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**RECOMMENDATIONS
ON COMPROMISE AMENDMENTS
TO DRAFT DIRECTIVE ON COMBATING TERRORISM**

- 20.06.2016 -

In view of the compromise amendments (COMP), European Digital Rights (EDRi), with the support of its member Access Now, recommends to:

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DETAILED ANALYSIS
COMPROMISES TERRORISM DIRECTIVE (v. 16.06.2016)

COMP 1: NO POSITION

**Compromise on convergence terrorism and organised crime
(covering AM 1, 9, 62, 123, 126, 127)**

Comments: This compromise falls outside our scope of work.



COMP 2: OPPOSE

Compromise on prevention (covering AMs 18, 23, 24, 61, 64, 66, 158, 161, 176, 177, 178, 179, 180, 195, 292)

Recital 17a (new)

(17a) The prevention of radicalisation and recruitment of citizens of the Union by terrorist organisations requires a long-term, proactive and comprehensive approach, combining measures in the area of criminal justice with policies in the field of education, social- inclusion and integration, as well as the provision of effective de-radicalisation and exit programmes. Member States should share good practices on effective measures and projects in this field. Furthermore, Member States should share good practices on the use of effective alternative measures within the judicial approach to prevent citizens of the Union and third-country nationals legally residing in the Union from leaving the Union for terrorist purposes or to control their return to it from conflict zones. They should share such good practices not only among each other but also with third countries, where appropriate, as well as the relevant EU agencies.

Recital 17b (new)

(17b) Member States should pursue their efforts to prevent terrorism by coordinating their strategies and sharing the information and experience at their disposal, by implementing good practices at both Union and national level and by updating national prevention policies in accordance with the Union strategy for combating radicalisation and recruitment to terrorism. The Commission should, where appropriate, provide support to national, regional and local authorities in developing prevention policies.

Art 21a (cf Directive on Combating the sexual abuse and sexual exploitation of children and child pornography)

Prevention

1. Member States shall take appropriate measures to prevent the radicalisation and recruitment of citizens of the Union by terrorist organisations.
2. Member States shall take appropriate action, including through the Internet, such as the provision of information, education and awareness-raising campaigns

and the development of alternative narratives to counter terrorist propaganda, where appropriate in cooperation with private companies, relevant civil society organizations, local communities and other stakeholders, aimed at raising awareness and reducing the risk of radicalization and recruitment by terrorist organizations.

3. Member States shall promote regular training for staff likely to come into contact with persons vulnerable to radicalization, including front-line police officers and prison guards, aimed at enabling them to identify signals of and deal with radicalisation and recruitment by terrorist organisations.

Comments: What's the dividing line between state propaganda or corporate speech and "alternative narratives"? Are we prepared to let governments/companies/a set of NGOs tell the population how and what to think? Counter-speech can have a role, but legislating in this direction carries only risks and no demonstrable benefits.

COMP 3: NO POSITION

Compromise on nuclear/chemical terrorist threat (covering AMs 87, 170)

Comments: This compromise falls outside our scope of work.

COMP 4: OPPOSE

Compromise on terrorist financing and aiding/abetting (covering AMs 8, 10, 11, 36, 37, 42, 43, 81, 82, 83, 84, 85, 86, 117, 118, 119, 120, 121, 122, 123, 124, 125, 128, 129, 130, 131, 132, 293, 294, 295, 296, 297, 298, 299, 300, 301, 317, 325, 326, 327, 329, 330, 331, 332, 333, 334, 335, 338, 374, 375, 407)

Recital 5

(5) Taking account of the evolution of terrorist threats and legal obligations to the Union and Member States under international law, the definition of terrorist offences, offences related to a terrorist group and offences related to terrorist activities, should be further approximated in all Member States, so that it covers more comprehensively conduct related to in particular foreign terrorist fighters, the increasing misuse of the internet for terrorist purposes (e.g. for recruitment, propaganda and training) and terrorist financing. These forms of behaviour should be punishable if committed by any means, on- or offline, while respecting the principle of proportionality and necessity;

