

## Recommendations for the European Parliament's Draft Report on the Directive on Combating Terrorism

In the view of the Civil Liberties, Justice and Home Affairs Committee (LIBE)'s legislative work on the Directive on Combating Terrorism<sup>1</sup>, [European Digital Rights](#) (EDRi) would like to make a set of recommendations regarding the provisions falling within our scope of work, i.e. the protection of human rights in the digital environment. The absence of comments on certain provisions shall not be interpreted as an endorsement.

EDRi supports the aim of achieving a united, coherent and effective response to terrorism.<sup>2</sup> Notwithstanding the importance of ensuring that adequate measures are in place to fight terrorism, EDRi is concerned about the speed that this file is taking. Terrorism is a very complex issue and laws must be balanced, smart and work in times of crisis. With the view to being constructive in this process, EDRi encourages the rapporteur, shadow rapporteurs and LIBE members to consider EDRi's recommendations outlined before, when and after proposing amendments. EDRi's wording proposals are based on the Commission's proposal unless expressly specified (in the latter case, to explain the changes needed to the rapporteur's draft report).

### I. Human Rights Impact assessment needed

EDRi regrets the absence of an impact assessment. This is in contradiction with the EU Better Regulation Guidelines<sup>3</sup> and the European Commission's Better Regulation tool No. 24. While parts of the text are similar to the 2008 Framework Decision, six years is a very long time to wait for a review of an issue of such importance. In addition, the Council and the Parliament rapporteur are proposing new elements without any obvious evidence base.

Civil society has not been awarded the opportunity to provide input, evidence or expertise prior to the proposal of the Directive. The justification given by the Commission was based on the urgency of the file. However, this contradicts the Member States' proposal to transpose the Directive not in twelve months as proposed by the European Commission and the EP rapporteur, but in twenty-four months.<sup>4</sup>

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1 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONGML%2bCOMPARL%2bPE-577.046%2b01%2bDOC%2bPDF%2bV0%2f%2fEN>

2 For a more detailed analysis on the fundamental flaws of the Commission's proposal vis-à-vis its impact, legitimacy and effectiveness, see [http://www.commissie-meijers.nl/sites/all/files/cm1603\\_note\\_on\\_a\\_proposal\\_for\\_a\\_directive\\_on\\_combating\\_terrorism.pdf](http://www.commissie-meijers.nl/sites/all/files/cm1603_note_on_a_proposal_for_a_directive_on_combating_terrorism.pdf)

3 According to the European Commission's Guidelines on Impact Assessments, the latter "*must set out the logical reasoning that links the problem (including subsidiarity issues), its underlying drivers, the objectives and a range of policy options to tackle the problem. They must present the likely impacts of the options, who will be affected by them and how.*" The guidelines also state that "*stakeholders must be able to provide feedback on the basis of an Inception Impact Assessment*", subject to a 12-week internet-based public consultation covering all of the main elements" in order to gather evidence. Cf. [http://ec.europa.eu/smart-regulation/guidelines/ug\\_chap3\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm)

4 <http://data.consilium.europa.eu/doc/document/ST-6655-2016-INIT/en/pdf>, cf. Article 25.

## EDRI's proposal:

**We urge the European Parliament to ask the European Commission to conduct an Impact assessment immediately.**

## II. Strong and meaningful human rights safeguards

### a) General clause

Contrary to the Framework Decision 2002, as amended in 2008, the Commission's proposal for a Directive does not contain any reference to fundamental rights and freedoms in the Articles.

- **Recital 19 should be deleted and replaced by a new Article**

We consider it problematic that Recital 19 states that the Directive respects fundamental rights, since this is not necessarily a given. A similar phrasing was also used in Recital 22 of Directive 2006/24/EC (the Data Retention Directive), which was later ruled to be in violation of the Charter of Fundamental Rights of the European Union.<sup>5</sup> An adequate fundamental rights clause should emphasise the limitations on fundamental rights that will be put in place as a result of this Directive, as well as the duty of Member states to observe such rights when implementing it, so judges can interpret the law adequately.

EDRI thus recommends rephrasing Recital 19 and converting it into an Article, based on the wording used in Article 1(2) of the 2002 Framework Decision on Combating Terrorism, Article 2 of the 2008 Framework Decision on Combating Terrorism, Article 12 of the Convention on the Prevention of Terrorism of the Council of Europe and Article 8 of the Additional Protocol. In addition, the Directive should emphasise that restrictions on fundamental rights must be provided for by law, be necessary and proportionate for the aim pursued..

