

## Combating terrorism

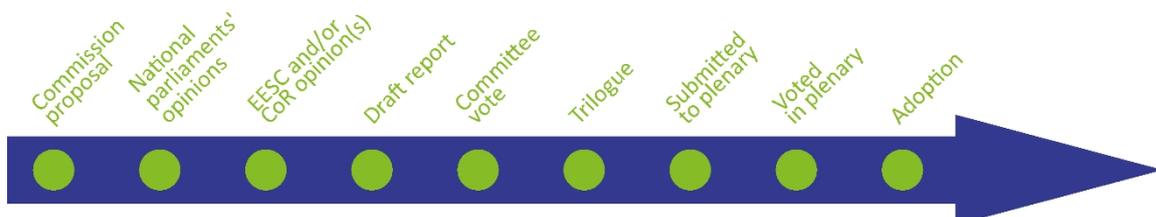
### OVERVIEW

The phenomenon of foreign fighters travelling to conflict zones, mostly in Syria and Iraq, represents a growing threat for the EU and its Member States. Most of the recent terrorist attacks in Europe were perpetrated by 'home-grown' terrorists, and at least some of the perpetrators proved to be returned foreign fighters.

In December 2015, the European Commission presented a proposal for a directive on combating terrorism, aimed at updating the current framework on criminalising terrorist offences and at bringing EU legislation into line with international developments, such as the adoption of UN Security Council Resolution 2178 and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism. The proposal extends the list of offences, to cover receiving of terrorist training, travelling and attempting to travel abroad for terrorism, and funding or facilitating such travel, and also includes provisions on the protection of victims. After completion of the legislative procedure at first reading in the Parliament and Council, the final act was signed in March 2017. Member States are required to transpose the new directive into national law by 8 September 2018.

### 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

<i>Committee responsible:</i>	Civil Liberties, Justice and Home Affairs (LIBE)	COM(2016) 625 2.12.2015
<i>Rapporteur:</i>	Monika Hohlmeier (EPP, Germany)	2015/00281(COD)
<i>Shadow rapporteurs:</i>	Caterina Chinnici (S&D, Italy) Timothy Kirkhope (ECR, UK) Petr Ježek (ALDE, Czech Republic) Cornelia Ernst (GUE/NGL, Germany) Eva Joly (Greens/EFA, France) Laura Agea (EFDD, Italy) Lorenzo Fontana (ENF, Italy)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Procedure completed.</i>	Directive (EU) 2017/541 <a href="#">OJ L 88, 31.3.2017, pp. 6-21</a>	



## Introduction

On 2 December 2015, the European Commission presented its [proposal](#) for a directive on combating terrorism, replacing [Council Framework Decision 2002/475/JHA](#), as amended by [Framework Decision 2008/919/JHA](#), and updating its provisions in response to the new patterns of terrorism. One of the proposal's overarching goals is to integrate the latest international terrorism-related instruments, among them [UN Security Council Resolution 2178\(2014\)](#) on foreign terrorist fighters, the [Additional Protocol](#) to the Council of Europe Convention on the Prevention of Terrorism and the updated [Financial Action Task Force Recommendations](#) on terrorist financing, into EU law. The proposal also seeks to address the need for harmonisation at EU level, given that many Member States have undertaken legislative amendments to meet their international obligations under the above new acts.

## Context

The recent rise of terrorist activities worldwide and the threat posed by '[foreign fighters](#)' (FF) travelling to conflict zones, mostly in Syria and Iraq, represent a growing concern. The scale of the foreign fighters phenomenon has reached unprecedented levels: it has been [estimated](#) that by December 2015, between 27 000 and 31 000 persons from at least 86 different countries had joined ISIL/Da'esh and other violent extremist groups (compared to 12 000 by [June 2014](#))<sup>1</sup>.

Nationals of several EU Member States have travelled to war zones to join the ranks of the foreign fighters. One of the main challenges has been posed by those who return, as they are associated with a higher risk of engaging in terrorist activity back home.

US consultancy Soufan Group's estimates reveal that by [December 2015](#), around 5 000 foreign fighters from EU Member States had travelled to Syria to join the civil war. The average rate of returnees reportedly amounts to 20–30 %<sup>2</sup>. A 2016 [report](#) by the International Centre for Counter-Terrorism (ICCT) also indicates that an average of 30% of foreign fighters have returned to their countries of departure. According to the report's EU-wide estimate from end October 2015, the total number of foreign fighters from the EU stood between 3 922 and 4 294. The report further says that the majority – around 2 838 persons – come from France, Germany, the UK and Belgium, the latter having the highest per-capita number of foreign fighters (see the table showing the 10 Member States with the highest FF numbers across the EU, and the numbers of returnees).