Recital 10

(10) Without prejudice to Directive 2015/849/EU of the European Parliament and of the Council, terrorist financing should be punishable in the Member States and cover not only the financing of terrorist acts, but also the financing of a terrorist group, as well as other offences related to terrorist activities, such as the recruitment and training, or travel for terrorist purposes, with a view to disrupting the support structures facilitating the commission of terrorist offences. Aiding and abetting or attempting terrorist financing should also be punishable

Recital 10a (new)

(10a) Illicit trade in firearms, oil, drugs, cigarettes and counterfeit goods and artworks and other cultural objects, as well as trade in human beings, racketeering and extortion have become very lucrative ways for terrorist groups to obtain funding. In seeking to combat terrorist financing, therefore, also the process that generates funding for terrorist organisations should be addressed.

While avoiding undue administrative burden for economic actors, Member States should take the necessary measures to ensure that terrorist groups may not benefit from any trading in goods. Appropriate and proportionate due diligence, monitoring and reporting requirements could have a preventative effect by materially impairing the trading activities of organised criminal groups and terrorist groups and by helping to track and prosecute organised crime and other commercial activities of terrorist organisations more effectively. Where appropriate, Member States should sanction breaches of these requirements.

Recital 10b (new)

(10b) Financial investigations are fundamental in uncovering the facilitation of terrorist offences and the networks and schemes of terrorist organisations. Such

investigations may be very productive, particularly when tax and customs authorities, financial intelligence units and judicial authorities are involved at an early stage of the investigation. Member States should aim to make financial investigations a standard component of all counter-terrorist investigations and to share relevant financial information among competent authorities. In their efforts to prevent, investigate and combat terrorist financing, Member States should make utmost use of Europol's financial intelligence and counter terrorist financing capabilities, as well as endeavour to ensure a more efficient and coordinated approach, for instance by establishing specialised units at national level to deal with financial investigations linked to terrorism, which may have considerable added value and contribute substantially to securing successful prosecutions.

Recital 11

(11) The provision of material support for terrorism through persons engaging in or acting as intermediaries in the supply or movement of services, assets and goods, including trade transactions involving the entry into or exit from the Union, should be punishable in the Member States as aiding and abetting terrorism or as terrorism financing if performed with the clear intention or knowledge that these operations or the proceeds thereof are intended to be used, in full or in part, for terrorist purposes or will benefit terrorist groups.

Article 11 (cf. CoE additional protocol + Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing)

Article 11

Terrorist financing

. Member States shall take the necessary measures to ensure that providing or collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the knowledge that they are to be used, in full or in part, in order to commit or to contribute to any of the offence(s) referred to in Articles 3 to 10 and 14 is punishable as a criminal offence when committed intentionally.

2. Where terrorist financing as referred to in paragraph 1 concerns any of the offences laid down in Articles 3, 4 or 9, it shall not be necessary that the funds are in fact used, in full or in part, to commit or to contribute to any of these offences, nor shall it be required that the offender knows for which specific act(s) the funds are to be used.

23. Member states shall take the necessary measures to ensure the freezing or seizure and confiscation of any funds and other assets used or allocated for the purpose of committing or attempting to commit any of the offences referred to in this Directive .

Article 15

For an offence referred to in Article 4 and Title III to be punishable, it shall not be necessary that a terrorist offence be actually committed, nor shall it be necessary, insofar as the offences referred to in Articles 5 to 10 and 12 to 14 are concerned, to establish a link to another specific act laid down in this directive.

Article 16

Aiding or abetting, inciting and attempting

1. Each Member State shall take the necessary measures to ensure that aiding or abetting an offence referred to in Articles 3 to 7 and 11 to 14 is made punishable.
2. Each Member State shall take the necessary measures to ensure that inciting an offence referred to in Articles 3 and 6 to 14 is made punishable.
3. Each Member State shall take the necessary measures to ensure that attempting to commit an offence referred to in Articles 3, 6, 7, 9 and 11 to 14, with the exception of possession as provided for in point (f) of Article 3(2) and the offence referred to in point (i) of Article 3(2), is made punishable.

Comments: The proposed amendments are unnecessarily broad and do not add any clarity or meaning. Article 15 is extremely broad and would go far beyond the recommendations of the UN Security Council on which this particular text is supposed to be based.