### EDRI's proposal (providing an alternative wording for the rapporteur's AM 53):

#### **Article 23a (new): Fundamental Rights and Principles**

~~1. This Directive respects the principles recognised by Article 2 of the Treaty on the European Union, respects fundamental rights and freedoms and observes 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 and 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~~

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<sup>5</sup> CJEU, Case C-293/12, *Digital Rights Ireland* (2014). ECLI:EU:C:2014:238, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d554974076469049acb0d9a238bdd21dbc.e34KaxiLc3eQc40LaxqMbN4OchaQe0?text=&docid=150642&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=16207>

~~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 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.~~ ***shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in the Charter of Fundamental Rights of the European Union and Articles 2 and 6 of the Treaty on European Union, as well as in the European Convention for the Protection of Human Rights and Fundamental Freedoms and International humanitarian law.***

***2. Restrictions to fundamental rights and freedoms must be provided for by law, be necessary and proportionate for the aim pursued.***

***3. This Directive has to be implemented in accordance with ~~these rights and principles~~ the Charter of Fundamental Rights and principles of EU law.***

## b) Non-discrimination

The current text of the proposed Directive seems to be neutral, but taken into account the explanatory memorandum and certain provisions of the draft Directive, this legal instrument is highly likely to be discriminatory in practice. As the UN Special Rapporteur on Counter-Terrorism and Human Rights points out, “on paper most strategies to counter violent extremism are generic. In practice, however, they tend to target specific groups determined to be most ‘at risk’ of being drawn to violent extremism”.<sup>6</sup>

The current proposal only provides a rather weak and narrow non-discrimination safeguard in Recital 20, which is restricted to criminal offences. EDRi encourages the European Parliament to strengthen this provision, in line with the EU Charter and the UN’s Plan of Action against Violent Extremism leading to terrorism, which calls on UN Member States to strengthen “the rule of law, repealing discriminatory legislation and implementing policies and laws that combat discrimination, marginalisation and exclusion in law and in practice”.<sup>7</sup>

**EDRi’s proposal** (amending the Commission’s proposal):

Recital 20

The implementation of ~~the criminalisation under~~ this Directive should be proportional to the nature and circumstances of ***each case*** ~~the offence~~, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discrimination.

<sup>6</sup> Report of the UN Special Rapporteur on Human Rights and Countering Terrorism of 22 February 2016, A/HRC/31/65, para. 43

<sup>7</sup> A/70/674, Para. 41, <https://www.un.org/counterterrorism/ctitf/en/plan-action-prevent-violent-extremism>

### c) Freedom of expression

The draft Directive contains provisions which can have a chilling effect on freedom of expression. In the words of the European Court of Human Rights (ECtHR), freedom of expression applies to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.<sup>8</sup>

The Directive must ensure that “any restrictions on freedom of expression are clearly and narrowly defined and meet the three-part test of legality, proportionality and necessity”, as the UN Plan of Action Against Violent Extremism outlines.<sup>9</sup> The Directive should help prevent abusive and arbitrary practices in Member States (see our Annex). Hence, EDRi encourages policy makers to adopt an Article which includes wording based on Recital 14 and Article 2 of the Framework Decision 2008.

#### EDRi's proposal:

***Article 23b (new) Freedom of expression***

***1. Nothing in this Directive may be interpreted as being intended to reduce or restrict the dissemination of information for the expression of an opinion. The expression of radical, polemical or controversial views in the public debate on sensitive political questions, including terrorism, fall outside the scope of this Directive and, in particular, of the definition of public provocation to commit a terrorist offence.***

***2. This Directive shall not have the effect to take measures in contradiction of fundamental principles relating to freedom of expression, including freedom of the press and the freedom of expression resulting from constitutional traditions or 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.***

### c) Emergency situations

The Directive must work for situation of crisis or emergency, in line with Article 15 of the European Convention on Human Rights (ECHR). In this sense, the UN Plan of Action on violent extremism leading to terrorism specifies that “certain rights are non-derogable even in time of public emergency which threatens the life of the nation”.<sup>10</sup> As the five UN Special Rapporteurs highlighted regarding France's situation after the Paris Attacks, “[w]hile exceptional measures may be required under exceptional circumstances, this does not relieve the authorities from demonstrating that these are applied solely for the purposes for which they were prescribed, and are directly related to the specific objective that inspired them.”<sup>11</sup>

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<sup>8</sup> Case ECtHR, Handyside v. UK, Application 5493/72, 7 December 1976, para. 49

<sup>9</sup> A/70/674, Para. 50, <https://www.un.org/counterterrorism/ctitf/en/plan-action-prevent-violent-extremism>

<sup>10</sup> Para. 20

<sup>11</sup> <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16961&LangID=F>

EDRI's proposal:

***Article 23c (new) Emergency situations and fundamental rights***

*In time of war or other public emergency threatening the life of the nation, Member States may take measures to derogate certain rights, in line with EU and International law. Such circumstances do not relieve the authorities from demonstrating that the measures undertaken are applied solely for the purpose of combating terrorism and are directly related to the specific objective of combating terrorism.*

**d) Effective remedies for Human Rights violations**

The UN's Plan of Action against violent extremism leading to terrorism also asks UN Member States to ensure accountability for human rights violations "through criminal procedures adhering to due-process guarantees."<sup>12</sup> This is absent from the European Commission's proposal. EDRI's proposal is based on the model clause proposed in the former UN Special rapporteur's report on best practices when countering terrorism:

EDRI's proposal:

***Article 23d (new) Right to effective remedies***

*1. Any person whose fundamental rights and freedoms have been violated in the exercise of counter-terrorism powers or the application of counter-terrorism law has a right to a speedy, effective and enforceable remedy.*

*2. Member States' judicial authorities shall have the ultimate responsibility to ensure that this right is effective.*

**e) Human rights safeguards for specific offences**

All provisions need to be read in compliance with fundamental rights and freedoms. In addition, when referring to a concept that does not have a harmonised definition, EU institutions should provide a definition in Article 2, in order to comply with the principle of legality so that, as the UN Special Rapporteur on Human Rights and combating terrorism stated, "criminal liability is narrowly and clearly defined."<sup>13</sup>

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<sup>12</sup> cf. Para. 50

<sup>13</sup> Para. 21,

[www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.65\\_AUV.docx](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.65_AUV.docx)

### III. Terrorist offences

- **Article 2: definitions**

The draft Directive contains many legal concepts which can mean different things. The Directive needs to comply with the principle of legality.

**EDRI's proposal:**

Should the Directive contain legal terms which are not defined in the other provisions, Article 2 should be amended to add the appropriate definitions. For specific examples, please see our recommendations per provision in this document.

- **Recital 5 and Article 3: terrorist offences**

Article 3 defines the concept of 'terrorist offences'. Recital 5 says that the Member States' definition of terrorist offences should cover forms of behaviour "punishable also if committed through the Internet, including social media". However, Articles 3(1)(b) and 3(2)(i) are not clear about what this means in practice.

- **Recital 5**

It is not clear why a reference to the Internet is needed. Criminal offences should be technology-neutral insofar as possible.

**EDRI's proposal:**

Recital 5  
Taking into account of the evolution of terrorist threats and legal obligations to the Union and Member States under international law, the definition of terrorist offences, including 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 relate to in particular foreign terrorist fighters and terrorist financing. ~~These forms of behaviour should be punishable also if committed through the Internet, including social media.~~

- **Article 3(1)(b) on 'unduly compelling a Government or international organisation '**

Pursuant to Article 3(1)(b), an offence may qualify as a terrorist offence when it is committed with the aim of '(b) unduly compelling a Government or international organisation to perform or abstain from performing any act'. Notwithstanding its use in existing legislation, the use of the word 'unduly' in this context is problematic, since it lacks a clear definition or legal import. An improved phrasing might refer to 'using violence or the threat of violence to compel', as we do not see how any non-violent attempt at influencing governmental policy could qualify as terrorism. Without such a modification, this provision risks affecting legitimate forms of protest and civil disobedience

under the concept of terrorism. For instance, as the UN Human Rights Committee states and the UN Special Rapporteur on Human Rights and Countering Terrorism endorses, “no site or information dissemination system should be prohibited from publishing material solely on the basis that it may be critical of the government or the social system espoused by the government”.

#### EDRi's proposal:

##### Article 3

1. (...)

(b) *using violence or the threat of violence to compel or seek to compel* ~~unduly compelling~~ a Government or international organisation to perform or abstain from performing any act.

- **Article 3(2)(i)**

Article 3(2) defines what 'intentional acts' means. EDRi considers Article 3(2)(i)'s wording is too broad and could lead to arbitrary and discriminatory abuses. EDRi suggests to bring it into line with Recital 13.

#### EDRi's proposal:

##### Article 3

2. (...)

(i) *seriously* threatening to commit any of the acts listed in points (a) to (h), *on the basis of objective, factual circumstances*.

- **Article 15: relationship to terrorist offences**

If the amendments we suggest are adopted, the proposed text from the Commission appears unproblematic.

- **Article 16: aiding or abetting, inciting and attempting**

Article 16 is intended to prohibit ancillary offences related to terrorist offences, namely aiding, abetting, inciting and attempting. We see a significant overlap with the provisions under Title III (Offences related to Terrorist Activities), since these are also aimed at prohibiting (specific forms of) assistance for terrorist offences. It would appear that many of these offences related to terrorist activities could also be treated under the more general principles referenced in Article 16. Conversely, many related offences currently covered by Article 16 have already found more specific treatment in Title III. This confusion generated by this dual approach is best illustrated by the fact that aiding of terrorism (e.g. through financing or providing training) itself becomes a specific offence.

As a result of this extension, the Directive's scope touches on activities with little to no direct relationship to actual terrorist acts. In the interest of legal certainty and good lawmaking, we

would encourage a closer specification of the interaction between Article 16 and Title III of the Directive, with the aim of reducing overlap between these rules. In addition, Article 16(2) is redundant as Article 5 is the provision dealing with incitement to terrorism.