The need to stem the increasing flow of foreign fighters has triggered action at international, European and national level, especially in the most affected countries.

## Existing situation

For more information on the existing legal framework, see the EPRS implementation appraisal briefing on [Framework Decision 2002/475/JHA on combating terrorism](#).

**Figure 1. Foreign fighters (FF) and returnees by Member State, 2015**

Country	FF	Returnees
France	>900	246
UK	700–760	>350
Germany	720–760	250
Belgium	420–516	55–120
Austria	230-300	>70
Sweden	300	80
Netherlands	220	40
Spain	120-139	25
Denmark	125	62
Italy	87	-

Data source: [ICCT report](#), April 2016.

### International level

On 24 September 2014, the UN Security Council adopted its [Resolution 2178](#) (UNSCR 2178), calling on UN members to classify the act of travelling or attempting to travel to another country for terrorist purposes or for providing or receiving terrorist training, as well as the act of financing or otherwise facilitating such travel, as a criminal offence in their national law.

In October 2015, the Financial Action Task Force (FATF) amended its [Interpretative Note to Recommendation 5](#) on terrorist financing offence, incorporating certain UNSCR 2178 provisions and adding financing of travel for terrorist purposes as a criminal offence.

In line with the requirements of UNSCR 2178, in May 2015, the Council of Europe (CoE) adopted an [Additional Protocol](#) to its Convention on the Prevention of Terrorism. On 22 October 2015, the Protocol was [signed](#) by 17 countries (including 12 EU Member States) and by the EU, which signed it together with the Convention.<sup>3</sup> Nine more EU Member States have since [joined](#).

### European level

The existing EU legislation on terrorist offences was adopted in 2002, shortly after the 9/11 attacks on the US, and was updated in 2008. Council Framework Decision (FD) [2002/475/JHA](#) on combating terrorism sought to align the Member States' legislations and established a first-ever common EU definition of terrorist offences. It furthermore required Member States to introduce provisions in their criminal codes penalising terrorism and prepared a harmonised list of acts constituting terrorist offences and their corresponding penalties. This list includes offences involving directing or participating in a terrorist group, as well as several forms of criminal conduct engaged in with a terrorist intention. Inciting, aiding and abetting, and attempting a terrorist offence is also punishable. Moreover, the FD contains a provision on appropriate assistance for victims and their families. It was later amended by Council FD [2008/919/JHA](#) to include three new offences: public provocation to commit a terrorist offence, recruitment for terrorism, and providing (but not *receiving*) training for terrorism.

### Situation in the Member States

According to the Commission's [report on the implementation](#) of FD 2008/919/JHA, all but two Member States<sup>4</sup> had transposed its provisions by 2014. The report also found that several Member States had gone beyond the requirements of the Framework Decision, having criminalised more types of terrorist-related behaviour than it stipulated<sup>5</sup>. For example, according to the [ICCT report](#), by 2015, fourteen Member States had started criminalising *receiving* terrorist training and nine Member States had made *travel* undertaken by foreign fighters a criminal offence.

While some Member States had already introduced legislation to criminalise terrorist acts covered by UNSCR 2178, others started doing so only after the resolution was adopted. It must be noted that EU Member States have different past experiences involving terrorism and have been affected by the foreign fighters phenomenon to varying degrees; furthermore, not all of them share the same approach or sense of urgency when addressing this issue. The Member States most affected have generally been the quickest to adopt new or reinforce existing counter-terrorism laws. One such example is [France](#), which had the relevant legislation in place already in 2014, followed by the [UK](#), [Spain](#), [Germany](#), [Belgium](#), [Italy](#), [Portugal](#), [Bulgaria](#), [Malta](#) and [Luxembourg](#) in 2015. Some Member States, despite having suffered limited exposure to terrorism and having yielded just a few foreign fighters (such as Bulgaria and Luxembourg), have nevertheless adopted

comprehensive counter-terrorism strategies and amended their criminal laws. Still, as stated above, a few others are lagging behind and have either not yet transposed the EU legal framework or have only just done it.

Differing approaches among Member States have been one of the arguments in favour of a EU-wide instrument to help align national provisions. Even though EU governments seemed to prefer an individual mode of implementing UNSCR 2178 into national law, they finally agreed on the need for aligned EU-wide legislation. [Arguably](#), harmonisation is necessary for law enforcement authorities and prosecutors to carry out their work efficiently and for closing the serious gaps between Member States' legislations, which risk being abused for creating 'safe havens' for returning terrorist fighters inside the EU.

### Parliament's starting position

Parliament has expressed its views on the foreign fighters phenomenon and on the criminal justice response on several occasions. In its resolution of 11 February 2015 on [anti-terrorism measures](#), it stressed the need to step up the effectiveness and coordination of the criminal justice response, namely through Eurojust, and explicitly called for updating FD 2008/919/JHA to harmonise the criminalisation of foreign-fighter-related offences across the EU.

In July 2015, Parliament adopted a resolution on the [EU agenda on security](#), welcoming the measures proposed by the Commission to combat terrorism, and namely 'to counter the threat of EU nationals and residents who travel abroad for the purpose of terrorism ('foreign fighters')'. Parliament pointed to the need of addressing multiple underlying factors such as radicalisation, as well as of counterbalancing online incitement to terrorist acts, preventing departures to join terrorist organisations, stemming recruitment and engagement in armed conflicts, disrupting financial support to terrorist organisations and ensuring adequate legal prosecution. Parliament called for 'a genuine strategy as regards European fighters ... and in particular those returning from conflict zones who want to leave the terrorist organisations' and reintegrate into society.

In a non-binding [resolution on prevention of radicalisation](#), adopted in November 2015, Parliament reiterated its call to develop a global strategy on preventing recruitment of Europeans into terrorist organisations and pointed to the need for effective and dissuasive criminal justice measures in all Member States. Parliament also called for 'a common definition for the criminalisation of persons to be considered as 'foreign fighters' and for 'a harmonised approach to the definition as a criminal offence of hate speech, online and offline', suggesting to add this specific offence to the relevant Council framework decisions.

In all these resolutions, Parliament referred to the rule of law, fundamental rights, civil liberties and proportionality as essential elements in successful counter-terrorism policies and called for the right balance between prevention policies and repressive measures. In the counter-terrorism context, it specifically mentioned privacy and data protection, freedom of expression and of association, non-discrimination, fair trial and due process, and the presumption of innocence as essential rights to be respected.

### Council & European Council starting position

The criminal justice response to the issue of foreign fighters and returnees was [identified by the Council](#) as one of four priority areas for EU action back in 2013, alongside efforts to prevent radicalisation and step up information-sharing and cooperation with third countries.<sup>6</sup> In August 2014, the European Council [confirmed](#) the need for 'determined

action ... to stem the flow of foreign fighters' and called for the accelerated implementation of the measures endorsed by the Council since June 2013, in particular those aimed to dissuade, detect and disrupt suspicious travel and investigate and prosecute foreign fighters.

The need and different ways for updating the legal framework to better address the challenge were outlined in the [discussion paper](#) on foreign fighters and returnees from 2 December 2014, presented to the Council by the Counter-Terrorism Coordinator (CTC). While Member States first expressed the view that updating legislation, namely to implement UNSCR 2178, could be achieved more quickly at the national level, the paper outlined several arguments in favour of a common EU legal framework: harmonised criminalisation of foreign fighters-related offences which would facilitate cross-border cooperation; establishment of common minimum standards to avoid prosecution gaps; a strong political message to third countries; and a possibility for review by the European Court of Justice. Following an in-depth discussion at the [December 2014 Justice and Home Affairs \(JHA\) Council](#), the ministers agreed to assess the need for updating FD 2002/475/JHA on combating terrorism.

In the aftermath of the *Charlie Hebdo* attack in January 2015, the JHA ministers called for intensifying counter-terrorism efforts. They also reiterated the importance of the judicial aspects of combating terrorism in a [joint statement](#) highlighting the need to 'consider further legislative developments with regard to the common understanding of criminal activities related to terrorism in light of the UNSCR 2178 (2014)'. In February 2015, the European Council adopted a [statement](#) outlining its vision for future counter-terrorism action in three main areas: ensuring EU citizens' security, preventing radicalisation and cooperating with international partners. It also reiterated the need to detect and disrupt terrorism-related travel and called for rehabilitation initiatives in the judicial context.

Following the November 2015 Paris attacks, JHA ministers, meeting at an extraordinary Council on 20 November 2015, [called](#) for accelerating the implementation of counter-terrorism measures and welcomed the Commission's intention to present a proposal for a directive updating the FD on combating terrorism before the end of 2015, 'with a view to collectively implementing into EU law UNSC Resolution 2178 (2014) and the additional Protocol of the Council of Europe Convention'. At this meeting, the Council also adopted [conclusions](#) on enhancing the criminal justice response to radicalisation, advocating 'a cross-sectorial and multidisciplinary approach to effectively tackle radicalisation ... taking into account all different aspects: prevention, investigation, prosecution, conviction, rehabilitation and reintegration'. The need to address the use of the Internet for radicalisation and recruitment was also mentioned. In its December 2015 [conclusions](#), the European Council called for a rapid examination of the Commission's proposal.

### Preparation of the proposal

*For more information on the preparation of the proposal, see the EPRS implementation appraisal briefing on [Framework Decision 2002/475/JHA on combating terrorism](#)*

On 28 April 2015, the Commission issued its communication on a [European agenda on security](#), defining 'a strong EU response to terrorism and foreign terrorist fighters' as one of its three main priorities. This document was endorsed by the Council in June 2015 as a renewed [Internal Security Strategy 20152020](#), having the main aim of 'tackling and preventing terrorism, radicalisation to terrorism and recruitment as well as financing related to terrorism, with special attention to the issue of foreign terrorist fighters'. Under

the objective of 'tackling terrorism', the Commission's communication called for a solid criminal justice response and announced its intention to review the FD on terrorism.

The Commission was planning to conduct an impact assessment in 2015 and present a proposal in 2016. However, the November 2015 Paris attacks speeded up the process and the proposal for a directive on combating terrorism was published on 2 December 2015 without an impact assessment. Several reports were produced to evaluate the current framework, among them the 2014 report on the implementation of the FD 2008, which identified enforcement gaps, and a supporting external study (not publicly available), which highlighted the added value of a common approach to criminalising offences, allowing for more efficient handling of cross-border cases. Moreover, Eurojust was tasked with assessing the existing legal framework to check whether it was sufficient and adequate in the context of recent developments. Between 2013 and 2015, Eurojust produced three (restricted) reports on the foreign fighters phenomenon and the criminal justice response. In its 2014 report, Eurojust recommended considering an update of existing EU legislation to establish a harmonised approach across the EU and ensure a common reference for investigating and prosecuting foreign fighters.

### The changes the proposal would bring

The proposed directive on combatting terrorism would implement the above-mentioned international laws and standards into EU law. Most new offences are in line with the CoE Additional Protocol, to which the Commission extensively refers throughout the text.

The directive's legal basis is Article 83(1) of the Treaty on the Functioning of the European Union (TFEU), providing for the establishment of the necessary minimum rules on the definition of criminal offences and sanctions. The proposal extends the scope of the current FD and defines three categories of conduct to criminalise: terrorist offences (Article 3), offences relating to a terrorist group (Article 4), and offences related to terrorist activities (Articles 5 to 14), which mainly cover preparatory acts, such as public provocation, recruitment, providing or receiving of training and travelling abroad for terrorism. New elements are also introduced in the general provisions, including extended grounds for criminalising aiding or abetting, inciting and attempting, as well as establishing jurisdiction for the offence of providing terrorist training, whatever the nationality of the offender. Moreover, the proposal contains specific provisions on the protection of victims of terrorism, based on Article 82(2)(c) TFEU as an additional legal basis. The main changes are outlined below.

#### Receiving terrorist training (Article 8)

In addition to the providing of training for the purpose of terrorism (already covered by FD 2008/919/JHA), the proposal criminalises the *receiving* of such training. This provision covers the receiving of such training both in person, for instance, by attending a training camp run by a terrorist association or group, and through various electronic media (for instance, Internet). In this way, it also addresses 'self-training' for terrorism. The 'receiving of training' must take place with a terrorism-related *purpose* and an *intention* to commit a terrorist offence.

#### Travelling abroad for terrorist purposes (Article 9)

Article 9 addresses the foreign fighters phenomenon by criminalising *travelling abroad for terrorist purposes*. The act of travelling to another country should be criminalised if it can be demonstrated that the 'intended purpose of that travel is to commit, contribute to or participate in *terrorist offences*', or to *provide or receive training* for terrorism. The

provision also includes travelling for the purpose of *participating in the activities of a terrorist group*. Both travel to third countries and to EU Member States is covered, *including those of the nationality or residence of the perpetrator*. The Commission notes that this article may potentially affect 'all individuals travelling to another country'.

#### **Organising or otherwise facilitating travelling for terrorist purposes (Article 10)**

This provision requires Member States to criminalise conduct enabling travel with a terrorist purpose, such as the *organisation* or *facilitation* of such travel. The term 'organisation' covers practical travel arrangements, such as ticket purchase or itinerary planning. 'Facilitation' means assisting a traveller in reaching their destination in any other way. The Commission gives the example of helping a person to unlawfully cross a border.

#### **Terrorist financing (Article 11)**

The proposal reinforces and extends the scope of the provisions linked to terrorist financing. A new offence of 'financing of travelling abroad for terrorism' – which had been missing from FD 2008/919/JHA – has been added. Article 11 together with Article 15 ('Relationship to terrorist offences') implements FATF Recommendation No 5, stating that terrorist financing should be criminalised even absent a link to a specific terrorist act.

#### **Aiding or abetting, inciting and attempting (Article 16)**

*Aiding and abetting* a terrorist offence may encompass a large variety of activities, such as the provision of services or material support such as transport, weapons, explosives or shelter. In addition to the current requirements, it is proposed to criminalise also aiding and abetting in relation to the receiving of training and to extend the criminalisation of *incitement* to all offences. The criminalisation of the *attempt* is also extended to all offences, including travelling abroad for terrorist purposes and terrorist financing, with the exception of receiving training and facilitating travel abroad.

#### **Protecting victims of terrorism**

The proposed directive incorporates the definition of 'victims of terrorism' (Recital 16), in line with the [Victims' Rights Directive](#), thus clarifying the status of the family members of victims of terrorism: family members of victims whose death was the direct result of terrorist offences are assimilated with direct victims and can benefit from the same rights. The aim is to take into account the specific needs of victims of terrorism. Victims' rights are covered by Article 22 on the protection of and assisting to victims and Article 23 on the rights of victims of terrorism resident in another Member State. These articles require providing immediate and adequate assistance to victims after an attack, as well as emotional and psychological support (namely in the place of residence of a victim, even if the terrorist offence was committed in another Member State) and access to information (on victims' rights, available support and compensations).

#### **Fundamental rights safeguards**

Whereas the FDs from 2002 and 2008 contained provisions on fundamental rights and principles, there is no specific article introducing fundamental rights safeguards in the Commission proposal. Reference to the principles of the EU Charter of Fundamental Rights and to proportionality is made in Recitals 19 and 20 respectively. The Commission states that 'the respect of fundamental rights in general and the principle of proportionality is respected in limiting the scope of the offences to what is necessary to allow for the effective prosecution of acts that pose a particular threat to security'. At the same time, the Commission recognises fundamental rights risks inherent to any legislation in the field of criminal law and, in particular, the possible impact on the freedom of movement inside the EU of the new offence of travelling abroad for terrorist

purposes. It is worth pointing out that this and other offences related to terrorist activities are punishable only 'when committed intentionally'; however, establishing a 'terrorist intention' may prove a challenge.

### Advisory committees

The European Economic and Social Committee (EESC) adopted its [opinion](#) on the proposal on [17 March 2016](#). While considering that the existing legal framework needs to be revised in view of the current international situation, the EESC calls for respecting the principle of proportionality and giving priority to fundamental rights, and stresses that 'it is possible to be both *secure* and *free* in Europe'. The EESC warns that the definitions in the proposal are not clear enough to guarantee the rights enshrined in the Charter and the Treaty, and that it leaves too great a margin for interpretation. The EESC points to the danger of legislating against anticipated crimes and makes specific comments on several articles. It suggests removing Article 3(2)(i), which states that '*threatening to commit*' a terrorist act is equivalent to committing one and asks whether hacking could be considered a terrorist act under Article 3(2)(d). As to the new offence of *travelling abroad for terrorism* (Article 9), the EESC finds the definition of '*for terrorism*' extremely unclear. It also points to the difficulty of determining whether a group is 'terrorist' in nature, given the existence of different lists and practices at UN, EU and national levels. Finally, the EESC finds that Article 15, which criminalises certain offences without the need for a terrorist offence to be actually committed, is problematic from the fundamental rights point of view, and underlines the difficulty of establishing 'terrorist intent'.