COMP 5: MIXED POSITION

Compromise on public provocation (covering AMs 6, 31, 99, 100, 105, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257)

Recital 7

(7) The offenses related to public provocation to commit a terrorist offence act comprise, inter alia, the glorification and justification of terrorism or the dissemination of messages or images on- and offline as a way to gather support for the terrorists cause or seriously intimidating the population. Such behaviour should be punishable when it causes a danger in the concrete case that terrorist offences may be committed.

Recital 7 a (new)

(7 a) Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States should ensure that the service provider is not liable for the information transmitted or stored in accordance with relevant provisions of Directive 2000/31/EC on electronic commerce.

Article 5 (cf. FD 2002/475/JHA)

Public provocation to commit a terrorist offence

Member States shall take the necessary measures to ensure that the distribution, or otherwise making available by any means on- or offline of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (h) of Article 3(2), where such conduct, advocating the commission of terrorist offences, causes a danger in the concrete case that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally.

Comments: The proposed text of Recital 7 is unacceptably unclear. The proposed text on 7a is welcome to mitigate the damage caused by the unnecessary and unclear amendments with regard to blocking and deletion of content.

COMP 6: OPPOSE

Compromise on removing illegal content (covering AMs 3, 40, 72, 75, 78, 91, 92, 101, 102, 103, 104, 260, 315, 316, 367, 372)

Recital 7a (new) (cf Directive on Combating the sexual abuse and sexual exploitation of children and child pornography)

(7a) An effective mean of combatting terrorism on the Internet is to remove illegal terrorist content at source. In that context, this Directive is without prejudice to voluntary action taken by the Internet industry to prevent the misuse of its services or to any support for such action by Member States, such as detecting and flagging illegal content. Member States should take all necessary measures to remove or to block access to webpages publicly inciting to commit terrorist offences. Where such measures are taken, they must be set by transparent procedures and provide adequate safeguards under the control of independent authorities. Member States should use their best endeavours to cooperate with third countries in seeking to secure the removal of such content from servers within their territory. However when removal of illegal content at its source is not possible, Member States may put in place measures to block access from the Union's territory to Internet pages identified as containing or disseminating terrorist content. Member States should consider legal action against internet and social media companies and service providers, which deliberately refuse to comply with a legal order to delete from their internet platforms illegal content extolling terrorism after being duly notified about such specific content. Such refusal should be punishable with effective, proportionate and dissuasive sanctions. The right to judicial review should be guaranteed to the internet and social media companies and service providers.

Article 14a (new) (cf Directive on Combating the sexual abuse and sexual exploitation of children and child pornography)

Article 14a

Measures against illegal terrorist content on the internet

1. Member States shall take the necessary measures to ensure the prompt removal of illegal content publicly inciting to commit a terrorist offence, as referred to in Article 5, hosted in their territory and to endeavour to obtain the removal of such content hosted outside of their territory. When that is not feasible Member States may take the necessary measures to block the access to such content.

2. These measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate and that users are informed of the reason for the restriction. Measures on removal and blocking shall be subject to judicial review.

Comments: The final version of this amendment is incoherent, out of the scope of the Directive and not in line with the wording of the Child Exploitation Directive. It says that blocking is “necessary” (in the complete absence of evidence to back up this assertion). It then says that Member States may (and therefore therefore don't need to, if they don't want to) block content. We strongly advise to consider the European Commission's 2007 impact assessment for amending the Framework Decision 2002 (see pp. 29 and 41).¹ It provides safeguards, but then says that this is without prejudice to voluntary measures, which means the safeguards can be ignored when voluntary measures are taken.

COMP 7: NO POSITION

Compromise on exchange of information (covering AMs 17, 47, 48, 79, 145, 150, 155, 156, 157, 159, 286, 288, 361, 362, 363, 365, 368, 369, 370, 373, 415)


Comments: This compromise falls outside our scope of work.