Therefore, **EDRi proposes to delete it**. In case MEPs disagree with its deletion, EDRi proposes the following **alternative**:

#### EDRi's proposal:

##### Article 16

1. Each Member State shall take the necessary measures to ensure that aiding or abetting an offence referred to in Articles 3 to 8 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 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.

#### IV. Cooperation among Member States, their authorities and EU

- **Information sharing about convicted individuals or suspects**

EDRi agrees with the EP rapporteur's intention in AM 17, but suggests improvements in order to comply with the principle of presumption of innocence.

#### EDRi's proposal:

##### **Recital 15c** (amending the rapporteur's proposal)\*

In order to prevent and combat terrorism, a closer cross-border cooperation among the competent national and European authorities is needed with regard to expedient exchange of ~~any~~ relevant information from criminal records or other available sources on ~~radicalised individuals,~~ ~~and in particular on~~ individuals who are or have been subject to criminal proceedings, **are suspects of a criminal offence** or asset freezing. ***This provision is without prejudice to the [official name of police data protection Directive].***

\* Comments: Parts in **bold** and ~~strike-through~~ reflect the changes introduced vis-à-vis AM 17.

- **'Electronic evidence'**

Whereas the Commission remains silent on this issue, LIBE's Draft report contains two proposals on (undefined) 'electronic evidence'.

Regarding AM 19 and AM 20 of the Rapporteur's Draft Report (recitals 15e and 15f), EP's



rapporteur mentions “the issues related to electronic evidence”, but does not explain what issues she is referring to or the analysis available that demonstrate the existence of a real issue. Should policy-makers wish to include a provision on ‘electronic evidence’:

- they should first define what ‘electronic evidence’ means (Article 2);
- be future-proof, being compatible with the development of technology and innovation; and
- merge both (new) recitals.

#### EDRi’s proposals:

*Recital 15e* (new) amending the rapporteur’s proposal)\*

~~Considering 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, the issues related to electronic evidence create challenges in investigations and prosecutions of terrorist offences. Member States should therefore cooperate among each other, notably through Eurojust, to ensure a coordinated approach for the development of any~~ **necessary, proportionate and effective** ~~measures that may prove efficient in dealing with the gathering, sharing, and admissibility of electronic evidence, in compliance with [official name of police data protection directive].~~

\*Comments: Parts in **bold** and ~~strike-through~~ reflect the changes introduced vis-à-vis AM 19.

*Recital 15f* (new) amending the rapporteur’s proposal)\*

~~A Eurojust report of November 2014 notes that the growing sophistication and wider use of anonymisers, proxy servers, the Tor network, satellite links and foreign 3G networks create additional challenges to the gathering and analysis of electronic evidence, which are rendered even greater by the storage of data in the cloud. Member States should therefore cooperate among each other, in particular through Eurojust, to identify and remove possible obstacles that may occur in mutual legal assistance requests for electronic evidence.~~

\*Comments: Parts in **bold** and ~~strike-through~~ reflect the changes introduced vis-à-vis AM 20.

- **Professionalism of authorities and Human Rights training**

Member State authorities vested of powers to combat terrorism must have received relevant training, including training on human rights; be accountable; and be subject to judicial oversight. EDRi’s proposal is based on wording used in para. 50 of the Recommendation of the UN Secretary-General of 24 December 2015.

EDRi's proposal:

*Recital 4c (new)*

*Member States should strengthen the professionalism of security forces, law enforcement agencies and justice institutions; and ensure effective oversight and accountability of such bodies, in conformity with international human rights law and the rule of law. This includes human rights training to security forces including on how to respect human rights within the context of measures taken to counter violent extremism and terrorism.*

#### IV. Internet related provisions

##### In general

The Commission's Draft Directive, or indeed all the texts on the table at the moment, refer to the Internet as being negative for society. There is no mention (not even in a recital) of the essential role of the Internet in promoting and protecting Human Rights and Fundamental Freedoms within the Union and in Third Countries. EDRi thus advises the European Parliament not to harm the progress the EU has made in the protection of Human Rights online within and outside our borders.

EDRi's proposal:

*Recital X (new)*

*The Internet plays an essential role in promoting values of peace, tolerance and solidarity as well as promoting and protecting Human Rights and Fundamental Freedoms within and outside the European Union.*

- **(new) Recital 4a – Internet Referral Units**

EDRi is concerned with AM 3 of the rapporteur's draft Report and appears unsuited to this Directive: the first part (up to "jurisdictional conflicts") does not have any obvious link with the last part of the recital. Similarly, the second half of the recital lacks clarity; it does not specify what 'flagging' (notifying?) of content entails, to whom it must be 'flagged', by whom that content would have to be removed, and under what procedure this might take place. This Directive is aimed at criminalisation of terrorism offences rather than creating a framework of law enforcement measures. The Directive's operative part does not contain any reference to these 'special units' or their activities. This recital therefore bears little relevance to the instrument as a whole. We see this as being a political statement rather than meaningful legislation.

Therefore, **EDRi proposes NOT to adopt it**. In case MEPs disagree with its deletion, EDRi proposes the following **alternative**:

**Recital 4b** (alternative to AM 3, Rapporteur's Draft Report)\*

Certain forms of internet use are conducive to **Terrorist** radicalisation, enabling fanatics throughout the world to **both online and offline involves radicalised individuals connecting with each other and recruiting vulnerable individuals** without any physical contact whatsoever and in a manner that is difficult to trace. Every Member State should set up a special unit tasked with ~~flagging~~ **identifying** illegal content on the internet and with facilitating the **investigation**, detection and removal of such content. **Member States should publish statistics on numbers of reports, investigations and prosecutions taken as a result of these activities.** The creation by Europol of the Internet Referral Unit (IRU), responsible for detecting illegal content and supporting Member States in this regard, while fully respecting the fundamental rights of all parties involved, **in particular with regard to predictability of the measures taken**, represents a significant step forward in this regard. Member States' units should also cooperate with the Union counter terrorism coordinator and the European Counter Terrorist Centre within Europol, as well as with civil society organisations active in this field. Member States should **cooperate** with each other and with the relevant Union agencies on these matters.

\* Comments:

Parts in **bold** and ~~strick-through~~ reflect the changes introduced vis-à-vis AM 3 of the rapporteur's Draft Report.

These changes create accountability and judicial responsibility and allow individuals to adapt their conduct to the law (predictability). If these units had the option to simply refer unwelcome content to internet providers, with no transparency regarding investigations, legal assessment or prosecutions, UN's standards would not be complied with. As the former Special rapporteur on the promotion and protection of Human Rights and fundamental freedoms while countering terrorism stated in its report "Ten areas of best practices in countering terrorism", "[w]here the law relating to terrorism confers discretionary powers upon public agencies, adequate safeguards, including judicial review, must exist for the purpose of ensuring that discretionary powers are not exercised arbitrarily or unreasonably."<sup>14</sup>

## Intent as a minimum standard for all terrorist offences, with a high standard of proof

- **Recital 13**

EDRi welcomes the attempt made in Recital 13 to clarify the meaning of 'intent' as used in the Directive. Distinguishing terrorist offences under this Directive from innocent activities such as travelling or debating is done primarily on the basis of intent. It is therefore crucial that intent is not merely imputed to suspects, but that it is proven on the basis of objective, factual circumstances. The proposed AM 13 heightens the standard set in the initial proposal, and EDRi therefore welcomes it, seconding the EP's rapporteur justification. However, EDRi suggests to remove 'as much as possible', since this means that the intention does not have to be based on objective, factual circumstances.

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14 Para. 15

EDRi's proposal (amending the Commission's proposal):

Recital 13

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

## Unambiguous and limited rules on incitement of terrorism

- **Article 5: Public provocation to commit a terrorist offence**

EDRi is concerned about the ambiguous phrasing and broad scope of Article 5 and its potential for abuse, as national anti-terrorist provocation rules have been abused in cases which appear to bear little connection to actual terrorist offences (see the Annex to this document). EDRi welcomes the intention of the EP's rapporteur to restrict Article 5. However, at this stage, none of the versions of Article 5 regarding "glorification of terrorism" comply with UN.

The former Special Rapporteur on human rights and counter terrorism stated (and the current rapporteur has supported this approach)<sup>15</sup> that "for the offence of incitement to terrorism to comply with international human rights law, it

- (a) must be limited to the incitement to **conduct that is truly terrorist in nature**;
- (b) must **restrict freedom of expression no more than is necessary** for the protection of national security, public order and safety or public health or morals;
- (c) must be **prescribed by law in precise language**, and **avoid vague terms such as "glorifying" or "promoting" terrorism**;
- (d) must include an **actual (objective) risk that the act incited will be committed**;
- (e) should **expressly refer to intent** to communicate a message and intent that this message incite the commission of a terrorist act; and
- (f) should preserve the application of legal defences or principles leading to the exclusion of criminal liability by **referring to "unlawful" incitement to terrorism**.<sup>16</sup>

In addition, none of the current versions of Article 5 would prevent Member States from criminalising indirect incitement. In 2008, the UN Secretary-General recommended UN Member States that "laws should **only** allow for the **criminal prosecution of direct** incitement to terrorism, that is, speech that **directly** encourages the commission of a crime, is intended to result in criminal

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<sup>15</sup> Para. 24:

[http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.65\\_AUV.docx](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.65_AUV.docx)

<sup>16</sup> Paras. 30-32: [http://www.un.org/ga/search/viewm\\_doc.asp?symbol=A/HRC/16/51](http://www.un.org/ga/search/viewm_doc.asp?symbol=A/HRC/16/51)

action and is likely to result in criminal sanction.”<sup>17</sup> This recommendation has been backed up by the UN Special Rapporteur on Human Rights and counter-terrorism’s report of 22 February 2016<sup>18</sup>.

