citizen Protection. It was the first entity in Greece exclusively dedicated to the victims of terrorism. No cost data is available, as the department was only created in 2020. In Germany, the post of Federal Government Commissioner for the issues of victims of terrorist offences was created in 2018 (however, the establishment of this post was initiated as a response to the terrorist attack in Berlin in 2016, i.e. not directly as a result of the Directive). Similar

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<sup>118</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 46-47.



positions have been established in all states (Länder) to provide assistance to the victims of terrorism. Cost data for these positions is not available. Bulgaria reported a two-fold increase of full-time equivalent staff in the law-enforcement unit combatting cybercrime, including provocation of online content (Article 21). The estimated annual cost for this increase is about EUR 370,000. However, similar to Austria, these costs are not exclusively dedicated to counter-terrorism cases. In all of these cases it is not possible to discern the share of those costs directly attributed to the Directive.

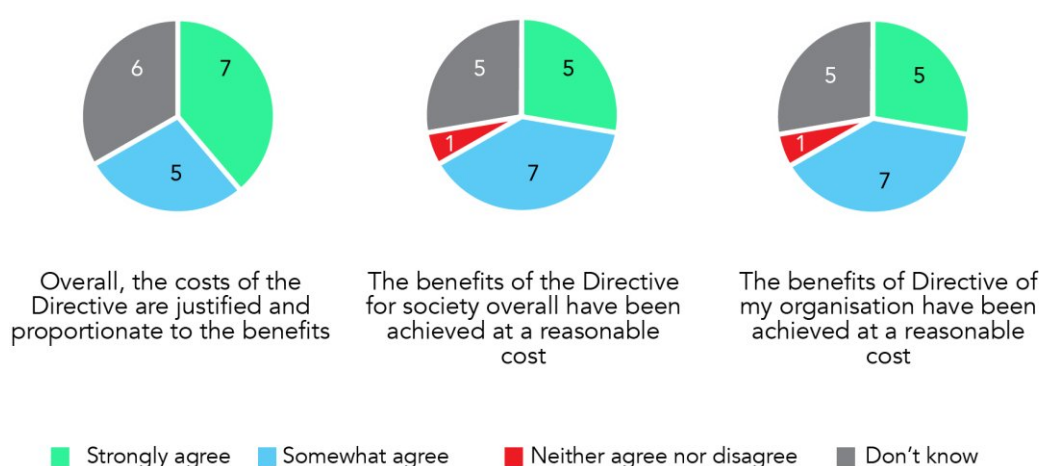
In regard to the implementation costs, the external study found that the costs were reasonable and proportionate to the benefits, and that these costs were justified. However, a significant number of stakeholders had no opinion on this issue due to lack of information on the incremental costs for implementing the Directive.

The findings on how reasonable and proportionate to the benefits the implementation costs are, are based on the opinions of stakeholders expressed in the surveys and follow-up stakeholder consultations. Stakeholders assessed the improvements generated by the Directives in the following six areas:

- Legal clarity
- Cooperation within a given Member State
- Cooperation with other Member States
- Cooperation with EU agencies
- Ability to counter the threat from terrorism
- Support, assistance and protection of victims of terrorism

For all these areas, the majority of stakeholders indicated that the Directive generated some or significant improvements (Figure 1). The most often cited benefits are enhanced legal clarity (86% of respondents), highlighting the elaboration of common definitions for terrorist offences and a common legal framework, and improved support for victims of terrorism (83% of respondents). A relatively smaller share of stakeholders (about 60%) believed that the Directive enhanced cooperation among institutions in their Member State or cooperation with EU agencies<sup>119</sup>.

*Figure 1<sup>120</sup>: Member States' assessment of improvements generated by the Directive*



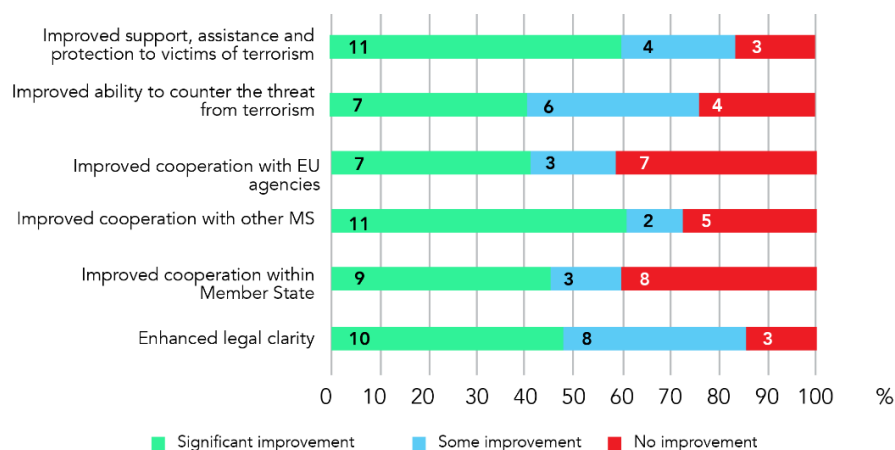
<sup>119</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 47-48.

<sup>120</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 48.

Source: Online survey of national stakeholders (Note: number of Member States varies by benefit, as not all Member States provided an answer).

The majority of national stakeholders (two thirds) held the view that the costs of the Directive were justified and proportionate to the benefits it generated in their Member State, and that these benefits have been achieved at a reasonable cost both at national level and at the level of their own organisation. About one third of respondents could not provide a definite answer to this question, which is indicative of the low level of awareness of the incremental costs attributable to the Directive (Figure 2).

Figure 2<sup>121</sup>: Assessment of costs and benefits by Member States



Source: Online survey of national authorities. (Note: not all Member States responded to the questions on costs and benefits.)

Based on the assumptions indicated in Annex VII, this external study estimates that the costs of drafting the Directive for the EU public administration amounted to approximately EUR 26,000 in the period 2015-2018. For public administrations at national level, the study estimates the costs of transposing the Directive into national law at a total of EUR 250,000 across the Member States. The recurrent (ongoing) costs of monitoring compliance is estimated at less than EUR 3,000 per year, and reporting to the EU at less than EUR 7,000 per year across the Member States<sup>122</sup>.

### 5.3.2 Scope for simplification and burden reduction

The evaluation has not found any scope for simplifying or reducing the administrative burden of implementing the Directive.

Based on the limited number of opinions expressed by stakeholders on the issue of simplifying or reducing the administrative burden of implementing the Directive, it appears that the administrative costs and efforts for implementing the Directive are very small and a reduction does not seem viable. Overall, stakeholders claimed that the administrative burden and costs have not increased due to the implementation of the Directive, with only two national stakeholders and three respondents to the public

<sup>121</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 49.

<sup>122</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 49.

consultation stating that administrative costs in their organisations have increased due to the Directive<sup>123</sup>.

It should be noted, however, that this conclusion is based on a small number of stakeholders' opinions, as most of the participants in the survey and the stakeholder consultations declined to comment on the issue (see also section 4 on data limitations).

## 5.4 COHERENCE

### **Summary findings – coherence**

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, although a potential inconsistency has been identified between the Directive and the Fifth Money-Laundering Directive.

#### **5.4.1 Internal coherence**

The evaluation finds that the different provisions of the Directive are generally deemed as consistent and coherent. Stakeholders consulted generally assessed this aspect positively, including EU and national-level stakeholders. This was particularly the case among national authorities, counter-terrorism units, members of the judiciary and prosecutors, most of whom believed that the provisions of the Directive are internally consistent. Nonetheless, one judge interviewed pointed to a potential inconsistency in the Directive, namely between the first and second subparagraphs of Article 11. Article 11(1) does not require that the funds be used, while Article 11(2) implies that there is a requirement for the funds to be in fact used, except for the financing of the offences in Articles 3, 4 and 9.

As directives rely on transposition into national law for their functioning, the evaluation also examined the degree of consistency in the way that Member States are implementing the Directive. Many provisions are being interpreted and applied in different ways across Member States, partly because the Directive only sets minimum rules. However, the different approaches do not seem to be inconsistent or incoherent. The evaluation did not identify any inconsistencies in the implementation of the Directive at the national level.

Nevertheless, one issue emerges from the evidence gathered, which relates to offences related to terrorist activities (Articles 5-12). A member of the judiciary argued that very often, several provisions can be applied to the same case (e.g. recruitment, training and travelling for the purpose of terrorism). This results in a wide margin of discretion for judges and could potentially lead to an inconsistent application of the Directive<sup>124</sup>. The FRA makes a similar point in its contribution, where it notes a concern in relation to the “use of generic catch-all offences or overlaps between the definitions of different terrorist and terrorism related offences”<sup>125</sup>.

#### **5.4.2 Coherence and complementarity with other policy interventions**

Apart from two exceptions, all stakeholders consulted reported that they are not aware of any inconsistencies between the Directive and other relevant legislation at national level in their Member State. Irrespective of their area of involvement (judiciary, counter-

<sup>123</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 50.

<sup>124</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 50.

<sup>125</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 2.

terrorism units, ministries), the vast majority acknowledged consistency between the Directive and other related instruments at national level. However, two Member States reported a potential incoherence between the Directive and their criminal law systems; German national authorities identified potential constitutional restraints in applying the Directive, and Spanish members of the judiciary pointed to the concept of negligence, which is used in their national law but not in the Directive<sup>126 127</sup>.

The evaluation finds furthermore that the Directive is highly coherent with policy interventions at the EU level. Of all stakeholders surveyed about the degree of coherence and complementarity between the Directive and other relevant instruments at EU level, none mentioned any inconsistencies. The evaluation examined the coherence with certain interventions in particular. No coherence issues have been identified between the Directive and the Victims' Rights Directive. The same applies to the Compensation Directive<sup>128</sup>: the Directive does not present inconsistencies or overlaps but can instead be considered complementary.

The Directive is also coherent with Directives regarding the European Investigation Order<sup>129</sup> in criminal matters, on electronic commerce<sup>130</sup>, and on citizens' rights and free movement<sup>131</sup>. In addition, the Regulation on addressing the dissemination of terrorist content online<sup>132</sup> is also consistent and closely aligned with the Directive, and specifically Article 21 of the Directive which requires Member States to take measures ensuring the swift removal of online content, limited to public provocation and leaving Member States the choice of the measures.

Recital 38 excludes the provision of humanitarian activities by impartial humanitarian organisations recognised by international law including international humanitarian law from the scope of the Directive. This humanitarian safeguard clause is coherent and consistent with other relevant EU-level interventions. Humanitarian organisations consulted agreed that the language used in the recital reflects the core values of the EU, as well as the language used in other relevant documents and communications, such as the Council conclusions on humanitarian assistance and humanitarian law (2019)<sup>133</sup> and on EU External Action on Preventing and Countering Terrorism and Violent Extremism (2020)<sup>134 135</sup>. Moreover, the exemption of Recital 38 is, according to humanitarian organisations consulted, one of the most protective ones at international level and therefore serves as an example at the international stage.

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<sup>126</sup> The issue identified by the Spanish members of the judiciary appears to be an issue of more far-reaching legislation at national level, rather than incoherence.

<sup>127</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 51.

<sup>128</sup> Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261/15, 6.8.2004.

<sup>129</sup> Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014.

<sup>130</sup> Directive 2000/31/EC of 8 June 2000 on legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000.

<sup>131</sup> Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004.

<sup>132</sup> Regulation (EU) 2021/784 of 29 April 2021 on addressing the dissemination of terrorist content online, OJ L 172/79, 17.5.2021.

<sup>133</sup> Council conclusions on humanitarian assistance and international humanitarian law adopted on 25 November 2019 (14487/19).

<sup>134</sup> Council Conclusions on EU External Action on Preventing and Countering Terrorism and Violent Extremism adopted on 15 June 2020 (8868/20).

<sup>135</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 54.

However, a potential inconsistency has been identified between the Directive and the Fifth Money-Laundering Directive<sup>136</sup> (hereafter “AMLD V”). Although the Directive adopts the same definition of ‘terrorism financing’ laid down in the AMLD V, there is a difference in their scope, particularly with regard to the “other offences related to terrorist activities” (Article 12). When defining the criminal offence of “terrorist financing”, Article 11 of the Directive excludes the financing of the offences listed in Article 12. By contrast, the AMLD V – which was adopted in 2018 – maintained the same definition of terrorist financing laid down in the previous AMLD, which referred to the financing of the offences “within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA”, where the current Article 12 offences were included. However, during the consultations, no stakeholder pointed to inconsistencies or incoherence between the two instruments<sup>137</sup>.

Finally, as regards coherence with international-level policy interventions, the evaluation finds the Directive to be coherent with relevant international interventions in the field of counter-terrorism, particularly those taken by the UN Security Council and the Council of Europe in 2014 and 2015.

In 2014, the UN Security Council adopted Resolution 2178 which required UN members to criminalise the act of travelling or attempting to travel to another country for terrorist purposes, and the financing or facilitating of such travel. The Resolution also required signatories to criminalise the act of providing or receiving terrorist training. The implementation of the Resolution in the EU was facilitated the following year (2015) when the Council of Europe adopted an Additional Protocol on its Convention on the Prevention of Terrorism. By 2015, a majority of Member States had started to criminalise the act of receiving terrorist training and some had similarly criminalised travel undertaken by foreign terrorist fighters as a criminal offence<sup>138</sup>. Through the Directive, the EU brought the legal framework at EU level in line with practices in many of the Member States. At the same time, the adoption of the Directive also respects and reinforces international standards in the field of counter-terrorism by reaffirming the requirements provided by Resolution 2178<sup>139</sup>.

When it comes to the humanitarian safeguard contained in Recital 38, the language used in the Directive is – according to humanitarian organisations consulted – one of the most protective ones at international level (compared to, e.g., UNSC Resolution 2462 on terrorist financing<sup>140</sup> or the UN Counter-Terrorism Strategy) and no inconsistencies in the approach adopted or the language used can be reported. Similarly, the exclusion of acts of war during an armed conflict (Recital 37) ensures consistency and coherence with humanitarian law principles, as noted by humanitarian organisations consulted<sup>141</sup>.

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<sup>136</sup> Directive (EU) 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19.6.2018.

<sup>137</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 53.

<sup>138</sup> Paunovic N., 2018, New EU criminal law approach to terrorist offences, University of Belgrade, Faculty of Law, p. 546.

<sup>139</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 54.

<sup>140</sup> Resolution 2462 (2019) Adopted by the Security Council at its 8496th meeting, on 28 March 2019.

<sup>141</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 54-55.

## 5.5 EU ADDED VALUE

### **Summary findings – EU added value**

The Directive has generated added value beyond what could have been achieved unilaterally by Member States or at international level. It has also provided added value compared to the Framework Decision. For the articles covering the rights of victims of terrorism (Articles 24 to 26), stakeholders' views are slightly more divided, although their assessment is overall positive. As for the consequences of withdrawing the Directive, the evaluation finds that the most likely consequence would be a reduced harmonisation of the offences falling under the Directive, which would have a negative impact on cooperation and information exchange between Member States.

The EU-added value of the Directive lies in the fact that it sets a common baseline in the EU, which creates a necessary basis for cooperation and information exchange. Council Decision 2005/671/JHA on the exchange of information and cooperation concerning terrorist offences requires Member States to transmit certain information in relation to terrorist offences to Europol and Eurojust (Article 2(3)). In addition, Member States are required to make available any relevant information in relation to terrorist offences to the authorities of other interested Member States (Article 2(6)). Terrorist offences are defined in the Council Decision as the offences referred to in the Directive. The Directive amended the Council Decision, so that the Council Decision refers to the Directive and not to the previous Framework Decision. In addition, some minor amendments were made, e.g. to clarify that Member States may also share information spontaneously with other Member States.

By setting harmonised definitions and minimum rules, the Directive allows for precisely this cross-border cooperation and information exchange. This harmonisation could neither have been achieved by Member States alone, nor at the international level. Instead, it is necessary that the EU sets such rules based on Article 83(1) of the TFEU. It is unlikely that such harmonisation would have happened in the absence of the Directive; criminal law takes shape incrementally and often reflects national circumstances. Without EU intervention, it is highly unlikely that Member States with different experiences with terrorism (in forms of terrorism and in intensity), would have taken a harmonised approach towards their criminal law framework.

### **5.5.1 Added value compared to national and international interventions**

The Commission proposal for the Directive highlighted the need for a new directive, building on the Framework Decision that was to be replaced. The proposal stated in the explanatory memorandum that “more coherent, comprehensive and aligned national criminal law provisions are necessary”. The proposal mentioned the new international standards and obligations, warranting the replacement of the Framework Decision and a strengthening of its framework. Finally, on subsidiarity the proposal states that the “objectives cannot be sufficiently achieved by EU Member States acting alone, since legislation only at the national level would not have the effect of establishing minimum rules on the definitions of and penalties for terrorist offences applicable throughout the EU”. For this reason, and in order to reduce the risks of legal fragmentation, unclarity and divergence, the proposal argued for an EU instrument<sup>142</sup>.

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<sup>142</sup> Proposal for a Directive on combating terrorism, COM(2015) 625 final, 2.12.2015.

The great majority of the stakeholders consulted (representing national authorities, counter-terrorism units, and members of the judiciary and prosecutors) believed that the Directive has generated added value compared to what could have been achieved by Member States individually, bilaterally or multilaterally. Their feedback also suggested that the main area in which the Directive is perceived to have generated added value is the approximation of criminal definitions and sanctions of terrorism-related offences. In the view of these stakeholders, the Directive has approximated criminal rules to counter terrorism in a way that Member States would not have been able to do individually. Ultimately, this has also contributed – to some extent – to facilitating information exchange and cooperation on terrorism matters between Member States. In view of the evolving terrorist threat and the diffusion in the forms of terrorism and the *modi operandi*, the Directive is pertinent also for Member States where there might initially (at the time of the proposal) have been less of a direct need for combating terrorism through criminal law. It has also responded to the threat posed by foreign terrorist fighters, giving Member States the tools to investigate, prosecute, adjudicate and sentence suspects on the basis of traveling for the purpose of terrorism, rather than for example participation in a terrorist organisation. This highlights the continued added value of the Directive.

A majority of stakeholders from national authorities, counter-terrorism units, and members of the judiciary and prosecutors found that Articles 1 to 23 have provided added value compared to the Framework Decision, i.e. added value compared to the baseline situation. Several stakeholders pointed out that the Directive has made it possible to take into account the evolution of terrorist threats, by bringing together in all Member States the definitions of offences related to terrorist groups and terrorist activities and providing a more comprehensive coverage of behaviour related to foreign terrorist fighters and terrorist financing. However, some stakeholders from Member States that already had a strong criminal law system to combat terrorist did not consider that the Directive added value<sup>143</sup>.

On victims' rights (Articles 24 to 26), the results of the stakeholder consultation show less consensus. Representatives from the judiciary and counter-terrorism units answering to the surveys were generally positive about the added value of the Directive in this area, with a majority of them considering that it has generated considerable or some added value. However, the interviews with victims' associations showed more divided opinions. In two Member States, victims' associations replied the Directive did not generate added value, for example because their Member State already had a strong victim protection system in place prior to the Directive. In contrast, victims' associations in other Member States reported that the Directive is clearer than the previous Framework Decision. They argue that the Directive is the first EU-level instrument that makes explicit the specific needs of victims of terrorism, assures close attention to terrorist attacks from the perspective of victims' rights and that provides support for victims outside their country of residence, which is important especially in cases of transnational terrorism<sup>144</sup>.

### **5.5.2 Likely consequences of withdrawing the Directive**

Overall, withdrawing the Directive are deemed to have a detrimental effect. As with the minimum rules established by the Directive the practical implementation varies across Member States, in the absence of such minimum rules the differences would likely widen, which would harm cooperation and information exchange between Members

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<sup>143</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 55-56.

<sup>144</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 56.

States. The Directive sets minimum rules to allow for a baseline ground for cooperation and information exchange. On the other hand, certain international standards – which are largely in line with some of the obligations of the Directive – would remain applicable, potentially limiting the impact of the withdrawal of the Directive.

The evaluation finds that the most likely consequence of withdrawing the Directive would be a reduced harmonisation of the offences of the Directive, which would have a negative impact on cooperation and information exchange between Member States. Withdrawing the Directive would lead to regulatory fragmentation and legal unclarity, whereas terrorist activity in the EU is quintessentially cross-border and requires cross-border responses. The regulatory weaknesses resulting from withdrawing the Directive could, as a result, be exploited by terrorists. A respondent to the public consultation representing a public authority indicates that, in their view, withdrawing the Directive would have a “very negative impact” on their organisation. They explained this by noting that judicial cooperation is crucial given that terrorism is a trans-national phenomenon. Another respondent to the public consultation, representing an NGO, notes that “the withdrawal of the [counter-terrorism] Directive would be nefarious for any Member State as it constitutes an essential benchmark in the EU fight against terrorism”.

In addition, given that the Directive has been implemented across the Member States (see also section 3), there would be costs involved in withdrawing the Directive, as well as costs related to the detrimental effects of reduced harmonisation and reduced coherence.

A majority of stakeholders from counter-terrorism units reported that a withdrawal of the Directive would have a negative impact on the efforts to counter terrorism in the EU, while half of them reported that a withdrawal of the Directive would have a negative impact on the efforts to counter terrorism in Member States as well.

## **5.6 IMPACT ON FUNDAMENTAL RIGHTS AND FREEDOMS**

### **Summary findings – impact on fundamental rights and freedoms**

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 do 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. Despite safeguard measures in place in the Member States to prevent discrimination, some stakeholders criticise 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.

### **5.6.1 General impact of the Directive on fundamental rights and freedoms**

The obligations contained in Articles 1 to 23 of the Directive impose limitations on the rights of individuals, notably the freedom of expression, assembly, association, movement, the right to privacy and family life, the right to political participation or the right to liberty. The investigation and prosecution of suspected cases of terrorism, i.e. the implementation of the Directive, may also – depending on how they are carried out – have an impact on rights that are particularly important for suspected, accused or convicted individuals (e.g. the right to an effective remedy and to a fair trial). The right to



non-discrimination may be breached if the obligations contained in the Directive are applied in a way that, unjustifiably, disproportionately affects specific demographics. The fact that the Directive impacts these rights was reflected in the feedback provided by members of the judiciary and prosecutors consulted for the external study, with a majority indicating that the Directive had had an observable impact on fundamental rights<sup>145</sup>.

The question is therefore not whether the Directive has posed limitations to fundamental rights, but to what extent these limitations meet the requirements of the Charter and whether there are safeguards in place to mitigate adverse effects. When implementing the Directive, Member States are bound by the Charter, which has the same value as the Treaties (Article 6 TEU)<sup>146</sup>. This is explicitly mentioned in Article 23 of the Directive. Any restriction to the rights and freedoms enshrined in the Charter must therefore fulfil the requirements of Article 52(1) of the Charter, namely the need to be provided by law (see also Article 49 of the Charter which affirms the principle of legality of criminal offences and penalties), to be of general interest, and to be necessary and proportionate (i.e., they must respect the essence of the rights and the limitations do not go beyond what is necessary to achieve the objective of general interest recognised by the Union or the need to protect the rights and freedoms of the others). An additional requirement is imposed by Articles 20 and 21 of the Charter, requiring all actions of Member States to be non-discriminatory, both in intention and effect.

Overall, most stakeholders consulted for the evaluation do not consider the implementation of the Directive to be problematic from a fundamental rights perspective (with the exception of respondents to the public consultation, most of which were NGOs). This was reflected in the feedback provided by national authorities, but also by national human rights organisations consulted. In both cases, a majority of stakeholders consulted – in the case of national authorities, a great majority – indicated that no fundamental issues had been raised specifically concerning the Directive. A great majority of national authorities did not report any cases in which investigation or prosecution measures were challenged for their impact on fundamental rights, with some arguing that the text of the Directive ensures a fair balance between criminalisation and the respect of fundamental rights. In some of these cases, the lack of impact was attributed to the fact that the Directive had not led to any changes in national legislation, which was the case in two Member States<sup>147</sup>. Nevertheless, a respondent to the public consultation representing a public authority, noted that there might be a tension in particular between “glorification of terrorism” (an example of indirect public provocation to commit a terrorist offence in Article 5 of the Directive) and the freedom of expression.

Among national authorities and human rights organisations, concrete issues were only reported by stakeholders from Germany, where national authorities have decided to maintain a more general approach to regulating terrorist offences, as they consider that a more literal transposition of the Directive would lead to tensions between certain offences and the principle of culpability and the freedom of expression. This is the case especially where the conduct is considered by Germany far from causing harm or posing a tangible threat, for example Article 5 of the Directive, which covers public provocation to commit a terrorist offence.

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<sup>145</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 57-58.

<sup>146</sup> Charter of Fundamental Rights of the European Union, OJ C 326/391, 26.10.2012.

<sup>147</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 58-59.

The limited impact on fundamental rights that stakeholders attribute to the Directive may be explained by the fact that its implementation is done within the context of criminal law, an area in which Member States have long established a legal framework which incorporates safeguards to ensure the legitimacy of limitations to fundamental rights. This explains why, when national authorities consulted were asked if their Member State had put in place measures to ensure that limitations to the exercise of fundamental rights are necessary, legitimate and proportionate, a majority indicated that they had, but their explanations showed that they were usually referring to general principles, such as the Criminal Code, the Constitution or the law regulating criminal procedures. Similar findings emerge from the interviewees with key stakeholders in the eight focus Member States, as most interviewees who specifically commented on this indicated that the usual fundamental rights safeguards apply and are sufficient. In their explanations, they also referred to the Constitution, the possibility for judicial or extra-judicial remedies, or the safeguards foreseen in the Criminal Code<sup>148</sup>.

Despite the safeguards in place and the overall positive assessment by stakeholders consulted, some issues have been identified by the external study and other sources. The general interest (which is one of the requirements of Article 52 of the Charter) of the obligations contained in the Directive is recognised by stakeholders. States have a legal obligation to investigate serious violations of human rights, which acts of terrorism undoubtedly constitute<sup>149</sup>. However, it has been argued that the implementation of the Directive could potentially lead to limitations of fundamental rights that do not comply with the principles of legality, necessity and proportionality.

The sections below go into more detail about specific impacts on fundamental rights and freedoms, distinguishing between impact caused directly and indirectly by the Directive. The below focuses on necessity, proportionality, and non-discrimination. Legality is discussed under section 5.7 on the rule of law to avoid repetition.

### **5.6.2 Impacts directly linked to the Directive**

In terms of proportionality, one of the main concerns identified by the external study relates to the increasing use of criminal law to prevent terrorist attacks by criminalising preparatory offences, as also outlined by several organisations contributing to the public consultation<sup>150</sup>. Indeed, several stakeholders expressed concerns about the criminalisation of preparatory offences and their facilitation. For example, the FRA notes that this can entail “criminalising activities considerably distant from an actual terrorist act”<sup>151</sup>. Likewise, the European Network Against Racism also concludes a “shift towards pre-emption in the development of criminal law offences relating to terrorism”<sup>152</sup>. Whether criminal law should have a preventive function is an important debate. With the adoption of the Directive, the European Parliament and the Council have clearly answered this question positively. The FRA research shows that on the one hand, particularly defence lawyers and members of the judiciary are concerned about this preventive use of criminal law. Some members of the judiciary and prosecutors acknowledge that there is a risk of disproportionately interfering with the rights of individuals – as well as the interests of the investigations – by intervening too early. On the other hand, however, “some judges

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<sup>148</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 58-59.

<sup>149</sup> International Commission of Jurists, 2020, Counter-Terrorism and Human Rights in the Courts: Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism, page 8.

<sup>150</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 60.

<sup>151</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 2.

<sup>152</sup> European Network Against Racism, Suspicion, discrimination and surveillance, 2021, page 29.

and prosecutors argue that such anticipatory approach is necessary to prevent attacks by radicalised individuals, particularly lone wolves”<sup>153</sup>. As discussed in section 5.1 on relevance, the terrorist landscape has seen a disintegration of formally structured terrorist organisations and the emergence of loosely networked terrorist cells and lone actors.

In the context of the preventive approach, the International Commission of Jurists notes that “criminal law should not punish abstract danger, or where there is no proximate link between the offender and the ultimate harm”<sup>154</sup>. Linking certain behaviour with actual risk is indeed a determination that has to be made by courts in certain cases. Eurojust highlights a court case in which such a determination had to be made in relation to Article 5, which covers public provocation to commit a terrorist offence and requires that the public provocation “advocates the commission of terrorist offences, thereby **causing a danger that one or more such offences may be committed**” (emphasis added). The court acquitted the defendant of public provocation to commit a terrorist attack because “it was not possible to establish that his propaganda created a realistic risk that one or more terrorist offences could possibly be committed”<sup>155</sup>.

Furthermore, the evaluation specifically examined the impact that Article 21 of the Directive (covering measures against public provocation content online) may have had on fundamental rights, and whether this was proportionate. Two of the five human rights organisations consulted in the context of the external study found the implementation of this article “potentially problematic”. In one Member State, the obligation imposed on online platforms to identify and take down any “illegal” content has proven to be controversial due to the lack of accountability of these platforms (i.e., legal remedies were not usually available to individuals in these cases). Representatives from the judiciary and national authorities consulted were more optimistic, generally stating that this provision has not restricted fundamental rights and freedoms. Only one Member State referred to one instance in which this measure had been challenged and annulled recently, but this was reportedly an exception to the rule. Overall, the limitations to fundamental rights that the implementation of this Article entails are largely considered proportionate. Most Member States have specific measures and safeguards to ensure that the removal and blocking of content respects the fundamental rights of individuals<sup>156</sup>. It should be noted that recently a new Regulation on terrorist content online was adopted<sup>157</sup>, which will be evaluated by June 2024, also for its impact on fundamental rights.

Additionally, the evaluation also specifically examined whether Recital 38 containing the humanitarian safeguard clause has been adequate to prevent adverse effects on the provision of humanitarian activities. Recital 38 of the Directive excludes humanitarian activities by impartial humanitarian organisations recognised by international law from the scope of the Directive. As the exemption is part of the recital – as opposed to the operative part of the Directive – Member States are not obliged to transpose it. This explains why only four Member States have reflected this exemption in their national

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<sup>153</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 20.

<sup>154</sup> International Commission of Jurists, 2020, Counter-Terrorism and Human Rights in the Courts: Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism, page 15.

<sup>155</sup> Eurojust contribution to the evaluation of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, 2021, page 7.

<sup>156</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 61.

<sup>157</sup> Regulation (EU) 2021/784 of 29 April 2021 on addressing the dissemination of terrorist content online, OJ L 172/79, 17.5.2021.

legislation. In most cases, the exemption can be inferred from generic legislation like the Criminal Code. Humanitarian organisations consulted for the external study recognised the added value of the recital, which in their view is one of the most protective ones at international level and therefore serves as an example at the international stage. They also acknowledged that although in theory some articles of the Directive could pose a challenge to their activities (e.g. Article 4<sup>158</sup>), no actual issues concerning the prosecution of humanitarian workers on the basis of the Directive or national transposing provisions had arisen in practice. However, they pointed out that having clearer national legislation on the humanitarian exemption would benefit them to prevent problems in the future and to facilitate cooperation with private entities<sup>159</sup>. Seven respondents to the public consultation representing NGOs (who gave a coordinated reply) also noted that the fact that not all Member States have transposed the exemption leaves a risk that the activities of impartial humanitarian organisations might be impacted.

In relation to non-discrimination, Member States have not generally implemented specific measures to avoid discrimination in the context of the investigation, prosecution, adjudication and sentencing of terrorism-related cases. This does not mean, however, that no safeguards are in place; the general measures applicable to ensure non-discrimination throughout criminal procedures or from acts of the State also apply in this context. This is what emerges from the responses of national authorities consulted for the external study; although two thirds of respondents indicated that they had implemented specific measures, the open-ended answers revealed that both groups were mostly referring to general non-discrimination safeguards, such as principles and obligations to respect fundamental rights and ensure non-discrimination laid down in the Constitution or Criminal Procedural Code. Other examples include training courses for judges and prosecutors and other awareness-raising activities and participation of law enforcement agencies in European projects to prevent and combat racism. One Member State also referred to various measures that are put in place during criminal proceedings to ensure that judges are not biased or that the information is provided in a way that is understandable in case the accused does not speak the national language or has a disability<sup>160</sup>.

Despite these safeguards, counter-terrorism measures have sparked criticism for their potential discriminatory effect. Most of the specific examples put forward in literature and by stakeholders consulted are not directly linked to the implementation of the Directive and, in fact, pre-date it<sup>161</sup>. However, there are also more recent sources which link counter-terrorism measures to potential discrimination.

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<sup>158</sup> In their role as neutral providers of humanitarian assistance, impartial humanitarian organisations may sometimes have to engage with organisations that have been designated as terrorist organisations by the EU, for example to ensure that the assistance reaches all people in need. This could create a tension with Article 4 on offences relating to a terrorist group.

<sup>159</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 63-64.

<sup>160</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 62-63.

<sup>161</sup> For instance, in a report published by Amnesty International in 2016, the organisation argued that the then-recent measures – which predate the adoption of the Directive – adopted by Member States had resulted in breaches of the right to non-discrimination. The report suggests that certain population groups – particularly Muslims, foreign nationals (e.g. refugees) and people perceived as such – had been disproportionately affected by the national measures (Amnesty International, 2016, Dangerously disproportionate – The ever-expanding national security state in Europe).

For example, four stakeholders<sup>162</sup> from the eight selected Member States, and several NGOs that contributed to the public consultation, viewed the recent evolution in counter-terrorism in their Member States (in general) as having a discriminatory effect. Some of the examples provided were the use of new investigative tools which are based on algorithms that may be biased, or increasing suspicion towards certain population groups (e.g. migrants, Muslims<sup>163</sup>). Furthermore, a report published by the European Network Against Racism argues that the criminalisation of pre-emptive action can lead to investigations which rely on perceived risks and targeting decisions made by intelligence and law enforcement, emphasising throughout its report in particular the negative impacts of such issues on Muslims<sup>164</sup>. Likewise, the International Commission of Jurists warns judges and prosecutors of the risk of conscious or unconscious bias throughout criminal proceedings<sup>165</sup>. The FRA notes that “law enforcement, prosecutors and members of the judiciary generally reject that the background of a person would be a decisive factor but acknowledge that it is considered together with other information. Some lawyers but also members of the judiciary and law enforcement officers believe that a person’s Muslim background plays a role at least in the initial suspicion, and that religion, ethnicity or ideology may be a basis for profiling and establishing terrorist intent. Respondents across professional groups underline the risk of subjective assessment and assuming intent based on own perceptions and values, which may differ from those of persons with a Muslim background, and call for caution in order to avoid judging beliefs and criminalising religion”<sup>166</sup>.

Additionally, the fact that Member States report difficulties to classify extreme right-wing violent acts as acts of terrorism could result in discrimination. This would be the case if certain forms of terrorism (and therefore certain demographics) are more often investigated, prosecuted, adjudicated or sentenced on the basis of the Directive or national transposing provisions than could be expected on the basis of their share in committing acts of terrorism.

### **5.6.3 Impacts indirectly linked to the Directive**

The Directive requires Member States to take the necessary measures to ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases, are available to persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 3 to 12 (Article 20(1)). According to the FRA, in most of the Member States that it conducted fieldwork in, the “legal conditions for approving the use of investigative tools generally do not differ from other serious crimes”. However, there are some concerns with how these investigative tools are applied in practice, and “some judges and prosecutors acknowledge that the preparatory nature of terrorist offences results in authorising intrusive investigative tools with less tangible evidence compared to other crimes”<sup>167</sup>.

Sometimes counter-terrorism measures impact the procedural rights a suspect has. For

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<sup>162</sup> One from a national authority, one from prosecution or judiciary, and two from human rights organisations.

<sup>163</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 63.

<sup>164</sup> European Network Against Racism, Suspicion, discrimination and surveillance, 2021, page 16.

<sup>165</sup> International Commission of Jurists, 2020, Counter-Terrorism and Human Rights in the Courts: Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism.

<sup>166</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 7.

<sup>167</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 3-4.

example, “in some Member States, pre-trial deprivation of liberty can be imposed for longer periods than for other crimes”<sup>168</sup>. This impact extends to administrative measures, for which the FRA reports that in some cases, the presumption of innocence might be reversed, with defendants having to prove they are not dangerous. This reversion of the burden of proof was also noted by a respondent to the public consultation, representing an NGO. Apart from their procedural implications, the FRA has identified certain administrative measures that might impact fundamental rights and freedoms. It identifies particular concerns with: 1) measures that aim at monitoring individuals such as after a prison sentence; 2) measures imposing a restricting of movement of a suspected individual, and; 3) specific measures imposed as sanctions, including the deprivation of nationality<sup>169</sup>. The proportionality of administrative preventive measures was also questioned by a respondent to the public consultation, representing an NGO.

In the consultations carried out for the external study, several human rights organisations expressed concerns about cooperation and exchange of information between the various authorities involved in the investigation of suspected cases of terrorism. One human rights organisation pointed out that the exchange of personal data acquired and collected during the investigation of terrorist offences (Article 22(2)) can be problematic from the perspective of data protection rules (including the Charter, but also Directive 2016/680<sup>170</sup>) if no mechanism to monitor compliance other than the oversight of prosecutors and judicial authorities is in place<sup>171</sup>.

There are cases in which Member States go further in their criminalisation than the Directive requires. This is not a problem for the functioning of the Directive, as its aim is to create a common baseline in the EU to create a basis for cooperation and information exchange, and to prevent the existence of legal loopholes that may be exploited by terrorists. In fact, several Member States already had more far-reaching legislation in place before the adoption of the Directive. Nevertheless, this could impact on fundamental rights and freedoms for individuals under the jurisdiction of that Member State. The stakeholder consultation carried out for the external study reveals that the criminalisation of public provocation to commit a terrorist offence (Article 5) sparks some debate in light of its fundamental rights impact, especially in certain Member States which have gone beyond the minimum requirements laid down in the Directive (such as Spain)<sup>172</sup>. In addition, the FRA, among others, points to the crime of self-indoctrination in the Spanish national framework, which goes further than Article 8 of the Directive covering the receiving of training for terrorism<sup>173</sup>. Eurojust also points to a court case in which the High Court of Spain expressed that for the offence of self-indoctrination, “a restrictive interpretation of the criminal legislation is necessary in order not to violate the right to freedom of thought and the right to information”<sup>174</sup>. Likewise, the European Network Against Racism refers to the offence of “apology for terrorism” in France’s national law as having potential adverse effects on fundamental rights<sup>175</sup>.

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<sup>168</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 10.

<sup>169</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 24-26.

<sup>170</sup> Directive (EU) 2016/680, OJ L 119/89, 4.5.2016.

<sup>171</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 62.

<sup>172</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 60.

<sup>173</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 21.

<sup>174</sup> Eurojust contribution to the evaluation of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, 2021, page 11.

<sup>175</sup> European Network Against Racism, Suspicion, discrimination and surveillance, 2021, pages 29-30.

Finally, the FRA notes that “counter-terrorism legislation is not sufficiently evaluated at the national level and new laws are passed without an assessment of the impact of existing legislation, including on fundamental rights. This amplifies the impact counter-terrorism has on various rights, and raises questions of necessity and proportionality of some legislation and policies”. As for independent oversight once measures are in place, “while in some Member States, independent bodies with a robust mandate and expertise oversee counter-terrorism measures including with respect to their fundamental rights compatibility, in many others, such oversight appears to be limited”<sup>176</sup>.

## 5.7. IMPACT ON THE RULE OF LAW

### **Summary findings – impact on the rule of law**

The Directive has had a limited impact on the rule of law. 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. Finally, in two Member States, the Directive is in fact deemed to have had a positive impact on the rule of law, by increasing legal clarity.

The external study points to some fundamental concerns amongst scholars and other stakeholders, especially non-governmental organisations, about the compatibility of the Directive with the principle of the rule of law<sup>177</sup>. These concerns have, however, not been echoed by most stakeholders consulted. Most of them reported no issues about the impact of the Directive on the rule of law, apart from two stakeholders interviewed. In two Member States, the Directive was in fact deemed to have had a positive impact on the rule of law, by ensuring a more nuanced application of certain offences<sup>178</sup>.

The concerns that have been raised with respect to the Directive mostly related to the formal aspect of the rule of law (i.e. requiring the law to be general, prospective (meaning not retroactive), clear and non-contradictory), both linked to the process followed for its adoption (*ex ante*) as well as its content and implementation (*ex post*)<sup>179</sup>.

### **5.7.1 Adoption without impact assessment**

As for the *ex ante* aspect, i.e. the process followed for its adoption, the Directive was adopted without an impact assessment, which reduces the scope for scrutiny, transparency and justification<sup>180</sup>. As explained in section 2.3, 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 the EU underlined the need to act urgently and without delay. There was also an urgent need to implement new international obligations into EU law<sup>181</sup>.

<sup>176</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 3.

<sup>177</sup> Babická, K., 2020, EU Counter-terrorism Directive 2017/541: impact on human rights and way forward at EU level.

<sup>178</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 66.

<sup>179</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 64.

<sup>180</sup> Mitsilegas, V., 2020, Counter-terrorism and the rule of law in an evolving European Union: Plus Ça Change?.

<sup>181</sup> 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

The Court of Justice of the EU has stated that in cases of such ‘urgent’ legislation, the absence of an impact assessment could be compensated by other data collected (e.g. a public consultation or an evaluation once the legislation is in place)<sup>182</sup>. Indeed, this is one of the reasons why the Commission had asked the FRA to carry out its research into the impact on fundamental rights and freedoms of the Directive, with a view to feeding its findings into the evaluation. The view of the Court of Justice of the EU is not shared by some stakeholders (including academics and the European Parliament), who argue that these sources of evidence “lack the specific framing and objectives of an impact assessment”<sup>183</sup> and, therefore, the requirement to justify legislative action can only be fulfilled by properly assessing, before adoption, the objectives and policy options, and their impact<sup>184</sup>.

### 5.7.2 The principle of legality and legal clarity

As for the impact on the rule of law that the Directive has had *ex post*, i.e. through its content and implementation, it is important to consider the concept of legality. The principle of legality requires the law to be sufficiently clear to ensure a minimum standard of certainty and foreseeability to avoid arbitrariness. In practice, the European Court of Human Rights argues, criminal offences must be sufficiently defined to allow individuals to model their behaviour to comply with the rules, if needed with appropriate advice<sup>185</sup>. According to the desk research carried out for the external study, certain offences and their definitions of the Directive are not seen as sufficiently concrete or clear by certain stakeholders. This issue was already raised at the proposal stage by several non-governmental organisations<sup>186</sup> and has also been echoed in academic literature on various occasions since then. In their view, the vagueness of some of the EU and national definitions has resulted in room for interpretation by judges, prosecutors and legal practitioners<sup>187</sup>, inspiring the International Committee of Jurists to draft guidelines on their interpretation<sup>188</sup>. Three respondents to the public consultation (one EU citizen and two NGO representatives) held the view that the provisions of the Directive lack clarity and pose challenges in their application and interpretation.

Stakeholders involved in implementing the Directive, as well as members of the judiciary and prosecutors, do not generally share this view. While one human rights organisation and one international organisation consulted for the external study shared the criticism

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Council of Europe Convention on the Prevention of Terrorism (2015) and the Financial Action Task Force standards on terrorist financing.

<sup>182</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 64.

<sup>183</sup> Mitsilegas, V., 2020, Counter-terrorism and the rule of law in an evolving European Union: Plus Ça Change?.

<sup>184</sup> European Parliament, Directorate-General for Internal Policies (Policy Department C – Citizens’ rights and constitutional affairs), 2017, The European Union’s Policies on Counter-Terrorism; Caiola, A., 2017, The European Parliament and the Directive on combating terrorism.

<sup>185</sup> The ECtHR requires a degree of foreseeability that is reasonable in the circumstances, recognising that absolute certainty would be impossible to attain.

<sup>186</sup> International Commission of Jurists (ICJ), Amnesty International and Open Society Justice Initiative, 2016, Joint submission on the European Commission’s proposal for a Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism.

<sup>187</sup> Babická, K., 2020, EU Counter-terrorism Directive 2017/541: impact on human rights and way forward at EU level.

<sup>188</sup> International Commission of Jurists, 2020, Counter-Terrorism and Human Rights in the Courts: Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism.



that the Directive is insufficiently clear, most national stakeholders (national authorities, counter-terrorism units and members of the judiciary) found that the terms of the Directive are sufficiently clear and that no clarification is needed. Similarly, when asked about the clarity of specific terms such as aiding or abetting (Article 14), all national authorities answered indicated that no clarification is needed. Among members of the judiciary and counter-terrorism units, opinions on whether there is a lack of clarity and therefore guidance needed varied slightly. While counter-terrorism units did not see such a need, a small majority of members of the judiciary and prosecutors who participated in the survey expressed that guidance concerning definitions used could be beneficial<sup>189</sup>.

### **5.7.3 Proving terrorist intent and foreseeability**

As discussed in section 5.2.3, several Member States reported difficulties proving terrorist intent. This issue has been discussed in sections 5.1 and 5.2 on relevance and effectiveness, but it also may have an impact on legality and the rule of law. To determine terrorist intent, judges and prosecutors usually adopt the same approach as to all other cases of criminal offences, based on principles and rules contained in the criminal procedural code (i.e. using all evidence available during the trials and prioritising factual evidence to infer the subjective element). Difficulties to prove terrorist intent was also explicitly mentioned by several judges and national authorities interviewed. One respondent to the public consultation from an NGO also pointed to this difficulty. 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, it relates to the gathering of evidence, especially when the evidence is located outside of the national territory, a circumstance which is very common in the current terrorist context<sup>190</sup>.

The FRA notes that for some of the provisions of the Directive, “intent becomes the determining factor distinguishing between a lawful activity and a crime”<sup>191</sup>. The FRA notes that “diverging jurisprudence with regard to intent leads to different guidance for first instance decisions and a lack of foreseeability”<sup>192</sup>. In the context of Article 9 covering traveling for the purpose of terrorism, the FRA notes that the subjective element of intent may reverse the burden of proof towards to the defendant. However, it also seems that “courts are relatively strict when assessing intent in cases of travel, and the accused can be acquitted even in cases that appear relatively clear to the prosecution”<sup>193</sup>. Likewise, in the context of Article 8 on receiving training for terrorism, the FRA notes that “different professional groups offer diverging perspectives on the impact of this challenge on fundamental rights”. Defence lawyers claim that, in some cases, authorities present the activity itself, such as visiting a certain website, as evidence of intent, which impacts the principle of legality. However, “some law enforcement officers emphasise that intent is always carefully examined, and unless the police catches a person explicitly talking about their plans, it usually has to collect a lot of different elements that together prove a terrorist intent”<sup>194</sup>.

Eurojust highlights several court cases in which intent is explicitly discussed. In one case, a person was acquitted for receiving training for terrorism, because “the

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<sup>189</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 65.

<sup>190</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 34.

<sup>191</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 7.

<sup>192</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 14.

<sup>193</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 18.

<sup>194</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 22.

investigation did not establish that the defendant had taken any steps that would suggest that he had a concrete intention to use the materials to commit or participate in particularly serious crimes, that is to say, a terrorist act”<sup>195</sup>. In another case, the Supreme Court referenced the Directive and noted that “with regard to receiving instructions ... in addition to the objective of the instruction being to commit or contribute to a terrorist offence, the recipient of these instructions must also have the intention to commit or contribute to a terrorist offence”. In the case under discussion, this intent was established by the court<sup>196</sup>.

#### **5.7.4 Potential impact on lawful activities**

Finally, the FRA reports that certain stakeholders (NGOs, defence lawyers, academics and some members of the judiciary) raise concerns over expanding the notion of terrorism and the use of counter-terrorism measures to other areas, although this is not strictly limited to the effects of the Directive<sup>197</sup>. In addition, one human rights organisation interviewed for the external study stated that the implementation of the Directive may lead to situations in which acts that are not linked to a terrorist act may be considered as such, which would impact the rule of law<sup>198</sup>.

The FRA notes that a preventive approach to criminal law “can lead to criminalisation of ordinary activities such as travelling, studying or using online communication channels, and impact on lawful activities of actors such as journalists, researchers or humanitarian organisations”<sup>199</sup> and has researched whether this is the case in practice for several specific provisions of the Directive (Articles 5, 8 and 9). For Article 5, covering public provocation to commit a terrorist offence, the FRA notes that “while many respondents state that public provocation does not appear to affect legitimate professional activities, such as the work of journalists, some offer practical examples e.g. of a scientist arrested for having used in the research language that is associated with left-wing extremism (Germany), or the lack of harmonised jurisprudence in cases of controversial artistic expression (Spain)”<sup>200</sup>. For Article 8 covering receiving training for terrorism, different stakeholders hold different opinions. Defence lawyers, academics and NGOs raise concerns over the possible criminalisation of legitimate actors. However, “most law enforcement officers, prosecutors and judges across the fieldwork Member States [meaning the seven Member States the FRA conducted fieldwork in], state that they have not experienced such cases, and believe that they could usually be quickly distinguished. Some of them nevertheless consider that in some cases, activities of legitimate actors may appear as receiving training for terrorism, and can be difficult to establish at the beginning of investigations when the reasons for someone to e.g. visit a certain website are still [...] unclear”<sup>201</sup>. Finally, for Article 9, covering traveling for the purpose of terrorism, the FRA reports that “judges mostly consider the risk rather hypothetical as such cases would be identified at an earlier stage by law enforcement and prosecution. However, law enforcement and public prosecutors in several Member States state that while they generally do not encounter such cases, there is no guidance in place that

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<sup>195</sup> Eurojust contribution to the evaluation of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, 2021, page 12.

<sup>196</sup> Eurojust contribution to the evaluation of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, 2021, pages 10-11.

<sup>197</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 3.

<sup>198</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 60.

<sup>199</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 2.

<sup>200</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 13.

<sup>201</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 22.

would assist them in distinguishing lawful activities from terrorist travel<sup>202</sup>.

## **5.8 IMPACT ON THE LEVEL OF ASSISTANCE AND PROTECTION PROVIDED TO VICTIMS OF TERRORISM**

### **Summary findings – impact on the level of protection and assistance provided to victims of terrorism**

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. Such factors, although not directly emanating from the Directive, reduce the positive impact the Directive overall has on the level of assistance and protection provided to victims of terrorism.

### **5.8.1 Analysis of the impact of the Directive on the assistance and protection provided to victims of terrorism**

The evaluation finds that the impact of the Directive on the assistance and protection provided to victims of terrorism varies across Member States. The Directive is observed to have resulted in the adoption of measures that are seen as beneficial for victims of terrorism in many Member States, but these are usually Member States with no or small numbers of victims of terrorism. This can be explained by the fact that Member States that had been subject to attacks and therefore had victims of terrorism, usually already had more developed structures and more comprehensive services in place, as discussed in section 3.5.

Most Member States have taken steps towards improving the assistance and protection of victims of terrorism in the last years. The extent and significance of the advancements varies across Member States, and so does the rationale behind them (namely to comply with the obligations of the Directive, of the Victims' Rights Directive, or in response to terrorist attacks). Nevertheless, the Directive has prompted the adoption of measures in 16 Member States, which are considered useful tools to provide adequate protection and assistance to victims of terrorism by ensuring specialised support and services or better supporting victims in the Member State of their residence when the terrorist offence was committed in another Member State.

The feedback from stakeholders consulted for the external study was generally positive. With the exception of respondents to the public consultation, who mostly held a neutral opinion, the majority of respondents indicated that the Directive has been effective in enhancing the level of protection, support and assistance provided to victims and their family members. Overall, stakeholders from national authorities and members of the judiciary found that procedures through which victims access and are provided protection are designed in a way that are 'victim-friendly' and which minimise the psychological and administrative burden on them. Equally, stakeholders from the judiciary agreed that the communication with victims is given in simple and accessible language, and takes into account the personal characteristics of the victims that may affect their ability to

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<sup>202</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page 17.

understand or make themselves understood. The effectiveness of both developments (on procedures and communication with victim) was attributed to the Directive by most stakeholders from the judiciary, with the exception of two respondents, who held the view that improvements cannot be linked to the Directive. On the other hand, victims' associations underlined that a more centralised approach in communicating with victims is necessary. Some victims' associations specified that they could benefit from more elaborate communications with the general public (e.g. crisis helpline, website, information portal), and specific requirements of communicating with victims just following an attack and in the long-term<sup>203</sup>.

According to national authorities consulted, the Directive has also contributed to the improvement of victims' access to information on their rights, the available support services and compensation schemes of other Member States. In terms of access to information, as a result of the Directive, eight Member States have adopted measures that are considered to be very effective in ensuring the provision of information to victims, and which are highlighted as good practices in the EU Handbook on victims of terrorism<sup>204</sup>. These measures include, for example, the establishment of helplines and specialised websites.

Nevertheless, certain shortcomings can be identified. Some stakeholders from national authorities pointed out that that not all the information provided to victims is available in other languages, preventing victims who do not speak the language from effectively accessing it. Furthermore, not all Member States have designated single contact points - currently, 17 of the 25 Member States covered by the Directive have done so<sup>205</sup>. In fact, the external study recommends the Commission to consider proposing an obligation to establish such single contact points<sup>206</sup>. In addition, a respondent to the public consultation from a national authority noted that the Directive "contributed to the strengthening of the regulatory framework for victims of terrorism [but that] the effective implementation of both the existing and new regulatory framework with regard to victims, remains in question".

On the effectiveness of the Directive in ensuring adequate protection and assistance in cross-border cases, the evidence suggests that despite the challenges identified with respect to cooperation in specific cases, most stakeholders from national authorities and victims' associations believe that the Directive has facilitated overall cooperation between authorities and entities providing specialist support to victims between Member States. Some stakeholders from national authorities found that the Directive has had an impact on the better protection of their citizens in other Member States, compared to the situation prior to the entry into force of the Directive. However, other factors outside of the Directive have also played an important role with respect to cooperation in cross-border cases, such as the establishment of single contact points in Member States, as well as the connections already established between Member States on a bilateral basis<sup>207</sup>. The

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<sup>203</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, pages 42-43.

<sup>204</sup> EU Centre of Expertise for Victims of Terrorism, EU Handbook on Victims of Terrorism, 2021.

<sup>205</sup> Belgium, Bulgaria, Croatia, Czechia, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Slovakia, Spain and Sweden.

<sup>206</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 69.

<sup>207</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 43.

European Network on victims' rights (ENVR)<sup>208</sup> 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.

Nevertheless, when it comes to the impact of the Directive on individual, cross-border cases, the feedback differed across stakeholder groups. Among members of the judiciary, less than half believe that adequate protection is provided to victims who are resident in one Member State and who are victims of a terrorist attack in another Member State. This point was also supported by a report from the German Presidency, which underlined that it is usually cross-border victims who face particular obstacles that prevent them from effectively exercising their rights<sup>209</sup>. Among the obstacles identified in this report and by stakeholders consulted, the main ones are language barriers and the lack of familiarity with the legal system or the services available in the Member State. National victim support associations also underlined the psychological and logistical difficulties that victims of terrorism experience when returning to the place where the attack took place and where the trial is taking place<sup>210</sup>. Two victims' associations from Spain mentioned that adopting a document where all the rights of victims of terrorism are clearly set out would help to ensure that victims are recognised as such across the EU and facilitate their access to available services. The external study also recommends the Commission to produce a document on all the obligations imposed by the Counter-terrorism Directive and the Victims' Rights Directive<sup>211</sup>.

Finally, some national authorities emphasised that EU-level initiatives have also facilitated the exchange of information and knowledge between Member States in the field of rights of victims of terrorism, therefore contributing to the effectiveness of the Directive in this area<sup>212</sup>. For example, 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 trainings and by acting as the EU level Hub of expertise on all issues relevant for victims of terrorism<sup>213</sup>. The facilitation of cooperation between Member States to improve support for victims of terrorism in cross-border cases through the EU Centre of Expertise for Victims of Terrorism was among the key activities listed in the EU Strategy on victims' rights (2020-2025)<sup>214</sup>. The external study recommends the continuation of the activities of the EU Centre.

## 6. CONCLUSIONS

The overall objective of this Staff Working Document is to evaluate Directive (EU) 2017/541 on combating terrorism. The evaluation considers the Directive in light of eight evaluation criteria: relevance, effectiveness, efficiency, coherence, EU added value, the

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<sup>208</sup> 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, please see: <https://envr.eu/>.

<sup>209</sup> German Presidency, 2020, Report on the state of play regarding support for victims of terrorism, particularly in cross-border situations (12744/20).

<sup>210</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 43.

<sup>211</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 27.

<sup>212</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 45.

<sup>213</sup> [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/protecting-victims-rights/eu-centre-expertise-victims-terrorism\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/protecting-victims-rights/eu-centre-expertise-victims-terrorism_en)

<sup>214</sup> Communication from the Commission – EU Strategy on victims' rights (2020-2025), COM(2020) 258 final, 24.6.2020.

impact of the Directive on fundamental rights and freedoms, on the rule of law, and on the level of protection and assistance provided to victims of terrorism.

On the basis of the comparison made between the baseline situation, the implementation state of play, and feedback from stakeholders, the evaluation finds that:

- i. The scope and definitions of the Directive, as well as its minimum rules, are overall highly relevant. This finding was supported by a large majority of the stakeholders consulted. The relevance has been considered against the main terrorist trends in the EU. In relation to the expected relevance in the coming years, the evaluation finds that the Directive is expected to remain relevant in the next years. Both for the relevance in the reference period, as well as the relevance in the coming years, some minor gaps are identified, in particular in relation to the provisions on victims of terrorism.
- ii. The Directive has achieved its objectives to a satisfactory extent. Overall, the Directive seems to be equally applied to all forms of terrorism, which is important given the current and evolving threat picture. 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. A lack of available quantifiable data from the Member States makes it difficult to carry out a detailed assessment of the Directive's regulatory burden. 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. In addition, the evaluation has not found any scope for simplifying or reducing the administrative burden of implementing the Directive.
- 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, although a potential inconsistency has been identified between the Directive and the Fifth Money-Laundering Directive.
- v. In terms of EU added value, the Directive has generated added value beyond what could have been achieved unilaterally by Member States or at international level. It has also provided added value compared to the Framework Decision. For the articles covering the rights of victims of terrorism (Articles 24 to 26), stakeholders' views are slightly more divided, although their assessment is overall positive. As for the consequences of withdrawing the Directive, the evaluation finds that the most likely consequence would be a reduced harmonisation of the offences falling under the Directive, which would have a negative impact on cooperation and information exchange between Member States.
- 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 do 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 criticise 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. 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. Finally, in two Member States, the Directive is in fact deemed to have had a positive impact on the rule of law, by increasing legal clarity.
- 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. Such factors, although not directly emanating from the Directive, reduce the positive impact the Directive overall has on the level of assistance and protection provided to victims of terrorism.

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.

On the availability of relevant data for the purpose of the assessment, it has to be concluded that there was a lack of certain types of data. This includes quantifiable data in relation to the costs or burden of implementing the Directive, but also applies to data on the practical implementation of the Directive across all Member States. Member States did not always provide sufficient evidence during the consultations for the external study. This problem has been mitigated by, firstly, selecting eight focus Member States to study more in-depth how the Directive is implemented in practice. Secondly, after having noticed the lack of data available in certain cases, the questionnaires and surveys have been complemented with specific questions to gather as much relevant data as possible. The evaluation is based on a combination of extensive desk and field research, legal analysis including relevant case law, and a wide variety of stakeholder feedback through consultations carried out by the external contractor, but also by the Commission, the FRA and the EESC. This made it possible to triangulate the findings of the evaluation. Nevertheless, the evaluation would have benefitted from having additional data, and this is considered a lesson learnt (further discussed below).

Despite the overall positive assessment, there are several issues limiting the functioning of the Directive. There is scope for further improvement based on the lessons learned and shared by stakeholders as part of the evaluation.

Firstly, several Member States reported **difficulties in proving terrorist intent**. Intent is

an important element for the provisions of the Directive. The evaluation notes diverging views among stakeholders whether this is an issue that will need to be addressed: respondents from national authorities agreed that further clarifications of the term “intentional acts” are considered unnecessary, while the majority of respondents in the judiciary survey reported it is necessary.

In addition, there are indications that even though the Directive applies to all forms of terrorism, some Member States find it **challenging to classify violent extreme right-wing acts as acts of terrorism**. Addressing this issue is important not only to enhance the effectiveness of the Directive, but also 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.

Furthermore, some of the stakeholders consulted held the view that certain **provisions might benefit from clarification**. The external study therefore recommends the Commission to adopt non-regulatory guidance for Member States on the interpretation of Articles 1 – 14 of the Directive. Nevertheless, during the workshop with Member States, Europol, Eurojust and the EU Counter-Terrorism Coordinator’s office on 1 July 2021, 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.

Other issues have been identified in relation to the Directive’s **impact on the protection and assistance provided to victims of terrorism**. The plight of cross-border victims of terrorism is particularly evident throughout the evaluation. Overall, the Directive had a lower impact on the protection and assistance provided to victims of terrorism, and in particular cross-border victims, than expected.

The lessons learnt from the evaluation are, firstly, that it is important to monitor whether the Directive is equally applied to all forms of terrorism, even when it applies equally on paper. If one form of terrorism is less often investigated, prosecuted, adjudicated or sentenced on the basis of counter-terrorism provisions, it, among other things, poses a lost opportunity in terms of creating legal precedence for future cases. Although it is a sole competence of the judiciary to assess whether counter-terrorism legislation applies to individual cases, more efforts could be made at EU level to enhance the understanding of all forms of terrorism.

This relates to the second lesson learnt, which is that it is important to bring all relevant work strands to the attention of those implementing and applying the Directive, including through training of justice professionals. Some of the challenges identified in this evaluation (such as the difficulty of collecting evidence outside of the national territory or combating violent right-wing extremism) are being mitigated but in a different setting, e.g. in international fora or by actors involved in the prevention of radicalisation. It is therefore crucial to bring together all relevant stakeholders at regular intervals.

Thirdly and finally, it would be beneficial if Member States consistently monitor certain aspects related to the Directive. For example, the costs or burdens related to its implementation, or possible complaints by the public for disproportionate limitations of fundamental rights or violations of the principle of non-discrimination. This would enhance both the Member States’ as well as the Commission’s ability to evaluate the functioning of the Directive in the future.



## **ANNEX I: PROCEDURAL INFORMATION**

### **1. Lead DG, Decide Planning/CWP references**

The Evaluation Roadmap for the initiative was published by DG Migration and Home Affairs (DG HOME) on the Commission's 'Have your say' webpage<sup>215</sup> in October 2020. The Terms of Reference for engaging a contractor to carry out the external study as part of the evaluation were drawn up in the autumn of the same year. A request for service was issued on 27 October 2020, and a contractor selected by an evaluation committee consisting of staff from DG HOME later during the autumn<sup>216</sup>. The study began on 30 December 2020 and ended on 25 June 2020. The agenda planning (Decide) reference assigned to the evaluation is PLAN/2020/8726. There is no reference to the evaluation in the Commission Work Programme 2021.

### **2. Organisation and timing**

As per the Better Regulation Guidelines, an inter-service steering group was set up within the Commission to oversee the evaluation. Several Directorates-General (DGs) within the Commission<sup>217</sup> were invited to nominate representatives to the steering group.

The meetings of the steering group were chaired by DG Migration and Home Affairs (DG HOME). The steering group was regularly consulted over the course of the evaluation, typically in conjunction with the submission of specific draft reports by the contractor responsible for carrying out the external study. These consultations took place both in the context of regular meetings, via email and telephone. The following list provides an overview of the steering group's work over the course of the evaluation:

- The inter-service steering group was convened for the first time on 9 October 2020 in order to receive initial information about and provide feedback on draft versions of the Terms of Reference for the external study and the Stakeholder Consultation Strategy, which described how the Commission intended to consult with different stakeholder groups in the context of the evaluation;
- On 1 February 2021, the steering group received from the contractor a presentation of its draft Inception Report. This report was revised on the basis of the steering group's feedback and subsequently accepted by the steering group. The meeting also served as an opportunity to provide feedback on the draft questionnaire for the public consultation, and to collect suggestions from the steering group as to possible stakeholders to invite to participate in surveys and interviews;

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<sup>215</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12545-Combating-terrorism-evaluation-of-EU-rules\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12545-Combating-terrorism-evaluation-of-EU-rules_en)

<sup>216</sup> The call for service was issued via framework contract HOME/2018/ISFB/PR/EVAL/0017. One contractor submitted a bid to carry out the evaluation. The evaluation committee considered a number of criteria, namely: compliance with the technical specifications described in the Terms of Reference; demonstrated understanding of the objectives and tasks; the quality of the preliminary assessment of difficulties and expected results; the quality of the proposed methodology; and the quality of the project management and team organisation. The Commission awarded the contract to ICF.

<sup>217</sup> The DGs invited to participate in the steering group included: the Secretariat-General of the Commission (SG); Legal Service (LS); European Civil Protection and Humanitarian Aid Operations (ECHO); Justice and Consumers (JUST); and Communications Networks, Content and Technology (CONNECT);

- On 17 March 2021, the steering group met again, this time to receive a presentation of the contractor's draft Interim Report. The report was subsequently accepted after revisions were made to reflect the comments of the steering group;
- On 15 April 2021, DG HOME organised a stock-taking workshop, to which Member States' representatives as well as the steering group was invited. The aim of the workshop was to have the relevant stakeholders present the state of play in relation to their work on the evaluation. DG HOME, ICF, the FRA and the EESC gave presentations, with 24 out of the 25 Member States concerned being present.
- On 28 May 2021, the steering group convened to receive and provided feedback on the basis of a presentation of the contractor's draft Final Report. The participants were invited to provide additional written feedback after the meeting;
- On 1 June 2021, the steering group was convened to discuss the draft staff working document, and to provide comments.
- On 21 June 2021, a revised draft of the Final Report was circulated by email to the members of the steering group for final review. On 24 June 2021, DG HOME provided the contractor with the steering group's comments;
- On 21 July 2021, the Final Report was re-submitted by the contractor to DG HOME and subsequently accepted;

The work of the contractor was extended by approximately two weeks, given the fact that the public consultation was launched later than initially anticipated. This decision was made out of respect for the Better Regulation Guidelines and in order to allow the contractor adequate time to account for all responses to the Consultation (which ended on 16 June 2021).

### **3. Exceptions to the better regulation guidelines**

In conducting the evaluation, no exceptions from the usual procedural requirements described in the Better Regulation Guidelines were required.

### **4. Consultation of the RSB**

The Regulatory Scrutiny Board was consulted on 14 July 2021. On 16 July 2021, it gave a positive opinion with recommendations for improvement. The current document was then revised to better reflect the cross-border component of the Directive and its EU added value. The document was also streamlined and repetitions were deleted. In addition, the document was revised to better explain data limitations and how these impacted the findings. Finally, lessons learnt were added.

### **5. Evidence, sources and quality**

The evaluation drew on different types of documents at EU, international and national level, respectively. Documents at the EU level provided indications as to the nature and scope of EU counter-terrorism policy, in particular when related to criminal law. At international level, the contractor reviewed documents describing international standards and initiatives relating to criminal law provisions in the field of counter-terrorism. Finally, at the national level, national legislative measures, strategies, administrative procedures and guidelines that in one way or another were relevant in transposing and implementing the provisions contained in the Directive were of particular relevance.

Drawing on evidence from the 2020 transposition report of the Directive<sup>218</sup>, the contractor conducted an in-depth analysis of national implementation measures with the aim of creating a better understanding of the situation in practice. More information on sources is provided in Annex III. Besides a review of the relevant documents, the evaluation also relied on extensive consultations with a wide range of stakeholders. These consultations served as opportunities to collect new data or to confirm the validity of already collected data. Additional information concerning the stakeholder consultations is provided in Annex II.

Apart from this work done by the contractor, the Commission relied on two additional sources of information. First, in October 2019, DG HOME had requested the FRA to carry out research into the impact on fundamental rights and freedoms of Directive (EU) 2017/541 on combating terrorism, with a view to feeding its findings into the evaluation of the Directive. The FRA submitted their contribution to DG HOME on 14 April 2021. The FRA will publish a more elaborate report at the end of 2021. Secondly, in October 2020, DG HOME had requested more information from Eurojust to feed into the evaluation. Eurojust sent DG HOME its contribution on 29 April 2021. Finally, the EESC, conducted an evaluation of the Directive as well, and produced an information report<sup>219</sup>.

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<sup>218</sup> COM(2020) 619 final, 30.9.2020.

<sup>219</sup> European Economic and Social Committee, Information report, Evaluation of the Directive on combating terrorism, SOC/675, 2021.

## ANNEX II: STAKEHOLDER CONSULTATION

This annex is the synopsis report of all stakeholder consultation activities undertaken for the evaluation.

### 1. CONSULTATION STRATEGY

The consultation strategy, as agreed with the inter-service steering group, identified the relevant stakeholders and selected the appropriate consultation methods and tools. The strategy identified as the main stakeholders Member States' authorities responsible for the implementation of the Directive. Other important stakeholders are relevant Directorate-Generals within the Commission, the European External Action Service, the FRA, Europol, Eurojust, civil society, academia and think tanks, and the general public. As for the consultation methods and tools, the strategy proposed as a minimum to carry out targeted surveys, semi-structured interviews, and a public consultation.

### 2. CONSULTATION ACTIVITIES

Table 1 provides an overview of the consultation activities and the main stakeholder groups that were targeted by the external study. Stakeholders were selected to be as comprehensive and representative as possible and all relevant groups (at EU, national and international level) were given an opportunity to provide their views and experiences concerning the functioning and impacts of the Directive. The consultation comprised a mix of complementary methods including online surveys, semi-structured interviews, a public consultation and a webinar for victims' support associations.

*Table 1: Consultation strategy activities and tools per each stakeholder group*

Stakeholder group	Consultation activity/tool	Answers received/ Interviews carried out
<b>EU institutions and bodies</b>	Interviews (including scoping interviews)	10
<b>International stakeholders</b>	Interviews	6
<b>Other stakeholders</b>	Interviews	4 (3 humanitarian organisations)
<b>National authorities in Member States</b>	Email questionnaire in Member States	23 Member States
	Interviews in focus countries	13 interviews in 8 Member States
	Public consultation	2 representatives from public authorities
<b>Counter-terrorism units</b>	Online survey in Member States	7 responses in 7 Member States
	Interviews in focus countries	1 interview in 1 Member States

Stakeholder group	Consultation activity/tool	Answers received/ Interviews carried out
<b>Judiciary and prosecutors</b>	Online survey in Member States	15 responses covering 10 Member States
	Interviews in focus countries	5 interviews covering 5 Member States
<b>Human rights organisations</b>	Interviews in focus countries	5 interviews in 5 Member States
	Public consultation	15
<b>Victims support associations</b>	Interviews in focus countries	7 interviews in 5 Member States
	Webinar in Member States	10 organisations covering 7 countries
<b>General public</b>	Public Consultation	6

In addition to these consultations, the FRA also conducted interviews with 107 practitioners (defence lawyers, judges and investigative judges, law enforcement, public prosecutors, NGOs, and academia) in their focus Member States (Belgium, France, Germany, Greece, Hungary, Spain and Sweden).

## 2.1 Questionnaires

A comprehensive questionnaire, covering all the evaluation criteria and designed to be able to answer all the evaluation questions, was sent to the competent authorities in each Member States. The questionnaire was provided in Microsoft Word to facilitate circulation and elaboration of a consolidated answer from national competent authorities. The questionnaire was launched on 24 February 2021 and disseminated via email. National competent authorities were given until end May 2021 to reply, although initially the deadline was set at 22 March 2021.

Replies were received from 23 Member States, mostly from national Ministries of the Interior (including units involved in counter-terrorism as well as victim protection) and Ministries of Justice. Participants provided comprehensive replies covering all questions and evaluation criteria, especially on ‘effectiveness’ and ‘relevance’.

## 2.2 Online surveys

Two online surveys were carried out, one targeting **counter-terrorism units**, and a second one designed for **judiciary and prosecutors** dealing with terrorism-related cases. Both were launched, in English, on 24 February 2021. The surveys remained live for 13 weeks and were closed on 26 May 2021. The surveys were disseminated via email; the survey for the judiciary was also disseminated through national associations of judges and prosecutors. The survey for counter-terrorism units collected seven replies from seven different EU Member States, while the one for members of the judiciary and prosecutors collected 15 responses from 10 Member States.

The two online surveys collected fewer replies than anticipated, despite a dissemination campaign and reminder emails, including in the own language of the target audience.

Respondents provided a good level of detail for all questions and evaluation criteria, although the information on ‘effectiveness’ and ‘relevance’ (especially the questions related to criminal law and investigation and prosecution) was more comprehensive than for the other evaluation criteria (especially ‘efficiency’).

### **2.3 Targeted interviews**

EU and international level stakeholders were interviewed face-to-face or by telephone. ICF carried out ten such interviews, covering EU bodies and institutions, international institutions and international humanitarian organisations.

Interviews were carried out with key stakeholders in eight Member States (BE, BG, DE, EL, ES, FR, IT, NL), selected in collaboration with the Commission. These targeted interviews (31 in total) focused on the implementation of the Directive in the selected Member States. Interviews were conducted with national competent authorities (Ministries of Interior and Ministries of Justice, depending on the institutional set-up in the Member State); counter-terrorism units; judiciary and prosecutors; human rights organisations; and victims associations. The information collected via the targeted interviews focused in particular on the evaluation criteria of effectiveness, relevance, and impacts on fundamental rights.

### **2.4 Webinar with victims’ associations and NGOs**

A 1.5-hour webinar was hosted on 26 April 2021 via the online platform of the EU Centre of Expertise for victims of terrorism (EU CVT). The webinar focussed on the protection and support to victims of terrorism and targeted mostly services and professionals supporting victims. In addition to the Commission and ICF, 10 organisations from seven Member States participated in the webinar.

### **2.5 Stock-taking workshop**

DG HOME organised a stock-taking workshop, to which Member States’ representatives as well as the steering group was invited. The aim of the workshop was to have the relevant stakeholders present the state of play in relation to their work on the evaluation. DG HOME, ICF, the FRA and the EESC gave presentations. 57 representatives from 24 (out of the 25) Member States were present, with representatives from different relevant services, such as ministries of interior, ministries of justice, the judiciary, law enforcement and intelligence.

### **2.6 Public Consultation**

The Public Consultation (PC) was launched on 24 March 2021 via the EU Survey platform and remained open until 16 June 2021 (duration of 12 weeks). The PC was available in all EU official languages<sup>220</sup> and was open to all stakeholders and the general public. So far, the PC has collected 23 replies, which is used as anecdotal evidence.

## **3. RESULTS**

This section first presents the feedback received on the roadmap, and then presents a summary of the results of the stakeholder consultation by evaluation criterion. The criteria of relevance and effectiveness have been merged to reduce repetition.

### **3.1 Feedback received on the roadmap**

Seven stakeholders submitted feedback on the evaluation roadmap, of which one

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<sup>220</sup> Except Irish (Gaelic).

twice<sup>221</sup>. One represented a business association, two a non-governmental association, one a public authority, and three were unspecified. Two stakeholders noted the importance of assessing the Directive's impact on fundamental rights and freedoms, of which one also noted the importance of an efficiency assessment. Two organisations submitted issues to be taken into account in the assessment of the impact of the Directive on the level of protection and assistance provided to victims of terrorism, for example in relation to the right to information. One stakeholder made observations in relation to the protection of critical infrastructure. Another stakeholder commented on the link between religion and terrorism. Finally, one stakeholder commented on the Counter-Terrorism Agenda for the EU, rather than the Directive.

### **3.2 Effectiveness (including the impact on the level of protection and assistance provided to victims of terrorism) and relevance**

#### *Definitions (Articles 3-12)*

Respondents to the **online survey of counter-terrorism units** generally considered the scope and elements of the Directive relevant to combatting terrorism in the EU, although some thought that there was further room to tackle the threat posed by foreign terrorist fighters and returnees and online terrorist content. Counter-terrorism units also generally indicated that the Directive is equipped to address possible future terrorist trends in the EU.

Most counter-terrorism units reported that new measures had been adopted in their Member State related to aspects of the Directive, including legislative measures, policy measures and administrative measures. Counter-terrorism units considered the Directive somewhat successful in approximating the definition of criminal offences in the field of terrorism, establishing minimum rules across the EU on sanctions for terrorism-related criminal offences and enhancing the protection of and support and assistance to victims of terrorism. In general, counter-terrorism units considered the scope and content of the Directive and the way in which it has been applied in practice to have had a positive impact.

Respondents to the **online survey of judiciary and prosecutors** considered the scope and elements of the Directive as relevant for combatting terrorism in the EU, and the majority concurred that the Directive is equipped to address possible future terrorist trends and threats. Respondents mentioned non-comprehensive coverage of extreme right-wing terrorism, uncertainties as to whether the Directive is equipped to address new trends, and the inclusion of targeted assassinations with a racist motive concealed as criminal acts in Article 3 as areas for improvement. The majority reported no gaps in the Directive that need to be addressed, and no difficulties in terms of being able to prove terrorist intent. However, among the replies that reported gaps, lack of clarity on the definition of terrorism and insufficient provisions on "lone actor terrorism" were mentioned, as was the need for a clearer definition of 'intentional acts'. Most respondents did not report any difficulties related to the investigation or prosecution of terrorist cases.

The definitions for criminal offences in the Directive were considered suitable and fit by the majority of respondents to the **online survey of counter-terrorism units**, considering the current and likely future terrorist threats and trends in the EU. Limited concerns were expressed about definition of terrorist offences in Articles 3-12 and 14, the

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<sup>221</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12545-Combating-terrorism-evaluation-of-EU-rules\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12545-Combating-terrorism-evaluation-of-EU-rules_en)

investigation and prosecution of terrorist offences in Articles 19 and 20, the blocking or removal of content constituting a provocation to commit a terrorist offence in Article 21 and the cooperation and exchange of information in the context of terrorist offences in Article 22.

Most respondents to the **online survey of counter-terrorism units** consider the Directive to be effective in establishing minimum rules across the EU on sanctions for terrorism-related criminal offences; enhancing cooperation and information sharing with counterparts in other Member States; enhancing cooperation and information sharing with relevant EU agencies; and approximating the definition of terrorism-related criminal offences across EU Member States.

The vast majority of respondents to the **questionnaire for competent authorities** considered the definitions contained in the Directive to be relevant. Respondents considered the definition of “terrorist offences” in article 3 ‘just right’, and did not consider that the term ‘intentional acts’ requires further clarification.

The majority of Member State competent authorities indicated that terrorist offences were already defined before the Directive came into force. In two Member States, pre-existing measures were identical to the ones provided for by the Directive, while in many others some amendments/extensions were made.

Most Member State competent authorities gave a positive assessment of the effectiveness of the Directive in approximating the definition of terrorist offences:

- Terrorist offences (Article 3): 10 Member States considered the Directive helped ‘to some extent’, while 10 Member States considered the Directive helped to a very or to a very great extent;
- Offences related to a terrorist group (Article 4): 6 Member States considered the Directive helped ‘to some extent’, while 10 Member States considered the Directive helped to a very or to a very great extent; and
- Offences related to terrorist activity (Title III): 6 Member States considered the Directive helped ‘to some extent’, while 12 Member States considered the Directive helped to a very or to a very great extent.

**Interviews with international level organisations** revealed that the Directive was designed as a response to a specific terrorist threat (jihadist terrorism) and that there is a need to consider the evolution of the context, with the emergence of other forms of terrorism (such as right-wing extremism). Interviewees also commented that the scope of the Directive might leave too much room for interpretation to Member States. They noted that the notions of intent and participation are too broad and difficult to apply (e.g. in the case of returning foreign terrorist fighters). Interviewees also highlighted that the repatriation of children should be included in the Directive.

**Interviewees at EU level** highlighted that the Directive provides a stronger and more harmonised treatment of national travel for terrorism purposes. However, on the topic of foreign terrorist fighters, there is still need for more EU guidance for national prosecutors and Eurojust. Interviewees explained that although right-wing extremism is becoming increasingly relevant, it would be complex to include it in the scope of the Directive.



**Interviews with competent authorities in selected Member States** confirmed the main findings from the surveys and highlighted some difficulties in proving intent. Interviewees highlighted that many issues that have arisen in the Member States are related to national provisions - many of which were already in place before the Directive.

The opinion of respondents to the **open public questionnaire** on the relevance of the definitions was overall slightly more negative than positive. The number of respondents who found the Directive's definitions not suitable and fit for purpose in light of the changing nature and pattern of terrorist threats faced by the EU (9 of 21 respondents) was higher than those who believed they are (6 of 21 respondents)

#### Sanctions (Articles 15-18)

In the **online survey for judiciary and prosecutors**, most respondents considered that sanctions rendered for terrorist offences in their Member State are effective, proportionate and dissuasive. Respondents also specified that terrorist offences are subject to high penalties under national law, the criminal law provides for a wide span of possible punishment for most offences related to terrorism, penalties for promoting terrorist propaganda range from one to three years imprisonment and that sanctions already imposed are considered as effective and proportionate.

In the **Member States' questionnaire**, nine competent authorities reported that their Member State had adopted measures to implement the Directive's provisions on sanctions. In many cases, they aligned their sanctions by increasing fines and prison sentences. In other cases, national legislation already defined sanctions more severe than those laid down in the Directive.

Respondents reported that the sanctions have been used so far mostly in cases against jihadists, and more rarely against right-wing extremists. They have been applied in several Member States for different offences as defined in the Directive:

- Terrorist offences: 3 Member States;
- Offences relating to a terrorist group: 3 Member States;
- Public provocation to commit a terrorist offence: 2 Member States;
- providing and receiving training for terrorism: 1 Member State;
- Travelling for the purpose of terrorism: 2 Member States;
- Financing of terrorism: 5 Member States;
- Other offences: 1 Member State; and
- Aiding and abetting, inciting and attempting: 1 Member State.

Member State competent authorities considered that the Directive's minimum rules on penalties for natural and legal persons are suitable and fit for purpose.

The opinion of respondents to the **open public questionnaire** on the relevance of the minimum rules laid down by the Directive on sanctions and penalties linked to terrorism-related offences was slightly more negative than positive (5 of 18 respondents disagreed that they were suitable and fit for purpose to address current and possible future trends, while 3 respondents agreed and 4 held a neutral position).

### Investigation, prosecution and adjudication (Articles 19-20)

The **online survey to judiciary and prosecutors** highlighted several relevant court cases that have taken place, as well as rulings, and convictions/acquittals. Sanctions have also been reported, including five imprisonments, ranging from 1 to 10 years.

The scope and content of the Directive and the way in which the Directive has been applied in practice have a positive impact on the effectiveness of the Directive according to many respondents. Many respondents reported that their organisation could benefit from European Commission legal guidance in interpreting the provisions of the Directive, especially via training courses and seminars and legal guidance combined with examples from complying jurisprudence in Member States.

The **questionnaire to competent authorities in Member States** found that new measures were adopted since 2017 in 13 Member States. Most concerned amendments or extension of existing legislation.

A limited number of respondents indicated that the Directive had an overall positive impact on the ability of authorities in the Member States to:

- Investigate terrorism-related criminal offences;
- Prosecute terrorism-related criminal offences;
- Adjudicate terrorism-related criminal offences.

The vast majority of respondents did not report issues faced by their Member State to implement the provisions in Articles 19 and 20 of the Directive, and indicated that they are adequate given the changing nature and pattern of terrorist threats.

**Interviews at EU level** highlighted the benefit of further guidance on the relationship between international humanitarian law and terrorism law to listing terrorist groups.

### Online content (Article 21)

Most respondents in the **online survey of counter-terrorism units** thought that the Directive is suitable to tackle the threat of online terrorist content but there was no consensus on whether online terrorist content is removed or blocked more swiftly now than before 2017.

**Respondents to the questionnaire for competent authorities** reported that most Member States adopted practical measures to ensure that online content constituting a public provocation to commit a terrorist offence is removed or blocked, which were legislative measures, administrative measures, a combination of legislative and administrative measures, judicial measures, and policy measures. Most respondents considered that Art. 21 and the national provisions that transpose it, have been effective in ensuring that online terrorist content is removed or blocked.

**Interviews at EU level and with national competent authorities** in eight Member States highlighted that the new Regulation on online content will introduce some changes.

### Cooperation and exchange of information (Article 22)

The **online survey to counter-terrorism units** did not provide a clear assessment on whether the Directive made information sharing and/or cooperation more efficient. Some respondents reported that cooperation has been enabled or facilitated through joint operations and investigations and through collaboration on terrorism issues between

Member States, and that Article 22 has strengthened information sharing for electronic and biometric information or evidence.

The views from the **online survey to judiciary and prosecutors** were similarly fragmented, with only five respondents considering that Article 22 has enabled their organisation to share information with counterparts in other EU Member States. Respondents specified that the Directive has strengthened information sharing in relation to particular types of information or evidence, on travel of citizens to other Member States that could be related to terrorist intentions, and on evidence resulting from measures of surveillance of telecommunication.

Results from the **questionnaire to competent authorities in Member States** indicate that most Member States already had measures in place to ensure information exchange with other Member States before the Directive entered into force. Most respondent agreed that the Directive has improved the exchange of information between Member States, making it easier to:

- Send more information spontaneously to other Member States;
- Receive more information spontaneously from other Member States;
- Respond to more requests for information from other Member States;
- Issue more requests for information to other Member States;
- Respond more promptly to requests for information from other Member States; and
- Respond more promptly to requests for other Member States.

In the **interviews, competent authorities** stressed the importance of cooperation and exchange of information among Member States, which they considered as improved over time. However, some highlighted that they already had good exchanges and cooperation with other Member States and EU agencies to counter terrorism (Europol and Eurojust) prior to the Directive.

In the **interviews, human rights organisations** in Member States reported some concerns on the extent of cooperation and exchange of information among Member States, especially when intelligence services are involved. They noted that there is no clear understanding of the conditions under which the transfer of information is required, of what threshold the intelligence agencies should use to transfer information to police, nor of the obligations to do so.

Only one respondent to the **open public questionnaire** reflected on the effect that the Directive had on exchanges of information and cooperation, indicating that it had led to significant improvements in cooperation in the field of counter-terrorism, both between Member States as well as Member States and Union agencies and bodies active in this area (e.g. Europol and Eurojust). More specifically, the respondent found that Article 22 had led, to some extent, to more proactive cooperation and information sharing for all forms of information and evidence, including electronic evidence, between Member States.

#### Victims (Articles 24-26)

Most respondents in **the online survey of judiciary and prosecutors** reported that victims of terrorism in their Member States receive adequate protection, that the

procedures through which victims' access and are provided protection are designed in a way that are 'victim-friendly' and that the communication with victims is given in simple and accessible language and considers personal characteristics. However, most thought that inadequate protection is provided in their Member State to residents who become victims of terrorist attacks in other EU Member States and to victims of terrorist attacks that take place in their Member State but who are resident in other EU Member States. Most respondents affirmed that the protection of victims of terrorism has improved, but few attributed this to the Directive.

The **questionnaire to competent authorities** found that many Member States already had measures to support and protect victims of terrorism, which have not been modified as a result of the Directive. Some Member States had measures in place, which have been modified as a result of the Directive and some new measures have been implemented. Member States provide different types of assistance and support to victims of terrorism, including general victim support, medical support following an attack, emotional and psychological support, provision of advice and information, and assistance with claims regarding compensation. Most respondents thought that the Directive has been effective in providing assistance and support to victims of terrorism, and that it is adequate to respond to their needs.

The **interviews with competent authorities** in eight Member States similarly highlighted that Member States already had provisions to support and protect victims of terrorism aligned with those of the Directive. Interviewees also commented that the cross-border protection included in the Directive, while very important, has not been used yet.

Similarly, **interviews with human rights organisations and victims' organisations** in Member States highlighted that most of the provisions and practices implemented by the Directive were already in place in the Member States due to the Victims' Right Directive. Much of the effectiveness of the protection and support mechanisms still depends on the implementation by Member States, which differs greatly across the EU. Victims' organisations also stressed that victims of terrorism may suffer long-term consequences, which are currently hardly considered. They considered the cross-border protection included in the Directive as very important.

The **webinar** highlighted e.g. the distinction between victims and witnesses, which can be difficult to make. Several issues were highlighted including the difficulty of identifying victims (e.g. victims sometimes do not consider themselves as such, if they are not injured). Participants commented that the definition of support is somewhat vague when applied in practice, and some elements (such as specialised treatment, or support care for trauma) are often not provided. Most participants indicated that single contact points and specialised training are important best practices.

Most respondents to the **open public questionnaire** who expressed their opinion on whether the Directive has led to better protection of and assistance to victims of terrorism held a neutral opinion (6 of 20 respondents neither agreed nor disagreed, while 4 agreed and 1 disagreed). Among those who believed that the Directive impacted victims of terrorism positively, three noted that the Directive contributed to the strengthening of the regulatory framework for victims of terrorism. The respondent who disagreed with the statement above criticised that the Directive does not recognise persons who have been indirectly affected by the attack (e.g. first responders or second-degree family members) as victims.

### 3.3 Efficiency

The majority of respondents in the **online survey to counter-terrorism** units said the Directive had no or little impact on costs associated with familiarisation and training on the provisions of the Directive, update of IT systems, update of operating costs, and monitoring costs; on human resources and administrative burden; and on financial resources. The counter-terrorism units also disclosed some (limited) positive impacts of the Directive on efficiency, such as making meeting objectives more effective and improving procedures. Counter-terrorism units also agreed that benefits generated by the Directive have been achieved at a reasonable cost for national authorities in their Member State, and for organisations providing assistance to victims of terrorism.

Respondents to the **online survey to judiciary and prosecutors** reported that the impact of the Directive has not inferred costs or that they do not know. Many respondents highlighted that such information is unavailable, as the costs of the Directive were not calculated separately from pre-existing costs, and that, when costs and staff for counter-terrorism increased over time, this was a consequence of national provisions and actions, rather than of implementing the Directive.

The majority of respondents to the online survey to judiciary and prosecutors reported that the Directive had no or little impact on costs (based on the limited amount of information available), including on:

- financial resources for their units/teams and for other judicial authorities/prosecutors;
- costs of human resources for their units/teams and for other judicial authorities/prosecutors; and
- on human resources and administrative burden for their units/teams and for other judicial authorities/prosecutors.

The online survey to **counter-terrorism units** also disclosed some (limited) positive impacts of the Directive on efficiency, such as making meeting objectives more effective and improving procedures. One counter-terrorism units reported that the Directive has had a positive impact as it has created uniform European standards to combat terrorists.

Respondents in **the questionnaire to competent authorities in Member States** were similarly unable to allocate specific costs (staff, IT and other equipment, training, etc.) directly to the Directive, or to activities related to the transposition and implementation of the Directive (e.g. costs for transposing and familiarising with the Directive, costs of investigation and prosecution, costs of providing protection to victims of terrorism and their families, costs of providing information to victims of terrorism, costs of monitoring and reporting and of cooperating with other authorities). Some noted that there had been an increase in staff (and thus budget) to combat terrorism and cybercrime, but linked this to national initiatives and priorities, rather than the Directive. Respondents identified the following as the main benefits of the Directive:

- enhanced legal clarity;
- improved ability to cooperate with other bodies and agencies in the same Member State, in another Member State and with EU agencies to counter terrorism such as Europol and Eurojust; and
- improved ability to counter the threat from terrorism.

In the **interviews**, the national competent authorities in eight Member States were similarly unable to attribute specific costs directly to the Directive, or to activities related to the transposition and implementation of the Directive.

As for the **open public questionnaire**, most respondents could not assess the costs incurred as a result of the Directive or the benefits generated for their Member State.

### **3.4 Coherence**

A large majority of respondents in the **online surveys to counter-terrorism units and to judiciary and prosecutors** considered the provisions of the Directive to be internally consistent. Most respondents were unaware of any inconsistencies between the Directive and other legislation in their Member State or other legislation at EU level. Stakeholders also considered the Directive to be coherent and complementary with legislation at international level, at EU level and in Member States.

The **questionnaire to competent authorities in Member States** also revealed that the Directive is considered internally consistent (i.e. they are logical, non-contradictory, easy to interpret). The competent authorities also considered the Directive to be consistent with other policy and legislative interventions in the field of counter-terrorism and protection of victims' rights at EU and national level. Respondents provided a very similar assessment of the complementarity of the Directive with other policy and legislative interventions in the field of counter-terrorism protection of victims' rights at EU and national level. Doubts were expressed on the relationship between Article 21 of and the future TCO (terrorist content online) Regulation, and how they will interact.

**Interviews at international level** considered the Directive to be internally consistent and coherent with legislation in Member States and with UN minimum rules. However, respondents also highlighted that reference to the UN measures (including the Budapest Convention and the so-called "19 legal instruments against terrorism") could be strengthened in the Directive, as UN provisions on CBRN, aviation setting, maritime related issues, financing, kidnapping are reflected only partially in the Directive.

**Interviews at EU level** also highlighted the consistency of the Directive, both internally and with other legislation and policy interventions on counter-terrorism and protection of victims' rights at EU level.

**Interviews with national authorities and judiciary and prosecutors** in eight selected Member States also stressed the consistency and complementarity of the Directive with the national legislative and policy frameworks on counter-terrorism and protection of victims' rights. Specific issues include the notion of 'conspiracy', which is included in some national framework but not in the Directive, and the risk of putting too much emphasis to victims of terrorism compared to victims of other crimes. Some respondents commented on Article 11 (Terrorist Financing), which is considered contradictory regarding the necessity or not of the use of funds.

**Human rights organisations** similarly highlighted the consistency and complementarity of the Directive with national provisions. They also stressed the risk of putting too much emphasis on victims of terrorism versus victims of other crimes, and the fact the Directive protects victims and their image, but does not cover other important aspects, such as humiliation of victims.

Respondents to the **open public questionnaire** found the Directive to be overall coherent

to and complementary with other interventions at the EU, national and international level.

### **3.5 EU added value**

The **online survey to counter-terrorism units** revealed that the Directive provided EU added value to defining criminal offences in the area of terrorism, sanctions and protecting victims of terrorism. Counter-terrorism units reported that, without the Directive, there would be a negative impact on efforts to counter terrorism in the EU and in Member States.

The **online survey to judiciary and prosecutors** found that the Directive has provided added value in defining criminal offences in the area of terrorism, and in particular in creating uniform standards for prosecuting terrorist offences and beneficial explanations in the preamble. The Directive has provided added value concerning sanctions and in protecting victims of terrorism. Respondents also affirmed that, without the Directive, there would be a negative impact on efforts to counter terrorism in the EU and in Member States. The Directive has contributed to harmonising Member States' national legislation on terrorism matters, increased judicial and police cooperation and has encouraged Member States to update their national legal frameworks in relation to terrorism.

The **questionnaire to competent authorities in Member States** confirmed that the Directive provided added value, especially in comparison to the Framework Decision. A clearer definition of terrorism and terrorism-related crimes and a more comprehensive set of provisions are the features considered to have more EU added value. The Directive is also considered providing added value to Member States. While many Member States did not introduce new laws due to the Directive, as their frameworks were already as comprehensive, it is acknowledged that the Directive helped harmonising national frameworks.

**Interviews at international level** pointed out that the Directive provides added value, but it is quite broad in the definition of terrorism-related offences, and this leaves broad room for interpretation by Member States.

**Interviews at EU level** stressed the added value provided by the Directive, especially in comparison to the Framework Decision, as the Directive takes into account a changed context, and includes provisions (such as those on terrorist content online and FTFs), which were absent from the previous framework.

**Interviews with national authorities and judiciary and prosecutors** highlighted that the Directive provides added value, mostly by providing legal clarity, harmonising national legislations, and by increasing judicial and police cooperation. Interviewees also commented positively on the added value provided by the Directive in responding to emerging threats, especially cross-border and concerning FTFs.

**Interviews with victims' associations** also identified the harmonisation of legislative frameworks and increased cooperation as the main added values of the Directive.

To assess the value added by the Directive, respondents to the **open public questionnaire** were asked to reflect on the impact that its withdrawal would have on their Member State (and their organisation if they answered on behalf of one). The responses revealed split views on this. In both cases the same number of responses pointed to a positive and a negative impact (4 out of 15 respondents concerning the

impact on their Member State, and 2 of 11 respondents concerning the impact on their organisation). It is worth noting, however, that most respondents representing organisations were not in a position to assess what the impact on their organisation would be (7 of 11 respondents).

### **3.6 Impact on Fundamental Rights and Rule of Law**

The majority of respondents in the **online survey to judiciary and prosecutors** deemed the Directive to have impacts on fundamental rights and freedoms, by reducing the freedom of speech and increased criminalisation in some Member States. The limitations to fundamental rights and freedoms are directly linked to the measures in the Directive (always or in some instances) by many respondents. Of these, some specified that national case-law is aligned with the standards in the EU Charter of Fundamental Rights. Several respondents reported that Article 21 of the Directive has not had any observable impacts on fundamental rights and freedoms.

The **questionnaire to competent authorities in Member States** found that the Directive has not raised any issues in terms of fundamental rights. Only one Member State reported the existence of legal cases taken in this context (DE). Some Member States reportedly took measures to ensure that limitations on the exercises of fundamental rights are necessary, legitimate and proportionate. Many Member States put in place specific measures to ensure non-discrimination during the investigation, prosecution and trial and sentencing stages.

**Interviews with national authorities and judiciary and prosecutors** in eight selected Member States also found no major negative impacts on fundamental rights and rule of law. Even when the Directive restricts fundamental rights and freedoms, such as during the investigation proceedings, these limitations are necessary, legitimate and proportionate and they are subject to strict procedural guarantees. In some cases, the Directive also reduced the application of more restrictive national provisions.

**Interviews with human rights organisations** confirmed that the Directive has not had major adverse impacts on fundamental rights and the rule of law. Some concerns were expressed on Article 22(2), and the right to protection of personal data acquired and collected during the investigation of terrorist offenses, which could require establishing an independent authority to monitor compliance with the right to protection of suspect's/accused's personal data other than Prosecutors and Judicial Authorities.

The vast majority of respondents to the **open public questionnaire** (16 of 21 respondents) agreed that the implementation of the Directive had raised issues concerning its impact on fundamental rights at Member State or EU level. Only two respondents disagreed, with the remaining respondents indicating that they did not know.



## **ANNEX III: METHODS AND ANALYTICAL TOOLS**

In this annex, the methods and sources that were drawn upon in carrying out the evaluation are described, as well as the limitations that were encountered.

### **1. METHODS AND SOURCES**

The stated aim of the Directive is to combat terrorism. A range of methodological tools and techniques were included in the analytical framework that was developed during the preparatory phase of the study. This contained both desk and field research involving interviews, online surveys, questionnaires workshops, and case studies targeting a wide range of stakeholders. The contractor also made use of the results of the public consultation, which was open from 24 March 2021 until 16 June 2021.

#### **1.1 Desk research**

For the desk research, ICF identified and screened relevant documents and data, based on a template developed at inception stage. The template was structured around the key evaluation questions for which the desk research was expected to be most relevant. The list of documents was continuously updated throughout the study as new documents and evidence were identified and reviewed. A complete list of documentation reviewed throughout the study can be found in Annex 3 of the external study<sup>222</sup>.

In addition, for the desk research phase, the Commission reviewed the contributions from the FRA<sup>223</sup> and Eurojust<sup>224</sup>. The FRA's contribution is partly based on field research. The Commission also reviewed the EESC's information report<sup>225</sup>.

#### **1.2 Field research**

See above in Annex II for details on the stakeholder consultation process.

ICF carried out its field research using different consultation methods. It developed the questionnaire, which was translated and launched by the European Commission on 24 March and open until 16 June 2021. ICF supported the dissemination of the public consultation. In particular, certain groups of key stakeholders not specifically targeted by other consultation activities were specifically invited to respond to the public consultation. This concerns mostly human rights organisations and other NGOs not invited to an interview, as well as other NGOs and members of academia. ICF also asked humanitarian associations interviewed to disseminate the link among their members and network if they considered the questions to be relevant for other organisations providing humanitarian assistance.

Targeted online surveys, email questionnaires and online webinars included targeted consultations with key stakeholders in all Member States. The targeted consultations consisted of:

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<sup>222</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report.

<sup>223</sup> European Union Agency for Fundamental Rights, Contribution to the Commission, 2021, page.

<sup>224</sup> Eurojust contribution to the evaluation of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, 2021.

<sup>225</sup> European Economic and Social Committee, Information report, Evaluation of the Directive on combating terrorism, SOC/675, 2021.

- An email questionnaire targeting national authorities responsible for transposing and implementing the Directive (e.g., Ministry of Justice or Ministry of Interior);
- Two online surveys using the online platform VoxCo, one targeting counter-terrorism units in law enforcement agencies, and one designed for members of the judiciary and prosecutors dealing with terrorism-related cases. The surveys covered all evaluation criteria but focused on the practical implementation of the Directive during the investigation, prosecution and adjudication of terrorism-related cases;
- A webinar session gathering national associations and other stakeholders representing the interests of victims of terrorism, via the EU Centre of Expertise for Victims of Terrorism.
- A stock-taking workshop organised by DG HOME. DG HOME, ICF, the FRA and the EESC gave updates on the work they were carrying out, providing space for Member States to comment and provide feedback.

To reach the most relevant stakeholders at national level, ICF requested support from Member States' Permanent Representation to the EU, national associations of prosecutors and members of the judiciary, and Eurojust. The two online surveys and the email questionnaire were launched on 24 February 2021. The deadline to submit responses was initially set on 22 March (i.e., four weeks) and postponed until mid-April. Several reminders were sent to non-respondents – where possible, in their national language - over the course of April. To accommodate stakeholders who would have not managed to submit their responses before then, it was ultimately decided to allow stakeholders to submit responses until the end of the project. 45 responses have been received to the questionnaire and the two online surveys.

The Commission organised a stock-taking workshop on 15 April 2021, to which Member States' representatives as well as the Commission's inter-service steering group was invited. 57 representatives from 24 (out of the 25) Member States were present, with representatives from different relevant services, such as ministries of interior, ministries of justice, the judiciary, law enforcement and intelligence. DG HOME, ICF, the FRA and the EESC gave updates on the work they were carrying out, providing space for Member States to comment and provide feedback.

The webinar on victims' rights was held using the EU Centre of Expertise for Victims of Terrorism platform on 26 April 2021. National associations and stakeholders representing the interests of victims of terrorism received an invitation to participate on the week of 12 April. The initial approach envisaged up to four alternative sessions, but the number was reduced to two to adapt the strategy to: a) delays in the design of the webinar, and b) the number of attendees that were expected. Ultimately, only one session took place due to the low number of attendees registered for the other. A total of 10 associations and stakeholders representing the interests of victims of terrorism in 7 Member States (BE, ES, HR, IE, IT, PT, and SE) participated in this session.

Targeted interviews were conducted with key stakeholders at EU and international level, as well as with national stakeholders from the eight selected Member States. The deadline to carry out interviews was originally planned for mid-April 2021, but it was postponed until early May. National stakeholders also targeted by the written questionnaire or online surveys were asked to fill out the questionnaire before

participating in a (follow-up) interview, but they were also given the option to take part in an in-depth interview instead. Some of them preferred the latter alternative, an approach that was also prioritised towards the end of the consultation period in order to avoid further delays. In total, 41 interviews were carried out.

## **2. LIMITATIONS**

The ability of the evaluation to assess the practical implementation of the Directive in all Member States has been limited by the difficulty to obtain additional evidence to what was provided in the transposition study. This is particularly the case for some Member States, especially those where terrorism is not considered a key priority. To mitigate this risk, specific questions on the measures applied because of the Directive, as well as on implementation issues, were included in the surveys and questionnaires for national stakeholders. This allowed the evaluation to fill many of the gaps identified at the interim stage. It also meant that some of the findings are based on evidence reported by stakeholders which has not been triangulated, also affecting the robustness of these findings and limiting the ability of the report to ensure a more balanced focus on Member States.

For the external study, the response from stakeholders was lower than expected. Several limitations have affected the information and feedback provided by stakeholders in the consultations. A short timeline to carry out the consultations, combined with some initial delays in the launch of the surveys and the wide range of stakeholders involved in the implementation of the Directive at national level (and regional in some cases), led to significant delays in the organisation of the first interviews. Other factors (e.g., interviewees affected by COVID-19, holiday period) resulted in further delays on the part of the stakeholders to contribute to the evaluation.

The external study also reports that stakeholder fatigue appears to have also limited the interest and availability of key stakeholders to contribute to the evaluation. For example, another evaluation of the same Directive was carried out simultaneously by the EESC, and the FRA very recently carried out its research project on the Directive (on the request of the Commission). This meant that the same stakeholders were requested to provide similar feedback for three different studies within a brief period of time.

To ensure the highest possible number of responses from stakeholders, ICF sent up to three general reminders to non-responsive stakeholders, where possible in their national language and via telephone. For specific stakeholders whose feedback was considered particularly crucial, ICF continued to make efforts to secure their participation, also involving the Commission. The deadline to participate was also extended several times and ultimately until the end of May 2021.

Another limitation is the lack of data or the poor quality of the data provided by stakeholders on implementation, but especially on costs. It has impacted the ability to assess the practical implementation of the Directive across all Member States, and in particular the analysis of the efficiency of the Directive. This is due to the inability of Member States to provide costs related to its implementation. Several reasons were highlighted by Member States as to why this is the case, notably:

- Incremental costs are not monitored and reported. By and large, national authorities involved in implementing the Directive do not report and monitor counter-terrorism related costs as a separate item in their budgets or financial reports. Therefore, it is

difficult to compare a baseline (prior to the Directive) and the incremental costs incurred due to the Directive.

- Multitude of institutions involved. The implementation of the Directive in each Member States is carried out by a multitude of institutions, including legislative authorities, national security/counter-terrorism units, judiciary, victim support agencies and NGOs. There is no central entity which could compile and report the counter-terrorism related costs of all authorities involved.
- Multiple types of costs. Costs related to the implementation of the Directive cover a great number of needs, such as transposition costs, infrastructure and equipment costs, investigation and prosecution costs, cooperation costs, support to and protection of victims of terrorism, costs for reporting, etc. While some of these costs may be possible to account for (e.g. victim support or procurement of specific counter-terrorism equipment or software), many costs like investigation, prosecution or cooperation cannot be clearly distinguished from the regular costs which would have been incurred regardless of the implementation of the Directive.
- Shared resources. In many organisations resources are shared, e.g. a unit monitoring online terrorist content would also handle online fraud, child pornography or other online crimes; agencies supporting victims of terrorism may also support victims of other crimes.
- Scale of counter-terrorism costs. For the majority of national authorities involved, counter-terrorism activities represent a relatively small portion of their regular activities. This is particularly true for Member States with few or no terrorist cases. As a result, the cost of counter-terrorism activities is not budgeted or reported separately. A few exceptions were identified, e.g. the budget and staff of the Directorate General for Support of Victims of Terrorism in Spain, or the Victims Support Finland. However, in many Member States even the support for victims of terrorism could not be identified, as victim support institutions also provide support to victims of crime in general.

To mitigate the impact of these limitations, the ICF carried out targeted searches to obtain further evidence. In the case of the eight focus Member States, ICF followed up with stakeholders to clarify or expand on certain aspects, where feasible. To conclude, in order to provide an answer to the evaluation questions on efficiency, ICF conducted a qualitative analysis using the limited data provided, combined with assumptions on efforts required based on the changes adopted as a result of the Directive. Nonetheless, the limitations have to some extent impacted the overall assessment and triangulation of the evidence and, consequently, the robustness of the findings.

## **ANNEX IV: EVALUATION CRITERIA AND QUESTIONS**

### **Relevance**

1. To what extent are the scope and definitions of the Directive still suitable and fit for purpose considering the main current terrorist trends in the EU and the changing nature and pattern of terrorist threats faced by Member States?
2. To what extent are the minimum rules on criminal offences (articles 4-12) and sanctions in the area of terrorism, and the measures of protection of and support to victims of terrorism still suitable and fit for purpose considering the main current terrorist trends and the changing nature and pattern of terrorist threats faced by Member States?
3. Is the Directive expected to remain relevant in the coming years?

### **Effectiveness**

4. How has the Directive been implemented in practice, including in relation to exchanges of information between Member States? Has it been implemented equally to all types of terrorism-related offences?
5. To what extent has the Directive achieved its stated objectives (with regard to all types of terrorism)?
6. Are there any factors that have contributed to or limited the effectiveness of the Directive, including to effectively combat terrorism from a criminal justice perspective?

### **Efficiency**

7. To what extent do the implementation costs and the benefits of the Directive differ in the individual Member States and for the EU as a whole?
8. Are the implementation costs reasonable and proportionate to the benefits? Are the costs and benefits justified and proportionate for all Member States and all stakeholder groups, and what factors have played a role in this?
9. What is the scope for simplifying or reducing the administrative burden of implementing the Directive without undermining the intended objectives of the intervention?

### **Coherence**

10. To what extent is the Directive coherent internally?
11. To what extent is the Directive coherent and complementary to other policy interventions with similar objectives (at EU/Member State/international levels)? What are the main synergies, inconsistencies, gaps or overlaps between the Directive and the relevant EU/Member State legislative frameworks?

**EU added value**

12. To what extent has the Directive achieved European added value as opposed to what could have been achieved at either national or the international level?
13. What would be the most likely consequence of withdrawing the Directive?

**Impact on fundamental rights and freedoms**

14. To what extent and how does the Directive have an impact on fundamental rights and freedoms as enshrined in the EU Charter of Fundamental Rights (the Charter)? What safeguard measures are in place to ensure that any limitation to the exercise of fundamental rights is necessary, legitimate and proportionate?

**Impact on the rule of law**

15. To what extent does the Directive have an impact on the rule of law?

**Impact on the protection and assistance provided to victims of terrorism**

16. To what extent has the Directive impacted the level of protection and assistance afforded to victims of terrorism?

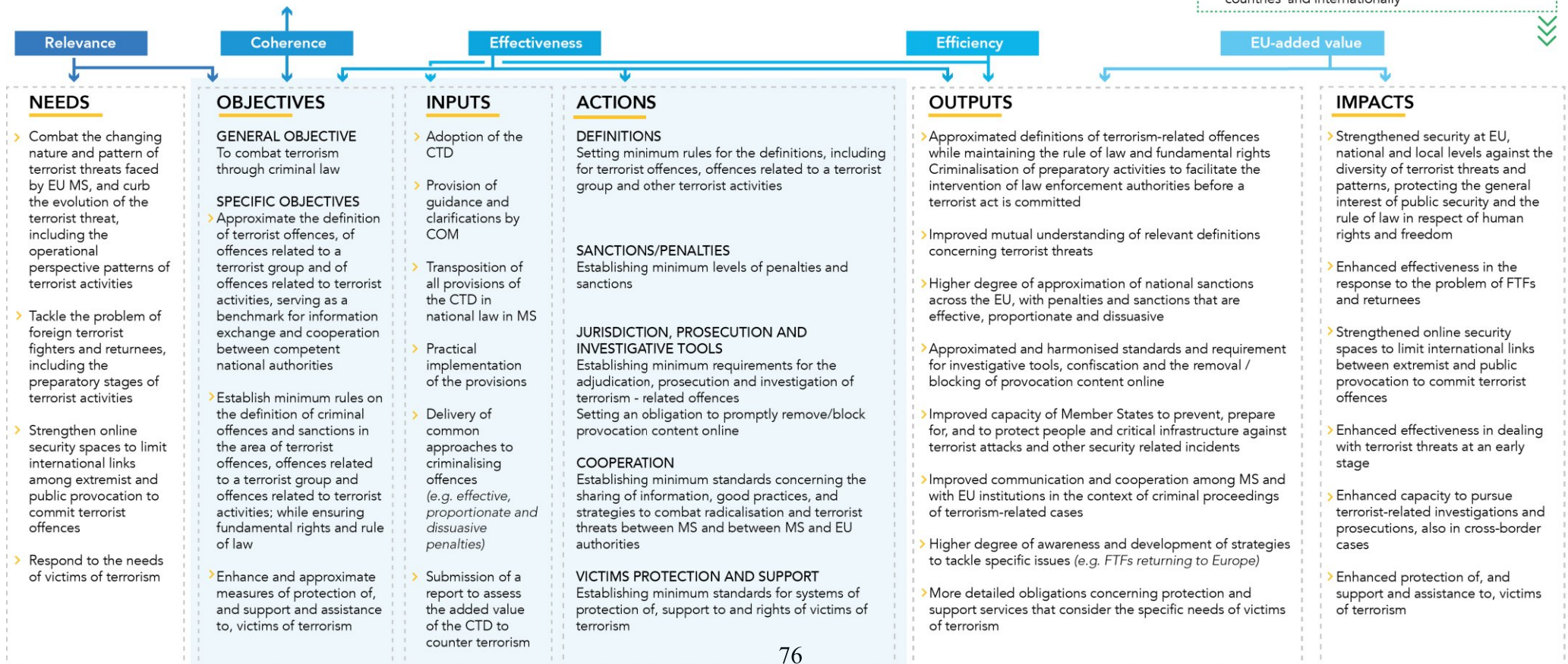
## ANNEX V: INTERVENTION LOGIC

### Other Relevant Policies (EU, Member State and International Level)

- International and EU legislation / policy to counter terrorism and radicalisation (e.g. UNSC / Council of Europe resolutions / protocols)
- EU laws relating to dissemination of illegal content online
- EU laws on non-discrimination and fundamental rights, including in the context of criminal proceedings
- International and EU legislation and measures on the rights of victims (including of terrorism)
- Legislative national developments going beyond the minimum rules in the CTD

### Exogenous factors:

Terrorist threat in the EU and increased number of cross-border victims in terrorist attacks  
Online propaganda  
Increasing efforts and capacity of law enforcement agencies to target illegal content online  
Wars and general unrest in the EU neighbourhood countries and internationally



Directive (EU) 2017/541

## ANNEX VI: MAIN DIFFERENCES BETWEEN FRAMEWORK DECISION 2002/475/JHA AND DIRECTIVE (EU) 2017/541

Topic	Framework Decision 2002/475/JHA	Directive 2017/541/EU
<b>Terrorism-related criminal offences</b>	<p>Sets an obligation for Member States to criminalise terrorist offences and offences related to a terrorist group and includes a definition of these offences.</p> <p>Sets an obligation for Member States to criminalise offences related to terrorist activities, but it does not establish minimum rules for their definition. The offences included are: public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism.</p> <p>Inciting, aiding or abetting and attempting to commit an offence are made punishable.</p> <p>Only required criminalisation of terrorist financing to the extent that funding is provided to a terrorist group but not e.g., if provided to all offences related to terrorist activities, including recruitment, training or travelling abroad for terrorism.</p>	<p>Expands the list of offences that Member States need to criminalise to <u>also</u> include: public provocation to commit a terrorist offence; receiving training for terrorist purposes; travelling or organising / facilitating travelling for the purpose of terrorism; terrorist financing (see below) ; illegal system and illegal data interference (cyber-attacks), when committed against a critical infrastructure information system.</p> <p>Provides minimum rules concerning the definition of offences related to terrorist activities.</p> <p>Aiding and abetting, inciting and attempting: some amendments to ensure consistency and effective application of the relevant rules and to avoid loopholes.</p> <p>Article 11 introduced a distinct terrorist financing offence consisting of the provision or collection of funds with the intention (or in the knowledge) that they be used to commit terrorist offences.</p>
<b>Sanctions</b>	Sets an obligation for Member States to provide effective, proportionate and dissuasive criminal penalties.	Differentiates penalties for natural persons from sanctions for legal entities liable for the offences.
<b>Prosecution, investigation and adjudication</b>	Sets obligations for Member States to establish their jurisdiction over offences	<p>Jurisdiction and prosecution: some amendments to ensure consistency and effective application of the relevant rules and to avoid loopholes.</p> <p>A provision on investigative tools and confiscation was added.</p> <p>Article 21 sets obligations for Member States to ensure the prompt removal (or blocking) of online content constituting a public provocation to commit a terrorist offence.</p>



<b>Cooperation and exchanges of information</b>	No specific provisions on cooperation and exchanges of information.	Article 22 strengthens information sharing (in relation to criminal proceedings on terrorist offences) and cooperation among Member States and from Member States to Europol and Eurojust.
<b>Protection and support of victims</b>	Sets an obligation for Member States to protect and assist victims of offences without establishing specific rules on the provision of protection/support to victims of terrorism.	In addition to setting the obligation to protect and assist victims of terrorism, it establishes a minimum rules concerning the assistance, support and protection to victims of terrorism, in accordance with Directive 2012/29/EU.

## ANNEX VII: APPROACH TO QUANTIFICATION OF COSTS

This annex provides a description of the approach taken to quantify the costs to EU and national public authorities that can be attributed to the Directive.

### Costs

The costs for public administrators (both, national and EU-level) are related to transposition, monitoring and reporting and can be subdivided into: one-off costs and ongoing costs. The one-off costs relate to costs that public administrators incurred when the Directive was transposed. Ongoing costs are costs that public administrators have continued to face after the introduction of the Directive.

The costs are based on one-off and recurrent costs for which the FTE have been estimated based on similar estimates for other evaluations. The national public administrators' wages are based on Eurostat data of wages of public sector staff for each EU Member States. The EU wages are based on AD10 wages<sup>226</sup>.

#### *Costs for national public administrations*

The recurrent costs of national public administrations related to the transposition and implementation of the Directive are related to the transposition, monitoring and reporting of the Directive. The methodology and assumptions followed to calculate these costs are summarised in Table 1<sup>227</sup>.

*Table 1 Approach to recurrent costs of public administrations*

Recurrent cost	Methodology	Assumptions
Transposing the Directive	Unit cost = No. of days per person X Average daily wages for the public sector X No. of persons involved  Total cost = Unit cost X 27 Member States	2 official per MS  5 to 10 days per official per month  Average daily wage for the public sector per country from Eurostat
Monitoring	Unit cost = No. of days per person X Average daily wages for the public sector X No. of persons involved  Total cost = Unit cost X 27 Member States	1 official per MS  1 day per official per year to monitor compliance
Reporting	Unit cost = No. of days per person X Average daily wages for the public sector X No. of persons involved	1 official per MS  2 to 3 days per official per year

<sup>226</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 106.

<sup>227</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 106.

Recurrent cost	Methodology	Assumptions
	Total cost = Unit cost X 27 Member States	

### ***Costs for EU public administration***

The recurrent costs of EU public administration related to the transposition and implementation of the Directive are related to the drafting of the Directive. The methodology and assumptions followed to calculate these costs are summarised in Table 2<sup>228</sup>.

*Table 2: Approach to recurrent costs of public administrations*

Recurrent cost	Methodology	Assumptions
Drafting the Directive	Unit cost = No. of days per person X Average daily wages for the public sector X No. of persons involved  Total cost = Unit cost X 27 Member States	2 official per MS 10 days per official per month, for 6 months  Average daily wage for the public sector per country from the EC website

<sup>228</sup> ICF (2021). Evaluation of Directive 2017/541 on countering terrorism, final report, page 107.