### National parliaments

The deadline for raising subsidiarity concerns regarding the proposal expired on 17 February 2016 without any reasoned opinions having been submitted. The [national parliaments](#) of 18 Member States examined the proposal. Several of them submitted comments on aspects, including: fundamental rights safeguards to be incorporated in the normative part of the directive (Cyprus); the need to address the crime of trafficking in cultural goods (Austria, Italy); the rights of victims (Romania); and combating the use of the Internet for terrorist propaganda and recruitment (Italy, Romania). On 9 March 2016, the UK House of Commons [endorsed](#) the UK Government's decision not to opt into the proposed directive. However, in April 2016, the UK Parliament's European Scrutiny Committee [notified](#) the government that the directive remains under scrutiny and asked to be informed on the outcome of the trilogue negotiations and on the final text.

### Stakeholders' views<sup>7</sup>

#### International stakeholders

The UN Security Council Counter-Terrorism Committee, which monitors the implementation of UNSCR 2178, has repeatedly drawn attention to the importance of full compliance with international law (in particular with international human rights, refugee and humanitarian law), when taking measures to stem the flow of foreign fighters. In its [second](#) and [third](#) implementation reports from September and December 2015, it underlined the need to ensure that any limitation of fundamental rights such as the freedom of speech, should be proportionate and non-discriminatory.

In a [resolution](#) from January 2016, the Council of Europe Parliamentary Assembly (PACE) welcomed the proposal and called for a fair balance 'between defending freedom and security, on the one hand, and avoiding the violation of those very rights, on the other',

and for ensuring effective democratic oversight by both the national parliaments and other independent actors, such as national human rights organisations and civil society.

### **Civil society**

Several NGOs and civil liberties advocates have expressed concerns and criticism regarding the proposal. The need to respect human rights obligations and international humanitarian law was underlined in a [joint civil society statement on counter-terrorism](#), signed by 13 organisations. The authors expressed concerns over fast-track procedures at EU and national level used for adopting security measures, without a proper (or any) impact assessment, as in the case of the proposal on combating terrorism. They raised concerns about the proposal's definition of terrorism, pointing to the human rights risks of vague and over-broad definitions, and about the proposal's criminalising some forms of conduct without any direct link to specific terrorist offences or activities. Finally, they pointed to the direct impact of the proposed measures on the freedom of movement or of expression and assembly, and reminded that any limitations to fundamental rights have to be proportionate, necessary and subject to independent or judicial review.

The same concerns were raised in the [joint submission](#) on the proposal by Amnesty International, the International Commission of Jurists and Open Society, indicating in particular that both UNSCR 2178 and the CoE Additional Protocol contain flaws that could lead to arbitrary, disproportionate and discriminatory interference with human rights, and that such flaws are also present (and sometimes exacerbated) in the proposed directive. The authors analyse several problematic articles in detail and call for the inclusion of a human rights safeguard clause in the operative section of the directive, in line with the existing framework decision, and for adding a specific provision on freedom of expression safeguards (as was the case in FD 2008).

The Meijers Committee,<sup>8</sup> in its [Note on a Proposal for a Directive on combating terrorism](#), indicates that 'the fact that international obligations in this area have already been adopted does not discharge the EU legislature of the obligation to make its own critical assessment' and also points to the absence of reference to fundamental rights (except in the preamble). The most problematic aspects identified by this committee are: a broad definition of terrorism which can lead to unjust results, 'especially in combination with a broad array of preparatory offences'; unprecedented opportunities to cumulate offences; explicit criminalisation of indirect provocation, and a risk of reversing the burden of proof in relation to travelling abroad, which will prove especially problematic for humanitarian organisations and journalists. Moreover, the committee wonders how the proposed directive relates to the 'European institutions' laudable initiatives on deradicalisation, disengagement and rehabilitation of (potential) foreign fighters and returnees, and recalls the Commission's own warning about possible 'unintended consequences' of the prosecution<sup>9</sup>, as well as the Council conclusions on model provisions<sup>10</sup>, stating that 'criminalisation of a conduct at an unwarrantably early stage' should be avoided.

In its [recommendations](#) to the draft report on the directive, prepared by Parliament's Civil Liberties Justice and Home Affairs (LIBE) Committee, the European Digital Rights association (EDRi)<sup>11</sup> made several proposals for amending the Commission proposal and the said draft report. EDRi urged Parliament to ask the Commission to immediately conduct an impact assessment and proposed reducing the deadline for reporting on the impact and added value of the directive from four years to a year, and to introduce independent and parliamentary review obligations. EDRi also called for including strong human rights safeguards in the directive, through a general clause on fundamental rights

and specific clauses on freedom of expression, emergency situations and effective remedies. Finally, EDRI expressed regret that the draft report only considers the internet's negative influence on society and pointed out that internet access restrictions and website removal fall outside the scope, which mainly aims at defining criminal offences.

In its recent [report](#) on defence rights in Europe, in which it adopted a criminal justice perspective, the Legal Experts Advisory Panel (LEAP) enumerated several issues arising in terrorism prosecutions and relevant to the proposal: the prevalence of evidence obtained via intelligence agencies; the risks arising from reliance upon evidence obtained in third countries where torture is prevalent; the difficulties arising from broad definitions of terrorism offences; and the poor-quality interpretation of international law in criminal courts. LEAP recommended the LIBE Committee to take into account the 'fair trials threats arising from the use of intelligence evidence and the challenges faced by national criminal courts in applying EU law definitions'.

### Legislative process

The Working Party on Substantive Criminal Law (DROIPEN) met several times to examine the proposal. On 11 March 2016, the Council agreed its [negotiating position](#). In its [general approach](#), the Council introduced several changes to the Commission proposal: a new Recital 19a on the need to respect international (including humanitarian) law, a new article **on fundamental principles** relating to freedom of press and other media; the criminalisation of travelling abroad for terrorism limited to countries **outside the EU**; a new article on the **effective tools** that should be available to investigate and prosecute terrorist offences, and another on the protection of **victims of terrorism**, focusing on criminal proceedings. Moreover, Article 5 was modified to refer to the 'glorification of terrorist acts' as a form of **indirect public provocation**; two new recitals were added on the measures to remove or block access to webpages publicly inciting the committing of terrorist offences, and on the exemption of dissemination of information 'for scientific, academic and reporting purposes' and of 'radical, polemic or controversial views' from the scope of the directive; and 'illegal system interference' and 'illegal data interference' were added to the list of terrorist offences (Article 3), in line with Directive 2013/40/EU on **cyber-attacks**. The transposition deadline would be extended to 24 months.

The LIBE Committee published the [draft report](#) on 9 March 2016 (rapporteur: Monika Hohlmeier, EPP, Germany). On 4 July, LIBE [adopted](#) its report, as well as the mandate for opening negotiations with the Council. The LIBE report introduced a significant number of modifications to the proposal. New articles were added in the body of the directive, introducing **safeguards for fundamental rights and freedoms**, such as freedom of expression, the principles of proportionality and non-discrimination, and provisions on procedural rights and effective remedies. The provision on travelling for terrorism has been extended to cover travel to **any country** (including in the EU). The report goes beyond the Council's position, introducing a new article on '**measures against illicit terrorist content on the internet**', requiring the removal of terrorism-related illegal content or blocking access to it if not feasible (with adequate safeguards and judicial review). It also incorporates an article on **investigative tools**, as well as reinforced provisions on **victims' protection and support**. Regarding **terrorist financing**, a provision provides for freezing of terrorists' assets and encourages systematic financial investigations, financial information-sharing and the creation of specialised national units. Last but not least, a new article on **prevention** of radicalisation and recruitment to terrorism was added, as well as an obligation to **exchange information** concerning

terrorist offences, including systematic entering of alerts into the Schengen Information System (SIS II) on suspected or convicted offenders, and sharing of relevant Passenger Name Record (PNR) data.

Seven trilogue meetings with the Council and the Commission took place between July and November 2016. A [compromise agreement](#) was reached on 17 November 2016, endorsing most of the changes proposed by Parliament. The compromise was approved by the European Parliament and the Council, on 16 February and 7 March respectively.

Under the compromise, the following terrorist activities are made punishable:

- illegal system interference and illegal data interference (cyber-attacks), when they are committed against a critical infrastructure information system
- travelling for the purpose of terrorism both in the case of outbound travel and of travel to a EU Member State to commit a terrorist offence, to join a terrorist group or to provide or receive training for terrorism (for inbound travel, Member States may criminalise it as the act of travelling for terrorism or as a preparatory act);
- terrorist financing (criminalisation covers not only the financing of terrorist acts but also the financing of a terrorist group);
- receiving training for terrorism, including self-study through the internet or other teaching material;
- public provocation to commit terrorism, whether online or offline (Member States are required to remove such online content or to block access to it, while ensuring transparency and adequate safeguards as well as the possibility of judicial redress);

Moreover, the agreed text contains:

- a specific article on fundamental rights and freedoms;
- special provision on recruitment and training for terrorism directed towards a child, to be taken into account in sentencing;
- an article on effective investigative tools, which should be targeted and proportional, and on freezing and confiscation of proceeds of terrorist offences;
- strong provisions on assistance to and protection of victims of terrorism, including their family members, and requirement on Member States for comprehensive response to their specific needs (assistance and support, not only in the country where the attack was committed but also in that of the victims' residence);
- a reference to a long-term, proactive and comprehensive approach, combining criminal justice measures with deradicalisation and rehabilitation programmes;
- provisions on reporting, not only on the implementation (after 18 months) but also on the directive's added value and on its impact on fundamental rights and freedoms (after 36 months).

It is also specified throughout the text that a preparatory act must have been carried out intentionally or knowingly to be criminalised. Finally, the new directive will impose on the Member States the obligation to exchange information gathered in terrorism-related criminal proceedings, and amend Council Decision 2005/671/JHA on the exchange of information and cooperation on terrorist offences, reinforcing its provisions.

The final act was signed by the presidents of the co-legislators on 15 March 2017 and published in the Official Journal on 31 March 2017 as [Directive \(EU\) 2017/541](#), which entered into force on 20 April 2017. Member States have to transpose it into national legislation by 8 September 2018. Under Article 29 of the directive, the Commission should

submit, by 8 March 2020, a report on its implementation, as well as, by 8 September 2021, an evaluation report examining its added value and impact on fundamental rights.

### EP supporting analysis

- [Framework Decision 2002/475/JHA on combating terrorism: Implementation Appraisal](#), EPRS briefing, Ivana Kiendl Krišto, May 2016.
- [Foreign fighters – Member State responses and EU action](#), EPRS Briefing, Piotr Bąkowski and Laura Puccio, March 2016.
- [The European Union’s Policies on Counter-Terrorism: Relevance, Coherence and Effectiveness](#), EP Policy Department on Citizens' Rights and Constitutional Affairs, January 2017.

### Other sources

- [The Foreign Fighters Phenomenon in the EU – Profiles, Threats & Policies](#), ICCT, April 2016.
- [Combatting terrorism](#), European Parliament, Legislative Observatory (OEIL).

### Endnotes

- <sup>1</sup> See Soufan Group report on [Foreign Fighters in Syria](#) from June 2014 and its [updated report](#) from December 2015.
- <sup>2</sup> Soufan Group [updated report](#) on foreign fighters, December 2015, p. 4.
- <sup>3</sup> The European Parliament has yet to approve the EU's accession to the Council of Europe Convention and to the Foreign Fighters Protocol.
- <sup>4</sup> The two Member States were Ireland and Greece. Ireland adopted its [relevant legislation](#) in 2015. There was no information available about new Greek legislation at the time of writing.
- <sup>5</sup> As confirmed by other reports, such as the Third Eurojust Report on Foreign Terrorist Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response, November 2015 (Restricted), or the ICCT report on [The Foreign Fighters Phenomenon in the EU – Profiles, Threats & Policies](#), April 2016.
- <sup>6</sup> In June 2013, the JHA Council approved a package of [22 measures](#) proposed by the CTC aiming at assessing the FF phenomenon, preventing radicalisation, detecting suspicious travel, investigating, prosecuting and dealing with returnees. See also [CTC report](#) from November 2014 on the implementation of the EU CT strategy.
- <sup>7</sup> This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.
- <sup>8</sup> The Meijers Committee is a standing committee of experts on international immigration, refugee and criminal law.
- <sup>9</sup> European Commission, [Background document](#) to the High-Level Ministerial Conference 'Criminal justice response to radicalisation', 19 October 2015, p. 2.
- <sup>10</sup> [Council Conclusions on model provisions, guiding the Council's criminal law deliberations](#), 2979th Justice and Home Affairs Council meeting, Brussels, 30 November 2009.
- <sup>11</sup> [European Digital Rights](#) (EDRi) is an international not-for-profit association of 31 digital human rights organisations from across Europe, defending rights and freedoms in the digital environment, such as the right to privacy, freedom of expression, communication and access to information.

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