COMP 8: NO POSITION

Compromise on victims of terrorism (covering AMs 21, 22, 49, 50, 51, 52, 163, 164, 165, 166, 167, 168, 169, 171, 172, 173, 174, 175, 181, 336, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403)

Comments: This compromise falls outside our scope of work. However, we welcome the provisions in the proposed recital 16b.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2007:1424:FIN:EN:PDF>

 **COMP 9: OPPOSE**

Compromise on investigative tools (covering AMs 15, 46, 152, 366)

Recital 15a (new)


(15a) To ensure the success of investigations and prosecutions of terrorist offences, offences related to a terrorist group and offences related to terrorist activities, the competent authorities responsible for investigating and prosecuting such offences should have the possibility to make use of effective investigative tools such as those used in combating organised crimes or other serious crimes. Taking into account, inter alia, the principle of proportionality, the use of such tools, in accordance with national law, should be targeted and commensurate with the nature and gravity of the offences under investigation.

Article 21c (new) (cf. Directive on preventing and combating trafficking in human beings and protecting its victims)

Investigative tools

In accordance with national law and subject to appropriate legal safeguards, Member States shall 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 14.

Comments: While this text is is much better than many of the drafts, it falls below a minimum level of clarity and predictability that one should be able to accept from European lawmaking.

 **COMP 10: OPPOSE**

Compromise on electronic evidence (covering AMs 19, 20, 154, 160, 162)

Recital 15b (new)

(15b) The fact that terrorist organisations rely heavily upon various electronic tools, the internet and social media to communicate, promote, and incite terrorist acts, to recruit potential fighters, to collect funds, or to arrange for other support for their activities, creates challenges in investigations and prosecutions of terrorist offences. Member States should therefore cooperate among each other notably through Eurojust and Europol and with the European Commission to ensure a coordinated approach in dealing with the gathering, sharing, and admissibility of electronic evidence.

Comments: This adds no particular meaning or clarity to the legislation.



COMP 11: MIXED POSITION

Compromise on International humanitarian law (covering AMs 5, 16, 89, 94, 95, 206, 245, 246, 247, 240)

Recital 6a (new)

(6a) This Directive should not have the effect of altering the rights, obligations, and responsibilities of Member States and organisations under international law, including under international humanitarian law. Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of those terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a state in the exercise of their official duties are not governed by this Directive.

Recital 6b (new)

(6b) the provision of humanitarian assistance by impartial humanitarian organisations recognised by international law, including international humanitarian law should not be considered as contributing to the criminal activities of a terrorist group while taking into account the case law of the Court of Justice of the European Union.

Comments: While Recital 6a (new) is not enough to mitigate lack of clarity elsewhere in the Directive, it is a step in the right direction. Recital 6b (new) falls outside our scope of work.

COMP 12: SUPPORT

Compromise on fundamental rights (covering AMs 26, 53, 54, 187, 188, 189, 190, 191, 192, 194, 203, 204, 206, 258, 259, 360, 404, 405, 406, 408, 409, 410, 411, 412, 414, 417, 420, 421)

Recital 19

(19) This Directive and its implementation should respect the principles recognised by Article 2 of the Treaty on the European Union, should respect fundamental rights and freedoms and should observe the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including those set out in Chapters II, III, V and VI thereof which encompass inter alia the right to liberty and security, freedom of expression, freedom of speech, freedom of information, freedom of association and freedom of thought, conscience and religion, the general prohibition of discrimination in particular on grounds of race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, the right to respect for private and family life and the right to protection of personal data, the principle of legality and proportionality of criminal offences and penalties, covering also the requirement of precision, clarity and foreseeability in criminal law, the presumption of innocence and the right to a fair trial, the outcome of which is determined by the individual circumstances of the case, and the principles recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as well as freedom of movement as set forth in Article 21(1) of the Treaty on the Functioning of the European Union and Directive 2004/38/EC, recognising that exceptions may be made to the freedom of movement on the grounds of public policy or national security. Any limitation on the exercise of those rights and freedom shall be subject to the respect of the conditions enshrined in Article 52(1) of the Charter.

Recital 19a (new)

(19a) This Directive should not have the effect of requiring Member States to take measures which would result in any form of discrimination

Article 23b (new)

Article 23b

Fundamental Rights and Freedoms

1. In the transposition and implementation of this Directive Member States shall ensure that criminalisation shall be proportionate to the legitimate aims pursued and necessary in a democratic society, and shall exclude any form of arbitrariness or discrimination.