**EDRI’s proposal** (amending the Commission’s proposal) **is in line with UN standards:**

Article 5\*

1. Member States shall take the necessary measures to ensure that the *intentional and unlawful* distribution, or otherwise making available of a message to the public, with the *clear* intent to incite the commission of one of the offences listed in points (a) to (h) of Article 3(2), where such conduct, whether or not *directly expressly* advocating *the commission of* terrorist offences, *manifestly* causes a *clear, substantial and imminent* danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally *and unlawfully*

**2. Member States shall only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal sanction.**

\*Comments: On top of the comments above, EDRI deems it necessary to further clarify three of the changes:

- **Intent.** Article 5 must be read in conjunction with Recitals 13 and 14. In the words of the UN Special Rapporteur on Human Rights and Combating Terrorism, the liability should not be in the illegality of the content of the speech alone, but on the “speaker’s intention or the actual impact of the speech”. Otherwise, this would prevent unnecessary or disproportionate interferences with freedom of expression.<sup>19</sup>
- **“Unlawfully”** was included in Article 5 of the Council of Europe’s Convention on the Prevention of Terrorism and also in the model clause recommended by the UN Special Rapporteur on Counter-Terrorism and Human Rights. As the latter states, without ‘unlawfully’, the Directive would be excluding criminal liability exemptions and legal defences against it.
- **“Expressly or not”** instead of “directly or not” (European Convention’s language). The UN Special Rapporteur on Counter-Terrorism and Human rights proposed this modification to the European Convention on Prevention of Terrorism “to prove both a subjective intention to incite as well as an objective danger that a terrorist act will be committed”, while also including “coded language”.<sup>20</sup> This recommendation is a reaction to EctHR case Leroy v France (2008) and is in line with Article 12(1) of the European Convention on Prevention of Terrorism.

17 Para. 62 <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20A%2063%20337.pdf>

18 Para. 24

19 Para. 39.

20 UN Special Rapporteur on Counter-Terrorism and Human Rights’ Report “Ten areas of best practices in countering terrorism”, A/HRC/16/51, para. 30

## Incitement to terrorism and websites' blocking and removal

- **Recital 7**

Recital 7 should be deleted. As the Meijers Committee stated, “this recital leads to a disproportional infringement of freedom of expression including the freedom of the press”. “Member States may interpret this as meaning that, even if there is no real danger of future offences, offence to victims and their families is sufficient reason to criminalise expressions”.<sup>21</sup> In addition, it is not clear whether with this recital Member States would be criminalising individuals sharing messages or images for ‘journalistic purposes’.

With regard to AM 6 in LIBE's Draft Report, EDRi considers Internet access restrictions and websites' removal fall outside the scope of the Directive, which is essentially to define criminal offences (see Article 1 of the proposed Directive). In addition, this does not harmonise Member State laws. Should MEPs want to address these issues, EDRi considers AM6's text should be improved in line with Article 52 of the Charter of Fundamental Rights.

**EDRi's proposal** (amending the rapporteur's suggestion in AM 6):

Recital 7\*

~~The offences 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 including those related to the victims of terrorism as a way to gain publicity for the terrorists cause or seriously intimidating the population, provided that such behaviour causes a danger that terrorist acts may be committed.~~ To strengthen actions against public provocation to commit a terrorist offence on, ~~and also taking into account the increased use of technology, in particular the Internet, it seems appropriate for Member States~~ **may** take measures to remove or to block access to webpages publicly inciting to commit terrorist offences. Where such measures are taken, they must be ***provided for by law***, set by transparent procedures and provide adequate safeguards, in particular to ensure ***legal predictability and*** that restrictions are limited to what is necessary and proportionate. ***Such measures should be subject to periodic review, to assess if the stated goal(s) of the legislation are being achieved.***

\*Comments: these changes show the changes regarding AM 6 of the Rapporteur's Draft Report.

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21 [http://www.commissie-meijers.nl/sites/all/files/cm1603\\_note\\_on\\_a\\_proposal\\_for\\_a\\_directive\\_on\\_combating\\_terrorism\\_.pdf](http://www.commissie-meijers.nl/sites/all/files/cm1603_note_on_a_proposal_for_a_directive_on_combating_terrorism_.pdf)

- **(new) Article 14a (AM 40 of LIBE's Draft Report)**

Restricted access to certain websites can be counterproductive, as websites can be replaced easily and rapidly, making it, at best” only a “temporary disruption”.<sup>22</sup>

EDRI notes and welcomes that the provision on website blocking proposed by the EP's rapporteur under AM 40 is largely similar to that in Article 25 of Directive 2011/92/EU (Directive on combating sexual exploitation of children), which contains reasonable wording dealing with this. However, the recital misses three things:

- First, it should emphasise that objectives need to be clear and in a way that these measures actually necessary and proportionate.
- Second, restrictions must be provided for by law (Article 52 of the Charter of Fundamental Rights) and subject to periodic review and judicial control. As the UN Special Rapporteur stated in its Report of 22 February 2016, “independent judicial recourse must be available. Laws that allow executive authorities to block websites, in the absence of any initial judicial control or ex-post facto judicial recourse may not comply with this requirement”.<sup>23</sup>
- Third, websites' removals and access restrictions (“blocking”) are two different things. Access restrictions should only be pursued when removals at source are not achieved.

**EDRI's proposal:**

Article 14a (amending the rapporteur's text)\*

1. Member States shall take the necessary measures to ensure the prompt removal of webpages 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 pages hosted outside of their territory.

2. *Where the measures described in Article 14a(1) cannot be achieved*, Member States may take measures to block access to webpages publicly inciting to commit a terrorist offence towards the Internet users within their territory. These measures must be *provided for by law*, set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is *demonstrably* necessary and proportionate, ~~and~~ that users are informed of the reason for the restriction, *that is subject to initial judicial control and periodic review*. Those safeguards shall also include the possibility of judicial redress.

Comments: \* Parts in **bold** and ~~strike-through~~ reflect the changes introduced vis-à-vis AM 40.

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22 See Quilliam Foundations' Study “Jihad Trending: A Comprehensive Analysis of Online Extremism and How to Counter it”, <http://www.quilliamfoundation.org/wp/wp-content/uploads/publications/free/jihad-trending-quilliam-report.pdf>

23 Para. 40.

## Rejecting or clarifying the proposed amendments on malware and 'malicious software'

The proposed recital 11a (AM 12) and Article 14b (AM 41) by the EP's rapporteur on her draft report on the Directive should not be adopted for three main reasons:

- These proposals would not comply with the principle of legality, as 'malware' is not defined.
- Regarding the concept 'malware for terrorist purposes', this appears superfluous. This AM is seeking to solve a problem whose existence is not known and never been shown. To the extent it might exist, it is already criminal under the Council of Europe's Cybercrime Convention and Directive 2013/40/EU on attacks to Information systems, so it is unclear what added value this prohibition would bring in addition to existing European legal framework.
- EDRi also has difficulties to see the value of adding 'malicious software' in the Directive (AM 29 and AM 30 of LIBE's Draft Report), since these aspects are also covered in the Directive on attacks against computer system.

**Accordingly, EDRi recommends not proposing any amendments neither on manufacturing or developing malware, nor on 'malicious software'.**

## VI. Human rights regular review

As the UN Special Rapporteur on Counter-terrorism and Human Rights states in its report of 22 February 2016, "it is critical that States strictly monitor the human rights compliance of measures adopted to counter violent extremism [leading to terrorism], and ensure transparency in the operation of their initiatives."<sup>24</sup>

- **Article 25 (transposition) and Article 26 (reporting)**

Not alone the EU institutions have adopted a piece of legislation without conducting a much-needed impact assessment, but it would take at least four years for the Commission to report to the European Parliament and Member States about its assessment on the "impact and added value of this Directive on combating terrorism". This unacceptable period of non-review could go up to five years, if the Council's version is adopted and prolonged, particularly bearing in mind that such reports are often delayed. In addition, the Directive remains silent about the review mechanisms by Member States. This does not comply with UN standards.

In fact, the UN Secretary-General recommended UN Member States in its Plan of Action to Prevent Violent Extremism of 24 December 2015 to "review all national legislation policies, strategies and practices aimed at preventing and countering violent extremism [leading to terrorism] to ascertain whether they are firmly grounded in respect for human rights and the rule of law, and whether they put in place national mechanisms designed to ensure compliance."<sup>25</sup> In fact, according to the

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<sup>24</sup> Para. 37

[www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.65\\_AUV.docx](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.65_AUV.docx)

<sup>25</sup> A/70/674, para. 50



former Special rapporteur on Human Rights and Counter-terrorism,<sup>26</sup> the review process should comply with the following requirements:

- a) **annual** governmental review of and reporting on the exercise of powers under counter-terrorism laws
- b) annual **independent** review of the overall operation of counter-terrorism laws
- c) periodic parliamentary review.”

### EDRI's proposals:

#### Article 25 Transposition *and review mechanisms by Member States*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [12 months after adoption]. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the ~~main~~ provisions of national law which they adopt in the field covered by this Directive.

***3. Member States shall conduct annual independent reviews of and reporting on the exercise of powers under the laws falling within the scope of this Directive.***

#### Article 26 Reporting

1. The Commission shall, by [24 months after the deadline for implementation of this Directive], submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures to comply with this Directive.

2. The Commission shall, by [~~48~~ **12** months after the deadline for implementation of this Directive], submit a report to the European Parliament and to the Council, assessing the ~~impact~~ **and added value of this Directive on combating terrorism *and its impact on fundamental rights and freedoms and the rule of law.*** 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 this Directive.***

***3. In light of the independent reports of the European Commission, Member States shall conduct parliamentary periodic reviews.***

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<sup>26</sup> A/HRC/16/51, para. 19 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/178/98/PDF/G1017898.pdf?OpenElement>

## ANNEX

### How rules on 'provocation of terrorism' threaten free speech

EDRi is concerned that the Article 5 of the proposed Directive on Combating Terrorism might lead to collateral damage by harming freedom of expression. Similar rules on 'provocation of terrorism' and related crimes in Member States and abroad have in practice repeatedly been misapplied to cases which have little or nothing do with any commonly-held conception of 'terrorism'.

Criminalising speech can be dangerous, with significant risks for the freedom of expression. Such measures have affected public figures such as artists and journalists who play an integral part in public debate. They have been applied to clear cases of irony and satire. Furthermore, in some cases, links to the actual threat of terrorism are highly implausible.

At the same time, law enforcement action in such cases can have a profound effect on freedom of expression. Police interference, even when it does not lead to conviction, can 'set an example' and create a chilling effect, pushing others to self-censor out of fear. It should also be kept in mind that attempts to censor speech often have counter-productive effects; repressing speech, especially with false positives, can do more harm to the perceived legitimacy of government institutions than to the extremist movements which they aim to counteract. Legislators must therefore proceed with caution when attempting to criminalise speech in support of terrorism.

We provide various examples such incidents in order to illustrate the risks inherent in criminalising speech, and in order to reaffirm the need for clear, limited and specific rules with adequate free speech safeguards.

#### France

The French government has also criminalised speech which 'glorifies' terrorism. This rule has led to [many prosecutions](#), including cases criminalising expressions on social media, but also to comments made during arrests and other interactions with police.

- One of the most egregious examples is the prosecution of a [sixteen-year-old posting on Facebook](#), who uploaded a parody of a Charlie Hebdo comic (original and parody viewable [here](#)). The teen had no prior criminal record and, according to prosecutor [Yvon Ollivier](#) did not have a 'profile suggesting an evolution toward jihadism'. He is one of four minors prosecuted for glorification of terrorism in France. Even an [eight-year-old](#) has been interrogated.
- Another troubling example is that of the French comedian [Dieudonné](#), known for his controversial statements. He, too, was prosecuted for a Facebook post, after he wrote '*Je me sens Charlie Coulibaly*'. For this statement, he was received a two-month suspended prison sentence.
- In numerous incidents, the statements in question were made [under the influence of alcohol](#). In others, those prosecuted had mental health problems or [learning difficulties](#).

## United Kingdom

In the United Kingdom, the following [Tweet](#) was considered worthy of prosecution:

*'Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky high!!'*

The conviction of Paul Chambers for sending a “menacing” public electronic message was eventually overturned on appeal, but only after two and a half years of litigation and after having being dismissed from his job as a result. UK law enforcement has also interrogated a [10-year-old and his parents](#) for writing in a school assignment that he lived in a 'terrorist house'.

Finally, a case involving [a four-year-old child](#) was referred to the police because s/he drew a cucumber and subsequently referred to the drawing as a “cooker bomb” instead of a “cucumber”.

While these cases were not based on a legal prohibition on the provocation of terrorism, they do illustrate how law enforcement authorities and certain institutions are prone to overreact and harm freedom of expression in the process.

## Spain

Spain criminalises the 'glorification of terrorism'. Those convicted include:

- Two [puppeteers](#), who were convicted for a performance in which a puppet officer held up a miniature sign falsely accusing another puppet of terrorism, using a play on words that combined Al Qaeda and the Basque Terrorist Group [ETA](#).
- A [rapper](#) convicted and condemned for two years of prison for having composed songs that allegedly glorified terrorism.
- A [rapper](#), who was prosecuted for his posts on Twitter.
- A [21-year-old student](#), who posted on Twitter inciting a terror group known as 'the Grapo' - even though this group is considered 'to have long lost its operative capability' and was last active over 25 years ago.

## Outside the European Union

Incidents from outside the EU further illustrate how rules arbitrarily prohibiting speech related to terrorism can lend themselves for abuse. These are a few examples:

- In Turkey, two [British journalists](#) from the popular 'Vice' network were detained for 'aiding a terrorist organisation'. Turkey has also blocked [entire social media websites](#) following terror attacks, such as when they blocked Twitter and Facebook in October 2015.



- In Jordan, [over a dozen journalists and activists](#) have been prosecuted under the anti-terror law, with one activist being jailed for five months for criticising the royal family's support of Charlie Hebdo on Facebook.
- In Egypt, [three journalists from Al Jazeera](#) were sentenced to three years in prison for 'broadcasting false information' and 'aiding a terrorist organisation' for their reporting on the Muslim Brotherhood.
- In Cameroon, a [Radio France International correspondent](#) was prosecuted for 'complicity in terrorism and failing to denounce acts of terror' as an alleged accomplice of the Boko Haram group.

**For more information or clarification, please contact**

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