2. This Directive shall not have the effect of altering the obligation of Member States to respect fundamental rights enshrined in article 2 and 6 of the Treaty on the European Union and the Charter of Fundamental Rights of the European Union as well as in the European Convention for the Protection of Human Rights

and Fundamental Freedoms and international humanitarian law, and shall be implemented and interpreted in accordance with these rights and principles.

Recital 19b (new)

(19b) Nothing in this Directive should be interpreted as being intended to reduce or restrict the dissemination of information for the expression of an opinion or for scientific, academic or reporting purposes, as well as the expression of polemic or controversial views in the public debate on sensitive political questions.

Article 23c (new)

Article 23c

Fundamental principles relating to freedom of expression

This Directive shall not have the effect of requiring Member States to take measures in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media and shall be without prejudice to national rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

Comments: We regret the implications of “in particular freedom of the press” which implicitly downgrading other exercises of freedom of expression. However, we welcome the addition of this measure in the operative part of the legislation.

COMP 13: SUPPORT

Compromise on procedural rights and effective remedies (covering AMs 55, 193, 287, 318, 339, 360, 405, 416, 418)

Recital 19a (new)

(19a) Nothing in this Directive should be interpreted as being intended to reduce or restrict the Union acquis on procedural rights of suspects or accused persons in criminal proceedings including the directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings. Persons suspected of committing the offences laid down in this directive, should not bear the burden of proof.

Article 23d (new)

Article 23d

1. This Directive shall not have the effect of requiring Member States to take measures in contradiction with their obligations under Union law with regards to the procedural rights of suspects or accused persons in criminal proceedings.

2. Anyone whose rights and freedoms have unduly been violated in the application of the provisions of this Directive shall have the right to an effective remedy as enshrined in Article 47 of the Charter of Fundamental Rights.

Comments: This is a helpful addition.

COMP 14: NO POSITION

Compromise on receiving of training (covering AMs 32, 115, 269, 270, 271, 272, 273, 274, 275, 276, 277)

Comments: This compromise falls outside our scope of work.

COMP 15: OPPOSE

Compromise on travelling (covering AMs 7, 33, 34, 106, 107, 108, 109, 110, 111, 112, 278, 279, 280, 281, 282, 283, 284, 285)

Recital 8

(8) While it is not indispensable to criminalise the act of travelling as such, considering the seriousness of the threat and the need to, in particular, stem the flow of foreign terrorist fighters, it is necessary to criminalise the travelling abroad for terrorist purposes, being not only the commission of terrorist offences and providing or receiving training but also to participate in the activities of a terrorist group. Such act should be criminalised under specific conditions and only when the terrorist purpose of the travel is proven by inferring, from

objective, circumstances. Facilitating or organizing such travel should also be criminalised.

Article 9

Travelling abroad for the purpose of terrorism

Member States shall take the necessary measures to ensure that any travel to a country or a Member State, which is not that of the traveller's nationality or residence, directly or by transiting through one or several Member States, is punishable as a criminal offence when committed intentionally, when it can be objectively demonstrated that it was made for the purpose of the commission of or contribution to a terrorist offence referred to in Article 3, or for the participation in the activities of a terrorist group, referred to in article 4, with knowledge of the fact that such participation will contribute to the criminal activity of such a group, or for the providing or receiving of training for terrorism referred to in Articles 7 and 8.

Comments: The Commission justified the creation of the criminalisation of travel to be required by the UN Security Council decision 2178 (2014). However, the proposal in Article 9 goes well beyond what is requested by the UN Security Council as it covers travels to an individual's own country.

Perhaps, most importantly, the UN Security Council also put the emphasis on important safeguards that are not mentioned in the proposed Directive:²

"Reaffirms that all States shall prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents, underscores, in this regard, the importance of addressing, *in accordance with their relevant international obligations*, the threat posed by foreign terrorist fighters, and encourages Member States to employ *evidence-based* traveller risk assessment and screening procedures including collection and analysis of travel data, *without resorting to profiling based on stereotypes founded on grounds of discrimination prohibited by international law.*"

More broadly, the Directive should focus on criminalising terrorism offences rather than criminalising a neutral concept such as travel, as it appears to be the described in the recital.

² http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf