LUISS Guido Carli
LIBERA UNIVERSITÀ INTERNAZIONALE DEGLI STUDI SOCIALI

Faculty of Law

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Repression and Prevention of Terrorism in the EU.

Balancing Collective Security and Fundamental Rights Protection

Prof. Maurizio Bellacosa	***Prof. Mitja Gialuz***
Supervisor	Co-Supervisor

Antonio Fabrizio Iurlano
Student ID, 150773

Candidate

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CHAPTER IV - EXCURSUS: ASSET FREEZING AND CRIMINAL LAW

INTRODUCTION

Terrorism is a criminal phenomenon that seeks to attack values that lay at the very heart of a democratic State. To protect them, European legislators have been resorting to criminal law for a long time. In recent years, the terrorist threat has become increasingly transnational, and the necessity of a strong cooperation between national authorities to get a hold on this issue undeniable. Awareness about this new "era" of terrorism and the need to adjust counterterrorism policies accordingly started to arise mainly after the attacks on the World Trade Center in 2001. Differences in the national systems of criminal justice were seen as a potential obstacle for an effective cooperation between national authorities. Therefore, for over twenty years now, the European Union has made efforts to facilitate a coordinated response by approximating the national criminal laws which repress terrorism *lato sensu*. In this context, Directive 2017/541 constitutes the cornerstone of the European Union's counterterrorism policy, as well as the most recent instrument for the abovementioned approximating purpose.

The primary focus of this dissertation is on the provisions of said Directive which establish obligations for Member States to criminalize certain acts. Eventually, asset freezing as a complementary preventive measure against the financing of terrorism shall be examined too, but only to a limited extent and with particular attention to the aspects which render the measure a close relative to criminal law[1]. The goal is to highlight the problematic aspects of those two elements of the Union's counterterrorism policy and to trigger critical reflections on possible improvements that could bring them more in line with the values of the Rule of Law. For that purpose, opinions of legal scholars and human rights defenders will be examined[2].

[1] Opinion shared by F. GALLI, *The freezing of terrorists' assets: preventive purposes with a punitive effect*, in A. WEYEMBERGH – F. GALLI, *Do labels still matter? Blurring Boundaries between Administrative and Criminal Law. The influence of the EU*, Brussels, 2014, 43 et seq.

[2] Particularly relevant contributions include EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Directive (EU) 2017/541 on combating terrorism: impact on fundamental rights and freedoms*, Luxembourg, 2021; H. DUFFY – R. PILLAY – K. BABICKA, *Counter-Terrorism and Human Rights in the Courts. Guidance for Judges, Prosecutors and Lawyers on Application of*

Chapter one gives a brief insight into the historical evolution of terrorism as a criminological phenomenon[3] on the one hand, and of the correlated European counterterrorism policies on the other hand. This background knowledge is essential to fully understand the reasons behind certain choices of the Union's institutions. In particular, the shift from mainly domestic forms of terrorism – referrable to strongly hierarchical organizations which essentially acted for internal political reasons – towards terrorism perpetrated by loosely organized terror-networks with a global reach was a decisive factor influencing the renewed approach of international actors such as the United Nations, the Council of Europe and the European Union. The sources of law stemming from these organizations, as well as those adopted by national legislators, have influenced each other, leading to a "circular" legal framework[4].

Chapter two purports to provide the reader with the fundamental notions which are necessary to carry out a critical examination of the Directive. Since the primary research question is whether the latter complies with the values of the Rule of Law, the goal is to give this evanescing concept a concrete slant[5], by breaking it down into its constitutive elements and considering those in the peculiar context of the European legal order[6]. The constitutive role of the law, as foundation for the exercise of power by State authorities, is one of those elements and translates into the principle of conferred powers for the Union's institutions. Therefore, a detailed examination of Article 83 TFEU – the legal basis of

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EU Directive 2017/541 on Combatting Terrorism, Geneva, International Commission of Jurists, 2020.

[3] Interesting insights into the characteristics of current forms of terrorism are inferable from the statistical data collected by Europol. Cf. EUROPEAN UNION AGENCY FOR LAW ENFORCEMENT COOPERATION., *European Union Terrorism Situation and Trend Report 2021*, Luxembourg, 2021.

[4] Cf. F. ROSSI, *La circolarità dei modelli nazionali nel processo di armonizzazione europea delle legislazioni penali antiterrorismo*, in *Dir. Pen. Cont. - Riv. Trim.*, 2017, 1. Certain domestic systems of criminal justice had a significant bottom-up influence on the supranational sources of law. In that sense and for an examination of those systems ID., *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, Naples, 2022, 169 et seq.

[5] For that purpose, documents elaborated by the so-called "Venice Commission" are highly relevant. See *inter alia* EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *Report on the Rule of Law*, Venice, 2011.

[6] For observations on the autonomous EU concept of the Rule of Law see C. C. MURPHY, *EU Counter-terrorism Law: Pre-emption and the Rule of Law (European Union Counter-terrorism Law)*, Oxford/Portland, 2012, 35 et seq.

Directive 2017/541 – is an essential part of Chapter two[7]. Moreover, respect for fundamental rights holds a prominent position in the Rule of Law notion[8]. A criminal policy based on widely accepted general principles of criminal law – such as the harm principle and the principles of legality and proportionality – which can be regarded as part of the common constitutional tradition of the Member States of the European Union, can ensure such respect for fundamental rights. In that regard, the academic efforts[9] to elaborate a set of guidelines for an ideal European criminal policy constitute a precious point of reference that shall be thoroughly examined. Chapter two eventually completes the toolbox for the critical analysis of the Directive with clarifying remarks on the position and scope of fundamental rights within the legal order of the Union. To that end, the caselaw of the European Court of Human Rights concerning a narrow selection of fundamental rights that are affected by the European choices of criminalization will be considered[10].

Chapter three is entirely dedicated to Directive 2017/541. There, the cornerstone of the Union's counterterrorism policy shall be critically reviewed in the light of the constitutive elements of the Rule of Law elaborated in Chapter two. The examination shall include issues such as the democratic legitimacy of the act and whether the Union acted in compliance with the principles of conferred powers and subsidiarity. The main question, however, will be whether the European institutions followed the previously mentioned guidelines for a European criminal policy, representing the primary benchmark against which the Directive will be tested. Particular attention will be paid to the provisions which

[7] The cited doctrine on the matter includes A. BARLETTA, *La legalità penale tra diritto dell'Unione europea e costituzione*, Naples, 2011; A. KLIP, *European Criminal Law: an integrative approach*, 2nd Edition, Cambridge/Antwerp/Portland, 2012; H. SATZGER, *International and European criminal law*, 2nd Edition, Munich, 2018; W. BOGENSBERGER, *Article 83 TFEU*, in M. KELLERBAUER – M. KLAMERT – J. TOMKIN (Eds.), *The EU Treaties and the Charter of Fundamental Rights*, Oxford, 2019, 896 et seq.

[8] Cf. in that sense V. SCALIA, *Protection of Fundamental Rights and Criminal Law - The Dialogue between the EU Court of Justice and the National Courts*, in *eucrim*, 2015, 3, 100 et seq.

[9] The main contributions are EUROPEAN CRIMINAL POLICY INITIATIVE, *A Manifesto on European Criminal Policy*, in *Z. f. Int. Strafrechtsdogmatik*, 2009, 12, 707 et seq; S. S. BUISMAN, *The Future of EU Substantive Criminal Law: Towards a Uniform Set of Criminalisation Principles at the EU level*, in *Eur. J. Crime Crim. Law Crim. Justice*, 2022, 30/2, 161.

[10] For an extensive examination see A. M. SALINAS DE FRÍAS, *Counter-terrorism and human rights in the case law of the European Court of Human Rights*, Strasbourg, 2012.

contain the minimum definitions of criminal offences that Member States are compelled to introduce into their domestic legal orders. These include terrorist offences *stricto sensu* (Article 3), but also preparatory acts such as recruitment, training and travelling for terrorist purposes. The autonomous criminalization of the latter denotes the anticipatory approach of the Union, which can be challenging to reconcile with standards of criminal law that adhere to the Rule of Law.

The methodology of assessment shall be based on an initial description of the constitutive elements of the various EU offences, followed by a selection of the most important critical aspects relating to each offence. Unfortunately, the Courts of the European Union have not had the chance to interpret provisions of the Directive yet. Therefore, it is indispensable to have a look at how national legislators have interpreted the penalization obligations during the process of implementation in order to grasp some of the problematic implications of the supranational provisions[11]. With enhanced focus on Italy and Germany, a narrow selection of the implementing criminal laws adopted by domestic legislators will be examined. Furthermore, the correlated interpretative solutions elaborated by domestic Courts will be taken into account. This enables the reader to have a comparative perspective on the different techniques of implementation and on the varying degree in which the judiciary compensates the legislative tendency of hyper-criminalization across Europe.

Among other things, the Directive obliges to criminalize the financing of terrorism. The *ex post* repression of such behavior through criminal prosecution is complemented by administrative measures which can intervene pre-emptively and target individuals that are merely suspected of being involved in or associated

[11] Among the literature on the national measures of implementation cf. J. ALIX, *Terrorisme et droit pénal: étude critique des incriminations terroristes*, Paris, 2010; F. GALLI – A. WEYEMBERGH (Eds.), *EU counter-terrorism offences: what impact on national legislation and case-law?*, Brussels, 2012; N. CORRAL-MARAVER, *Der europäische Einfluss auf das spanische Terrorismusstrafrecht, insb. Umsetzung der EU-Richtlinie 2017/541*, in A. PETZSCHE – M. HEGER – G. METZLER (Eds.), *Terrorismusbekämpfung in Europa im Spannungsfeld zwischen Freiheit und Sicherheit: historische Erfahrungen und aktuelle Herausforderungen*, 1st Edition, Baden-Baden, 2019; A. PETZSCHE, *Erneute Ausweitung des deutschen Terrorismusstrafrechts dank Europa? Zum Umsetzungsbedarf der EU-Richtlinie 2017/541*, in A. PETZSCHE – M. HEGER – G. METZLER (Eds.), *Terrorismusbekämpfung in Europa im Spannungsfeld zwischen Freiheit und Sicherheit: historische Erfahrungen und aktuelle Herausforderungen*, 1st Edition, Baden-Baden, 2019.

with terrorist organizations. Chapter four deals with the freezing of assets at the European level, which constitutes one of those pre-emptive targeted sanctions. Attention will be paid mainly to the hypothesis that asset freezing is a substantially punitive rather than preventive measure[12], given that adherence to that position would imply that the judicial efforts to protect the procedural rights of blacklisted individuals are praiseworthy but still not at the point they should be.

The overall picture shows a European legislator who is determined to give a strong, anticipated response to terrorism, but seems to be very lax when it comes to respecting the fundamental rights of suspected terrorists. Arguably, there is a very weak attempt to find a reasonable balance between collective security and fundamental rights protection that can only be described as symbolic. The sacrifice of substantial and procedural rights seems to be deemed neglectable in the light of the common perception of (suspected) terrorists as State enemies, underserving of the level of protection granted to other criminals[13].

[12] Opinion expressed *ex multis* by N. KARALIOTA et al., *The new EU counter-terrorism offences and the complementary mechanism of controlling terrorist financing as challenges for the rule of law*, Leiden, 2020, 56 et seq.

[13] The European counterterrorism policy therefore comes close to the model of *Freindstrafrecht.* The infamous notion has been coined by G. JAKOBS, *Bürgerstrafrecht und Feindstrafrecht*, in *Ritsumeikan Law Rev.* 2004, 21, 93 et seq.

CHAPTER I

THE EVOLUTION OF EUROPEAN COUNTERTERRORISM

1. Approaching the vague notion of terrorism

What is terrorism in the first place? As will be seen throughout this dissertation, its legal definition is a controversial issue. This is because the term is highly stigmatizing and subjective, given that it is inextricably linked with moral and ideological perceptions[1]. While some might label a certain group as "terrorists", others might consider it to act as a legitimate force of resistance against an oppressive regime. Put bluntly, to cite a common phrase among scholars, «one man's terrorist is another man's freedom fighter»[2].

From an etymological point of view, the term derives from the French "*terrorisme"*, which was coined at the end of the 18th century to describe the fear-inducing practices used by French revolutionaries against their opponents. Hence, at its origins, *terrorisme* referred to the reign of terror of Robespierre's Jacobin party and therefore to State Terrorism against domestic enemies[3].

Nowadays, despite the persistent struggle to agree upon a universal definition[4], terrorism is generally understood to be a crime perpetrated by private individuals or entities, while State Terrorism is largely considered to be outside the scope of the definition[5]. In fact, one could argue that States are the ultimate targets, the "addressees" of acts of terrorism, rather than their perpetrators[6]. While

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[1] Cf. J. TEICHMAN, *How to Define Terrorism*, in *Philosophy* 1989, 64/250, 507 et seq.

[2] See J. JANSSON, *Terrorism, criminal law and politics: the decline of the political offence exception to extradition*, Abingdon/New York, 2020, 19.

[3] See V. MASARONE, *Politica criminale e diritto penale nel contrasto al terrorismo internazionale: tra normativa interna, europea ed internazionale*, Naples, 2013, 87; R. WENIN, *Una riflessione comparata sulle norme in materia di addestramento per finalità di terrorismo*, in *Dir. Pen. Cont. - Riv. Trim*., 2016, 4, 109.

[4] Some even go as far as excluding that a complete and exhaustive legal definition of terrorism is possible. In that sense F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, Naples, 2022, 6 et seq.

[5] See C. C. MURPHY, *EU Counter-terrorism Law: Pre-emption and the Rule of Law (European Union Counter-terrorism Law)*, Oxford/Portland, 2012, 60.

[6] Cf. F. NEUBACHER, *Terrorismus – Was haben „Rote Armee Fraktion" und „Jihadisten" gemeinsam?*, in *JURA - Juristische Ausbild*., 2010, 32/10, 2; See also J. TEICHMAN, cit., 508: «Originally then, terrorism was thought of as a type of behaviour perpetrated *by* governments; now it is regarded, usually though not always, as a type of behaviour directed *against* governments» (emphasis added).

the immediate victims are generally innocent civilians, randomly chosen as representatives of a population or community perceived as an ideological enemy[7], the message that is sent through terror-attacks is usually addressed at state-governments or International Organizations. Thus, broadly speaking, terrorism can be seen as a violent strategy of political-ideological communication[8]. The purpose of terrorist acts is creating a climate of fear among a wide audience, which in turn puts pressure on governments to act or refrain from acting in a certain way[9].

As will be shown afterwards[10], the European Union has undertaken attempts to provide a common definition of terrorist acts. The definition has been criticized for its broadness, which is said to negatively affect the clarity of Member State legislation[11].

2. Historical excursus on Terrorism in Europe

An analysis of the current EU counterterrorism policy cannot be carried out without considering its evolution. The law in this field has changed over time to adapt to new forms of terrorism. In other words, there is a strong link, a parallelism, between the evolution of terrorism as a criminological phenomenon and counterterrorism laws. The 2020 EU Counterterrorism Agenda expressly acknowledges this correlation by stating that «As this threat evolves, so too must our cooperation to counter it»[12]. It is thus imperative to briefly look into the

[7] See in this sense EUROPEAN UNION AGENCY FOR LAW ENFORCEMENT COOPERATION, *European Union Terrorism Situation and Trend Report 2021*, Luxembourg, 2021, 12.
[8] Cf. J. HÜRTER, *Terrorismusbekämpfung in Westeuropa: Demokratie und Sicherkeit in den 1970er und 1980er Jahren*, Berlin/Munich/Boston, 2014, 2.
[9] Among others, the Council of Europe is known for this point of view. The Convention on the Prevention of Terrorism states in its preamble that «acts of terrorism have the purpose by their nature or context to seriously intimidate a population or unduly compel a government or an international organisation to perform or abstain from performing any act or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation». See also M. STOHL, *The Politics of terrorism*, New York, 3rd Edition 1988, 3 et seq.
[10] The European definition will be analyzed in detail in Chapter III, 5.1.
[11] See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Directive (EU) 2017/541 on combating terrorism: impact on fundamental rights and freedoms*, Luxembourg, 2021, 6.
[12] See EUROPEAN COMMISSION, *A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond*, Brussels, 2020, 1.

history of terrorism in Europe before diving into the legal aspects of counterterrorism.

Although interest and awareness about the phenomenon has spiked after the attacks on the World Trade Center in 2001, it won't come as a surprise that terrorism in its modern conception manifested itself long before that, also in Europe. Academics even go as far as identifying the Jewish "*sicarii"* as the first historical example of terrorists. They were known for stabbing people in public as a form of resistance against the Romans[13]. Some claim that western countries actively started the fight against terrorism as early as towards the end of the 19th century[14].

In the 1970s and 1980s, some European States faced prolonged periods of systematic ethno-separatist, left- and rightwing terror. For the purposes of this dissertation, it suffices to consider this period as a starting point, given that the challenges of that time allegedly led to the birth of EU cooperation in the fight against terrorism[15].

Towards the end of the '60s, instances of revolutionary terrorism started to emerge in Europe. Revolutionary terrorism is one of the categories scholars traditionally subdivide the phenomenon into[16], and it is safe to say that it is the most common form[17]. The goal of revolutionary terrorists is to overthrow a certain political system and to replace it with a new structure[18].

Italy and Germany were particularly affected by left-wing terrorism, while the United Kingdom had to deal with the ethno-separatist "Irish Republican Army", which had already existed before but became increasingly radical towards the end of the '60s. All these groups had a similar *modus operandi*, based primarily on kidnappings, murder, bombings and robberies[19].

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[13] See W. C. BROWN, *The Pre-History of Terrorism*, in E. CHENOWETH et al. (Eds.), *The Oxford Handbook of Terrorism*, Oxford, 2019, 87.
[14] Cf. in that sense J. JANSSON, cit., 2 and 95.
[15] Opinion expressed by J. BURCHETT – A. WEYEMBERGH – G. THEODORAKAKOU, *Counterterrorism policies, measures and tools in the EU - An assessment of the effectiveness of the EU counterterrorism policy*, Brussels, 2022, 14.
[16] See for instance G. MARTIN, *Types of Terrorism*, in M. DAWSON et al. (Eds.), *Developing Next-Generation Countermeasures for Homeland Security Threat Prevention*, Hershey, 2017, 6-7.
[17] See J. P. JENKINS, *Terrorism*, in *www.britannica.com/topic/terrorism*.
[18] See *Ibid.*
[19] Cf. J. HÜRTER, cit., 7 et seq.

Italy was going through a phase of high political tension that is referred to as the "years of lead" (*gli anni di piombo)*, during which highly structured terrorist groups from both sides of the extreme political spectrum posed a serious threat for national security[20]. According to estimates, a left-wing terrorist group, the so-called Red Brigades, committed 494 acts of terrorism between 1969 and 1982 in Italy[21]. On the other hand, in 1980, a fascist terrorists group placed a bomb in the railway station of Bologna, which led to 85 dead and 200 injured persons, a tragic event that is commemorated every year[22]. Overall, it is estimated that between 1969 and 1982 right-wing terrorism and extremism in Italy caused 186 deaths and 572 injuries[23].

Germany had to face similar issues[24]. The infamous Red Army Fraction acted in a comparable fashion to the Red Brigades. While the RAF is an example of domestic terrorism, German authorities had already experienced an episode of international terrorism that shocked the world: the Munich massacre in 1972. On that occasion, several hostages were killed by the Palestinian militant group Black September. They had been kidnapped with the intention of extorting the liberation of 200 prisoners from the Israeli government. The massacre was decisive for German authorities' renewed perception of terrorism as a transnational threat[25].

What needs to be highlighted is that the Red Brigades, the RAF, and the IRA all had some form of structural (usually hierarchical) organization, unlike modern terrorist cells, which are rather loosely organized.

2.1. Recent developments

Terrorism is therefore not a new phenomenon in Europe. Nevertheless, terrorism and its public perception have evolved over time and keep on evolving.

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[20] See T. HOF, *Staat und Terrorismus in Italien 1969-1982*, Munich, 2011, 48 et seq.
[21] P. VARVARO, *L'ora più buia: alcune riflessioni sull'attacco al cuore dello Stato*, in A. SANSONI – P. TOTARO – P. VARVARO (Eds.), *Il Segretario, lo Statista. Aldo Moro dal centro-sinistra alla solidarietà nazionale*, Naples, 2019, 287.
[22] See A. L. TOTA, *Terrorism and Collective Memories: Comparing Bologna, Naples and Madrid 11 March*, in *Int. J. Comp. Sociol.*, 2005, 46/1-2, 62.
[23] Cf. T. HOF, cit., 51.
[24] In that sense J. HÜRTER, cit., 6 et seq.
[25] See E. OBERLOSKAMP, *Codename TREVI: Terrorismusbekämpfung und die Anfänge einer europäischen Innenpolitik in den 1970er Jahren*, Berlin/Boston, 2017, 29 et seq.

A few decades ago, politically motivated terrorism used to be the biggest issue, and terrorists were generally part of bigger, organized networks that often constituted a purely domestic threat[26]. Over time, things seem to have changed: the most recent Terrorism Situation and Trend Report (2021) points out that EU Member States consider jihadist terrorism to be the greatest threat[27]. It also stresses that structured groups are becoming less relevant while lone-actor terrorism is on the rise. This is problematic since it seems to be easier to dismantle groups of terrorists before they engage in violent acts than to identify individual terrorists acting on their own[28]. Another considerable evolution concerns the availability of new means for carrying out terrorist plots. The EU Commission's Anti-Terrorism Agenda of 2020 warned about the malicious use of drones for terrorist purposes, as well as about the potential danger deriving from certain biological, chemical[29], or nuclear substances falling into the hands of terrorists[30]. Moreover, technological progress has facilitated the dissemination of terrorist propaganda as part of large-scale radicalization campaigns, a development that might be one of the contributing factors for the progressive shift towards lone-actor-terrorism[31].

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[26] Cf. M. GUTHEIL et al., *EU Member State's policies and laws on persons suspected of terrorism-related crimes*, Brussels, Policy Department for Citizens' Rights and Constitutional Affairs, 2017, 26.

[27] See EUROPEAN UNION AGENCY FOR LAW ENFORCEMENT COOPERATION., cit., 13; However, Right- and Left-wing, Anarchist, Ethno-Nationalist and Separatist Terrorism also continue to constitute significant threats for European security and are specifically analyzed by the report.

[28] See *Ibid.* 14; According to the report, 10 jihadist terrorist attacks were completed in 2020 in Europe, all of which were carried out by lone actors; See also EUROPEAN COMMISSION, *Evaluation of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*, Brussels, 2021, 2; Compare also with FD 2008/919/JHA, Recital 3: «The terrorist threat has grown and rapidly evolved in recent years, with changes in the modus operandi of terrorist activists and supporters including the replacement of structured and hierarchical groups by semi-autonomous cells loosely tied to each other. Such cells inter-link international networks and increasingly rely on the use of new technologies, in particular the Internet».

[29] For a deeper analysis of the issue of chemical terrorism see C. MCLEISH, *Recasting the Threat of Chemical Terrorism in the EU: the Issue of Returnees from the Syrian Conflict*, in *Eur. J. Risk Regul.*, 2017, 8/4, 643 et seq.; for an article concerning a recent instance of (attempted) chemical terrorism in Germany cf. *Iranian held in Germany suspected of chemical terror plot*, in *www.lemonde.fr/en/europe/article/2023/01/08/iranian-held-in-germany-suspected-of-chemical-terror-plot_6010744_143.html.*

[30] Cf. EUROPEAN COMMISSION, *A Counter-Terrorism Agenda for the EU*, cit., 2.

[31] See EUROPEAN UNION AGENCY FOR LAW ENFORCEMENT COOPERATION, cit., 14: «All completed jihadist attacks were committed by individuals acting alone, while at least three foiled plots

All the above-mentioned premises allow to draw a new picture of terrorism. A picture that cannot ignore its transnational nature. The events of September 11th were the shockwave that erased any doubt about it and laid the foundation for stronger international cooperation on the matter[32]. Scholars recognized that globalization had led to a "new era of terrorism", with new patterns and possibilities of carrying out violent actions and spreading political messages[33]. If globalization is intended as the progressive interconnection of the world through free movement of persons, goods, money, technology and ideas[34], then it is obvious that despite its numerous benefits it also implies great risks and dangers, including new forms of terrorism going beyond national borders in many different ways[35].

3. European cooperation before 9/11

As mentioned above, 2001 was a big turning point for anti-terror legislation worldwide. Until then, within the European Union terrorism was largely considered a matter of national security, too sensitive to be dealt with at the supranational level[36]. However, this doesn't mean that there was no form of cooperation between the Member States at all: in international fora such as the United Nations or the Council of Europe the phenomenon had led to the adoption of certain Conventions[37]. Still, those treaties were said to be rather unambitious and have been criticized for their ineffectiveness[38]. Allegedly, they were not able to strengthen a common understanding of terrorism, leaving the international and

involved multiple suspects. Lone actors or small groups might perpetrate terrorist attacks as a result of online or offline incitement. Several suspects arrested in 2020 had online contact with followers of terrorist groups outside the EU. In addition, jihadist terrorist attacks in Europe were observed to have a motivating effect on other potential terrorist attackers».

[32] Opinion expressed by J. BURCHETT – A. WEYEMBERGH – G. THEODORAKAKOU, cit., 14-15.

[33] In that sense A. L. TOTA, cit., 55-56.

[34] See E. TANNER, *Globalization, Terrorism, and Human Rights*, in J. F. ADDICOTT – M. J. H. BHUIYAN – T. M. R. CHOWDHURY (Eds.), *Globalization, International Law, and Human Rights*, Oxford, 2011, 89.

[35] See M. GUTHEIL et al., cit., 27 where the authors describe this evolution as «a shift from non-religious to faith-based terrorism, as well as from national-level to EU-wide and global terrorism».

[36] Cf. C. C. MURPHY, cit. 19.

[37] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 95 et seq. Examples of such treaties include the International Convention for the Suppression of the Financing of Terrorism, adopted within the United Nations, and the European Convention on the Suppression of Terrorism, elaborated under the auspices of the Council of Europe.

[38] See C. C. MURPHY, cit., 17-18.

European legal landscape in a heterogeneous state. While some States had enacted specific criminal norms, tailored to the characteristics and the seriousness of the terroristic phenomenon, others treated acts of terrorism as "ordinary" criminal offences[39].

The reluctance to give up sovereignty resulted in predominantly intergovernmental forms of cooperation. Starting from the 70s, European leaders felt the need to set up informal networks of cooperation between their respective law-enforcement agencies to deal with the terrorist challenges of the time[40]. Those countries that were most affected by the phenomenon seemed to be particularly prone to cooperate with each other. Examples of informal networks of cooperation include the Club de Berne, an intelligence sharing unit[41], and the Police Working Group on Terrorism[42]. Germany, Italy, and the United Kingdom, as said before, went through a turbulent time during the 70s. Therefore, it is no wonder that all of them participated in those intergovernmental units.

In the summer of 1975, the British government put forward a proposal for a European conference for internal security. It was approved during the European Council held on the 1st and 2nd December of the same year in Rome and led to the establishment of the so-called TREVI group, a form of institutionalized, intergovernmental cooperation within the European Community. The purpose of the group was to enhance efficiency in the fight against increasingly transnational forms of crime, such as terrorism. In fact, during the first meeting in 1976, systemic exchange of information concerning completed and planned acts of terrorism, as well as mutual assistance in concrete cases, were identified as fields of cooperation[43].

With the establishment of the European Union through the Maastricht Treaty of 1992, intergovernmental cooperation in criminal matters (and therefore also cooperation in the fight against terrorism) was mainly absorbed by the third pillar (Justice and Home Affairs). In 1997, the Amsterdam Treaty amended the

[39] See *Ibid.*
[40] Cf. J. BURCHETT – A. WEYEMBERGH – G. THEODORAKAKOU, cit., 14.
[41] Cf. A. GUTTMANN, *Combatting terror in Europe: Euro-Israeli counterterrorism intelligence cooperation in the* Club de Berne *(1971–1972)*, in *Intell. Natl. Secur.*, 2018, 33/2, 158.
[42] See C. C. MURPHY, cit., 19.
[43] For a more extensive review of the origins of TREVI read E. OBERLOSKAMP, cit., 81 et seq.

TEU, explicitly mentioning the fight against terrorism as a means for achieving the Area of Freedom, Security and Justice. Notwithstanding this formal acknowledgment, counterterrorism continued to be addressed at the intergovernmental level, which presented significant obstacles for its development, especially due to the unanimity rule governing Council decisions[44]. It is thus fair to conclude that «despite the various ad hoc attempts at co-operation, before 11 September 2001, terrorism was not at the forefront of the European security agenda»[45].

4. The EU's counterterrorism policies after 9/11

The events of September 2001 have been defined as a "catalyst"[46] for counterterrorism legislation. Shortly after them, the Security Council of the United Nations adopted Resolution n. 1373, which required UN Member States to take certain measures. Among other things, it was decided that «States shall ensure that terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts»[47]. Therefore, the Resolution provided the necessary impetus for intense legislative action in the field of counterterrorism, both in the EU and at the national level. The reluctance to give up sovereignty, which had hindered the proliferation of supranational counterterrorism measures in the past, was trumped by the new understanding of terrorism as a transnational threat, to be tackled through an integrated, holistic approach. The European Arrest Warrant is an excellent example for this mentality shift, given that the project received the political support it needed only after 2001. While the stimulus for new, effective measures might seem like a positive evolution, it must not be forgotten that many criminal laws that have been enacted in the immediate aftermath of 9/11 have been subject to harsh criticism. With the intent of giving a quick and determined

[44] In that sense J. BURCHETT – A. WEYEMBERGH – G. THEODORAKAKOU, cit., 14.
[45] See C. C. MURPHY, cit., 22.
[46] Cf. J. BURCHETT – A. WEYEMBERGH – G. THEODORAKAKOU, cit., 9.
[47] See UN SC Resolution 1373 Paragraph 2e.

response, some legislators seem to have openly thrown fundamental rights protection overboard[48].

Academics label this kind of legislation, which prioritizes the neutralization of the (potential) offender over the safeguarding of individual guarantees, as "emergency criminal law"[49]. The dangerousness of the individual is used as a justification for derogations from the rules of "ordinary" criminal law[50]. This dichotomy recalls the highly controversial theory of Günther Jakobs, who distinguishes between *Bürgerstrafrecht* ("criminal law of the citizen") and *Feindstrafrecht* ("criminal law of the enemy"): while for citizen to be held criminally liable, there needs to be an appreciable externalization of criminal intent, the enemy's dangerousness legitimizes an anticipated exercise of the State's coercive, punitive power. Jakobs explicitly mentions terrorists as a category that *must* be held responsible according to the derogatory criminal law of the enemy[51]. In that perspective, it has been argued that Jakobs sees criminal law as a tool of neutralization of the offender and disregards its re-educational function[52].

The legislative acts adopted by the EU in the aftermath of 9/11 were no strangers to criticism too. Framework Decision 2002/475/JHA was the first attempt to approximate national criminal laws concerning terrorism. It has been criticized as a «paradigmatic example of the failure to adopt a European criminal law»[53]. According to Murphy, its provisions were too broad and vague, violated the principle of legality, eroded the presumption of innocence and were unable to ensure uniformity in the national implementation process. The Framework Decision has been described as a good example of pre-emptive counterterrorism, which targets not only individuals posing an actual threat, but also merely potentially dangerous ones[54]. At this point it must be noted that the concerns regarding the broadness of EU definitions are belittled by some scholars. Rossi,

[48] Opinion held among others by C. C. MURPHY, cit. 22 et seq.
[49] In that sense, V. MASARONE, cit., 188.
[50] See *Ibid.*
[51] Cf. G. JAKOBS, *Bürgerstrafrecht und Feindstrafrecht*, in *Ritsumeikan Law Rev*., 2004, 21, 101.
[52] See in that sense F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 63 et seq.
[53] C. C. MURPHY, cit., 75.
[54] See *Ibid.* 74 et seq.

for instance, argues that it is unreasonable to pretend a precise definition at the EU level, given that the European provisions are addressed at national legislators and not individuals. It is the transposing, national provisions that need to be tested against the requirements of preciseness and foreseeability. The EU norm merely provides a minimum definition, which will inevitably contain elements of broadness to prevent an excessive compression of the margins of discretion and hence national sovereignty in criminal matters[55].

The above-mentioned Framework Decision was amended in 2008. The list of preparatory offences (sometimes also referred to as "inchoate offences") was broadened to adapt it to developments in international law. The Council of Europe's Convention on the Prevention of Terrorism and UNSC Resolution 1624 were determining factors in this regard. The main effect of the amendment was to further expand and anticipate the penal response, which caused considerable frictions with the freedom of speech and fundamental principles of criminal law recognized by the legal traditions of EU Member States[56].

Today, the Framework Decision is obsolete, having been replaced by Directive 2017/541, which can now be considered as the backbone of EU counterterrorism. The Directive was adopted as a response to the attacks of 2015 in Paris and to comply with international obligations[57]. This is indicative of a general trend that allows for European counterterrorism to be defined as an "event-driven"[58] field of law in perpetual evolution. In the past, policy-changes were almost always preceded by terror attacks that shook European society and brought new issues in the spotlight. The attacks in Paris and Nizza, for example, highlighted the danger of returning foreign terrorist fighters and led to the criminalization of travelling for terrorist purposes[59].

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[55] In that sense F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit. 164-165.
[56] Cf. V. MASARONE, cit., 148 et seq.; C. C. MURPHY, cit., 69 et seq.
[57] See S. DE LUCA, *La direttiva 2017/541/UE e il difficile bilanciamento tra esigenze di pubblica sicurezza e rispetto dei diritti umani*, in *http://rivista.eurojus.it/la-direttiva-2017541ue-e-il-difficile-bilanciamento-tra-esigenze-di-pubblica-sicurezza-e-rispetto-dei-diritti-umani/*.
[58] Term coined by J. BURCHETT – A. WEYEMBERGH – G. THEODORAKAKOU, cit., 8.
[59] See *Ibid.* 17.

While the Counterterrorism Directive has widened criminal liability and supposedly ensured stronger cooperation compared to the Framework Decision[60], some argue that little progress has been achieved in terms of fundamental rights protection. According to the EU Commission's evaluation report, most national stakeholders are satisfied by the Directive and believe that it ensures a «fair balance between criminalisation and the respect of fundamental rights»[61]. However, not everybody seems to share the Commission's optimistic point of view[62]. Academics did not hold back harsh criticism concerning the evaluation report, one commentator labelling it as "self-congratulatory"[63].

5. The current legal framework

Having recalled the most important developments in the past, it is now time to focus on the currently applicable law. A preliminary remark needs to be made though: counterterrorism is a broad, cross-cutting field of law, which isn't limited to just criminal law. This becomes clear by looking at the four pillars of the EU anti-terrorism agenda: anticipation, prevention, protection, and response. These goals are not only pursued through the "threat" of criminal prosecution, but also through administrative norms governing, just to mention a few examples, external border control, detention, management and trade of explosive materials or firearms, and other matters such as education and culture to achieve inclusion of minorities and ultimately prevent radicalization[64]. Some scholars are rather

[60] In this sense EUROPEAN COMMISSION, *Evaluation of Directive (EU) 2017/541,* cit., 22: «One member of the judiciary in Italy noted that the Directive, together with other European directives, has brought a clear benefit and enhanced the effectiveness of cooperation and exchange of information between the police and the magistrates of the Member States. This has been noted also in the interviews with international stakeholders, who pointed out how the adoption of a common lexicon on combating terrorism at an EU level increased the effectiveness of the exchange of information amongst Member States and international organisations».

[61] See *Ibid.* 38.

[62] Cf. for instance J. BURCHETT – A. WEYEMBERGH – G. THEODORAKAKOU, cit., 42. For a detailed assessment on the Directive's impact on fundamental rights see also EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit.

[63] See T. GHERBAOUI – M. SCHEININ, *Time to Rewrite the EU Directive on Combating Terrorism*, in *https://verfassungsblog.de/time-to-rewrite-the-eu-directive-on-combating-terrorism/*.

[64] Cf. EUROPEAN COMMISSION, *A Counter-Terrorism Agenda for the EU*, cit., 2 et seq. See also Article 3 of the Council of Europe's Convention on the Prevention of Terrorism: «Each Party shall take appropriate measures, particularly in the field of training of law enforcement authorities and other bodies, and in the fields of education, culture, information, media and public awareness raising, with a view to preventing terrorist offences and their negative effects while respecting

skeptical about the centrality of criminal law in the fight against terrorism and would favor a partial shift towards alternative solutions. More precisely, the penal response is said to be excessively anticipated, intervening at a stage where no considerable harm has occurred yet, in defiance of the harm principle. This allegedly leads to an «acritical assimilation of terrorists, radicalized individuals, and individuals going through a process of radicalization»[65]. The point is that at the earliest stage of radicalization, criminal prosecution might be counterproductive and actually exacerbate radicalization[66]. In her analysis on criminal law as a means of prevention against terrorism, Weißer questions whether the threat of criminal prosecution is enough of a deterrent for ideologically motivated individuals to refrain from committing a crime. While pointing out the critical aspects of criminalizing preparatory acts she also stresses that the inclusion of such acts in the *matière penale* entails the benefit of stronger procedural safeguards that would be lost if the preparatory phase were left in the hands of national intelligence[67].

Bearing in mind that criminal law is just one piece of the bigger puzzle, a complete analysis of the EU counterterrorism policies would go beyond the scope of this dissertation. The focus will instead be on how the EU influences its Member States' substantive criminal law to prevent terrorist offences.

Before looking at the relevant EU legislation it is worth mentioning that the Member States also have international obligations to comply with, stemming from international treaties, conventions, or resolutions. Generally speaking, the

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human rights obligations as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law […] Each Party shall promote tolerance by encouraging inter-religious and cross-cultural dialogue involving, where appropriate, non-governmental organisations and other elements of civil society with a view to preventing tensions that might contribute to the commission of terrorist offences».

[65] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 77.

[66] Opinion expressed *Ibid.* 76 et seq.; Individuals might complete the radicalization process in prison. See in this regard EUROPEAN UNION AGENCY FOR LAW ENFORCEMENT COOPERATION., cit., 16-17: «EU Member States continued to be concerned about jihadist radicalisation and recruitment in prison and the threat from released prisoners. Several jihadist terrorist attacks in recent years were perpetrated by recently released convicts. At least five jihadist incidents in Europe (Austria, Germany and the UK) in 2020 involved attackers who were either released convicts or prisoners at the time they committed the attack. Overall, however, recidivism among terrorism convicts in Europe is relatively low».

[67] See B. WEIßER, *Der „Kampf gegen den Terrorismus" — Prävention durch Strafrecht?*, in *JuristenZeitung*, 2008, 63/8, 393-394.

EU is not directly bound by those sources of law[68], but it still takes them into account when producing legal acts. Consequently, those sources indirectly shape European criminal law too.

5.1. Sources of International Law

International Organizations such as the United Nations ('UN'), the Council of Europe ('CoE') and the Organization for Security and Cooperation in Europe ('OSCE') have been active in the field of counterterrorism for a while now, producing both hard and soft law. Some of those sources expressly call upon States to criminalize certain acts. Among those, the most relevant ones, considering their legally binding nature and the prestige of the International Organization that has produced them, will be pointed out. Since the OSCE produces merely politically, and not legally binding acts (soft law), its sources will be left out of this analysis.

5.1.1. United Nations

5.1.1.1. UN Conventions on Terrorism

It has already been anticipated that States struggle to agree upon a common, general definition of terrorism. On the UN level, reaching such an agreement is particularly difficult, given the high number of contracting parties and the cultural and ideological differences between them[69]. While most academics agree that the United Nations failed in their attempt to elaborate a general definition, a few commentators take a different stance[70].

[68] This is particularly true for UN sources. UN membership is reserved to States and hence precluded for international organizations such as the European Union.

[69] The enhanced ability of regional organizations, consisting of a smaller number of homogeneous states, to reach consensus on such definitional issues is highlighted by S. BETTI – S. DAMBRUOSO, *Le armi del diritto contro il terrorismo: un esperto ONU fra diplomazia, codici e assistenza legale*, Milan, 2008, 37-38.

[70] See for instance A. BIANCHI, *Counterterrorism and International Law*, in E. CHENOWETH et al. (Eds.), *The Oxford Handbook of Terrorism*, Oxford/New York, 2019, 662: «the widely spread conviction that international law does not provide for a general definition of terrorism is most likely inaccurate […] Arguably, a minimum common denominator would not be impossible to

Whether or not a general definition was ultimately reached is open to debate. However, it is undisputed that in light of the definitional difficulties, the United Nations privileged a sectorial case by case approach. In other words, several Conventions have been adopted that define sector-specific terrorist offences and other acts somehow linked to terrorism[71]. Examples include the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the 1997 International Convention for the Suppression of Terrorist Bombings, the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, and – particularly interesting – the 1999 International Convention for the Suppression of the Financing of Terrorism[72].

The emphasis on this last Convention is justified by the fact that scholars have described it as the first International Convention containing, albeit indirectly, a general definition of terrorism[73]. Despite its sectorial character, the definition is supposedly capable of conferring concreteness to criminal laws, thus restricting their scope of application[74].

5.1.1.2. Resolutions of the UN Security Council

Besides the aforementioned sectorial Conventions, the Resolutions of the UN Security Council, adopted on the basis of Chapter VII of the UN Charter, have become increasingly important in the field of counterterrorism. The centrality of this source of law started to emerge in 1999, when Resolution n. 1267 introduced targeted sanctions against Al-Qaeda and the Taliban. However, it

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trace, if one were to look at the myriad different legal instruments that provide for a definition of terrorism […] It is particularly worthy of note that since its Resolution 49/60 of 1994, the General Assembly has consistently defined international terrorism; and that even the Security Council in its Res. 1566 (2004) provided its own definition, which is very similar to the one used by the GA and laid down in other treaties and international instruments».

[71] Cf. V. MASARONE, cit., 99 et seq.

[72] Cf. C. C. MURPHY, cit., 51 et seq.

[73] See L. D. CERQUA, *La nozione di condotte con finalità di terrorismo*, in C. DE MAGLIE – S. SEMINARA (Eds.), *Terrorismo internazionale e diritto penale*, Padua, 2007, 95. The Convention defines the notion of "terrorist acts" by reference to other sectorial Conventions listed in an Annex, but also provides a general definition contained in Article 2.1 letter b, which reads as follows: «Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act».

[74] Opinion expressed *Ibid.*

is the Resolution n. 1373 that has had an unprecedented impact. What sets this resolution apart is its general scope. It introduces obligations to prevent and fight terrorism (also through criminal law) without reference to specific individuals or groups suspected of being involved in terroristic activities. The measures imposed upon the UN Member States are said to be abstract and general in nature. This has sparked criticism, given that such measures should ideally be decided in multilateral negotiations and not within the Security Council[75].

Among other things, Resolution 1373 reaffirms the Member States' obligation to criminalize the funding of terrorist acts, which has already been introduced through the Convention of 1999[76]. Criminalization is also prescribed for financing, planning, preparing, perpetrating, or supporting terrorist acts[77]. The notion of "terrorist acts" is not further specified, which creates some interpretative issues. It seems as if the Resolution implicitly recalls the definitions contained in the sector-specific Conventions, but this doesn't resolve the doubt about whether the obligations stemming from the Resolution apply also to acts that are classified as terrorism exclusively under national law[78]. The order to ensure proportionality between punishment and seriousness of the terrorist acts is also deliberately kept in vague terms. An influential scholar[79] argues that this vagueness is an inevitable result of the diversity of criminal sanction systems across the globe. Such differences can concern the type of penalty that can be imposed, how it is quantified and how it is applied.

Resolution 1373 isn't the only one having relevance for European Criminal Law. Obligations to criminalize derive also from Resolution n. 2178, which was adopted in 2014 with the intention of tackling the emerging

[75] See S. BETTI – S. DAMBRUOSO, cit., 66 et seq.
[76] See Res. n. 1373 § 1b: «[States shall] Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts».
[77] See Res. n. 1373 § 2e: «Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts».
[78] Cf. S. BETTI – S. DAMBRUOSO, cit., 68.
[79] F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 105.

phenomenon of foreign terrorist fighters[80]. Member States are required to foresee as criminal offences certain acts that can be drawn under the umbrella term "travelling for the purposes of terrorism". Those who support such travelling, through funding or other forms of facilitation, must be held criminally liable too. The Resolution provides that receiving or providing training for terrorism must be criminalized as well[81]. Overall, the Resolution is in line with the trend of progressive anticipation of the penal response[82].

5.1.1.3. Targeted sanctions in UN Law

As seen before, the financing of terrorism is among the acts that the United Nations urged to criminalize. In order to cut off the flow of economic resources to terrorist groups, another important measure was taken at the UN level: with Resolution 1267 (1999), the Security Council established a system of targeted sanctions, which foresees the freezing of assets and the prohibition to make funds available to certain individuals and entities associated with the Taliban, included on a "blacklist", elaborated by the so-called "Sanctions Committee"[83]. Two years later, Resolution 1373 provided for a generic obligation to impose these "smart sanctions" on persons and legal entities suspected of being involved in terrorist activities[84]. It was on the basis of this general request that the EU introduced an autonomous sanction system[85].

The topic will be further analyzed in more detail[86], given that it has indirect relevance for European criminal law. For now, it suffices to anticipate that while some scholars[87] and the Court of Justice exclude the punitive nature of targeted sanctions, mainly because of their provisional and preventive character,

[80] See H. DECOEUR, *The criminalisation of armed jihad under french law: guilt by association in the age of enemy criminal law*, in *Eur. J. Crime Crim. Law Crim. Justice*, 2017, 25/4, 304-306.
[81] See Res. n. 2178 § 6.
[82] Opinion expressed by F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 111 et seq.
[83] See Resolution n. 1267 § 4b.
[84] See Resolution n. 1373 § 1c.
[85] Cf. A. ALÌ, *The Challenges of a Sanctions Machine: Some Reflections on the Legal Issues of EU Restrictive Measures in the Field of Common Foreign Security Policy*, in L. ANTONIOLLI – L. BONATTI – C. RUZZA (Eds.), *Highs and Lows of European Integration*, 1st Edition, Cham, 2019, 54.
[86] See Chapter IV.
[87] For instance C. C. MURPHY, cit., 137 et seq.

there are also dissenting opinions on the point. Furthermore, criminal law might play a role in preventing the circumvention of the sanctions system.

5.1.2. Council of Europe

The sources of law adopted by the United Nations constitute a general legal framework which regional International Organizations, such as the Council of Europe, build upon. As will be seen in the following paragraphs, the Council of Europe seems to closely observe the developments at the UN level and often transposes them into its own legal acts.

5.1.2.1. Convention on the Prevention of Terrorism (2005)

In 2005, the Council of Europe adopted the Convention on the Prevention of Terrorism. Similarly to the International Convention for the Suppression of the Financing of Terrorism, this Convention refrains from providing a general definition of the concept of "terrorist offence", which is instead defined via reference to the sectorial UN Conventions[88]. As can be inferred from the title of the Convention, it follows a preventive approach, pushing states to tackle the issue at an early stage in order to «diminish the potential for any terrorism to take place»[89]. It doesn't introduce further terrorist offences but provides precise definitions of certain preparatory acts (public provocation to commit a terrorist offence, recruitment for terrorism, training for terrorism) and obliges States to ensure criminal liability for them when they are committed "intentionally" and "unlawfully"[90]. Article 8 clarifies that those offences are to be punished as such, regardless of whether a terrorist offence has been actually committed thereafter or not. As for Article 9, it requires criminalization of so-called "ancillary offences"[91]. When it comes to obligations regarding the choice of penalties, Article 11 merely

[88] See Article 1 of the CoE Convention on the Prevention of Terrorism.
[89] C. C. MURPHY, cit., 26.
[90] Cf. J. ALIX, *Terrorisme et droit pénal: étude critique des incriminations terroristes*, Paris, 2010, 140-141. Articles 5, 6 and 7 of the Convention on the Prevention of Terrorism all contain the following clause: «Each Party shall adopt such measures as may be necessary to establish [public provocation to commit a terrorist offence/recruitment for terrorism/training for terrorism], as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law».
[91] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 127.

states that they must be effective, proportionate, and dissuasive. Another interesting provision is Article 10, which requires to ensure liability for legal entities participating in some of the inchoate offences while leaving discretion in the choice of the type of liability (criminal, administrative, civil).

5.1.2.2. Additional Protocol to the Convention (2015)

An Additional Protocol to the Convention was adopted in 2015 with the primary intention to respond to the phenomenon of foreign terrorist fighters. It is clear to see that in this case the Council of Europe mimicked the deliberations of the UN Security Council in Resolution 2178, which are expressly recalled in the Preamble[92]. The protocol foresees further criminal offences to be introduced into national legal orders. The focus is, as in Resolution 2178, on travelling for the purposes of terrorism, and funding or other forms of facilitation of such travelling. Besides these, receiving training for terrorism and participation in an association or group for the purpose of terrorism are also addressed by the Convention[93].

5.2. European Union

As analytically illustrated in the preceding paragraphs, several sources of international law oblige national legislators to criminalize certain acts. It must be emphasized that those sources of law are addressed at national legislators and cannot themselves form the legal basis for a criminal conviction. In other words, they rely on implementation into national law. This is a direct consequence of the fundamental principle of legality in criminal matters[94]. The same line of reasoning must be applied to EU norms containing obligations to criminalize[95]. Norms of this kind are enclosed in Directive 2017/541, which will be thoroughly analyzed in Chapter III. The Directive builds upon the obligations in international law, in

[92] Cf. *Ibid.* 128-129.
[93] See Articles 2-6 of the Additional Protocol to the Convention on the Prevention of Terrorism.
[94] In the European legal tradition criminal laws can only be enacted by national parliaments. This concept is known as *riserva di legge* in Italy, *Gesetzesvorbehalt* in Germany, and *réserve de loi* in France.
[95] In that sense A. KLIP, *European Criminal Law: an integrative approach*, 2nd Edition, Cambridge/Antwerp/Portland, 2012, 179.

some cases merely reaffirming them[96], in others further specifying them[97]. What needs to be stressed is that it provides *minimum* definitions of terrorist offences and offences related to terrorist groups and activities, without prejudice for national legislators to go beyond what is required. Most definitions of criminal offences are nothing but replications of those contained in the preceding Framework Decisions. However, a few new offences were introduced that required several legislators to adopt new laws.

5.3. National transposition

Article 28 of the Counterterrorism Directive prescribed the 8th of September 2018 as deadline for the Member States to take the necessary measures to comply with its provisions. In 2020 the European Commission submitted a report on the state of implementation of the Directive[98]. Only six Member States – among which Italy, Germany, and France – notified transposition within the deadline. Infringement proceedings were launched against sixteen Member States, which complied with the prescriptions within July 2020. While the majority of Member States had to modify their legal systems – in most cases through amendments to the national criminal code and the code of criminal procedure – Italy and France held that their legal orders were already in line with the Directive[99]. In fact, some scholars claim that those States' counterterrorism measures were the reference model for supra- and international legislators, leading to a bottom-up lawmaking process[100]. Overall, the Commission was satisfied with

[96] An example is the obligation to criminalize the offence of travelling for the purposes of terrorism. The offence is described in almost identical terms in Article 9 of EU Directive 2017/541 and Article 4 of the Council of Europe's Convention on the Prevention of Terrorism.

[97] The higher degree of specificity of EU law emerges, *inter alia*, in the norms concerning penalties. International sources tend to simply prescribe effective, proportionate, and dissuasive penalties. In stark contrast to that, Article 15 of Directive 2017/541 contains quite precise indications on penalties for natural persons. For instance, directing a terrorist group must be punishable by custodial sentence, and the maximum applicable sentence cannot be inferior to 15 years.

[98] See EUROPEAN COMMISSION, *Report from the Commission to the European Parliament and the Council based on Article 29(1) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*, Brussels, 2020, 3.

[99] Cf. *Ibid.*

[100] In that sense F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 169.

the transposition of the Directive. Still, it showed concern about how certain provisions had been transposed into national law – particularly Articles 3, 9, and 11. In several cases, legislators refrained from expressively introducing new criminal offences and relied on their coverage through the case-law of national courts. Also, the Commission complained about the omission of the formal label of "terrorist" with regard to certain offences. An approximative insight into a narrow selection of national legal orders can be useful to illustrate these issues and to understand the different techniques of implementation through a comparative point of view.

5.3.1. Italy

The Italian criminal code contains a series of terrorism-related offences. They are defined in Articles 270-*bis* to 270-*septies* and Articles 280 to 280-*ter* c.p. The list of offences has been progressively expanded, also due to the obligations arising under international and EU law. Overall, the Italian legal framework seems to comply with all the offences prescribed by the mentioned Directive, even if in some cases it is the judiciary that deserves credit for it.

In the recent past, there have been three significant legislative operations[101]. First, the *decreto-legge n. 144/2005* introduced the offences of "*addestramento"* and "*arruolamento"*, which correspond to the international and European offences of "training" and "recruitment" for the purposes of terrorism. After that, with the *decreto-legge n. 7/2015* the Italian legislator criminalized further acts, beyond the requirements of international sources. Not only did he introduce the offence of organizing, financing, and advertising of travelling for the purposes of terrorism[102], but he also expanded the scope of application of the offences of recruitment and training. The former now also covers the passive act of being recruited, while the latter includes the autonomous acquisition of information ("*auto-addestramento"*, "self-training"). The criminalization of this particular offence is justified as long as the self-trained individual then performs

[101] Cf. V. NARDI, *La punibilità dell'istigazione nel contrasto al terrorismo internazionale*, in *Dir. Pen. Cont. - Riv. Trim.*, 2017, 1, 123.
[102] See Article 270-*quater.1* of the Italian Criminal Code.

acts which are unambiguously aimed at committing a terrorist offence as defined under national law and hence reveal his terrorist intent. The last considerable legislative intervention came with Law n. 153/2016, which provided *inter alia* for the offences of nuclear terrorism[103] and financing acts of terrorism[104].

A few considerations need to be made. Firstly, only forms of facilitation of travelling for the purposes of terrorism are explicitly criminalized under Italian law, yet not the act of travelling itself. However, judges have filled this void by considering the act punishable under the offence of passive recruitment[105].

Secondly, and most importantly, the decree of 2005 transposed the EU definition of "terrorist offences" (at the time contained in FD 2002/475/JHA, today in Article 3 of Directive 2017/541) into national law[106]. Also in this regard, the expansionary tendency of Italian criminal law became clear. While the Directive classifies as terrorist offences specific, listed acts, when committed with certain aims, the Italian system – allegedly out of fear of leaving loopholes – only takes this latter, cognitive element into consideration, without restricting the objective acts that can amount to terrorist offences[107]. This leads to a risk of over-criminalization. Part of the Italian legal doctrine[108] and jurisprudence has elaborated a valuable theory to avoid this undesirable consequence: Article 270-*sexies*, despite pertaining primarily to the subjective element of the offence, is interpreted also as a filter for its objective part. In other words, only acts that are suitable for achieving the aim (causing serious damage to a country or an International Organization) can be qualified as terrorist offences, where committed with the specific intent (*dolus specialis*) described in the same provision. This solution neutralizes the danger of holding an individual accountable purely because of his intentions, which have not externalized

[103] See Article 280-*ter* of the Italian Criminal Code.
[104] See Article 270-*quinquies.1* of the Italian Criminal Code.
[105] Cf. Cass. pen. Sez. II, 14.03.2019, n. 23168, *in www.italgiure.giustizia.it*; In this decision, the Italian Court of Cassation stated: «[…] il viaggio – sia che lo si riguardi dal punto di vista di chi lo organizza, ovvero dal punto di vista di chi lo compie – assume i tratti oggettivi dell'estrinsecazione di una pregressa, o comunque almeno contestuale, condotta di reclutamento».
[106] See Article 270-*sexies* of the Italian Criminal Code.
[107] Cf. F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 178.
[108] For instance L. BRIZI, *L'illecito penale costruito ex latere subiecti: la "finalità di terrorismo" alla prova del diritto penale del fatto*, in Dir. Pen. Cont. - Riv. Trim., 2017, 1, 20 et seq.

themselves in appreciable, harmful deeds – a flagrant violation of the principle "*cogitationis poenam nemo patitur"*.

5.3.2. Germany

The EU Commission's report concerning the transposition of Directive 2017/541 identified a few shortcomings of the German legal framework. While other legislators have chosen to insert new offences in their criminal codes with the specific label of "terrorist offences"[109], the German legislator has adopted a different approach. The transposing provisions are scattered across the criminal code, often in the context of generic norms that do not deal exclusively with the terroristic phenomenon – a technique that probably aims at preserving as much as possible the structure of the criminal code.

On a critical note, the Commission recalled that Article 3 of the Directive requires to "define" (in other words, label) certain acts as "terrorist offences" under national law. Germany is said to have explicitly qualified as terrorist offences only the financing of terrorism[110] and offences related to terrorist groups[111]. Consequently, a lone actor committing an act as defined under article 3 wouldn't be indicted for a "terrorist offence" by a German Court, but for an "ordinary" offence[112]. However, §46 StGB allows for the peculiar aim of the act (the terrorist intent) to be taken into account when determining the penalty[113]. While this ensures a harsher treatment, as required by Article 15 paragraph 2 of the Directive, the issue concerning the formal qualification of the act persists. This could obstruct the effectiveness of cooperation between national authorities, which relies heavily on a common qualification of terrorist offences according to the Commission[114].

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[109] See for instance the Austrian Criminal Code (StGB): §278c "Terroristische Straftaten", §278e "Ausbildung für terroristische Zwecke", §278f "Anleitung zur Begehung einer terroristischen Straftat", §278g "Reisen für terroristische Zwecke", §282a "Aufforderung zu terroristischen Straftaten und Gutheißung terroristischer Straftaten" etc.

[110] See German Criminal Code (StGB) §89c.

[111] See German Criminal Code (StGB) §129a, §129b.

[112] Cf. EUROPEAN COMMISSION, *Report based on Article 29(1) of Directive (EU) 2017/541*, cit., 4-5.

[113] Cf. B. WEIßER, *Der Kampf gegen den Terrorismus*, cit., 388.

[114] See EUROPEAN COMMISSION, *Report based on Article 29(1) of Directive (EU) 2017/541*, cit., 5. However, there are scholars upholding the thesis that material implementation is sufficient. In that

While a specific provision, defining and establishing autonomous terrorist offences – comparable to Article 260-*sexies* of the Italian Criminal Code, or Paragraph 278c of the Austrian one – is nowhere to be found in the German StGB, indirect definitions of such acts can be retrieved in a few provisions. This legislative technique demonstrates the caution with which the German legislator deals with stigmatizing labels such as "terrorist" and "terrorism"[115]. An indirect definition can be found in Paragraph 89c StGB, labelled "financing of terrorism", which punishes collecting, receiving, or making available assets for the commission of certain offences, whose implicit, veiled terrorist qualification can be inferred from the title of the paragraph. For the definition of those offences, the StGB uses the same technique adopted by the EU in Article 3 of the Directive on combating terrorism. The result is a definition that combines objective and subjective elements. In contrast to Italian criminal law, the acts that can (indirectly) be qualified as terroristic are enclosed in a list[116]. As for the specific intent, its description corresponds to a large extent to the European provisions[117].

5.3.3. France

The attacks that took place in Paris in 2015 led to the declaration of the state of emergency. In this climate of emergency, significant changes in French criminal law were enacted. The extreme anticipation and harshness of the penal

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sense A. KLIP, cit., 221: «From the description int the Union legal instrument, it must be assumed that the material implementation of the conduct is sufficient, and that Union law does not require the introduction of the formal name tag into national law». See also M. BÖSE, *The impact of the Framework Decisions on combating terrorism on counterterrorism legislation and case law in Germany*, in F. GALLI – A. WEYEMBERGH (Eds.), *EU counter-terrorism offences: what impact on national legislation and case-law?*, Brussels, 2012, 67.

[115] Opinion expressed by T. A. ZWEIGLE, *Gesetzgeber im Konflikt zwischen Rechtsstaatlichkeit und Terrorismusbekämpfung: eine Untersuchung zu § 89a Abs. 2a StGB*, 1st Edition, Baden-Baden, 2020, 36-37.

[116] See *Ibid.*

[117] See §89c, Abs. 1 S. 2 StGB: «[…] nur anzuwenden, wenn die dort bezeichnete Tat dazu bestimmt ist, die Bevölkerung auf erhebliche Weise einzuschüchtern, eine Behörde oder eine internationale Organisation rechtswidrig mit Gewalt oder durch Drohung mit Gewalt zu nötigen oder die politischen, verfassungsrechtlichen, wirtschaftlichen oder sozialen Grundstrukturen eines Staates oder einer internationalen Organisation zu beseitigen oder erheblich zu beeinträchtigen, und durch die Art ihrer Begehung oder ihre Auswirkungen einen Staat oder eine internationale Organisation erheblich schädigen kann».

response, far beyond what is required by the EU[118], raise doubts on its compatibility with the principle of proportionality and have led some scholars to refer to the French model as a paradigm of *Feindstrafrecht*[119].

The French legislator has introduced specific criminal norms on terrorism that are all homogeneously collected in a dedicated section of the national criminal code entitled "*Du terrorisme"*[120]. Article 421-1 c.p. provides the definition of certain acts of terrorism. Like the EU and Germany, France relies on a list-based approach. However, while this choice is a restricting factor on what can be considered a terrorist offence, the element of intention is described in significantly broader and concise terms compared to other legal systems[121]. Indeed, it suffices that the listed act is committed with the aim of «seriously altering public order through intimidation or terror»[122].

The French counterterrorism system is said to be one of the most severe in Europe. For instance, academics[123] have criticized the unsparing application of Article 421-2-5 c.p., which transposes the Directive's Article 5 on public provocation to commit a terrorist offence. In the aftermath of the attacks in Paris, French Courts convicted individuals for statements that allegedly did not cause an actual danger that a terrorist offence be committed thereafter[124]. French law even went so far as to criminalize the act of regularly consulting websites hosting content which glorifies or incites the commitment of terror acts. However, the Constitutional Council quashed this offence twice (it was re-introduced in a modified version after the first declaration of unconstitutionality), holding that it

[118] This is particularly true for the offence of *entreprise individuelle* (Article 421-2-6 c.p.). See in this respect F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 213-215.
[119] Cf. H. DECOEUR, cit., 324-325.
[120] Cf. J. ALIX, cit., 71.
[121] See *Ibid.* 255 et seq. for an extended analysis of the specific terrorist intent under French law.
[122] See Article 421-1 of the French Criminal Code: «Constituent des actes de terrorisme, lorsqu'elles sont intentionnellement en relation avec une entreprise individuelle ou collective ayant pour but de *troubler gravement l'ordre public par l'intimidation ou la terreur*, les infractions suivantes […]».
[123] For instance R. CABALLERO, *Les restrictions de la liberté d'expression face au délit d'apologie du terrorisme*, in *https://verfassungsblog.de/die-einschraenkungen-der-meinungsfreiheit-aufgrund-des-kampfs-gegen-den-terrorismus-in-frankreich/*.
[124] See *Ibid.*

violated the principle of proportionality and the freedom of information and communication[125].

The French case provides an excellent example of how national legislators often overshoot the mark set at the European level. Fortunately, as seen in this paragraph, in some cases this tendency is curtailed to a certain extent by judicial review.

[125] Cf. F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 217-219; see also Cons. Const., 15.12.2017, n. 2017-682 QPC, in *www.legifrance.gouv.fr*, §16: «[…] les dispositions contestées portent une atteinte à l'exercice de la liberté de communication qui n'est pas nécessaire, adaptée et proportionnée. L'article 421-2-5-2 du code pénal doit donc […] être déclaré contraire à la Constitution».

CHAPTER II

FUNDAMENTAL PRINCIPLES AND HUMAN RIGHTS

1. General Notions and Principles

In the previous Chapter the complexity of the legal framework governing the penal response to terrorism was highlighted. In this multi-level system, the EU's "Directive on combating terrorism" is at the crossroad between international and national law. Since the primary goal of this dissertation is to provide a critical analysis on the Directive's lawfulness, and more specifically its compatibility with fundamental principles of criminal law and human rights, it is useful to have a clear picture of these two assessment criterions – which can be seen as constitutive elements of the Rule of Law – beforehand. The Chapter at hand will thus provide the necessary clarifications concerning general notions and principles of European Criminal Law and fundamental rights that might be endangered or violated by the Directive.

Chapter one also pointed out that under the law of the United Nations Member States of the European Union are compelled to apply targeted economic sanctions to individuals and entities that are linked to terrorist groups and inserted in so-called "blacklists". While this mechanism is widely regarded not to be punitive in nature[1], the targeted sanctions system still has a significant impact on certain human rights. However, these issues will be examined in Chapter four, which will be entirely dedicated to targeted asset freezing.

1.1. The Rule of Law

[1] In that sense, *ex multis* C. C. MURPHY, cit., 137 et seq. The controversy on the punitive rather than purely preventive nature of targeted sanctions boils down to contrasting opinions on the correct application of the so-called "Engel criteria", first elaborated by the European Court of Human Rights in the case *Engel and others vs. the Netherlands*. A detailed analysis of that debate is provided *infra*, Chapter IV, 4.1.

The first notion that needs to be addressed is the Rule of Law. European penologists concluded that criminal law should be backed by a high degree of democratic legitimacy and comply with Rule of Law standards[2].

The Rule of Law can thus be seen as the overarching, all-encompassing criterion Directive 2017/541 – and for that matter any counterterrorism measure adopted by the Union's institutions (including targeted sanctions) – must be tested against. The principle is in fact a wide-reaching one that concerns Union action in general, including the field of criminal law. It is therefore worth examining the notion in more detail.

First and foremost, it should be stressed that primary Union law explicitly recognizes the Rule of Law as a guiding principle. The "Treaty on European Union" solemnly states that «[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights»[3]. All institutions, bodies and agencies of the EU are compelled to abide by these fundamental principles, which are central pieces of the common legal tradition of the EU Member States[4].

However, the Rule of Law is an evanescing concept, an ideal that has been variously defined in the legal doctrine, which makes it difficult to grasp its essence and has led some scholars to label invocations of it as rhetorical and empty[5]. The Council of Europe's advisory body on constitutional matters, better known as the "Venice Commission", is *inter alia* entrusted with the task of promoting the Rule of Law, and therefore might be in the best position to provide a precise definition. In a report on the matter, it noted that «[l]ooking at the legal instruments, national and international, and the writings of scholars, judges and others, it seems as if there is now a consensus on the core meaning of the rule of

[2] See EUROPEAN CRIMINAL POLICY INITIATIVE, *A Manifesto on European Criminal Policy*, in *Z. für Int. Strafrechtsdogmatik*, 2009, 12, 707.
[3] See Article 2 of the TEU
[4] The commonality of the concept is highlighted by its presence in the legal terminology of different nations (*Rechtsstaat, Stato di diritto. État de droit, Estado de derecho…)*, although these terms are not always perfect synonyms. This latter circumstance was highlighted in EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *Report on the Rule of Law*, Venice, 2011, 3.
[5] On the difficulties in defining the concept see C. C. MURPHY, cit., 34. Cf. also R. H. FALLON JR., *The Rule of Law as a Concept in Constitutional Discourse*, in *Columbia Law Rev*., 1997, 1, 1 and 4: «The Rule of Law is a much celebrated, historic ideal, the meaning of which may be less clear today than ever before».

law and the elements contained within it»[6]. Besides breaking down the principle into its widely recognized constitutive elements, the report also provides some historical background information.

Allegedly, the origins of the Rule of Law date back to antiquity[7]. The first modern elaboration of the notion that had widespread influence is said to be the one provided by Albert Venn Dicey, a British constitutional lawyer. According to Dicey the Rule of Law constitutes one of the unwritten principles of British constitutional law[8]. In his vision, the main, albeit not exclusive, purpose of the principle is to constrain the theoretically unlimited power of the State over the individual. Among the pillars of the Rule of Law, Dicey identified the principles of equality and legality[9], elements which are mentioned in several more recent texts as well[10].

According to some modern scholars[11] the Rule of Law can be broken down into five constitutive parts, which are partially interconnected with each other. The first is the capacity of norms to guide the conduct of individuals. Put differently, the law should be accessible to the citizen and foreseeable[12]. As a second element the law's efficacy is often mentioned. Laws must actually guide individual conduct. At this point, another feature comes into play: the availability of impartial authorities that enforce the law[13]. Without enforcement, the law is just an empty vessel that lacks efficacy. The last two elements are reasonable stability and supremacy of the law. The latter implies that both citizen and public

[6] See EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *Report on the Rule of Law* cit., 9.
[7] See *Ibid.* 3, where the report quotes Plato: «Where the law is subject to some other authority and has none of its own, the collapse of state, in my view, is not far off, but if the law is the master of government and the government its slave, then the situation is full of promise and men enjoy all the blessings all the gods shower on a state».
[8] In this sense *Ibid.*; R. H. FALLON JR., cit., 1.
[9] See EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *Report on the Rule of Law,* cit., 4.
[10] For instance R. BIN – G. PITRUZZELLA, *Diritto costituzionale*, 18th Edition, Turin, 2017, 45.
[11] In that sense R. H. FALLON JR., cit., 8-9.
[12] These qualitative requirements of the law have been highlighted on numerous occasions by the jurisprudence of the European Court of Human Rights. See for instance ECtHR, 21.10.2013, Application n. 42750/09 in *hudoc.echr.coe.int, (Del Rio v. Spain)* § 91.
[13] See EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *The Rule of Law Checklist*, in www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf, 23.

authorities are subject to the law. In that sense, the teachings of Plato that depict the government as the "slave" of the law[14] were enlightening.

During its 106th plenary session, the Venice Commission adopted a comprehensive document which is entitled "The Rule of Law Checklist"[15], which builds upon the already cited report[16]. The checklist identifies specific benchmarks to assess adherence to the Rule of Law principles. These include, *inter alia,* the elements that have been mentioned *supra*. Regarding the element of supremacy of law, the checklist stresses that it applies to the law-making process as well. In other words, when exercising their normative power, legislators need to be constrained by superior, constitutional law[17]. In the western legal tradition, constitutional review of legislation is usually ensured either in a decentralized manner by ordinary judges[18] or in a centralized fashion by a specialized Constitutional Court[19]. Either way, this allows to exert some control over the legislative branch, a circumstance that is vital for ensuring a relationship of "checks and balances"[20]. Moreover, the Commission requires the lawmaking process to be transparent, inclusive and democratic[21]. Ideally, the enactment of laws should be preceded by impact assessments concerning *inter alia* human rights[22].

The role of human rights within the context of the Rule of Law is a controversial issue. In legal scholarship the thesis was put forward that a particular standard of human rights protection should not be considered as a

[14] See above, Chapter II footnote 7.
[15] See EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *The Rule of Law Checklist* cit.
[16] See above, Chapter II footnote 4.
[17] In that sense EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *The Rule of Law checklist*, cit., 17.
[18] For a brief description of this model see V. BARSOTTI et al., *Italian constitutional justice in global context*, 1st Edition, Oxford/New York, 2017, 15.
[19] This would be the so-called Austrian model elaborated by Hans Kelsen. Cf. *Ibid.* 16.
[20] In that sense EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *The Rule of Law Checklist*, cit. 16.
[21] Scholars are concerned about the progressive erosion of the *lex parlamentaria et democratica* via sources of law that are detached from the people's representatives. See A. BARLETTA, *La legalità penale tra diritto dell'Unione europea e costituzione*, Naples, 2011, 23.
[22] Cf. EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *The Rule of Law Checklist*, cit., 21. It's interesting to note that the adoption process of Directive 2017/541 has been described as rather hasty and it did not include a human rights impact assessment, but merely an *ex post* evaluation report. See in this sense T. GHERBAOUI – M. SCHEININ, cit.

substantial element of the Rule of Law[23]. However, other commentators[24] and even the Venice Commission[25] explicitly mention protection of human rights among the so-called "ingredients" of the Rule of Law. More precisely, the latter requires the High Contracting Parties to «ensure compliance with human rights law, including binding decisions of international courts»[26]. In the context of Union law, it is reasonable to cast doubt on the practical utility of this debate. Whether human rights are part of the Rule of Law or an autonomous notion is irrelevant given that primary law (i.e. Article 6 TEU) calls on Union institutions to respect human rights. This means that even if one were to consider human rights as a distinct notion outside the scope of the Rule of Law, secondary Union law that violates human rights would amount to a breach of primary, "constitutional" Union law (i.e. the Charter of Fundamental Rights). As seen above, the supremacy of law as a constitutive element of the Rule of Law entails that lawmakers must play by the rules of constitutional law[27]. Therefore, it could be concluded that violations of human rights constitute at least an indirect infringement of the Rule of Law. The alternative, yet substantially equivalent, solution would be to regard the specification of Article 6 TEU on the Union's duty to respect human rights as a redundant formula that puts additional emphasis on one of the "ingredients" of the Rule of Law.

While the relationship between human rights and the Rule of Law is debated, there seems to be widespread consensus on the fact that the principle of legality in criminal matters constitutes an essential element of the Rule of Law[28].

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[23] Cf. C. C. MURPHY, cit., 43. Amongst the reasons to uphold this claim the author mentions the potential loss of neutrality of the Rule of Law and the risk of considering individual breaches of rights as systematic failures in legal protection.

[24] For instance A. KARGOPOULOS, *Fundamental rights, national identity and EU criminal law*, in V. MITSILEGAS – M. BERGSTRÖM – T. KONSTADINIDES (Eds.), *Research handbook on EU criminal law*, Cheltenham, 2016, 127. The cited Author defines fundamental rights as «particular manifestations of the rule of law».

[25] Cf. EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *Report on the Rule of Law*, cit., 9.

[26] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *The Rule of Law Checklist*, cit., 19. The reference to binding decisions of international courts underscores the importance of the European Court of Human Rights' jurisprudence.

[27] The European legislator is subject to slightly different yet substantially analogous constraints that will be dealt with in Chapter II, 1.1.1.

[28] See ECtHR, 12.02.2008, Application n. 21906/04, in *hudoc.echr.coe.int, (Kafkaris v Cyprus)* § 137.

This could be regarded as another argument in favor of the hypothesis that includes fundamental rights in the Rule of Law notion, given that the *nullum crimen, nulla poena sine lege* principle constitutes an obligation upon judicial authorities (not to rule out of law), but also an individual right that occupies a prominent place in the European Convention on Human Rights[29]. The two notions are undoubtedly interwoven, given that they have a similar purpose: the principle of legality in criminal matters aims at protecting individuals against arbitrary exercise of judicial power (i.e. prosecution, conviction or punishment[30]). One author observed that it «demarcates the contours of the inherent power that states enjoy to criminalize and punish conducts»[31]. Likewise, the Rule of Law has been associated with the more generic purpose of protecting individuals against arbitrary exercise of public power[32].

1.1.1. The Rule of Law from the EU perspective

The traditional elaborations of the Rule of Law principles that have just been examined look at them from the perspective of States. The European Union, however, is an autonomous legal order with some peculiar traits that render it necessary to reconsider the constitutive elements of the Rule of Law under the lens of the interactive relationship between European and national authorities. While the Union explicitly recognizes the Rule of Law as a guiding principle, it has been stressed that the «EU concept of the rule of law is a unique one which draws on Member State law but remains an autonomous concept»[33]. The cited scholar observes that, within the EU, the Rule of Law plays a twofold role: on the one hand it has a constitutive purpose, on the other hand, a safeguarding one.

The constitutive role signals that the power of the European Union's institutions stems from law, more precisely from primary law. The Treaties therefore represent both the basis and the limit for acts of the Union, the same way

[29] Cf. A. M. SALINAS DE FRÍAS, *Counter-terrorism and human rights in the case law of the European Court of Human Rights*, Strasbourg, 2012, 115.
[30] See *Ibid.* In the words of the cited Author, «public authorities cannot rule out of law».
[31] A. KARGOPOULOS, cit., 127.
[32] In that sense R. H. FALLON JR., cit., 8; C. C. MURPHY refers to this purpose as the Rule of Law's "safeguarding role".
[33] See C. C. MURPHY, cit., 35.

a constitution restricts the choices of a national legislator. This means that when the Union choses to enact a Directive to approximate national criminal laws concerning terrorism it must «possess the required power and use the correct legal basis to do so»[34]. Following this line of reasoning, the European Rule of Law is tightly connected to the principle of conferral[35]. Essentially, the latter is nothing but one of the manifestations of the element of supremacy of the law within the context of the European Union. It implies that the institutions of the Union cannot rule outside of the powers attributed to them by the Member States and enshrined in primary law. As will be seen[36], there is a sound legal basis for the Directive on combating terrorism which therefore could be said to comply with this aspect of the Rule of Law.

Nevertheless, the existence of a legal basis alone is not sufficient for a Union act to be valid in light of the European Rule of Law. It must also pass the "stress test" of the principles of subsidiarity[37] and proportionality[38], both of which are enshrined in the Treaties. The essence of the two principles can be summarized in the following terms: where an objective can be achieved by the Member States autonomously, the Union should not act. When the Union is in the better position to achieve the objective, the means to do so should not go beyond what is necessary[39]. The principles will be examined in greater detail with specific regards to criminal law when dealing with the guidelines for a European Criminal Policy[40].

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[34] *Ibid.* 38.
[35] Cf. *Ibid.*
[36] See Chapter III, 3.
[37] See Article 5(3) TEU: «Under the principle of subsidiarity, in areas which do not fall within its exclusive competence [such as criminal law], the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level».
[38] See Article 5(4) TEU: « Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties».
[39] For a concise but complete description of the two principles read W. SCHROEDER, *Limits to European Harmonisation of Criminal Law*, in *Eucrim - Eur. Crim. Law Assoc. Forum*, 2020, 2, 147.
[40] See Chapter II, 1.4.

More generally, the act must comply with the European "constitutional"[41] order as a whole, which includes – besides all the above (competence, subsidiarity, proportionality) – fundamental rights standards as enshrined in the Charter of Nice or recognized by the Court of Justice as general principles of Union law. In fact, it has been claimed that the principles of proportionality and subsidiarity fail to effectively limit the powers of the European legislator, while the Charter allegedly constitutes a more stringent constraining factor[42]. With the entry into force of the Lisbon Treaty the Charter has acquired the same legal value as the TEU and the TFEU and thus constitutes primary Union law[43]. The Rule of Law requires the European legislator to respect the boundaries set by primary law. Since the latter includes also the Charter of Fundamental Rights, this is where the aforementioned safeguarding role of the Rule of Law comes into play. It ensures that «insofar as the Union is governed through law, that law is respectful of individual freedom»[44].

So far, this paragraph focused on the submission of acts of the Union to the Treaties and the Charter, a manifestation of the principle of supremacy of (primary) law. However, the abovementioned principle has another implication in the EU context. For Union law to be effective – which, as shown, is another requirement of the Rule of Law – Member States cannot disregard it and must actively enforce it. In other words, in case of conflicting norms Union law (be it primary or secondary) takes precedence over national law[45], which could be seen as another expression of the law's supremacy. As shall be seen *infra*[46], an absolute acceptance of the primacy principle elaborated by the Court of Justice would

[41] Strictly speaking a European constitution doesn't exist yet, but this doesn't mean that there is no European constitutional law. Cf. K.-D. BORCHARDT, *The ABC of EU law*, Luxembourg, 2017, 43: «Following the failure of the Treaty establishing a Constitution for Europe of 29 October 2004, the EU 'constitution' is still not laid down in a comprehensive constitutional document, as it is in most of the constitutions of its Member States, but arises from the totality of rules and fundamental values by which those in authority perceive themselves to be bound. These rules are to be found partly in the EU treaties or in the legal instruments produced by the Union institutions, but they also rest partly on custom».

[42] In that sense W. SCHROEDER, cit., 147.

[43] Cf. K.-D. BORCHARDT, cit., 90.

[44] See C. C. MURPHY, cit. 42.

[45] The primacy of Union law has been upheld by the Court of Justice starting from the leading case *Costa v. Enel* (ECJ, 15.07.1964, C-6/64, in *eur-lex.europa.eu*). See A. BARLETTA, cit., 25.

[46] The reference here is to the German *Solange* judicature and the Italian "counter-limits" doctrine. For a deeper examination see Chapter II, 1.3.4.2.

require complete trust in the Union. However, some Member States are still a bit cautious and eager to protect their core values and principles[47].

1.1.2. The Enforcement of EU Law

If the European Rule of Law includes the supremacy of Union law, for the latter to be effective it needs to be enforced[48]. Otherwise, it would become an abstract concept without practical utility. Impartial enforcement of the law has been mentioned amongst the constitutive elements of the Rule of Law[49], and it must be referred to both national and European law. What is to be understood under "enforcement" though and who ensures it?

In the Union context, enforcement means first and foremost implementation and application of Union law, which is a shared responsibility amongst the Union and its Member States[50], a circumstance which leads to a (partially) decentralized enforcement process.

The element of enforcement is tightly connected with the principle of sincere cooperation, which requires the Member States to take all the appropriate measures (general or particular) to fulfill the obligations stemming from primary and secondary Union law[51]. This duty is not exclusively addressed at national lawmakers, but it regards indiscriminately all national authorities, which means that implementing EU law, giving it full effect, is a responsibility of domestic

[47] See A. BARLETTA, cit., 87 where the Author recalls a decision by the French *Conseil Constitutionnel* in which the conformity of national law with a Directive was defined as a constitutional necessity that can however be disregarded where there is an explicit constitutional norm in conflict with the European source.
[48] Cf. C. C. MURPHY, cit., 40.
[49] See above Chapter II, Footnote 13.
[50] In that sense C. LACCHI, *Multilevel judicial protection in the EU and preliminary references*, in *Comm. Mark. Law Rev*., 2016, 53/3, 679: «Both national courts and the Court of Justice of the EU are entrusted with the task of ensuring the effective and uniform application of EU law, and guaranteeing the judicial protection of the rights conferred on individuals by EU law».
[51] See Art. 4(3) TEU: «The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union».

judges[52] too, whenever they are in the position to do so. In other words, the principle of sincere cooperation can affect national criminal law at two stages: when it is enacted and when it is applied[53].

In the specific case of Directives, «sincere co-operation generally requires that implementing legislation be enacted. A change of the administrative [or judicial] practice is insufficient»[54]. This applies *a fortiori* in the field of criminal law where the principle of legality reserves the introduction of new criminal offences to national legislators. As will be seen[55] the Union has a limited competence in the field of criminal law, which heavily relies on the implementing legislative acts of national parliaments[56]. This multi-level nature of the normative process implies that the requirements of clearness, preciseness and foreseeability – which stem from the principle of legality in criminal matters and have been identified as fundamental elements of the Rule of Law – should be referred to the final, "Europeanized" national provision addressed at individuals rather than to the European criminal provision that serves as a mere baseline for domestic legislators[57].

As for national judicial authorities, their duty of sincere cooperation results in direct application of certain sources of Union law (e.g. Regulations, Treaties, directly effective Directives) and ensuring the primacy of Union law by setting aside national provisions that run contrary to it. Also, if possible, national rules must be interpreted in conformity with EU legislation[58]. However, the Court of Justice's case-law made clear that these duties are not absolute. During their analysis of the *Kolpinghuis Nijmegen*[59] case, scholars have stated that «EU law emerges not simply as a law to be enforced, but also as a shield for individuals,

[52] In fact, national courts have been identified as the key players in the enforcement of Union law. Cf. in that sense C. LACCHI, cit., 680.
[53] Cf. A. BARLETTA, cit., 162.
[54] See A. KLIP, cit., 70.
[55] See Chapter II, 1.3.
[56] It has been claimed that while the *lex parlamentaria* principle is formally respected, the Union's sources of law have allegedly determined a shift in the traditional constitutional framework concerning criminal law. In this sense A. BARLETTA, cit., 20.
[57] Cf. F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 163 et seq.
[58] See K.-D. BORCHARDT, cit.. 136 et seq.
[59] See ECJ, 08.10.1987, C-80/86, in *eur-lex.europa.eu*.

and as such it shapes the EU as a system based on the 'rule of law'»[60]. Statements like these evoke the abovementioned theory on the safeguarding role of the Rule of Law. While the enforcement of EU secondary legal acts through national authorities is arguably an indispensable element of the Rule of Law[61], sometimes it must step back for the sake of higher values and principles, such as fundamental rights protection or the principle of legality in criminal matters[62]. At a closer look, these interests are protected by primary Union law. Thus, ensuring their prevalence over the interest of seeing the secondary legal acts being given full effect through domestic legislation and judicial application does not constitute a lack of enforcement of Union law, but quite the opposite. Enforcement of the secondary piece of legislation can (and should) still be ensured at a later stage by holding the Member State in breach of its obligations accountable through the infringement procedure.

It might be useful to give a concrete example to better understand what has just been said. If a Member State were to not transpose one of the offences provided for in Directive 2017/541 into national law, domestic judges could not convict an individual for that offence since that would amount to a breach of the *nulla poena sine lege* principle, which constitutes primary Union law[63]. In the unlikely event that an individual was nevertheless to face charges for that offence, he or she could apply to the Court of Justice through the preliminary reference procedure to uphold the legality principle[64]. While in this case the objectives of the Directive would remain temporarily unsatisfied, given that the individual's conduct goes unpunished, this does not mean that EU law is not being enforced. Giving precedence to primary norms is perfectly in line with the Rule of Law. The

[60] L. MARIN, *The General Principles of European (Criminal) Law as Limitation to the Enforcement of EU Law: The Kolpinghuis Nijmegen Rule*, in V. MITSILEGAS – A. DI MARTINO – L. MANCANO (Eds.), *The Court of Justice and European Criminal Law - Leading Cases in a Contextual Analysis*, Chicago, 2019, 8.

[61] Cf. R. H. FALLON JR., cit., 8-9, where efficacy and enforcement are mentioned among the constitutive elements of the Rule of Law.

[62] See L. MARIN, cit., 19-20; C. LACCHI, cit., 1.

[63] See Article 49(1) CFR: « No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed […]».

[64] The Charter is appliable to Member States when they are implementing Union law. For a more detailed explanation of this circumstance see Chapter II, 2.1.1.

omissions of the domestic legislator cannot be made up for through extensive judicial interpretation to the detriment of the individual and in breach of the requirement of legal certainty[65], but must instead be addressed by the legislator himself, who can be solicited to do so by putting pressure on him through the infringement procedure.

Since domestic judges are entrusted with the task of ensuring that domestic rules are in conformity with Union law[66], they are indirectly required to interpret the latter. Safeguarding uniformity in the interpretation across the Member States is one of the Court of Justice's responsibilities. The tool that allows the Court to provide binding interpretational guidance is the preliminary ruling procedure[67]. However, the procedure also serves the purpose of ensuring the lawfulness of Union acts and national implementation measures. During a proceeding before a domestic Court, the judge can issue a preliminary reference to the European Court of Justice in order to review the validity of a Union act (in other words its conformity with primary Union law) or the compliance of a domestic norm that is relevant to the case with Union law (primary and secondary). It can therefore be said that national judicial authorities are involved in upholding the Rule of Law and respect for fundamental rights within the EU's institutions and its Member States. Ultimately, however, the responsibility for ensuring the legality of Union acts is with the Court of Justice of the European Union[68]. Indeed, domestic courts do not have jurisdiction over the validity of such pieces of legislation[69]. Therefore, the European model of judicial review of (EU) legislation can be said to be a centralized one.

1.1.3. Conclusions on the EU Rule of Law

[65] Cf. A. BARLETTA, cit., 156.
[66] See *Ibid.* 169.
[67] See Article 267 TFEU: «The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union».
[68] Compare with V. SCALIA, *Protection of Fundamental Rights and Criminal Law - The Dialogue between the EU Court of Justice and the National Courts*, in *eucrim*, 2015, 3, 101: «[…] an *ex post* control should be done by the CJEU, or by the ECtHR, which will act in these cases as a real Constitutional Court in relation to legal provisions adopted by the EU legislator».
[69] See A. KARGOPOULOS, cit., 128: «[…] secondary EU criminal law remains largely outside any control from national courts […]».

The multifaceted nature of the Rule of Law can leave the reader in a state of confusion. Hopefully, the previous paragraphs were able to disentangle the notion at least partially. A short summary of the main findings with a prospective view to the topics that will be analyzed in the subsequent paragraphs could contribute to clarify the picture and to understand why these preliminary remarks were necessary.

The supremacy of law entails that primary Union law, which happens to include fundamental rights, constricts the choices of both the European legislator and the domestic authorities in their capacity of "enforcers" of Union law. Consequently, the Directive on combating terrorism and the national criminal offences that implement it must respect fundamental rights. To ensure this, the Directive, as well as the implementing national laws, should be in line with generally accepted principles of criminal law.

The Court of Justice is the "guardian" of legality (i.e. conformity with primary Union law) of European criminal law measures and the correlated, "Europeanized" domestic provisions. The latter are obviously not being enforced by European institutions, but in a decentralized manner by domestic courts. The latter can bring issues of interpretation or validity of Union law to the attention of the European Court of Justice via the preliminary reference procedure.

1.2. European Criminal Law

European Criminal Law, just like the Rule of Law, can be somewhat of a vague and ungraspable concept. It has been described as «an evolving area of law, a field of law in transition that has gradually changed in nature»[70]. If the term "criminal law" is interpreted from a traditional point of view – as the normative basis for the application of a criminal sanction (e.g., a custodial sentence) – then European criminal law *stricto sensu* does not exist yet[71]. For the time being, Union law (both primary and secondary) merely exerts an influence on how

[70] A. KLIP, cit., 1.
[71] Opinion expressed by H. SATZGER, *International and European criminal law*, 2nd Edition, Munich, 2018, 45.

national criminal law is produced and interpreted. This European influence on domestic criminal law is increasing progressively according to some scholars[72].

According to certain authors it won't be long before the European legislator will create European offences that won't need any national measures of implementation and can be directly applied by national judicial authorities[73]. In this regard, article 325 TFEU has been mentioned as a potential legal basis for such "supranational criminal law"[74].

As of today, if the notion of "European Criminal Law" is to retain some value it must be interpreted extensively. It is used as an umbrella term that encompasses, *inter alia*, legal acts of the Union that aim to approximate[75] national criminal law, the corresponding "Europeanized" national provisions as well as the relevant case-law of the European Court of Human Rights[76].

In the light of this broad interpretation, the Directive on combating terrorism and the national provisions transposing it are a paradigm of European Criminal Law and provide an excellent opportunity for contextualizing the general notions of European Criminal Law in a concrete, specific field.

1.2.1. Primary Union Law's influence on national criminal law

During the examination of the Rule of Law, it became clear that the Treaties and the Charter occupy the highest rank in the hierarchy of European sources of law. While primary Union law constrains the choices of the European legislator, it has a twofold influence on national criminal law too.

On the one hand, it can give rise to positive obligations, in the sense that it implicitly obliges to provide penal protection to certain legal interests[77]. Explicit

[72] See in this sense A. BARLETTA, cit., 20.
[73] Cf. H. SATZGER, *International and European criminal law*, cit., 45-46.
[74] See H. SATZGER, *Europäisches Strafrecht*, 2022, in *https://www.staatslexikon-online.de/Lexikon/Europäisches_Strafrecht.*
[75] The terms "harmonization" and "approximation" are sometimes used interchangeably in legal literature. Compare with A. KLIP, cit., 33.
[76] See in this sense H. SATZGER, *International and European criminal law*, cit., 45-46.
[77] These obligations derive primarily from the principles of assimilation and sincere cooperation. See in that sense A. BARLETTA, cit., 160 et seq. Those principles can require Member States to ensure the same level of legal protection for national legal interests and comparable European interests. In *Commission v. Greece* (ECJ, 21.09.1989, C-68/88, in *eur-lex.europa.eu)*, the Court stated that: «whilst the choice of penalties remains within [the Member States'] discretion, they

obligations to criminalize, however, stem from secondary law (i.e. Directives[78]) rather than from primary law.

On the other hand, the Treaties and the Charter can also determine negative obligations[79], meaning that criminalization of certain conducts at the national level can be illegitimate according to primary Union law[80]. Where domestic legislators fail to repeal the concerned provision judges should neutralize it by refusing to apply it. Allegedly, the treaty provisions on the fundamental freedoms and the internal market are the ones that are most suitable for exerting this neutralizing effect on national criminal statutes[81]. It has been observed that conflicts between primary law and domestic criminal law may arise both with regards to the elements of the criminal offence and the legal consequences attached to it (i.e. the type and severity of the penalty)[82].

This last consideration is important given that Directive 2017/541 obliges to ensure a minimum standard of criminalization, meaning that in theory national legislators are free to criminalize further conducts outside the scope of those considered by the Directive, or impose harsher maximum penalties then the ones foreseen at the European level. However, given the "upper limit" of primary EU law, this discretion does not seem to be absolute[83].

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must ensure […] that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive».

[78] See Chapter II 1.3.

[79] These *obligationes non puniendi* have led scholars to describe the Union as "negative legislator". Opinion expressed by A. BARLETTA, cit., 74.

[80] See *Ibid.* 25 and R. SICURELLA, *EU competence in criminal matters*, in V. MITSILEGAS – M. BERGSTRÖM – T. KONSTADINIDES (Eds.), *Research handbook on EU criminal law*, Cheltenham, 2016, 50: «criminal law provisions adopted at domestic level, and establishing criminal offences in all those areas falling within the scope of EC competence, may be affected by European legislation regulating any of these fields […] their scope of application may be reduced as a consequence […] of the fact that behaviours established as criminal, in the concrete case before the judge, are held to be covered by one of the European fundamental freedoms […] and consequently, because of the primacy of EC law, individual responsibility is held to be excluded in the concrete case».

[81] See A. BARLETTA, cit., 26.

[82] In this sense *Ibid.* 169; cf. also H. SATZGER, *International and European criminal law*, cit., 79 et seq. Specific elements of primary Union law that might act as an upper for criminal penalties are the principles of proportionality and non-discrimination.

[83] See A. KLIP, cit., 325: «When criminalising and adopting the maximum or minimum penalties provided for a crime, the legislature of the Member States must take the requirement [of proportionality] into consideration […] When handing down a sentence, the national court must again impose a penalty that is proportional to the offence actually committed».

1.2.2. Directives as source of European Criminal Law

It has been mentioned above that some scholars have identified provisions in the TFEU that allegedly empower the Union to introduce offences which are directly applicable in the Member States[84]. The concerned provisions refer to "all necessary measures", which is said to lay the foundation for the adoption of Regulations in the field of criminal law (law-making *stricto sensu*)[85]. However, since this issue is still debated in the legal community[86], for the time being the only certainty is the Union's competence to approximate substantive criminal law by means of Directives based on Article 83 TFEU, a provision which will be further analyzed *infra*[87].

For now, a brief insight into the legal effects of Directives in the peculiar field of criminal law might be useful. In general, Directives oblige Member States to achieve a certain result within a given transposition deadline but leave the choice of the means to do so to the discretion of national authorities[88]. Compared to Regulations they are more in line with the principle of subsidiarity. They strike a reasonable balance between necessity of uniformity and respect for national traditions[89] and therefore constitute the ideal legal act in a sensitive field like criminal law[90]. Directives are not directly addressed at individuals, but rather at the Member States. However, when they are directly effective – which occurs when they are sufficiently precise and unconditional[91] – they can be invoked by individuals against the State once the transposition period has passed. In other words, they can exert a direct effect only to the benefit of the individual. Given that Directives whose purpose is to approximate substantive criminal laws have an incriminating effect and hence are physiologically detrimental for the individual,

[84] Cf. A. BARLETTA, cit., 29.
[85] See H. SATZGER, *International and European criminal law*, cit., 66 et seq.
[86] Observation made *inter alia* by A. KLIP, cit., 168.
[87] See Chapter II, 1.3.
[88] See Article 288 TFEU: «A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods».
[89] Compare with K.-D. BORCHARDT, cit., 101.
[90] In this sense A. BARLETTA, cit., 33.
[91] See *Ibid.* 155.

Directives such as the one "on combating terrorism" cannot be directly effective[92]. This conclusion is solidly rooted in the Court of Justice's jurisprudence[93].

Having established that harmonizing Directives in the field of substantive criminal law are not directly relevant for the individual, their exclusive role is to impose an obligation of implementation (*rectius* criminalization) upon national authorities. Some scholars have noted that the Directives under Article 83 are often drafted in such a detailed manner that they compress the discretion of the Member States beyond the ordinary effect that is usually ascribed to Directives[94]. Supposedly, «they go beyond the mere result to be achieved […] since they affect to some extent the choice of the concrete forms and means to pursuing the objective»[95].

The first step to implementation is adopting the necessary laws and regulations. The legal doctrine has noted that there are different methods for the transposition of Directives. In particular, a scholar mentions the reference technique but stresses its potential conflict with the *lex certa* principle when at the national level the latter is interpreted as requiring a full description of the prohibited conduct in the domestic provision[96]. Given the high level of detail in the Directives, legislators may simply rely on the less problematic copy paste or literal translation method. However, the same attention to detail in the supranational construction of offences might tempt domestic lawmakers to subsume the "Euro-crimes" under broader offences with less constitutive elements[97]. It is not entirely clear whether such an approach is in line with the obligations to criminalize since to date there is no caselaw on the matter[98].

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[92] Cf. H. SATZGER, *International and European criminal law*, cit., 49.

[93] See ECJ, 11.06.1987, C-14/86, in *eur-lex.europa.eu (Pretore di salò vs persons unknown)*: «Council Directive 78/659 of 18 July 1978 cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive».

[94] See R. SICURELLA, cit., 70.

[95] *Ibid*.

[96] A. KLIP, cit., 221-223.

[97] For instance, the Italian *codice penale* does not contain the specific offence of public provocation to commit a terrorist offence. The omission is merely apparent, given that the conduct can still be punished based on Article 414 c.p. (*istigazione a delinquere*), which deals more generically with the offence of public incitement to commit crimes. The terrorist aim of the public incitement represents an element of specialty which is considered as an aggravating circumstance

After legislative transposition, the implementing provisions need to be applied by judicial authorities. At this stage, another effect of the Directives can be observed, which is often referred to as "indirect effect"[99]. The duty of consistent interpretation, which stems from the principle of sincere cooperation, obliges to interpret national provisions in the light of EU law (both primary and secondary)[100]. This interpretational standard prevents normative conflicts by compelling to choose, among the possible interpretations of a domestic norm, the one that is compatible with Union law. The matter has already been briefly touched upon when the enforcement of EU law was examined. Now it must be specified that the duty meets a few limitations. Firstly, it cannot go so far as to impose an interpretation *contra legem* (meaning beyond the limits given by the wording of the provision). With a view to safeguarding the principle of legality the European Court of Human Rights has stated that extensive interpretations in the light of EU law must meet the criterion of foreseeability to be legitimate[101]. Moreover, the *Kolpinguis Nijmegen* rule extends the *ratio* of the *Pretore di salò* case to the indirect effect of Directives. In other words, interpretation in the light of EU law cannot result in an extensive interpretation *in malam partem* that determines or aggravates the criminal liability of an individual[102].

To better visualize the prohibition of extensive *in malam partem* interpretation veiled as Union-orientated interpretation, a concrete example can be useful. The European Commission's evaluation report on the transposition of Directive 2017/541 found that Austria's criminal legislation did not cover research into certain weapons[103]. To give a bit of context, Article 3, paragraph 1, letter f of the Directive obliges to criminalize *inter alia* research into chemical,

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according to Article 270-bis.1 c.p. Hence, the result required by Directive 2017/541 (ensure that public provocation to commit a terrorist offence is punished) can be said to be achieved.

[98] See A. KLIP, cit., 223.

[99] Cf. H. SATZGER, *International and European criminal law*, cit., 113.

[100] See *Ibid.* 113 et seq. The duty of consistent interpretation under EU law is inspired by national traditions which compel judges to interpret domestic provision in conformity with the constitution (e.g. *interpretazione costituzionalmente conforme, Verfassungskonforme Auslegung)*. In that sense A. BARLETTA, cit., 179.

[101] Cf. V. C. TALAMO, *Obblighi europei di tutela penale*, in A. MASSARO (Ed.), *Diritto Penale Europeo - Effetti e conseguenze sul sistema penale nazionale*, 25 et seq.

[102] In that sense L. MARIN, cit., 14.

[103] See EUROPEAN COMMISSION, *Report based on Article 29(1) of Directive (EU) 2017/541*, cit., 5.

biological, radiological, or nuclear weapons with terrorist intent. As a matter of fact, § 278c StGB, which contains the list of terrorist offences, is silent about research into weapons. At a closer look the Commission's observation seems ill-founded: § 278f StGB appears to cover the offence[104].

However, in a hypothetical scenario in which that provision didn't exist, the only norm that could fill this void would be § 278e StGB (*Ausbildung für terroristische Zwecke*). The latter punishes the receiving of instructions concerning any kind of weapons or dangerous or harmful substances as criminal offence when there is an intent to subsequently make use of those instructions to commit one of the terrorist offences listed in § 278c StGB. One could argue that autonomous research into biological, nuclear, chemical or radiological weapons constitutes "receipt of instructions" for the purposes of § 278e StGB and back this claim with the duty of interpretation in light of the Directive. In fact, a "lone wolf" that looks up information on chemical weapons is, strictly speaking, receiving instructions from somewhere (e.g. a library or a web page). However, the receiving of instructions evidently alludes to another person providing them. Therefore, such a broad interpretation would have to be rejected because it would amount to a breach of the prohibition of extensive *in malam partem* interpretation, a corollary of the *lex certa* principle[105].

1.3. EU Approximation Competence in Criminal Matters.

[104] The false observation of the Commission is a consequence of the technical method of evaluation adopted for the report. Compare with K. BABICKA, *EU Counter-terrorism Directive 2017/541: impact on human rights and way forward at EU level*, in *http://opiniojuris.org/2020/11/20/eu-counter-terrorism-directive-2017-541-impact-on-human-rights-and-way-forward-at-eu-level/*: «The transposition report is a technical document, looking at the wording of the Directive in comparison to national legislation, and makes conclusions based on what might be missing in the *litera* of national laws. The transposition of the Directive as a whole in each specific national legal framework is not always reflected».

[105] The Italian constitutional court considers the prohibition of extensive interpretations *in malam partem* as a core element of the legality principle that would act as a counter-limit to the primacy of Union law. Cf. in this sense V. C. TALAMO, cit., 27. See also H. DUFFY – R. PILLAY – K. BABICKA, *Counter-Terrorism and Human Rights in the Courts. Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism*, Geneva, International Commission of Jurists, 2020, 14: «In some cases, judges will not be able to compensate for legislative deficits, without themselves engaging in unforeseeable law-making».

It has been highlighted that one important aspect of the Rule of Law is that power must be rooted in the law and exercised in conformity with it[106]. In the context of the European Union this requirement is a synonym of the principle of conferred powers[107]. In other words, any act of the Union's institutions must have a legal basis in the Treaties. This raises the issue of the legal basis for the enactment of Directives (such as the one on combating terrorism) that approximate criminal law.

A fundamental premise which needs to be stressed is that criminal law is a field of law that is strongly linked to national sovereignty and identity[108]. This is because criminal norms are based on moral and ethical evaluations of behavior that may differ significantly from one State to another[109]. Because of this, for a long time the Union lacked an explicit competence to legislate in this area, which therefore fell within the realm of exclusive competences of the Member States[110]. A revolutionary innovation came with the entry into force of the Lisbon Treaty, which is said to have completed the process of "communitarization" of European criminal law[111]. Since then, Article 83 TFEU[112] constitutes the basis for secondary legislation which approximates national substantive criminal law, although it has been emphasized that «this is far from corresponding to a full criminal law competence since it does not allow the EU to adopt provisions directly applicable to individuals»[113].

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[106] See C. C. MURPHY, cit., 38.

[107] The principle is enshrined in Article 5.2 TEU: «Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States».

[108] Cf. S. S. BUISMAN, *The Future of EU Substantive Criminal Law: Towards a Uniform Set of Criminalisation Principles at the EU level*, in *Eur. J. Crime Crim. Law Crim. Justice*, 2022, 30/2, 163: «Criminal law stood at the core of national sovereignty, and expressed (solely) the national-cultural values of a State».

[109] See H. SATZGER, *International and European criminal law*, cit., 75.

[110] Cf. R. SICURELLA, cit., 49.

[111] In this sense A. KARGOPOULOS, cit., 125.

[112] Paragraph one of Article 83 TFEU reads as follows: «The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.»

[113] R. SICURELLA, cit., 49. However, it has been mentioned already that some commentators believe that there are certain provisions (e.g. Article 325(4) TFEU) the EU institutions could rely on to enact supranational criminal offences. Cf. in this sense A. BARLETTA, cit., 107 et seq.

This rather limited competence of the Union manifests the persistent caution of Member States with regards to criminal law that is reflected also in Article 67 TFEU[114] which opens the Title on the Area of Freedom, Security and Justice. The provision has a programmatic character[115]. It stresses the importance of respect for national legal systems and traditions and underscores that approximation of criminal laws should be used as a means for achieving a high level of security only if necessary[116] – a specification which can be interpreted as an implicit reference to the principles of subsidiarity and proportionality[117]. According to Barletta the former deals with the issues whether criminal law should be used (*an*) and at which level (*ubi*). On the other hand, the latter supposedly concerns the type and severity of the criminal sanction (*quomodo* and *quantum*)[118].

Even though the Member States have given up part of their sovereignty by allowing the European Union to approximate substantive criminal laws, the principle of subsidiarity imposes to make use of the instrument of approximation only when it is necessary, *ergo* when the Member States are not capable of tackling the issue autonomously or the European institutions are in a better position to do so[119]. In other words, «EU harmonisation measures under criminal law must […] have an added value for Europe»[120]. A nonchalant use of the competence should therefore be observed critically[121], although it has been

[114] Art. 67 TFEU: «1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States […] 3. The Union shall endeavor to ensure a high level of security […] if necessary, through the approximation of criminal laws […]».
[115] In that sense H. SATZGER, *International and European criminal law*, cit., 86.
[116] See A. BARLETTA, cit., 136: «Tutto il Capo IV è costellato di clausole di salvaguardia particolari e di speciali richiami alla "necessarietà" degli interventi nella materia. Si vuole sottolineare in tal modo come l'applicazione del canone di sussidiarietà debba essere ancor più accorta nella materia penale e come la valutazione preventiva all'adozione delle misure debba essere effettuata in maniera rigorosa e ponderata».
[117] In that sense R. SICURELLA, cit., 56 where it is stated that the reference to national legal systems and traditions «reflects the many tensions and resistances to a further improvement of European integration and its evolution towards a more unified context».
[118] In that sense A. BARLETTA, cit., 129.
[119] See *Ibid.* 132. This ensures that decisions are taken as closely as possible to the citizen which are the final addressees of the criminal provisions.
[120] Cf. W. SCHROEDER, cit., 147.
[121] For a comparable statement see S. S. BUISMAN, cit., 164: «[…] the deployment of EU criminal law competences is still based on the premises that it should be treated with caution».

questioned how justiciable the subsidiarity principle is[122], despite the attribution of the role of "watchdogs" to the national parliaments of the Member States"[123].

The aspect of the subsidiarity principle that has just been examined relates to the vertical distribution of competence between Union and Member States (*ubi*). However, the principle is said to include also as a criterion of "horizontal" selection between the available measures (civil, administrative, penal)[124]. In less technical terms this means that the Union should not only act subsidiarily with respect to its Member States, but it should also treat criminal law as a subsidiary measure of last resort compared to other, less invasive options. Consequently, the cited Author admittedly creates a certain overlap between the principles of subsidiarity, and *ultima ratio*[125].

1.3.1. Competence in specific areas of crime (Art. 83.1 TFEU)

In the previous paragraph it was shown that Article 67 TFEU envisages the approximation of criminal laws as a (subsidiary) means for achieving a high level of security within the European Union. With specific regard to approximation of substantive criminal law, the normative point of reference is Article 83 TFEU[126]. The provision's first paragraph empowers the Union to establish minimum rules concerning the definition of criminal offences and sanctions in areas of particularly serious crimes with a cross-border dimension[127] (resulting from the nature or impact of such offences or from a special need to combat them on a common basis), which is said to significantly constrain the Member States'

[122] See R. SICURELLA, cit., 72. However, it has also been claimed that subsidiarity is a more effective criterion than proportionality when it comes to delimiting the expansion of European criminal law. In that sense A. BARLETTA, cit., 131.

[123] Cf. A. KLIP, cit., 35: «Any national parliament may, within eight weeks of the date of transmission of a draft legislative act, send a reasoned opinion stating why it considers that the draft does not comply with the principle of subsidiarity […] If one-third of the national parliaments share this view, the draft must be reviewed».

[124] See A. BARLETTA, cit., 134.

[125] See *Ibid.* 133 where the Author holds that the two principles represent two sides of the same coin. On a similar note cf. H. SATZGER, *International and European criminal law*, cit., 88.

[126] Cf. S. BADAME, *Riserva di legge e normativa europea. L'Unione Europea ha una specifica competenza in materia penale?*, in *http://www.salvisjuribus.it/riserva-di-legge-e-normativa-europea-lunione-europea-ha-una-specifica-competenza-in-materia-penale/*.

[127] This type of competence has been referred to as "securitised criminalisation". Cf. S. S. BUISMAN, cit., 176.

discretion and sovereignty[128]. However, the Treaty of Lisbon has allegedly strengthened the position of the European Parliament by requiring its approval for any draft Directive, which in turn recuperates an acceptable level of democratic legitimacy[129]. As seen, the latter is an important aspect of the Rule of Law ideal.

The areas of crime in which the Union can exercise this approximation competence are explicitly listed in the first paragraph of Article 83 TFEU. They include, *inter alia*, organized crime, trafficking in human beings and – most importantly – terrorism. The provision continues by stating that further categories of crime that display the attributes of particular seriousness and transnationality, which are said to be cumulative in nature[130], can be included into the list via unanimous[131] decision of the Council. An authoritative scholar has observed that it is not entirely clear whether in the areas of crime listed in Article 83 paragraph one those prerequisites are presumed to be met[132]. He claims that the negative solution would have the benefit of rendering the two criterions specific parameters for assessing compliance with the subsidiarity principle, although said scholar acknowledges that they will be met in most cases[133].

Hence, it could be argued that by introducing Article 83 TFEU through the Lisbon Treaty, the Member States have accepted that in the areas of crime listed in paragraph one the Union is usually in the best position to tackle the offences. Consequently, claims of violations of the principle of subsidiarity by acts that are based on this provision and effectively deal with the concerned areas of crime are likely to be dismissed. It can therefore be said that Directive 2017/541, which recalls Article 83 paragraph one as legal basis in its Preamble[134], was adopted

[128] In that sense R. SICURELLA, cit., 55.
[129] Opinion shared by H. SATZGER, *International and European criminal law*, cit., 84-85.
[130] In this sense cf. S. S. BUISMAN, cit., 177.
[131] See A. BARLETTA, cit., 100.
[132] Observation made by H. SATZGER, *International and European criminal law*, cit., 87-88.
[133] See *Ibid.* 88. On a comparable note and in more explicit terms see S. S. BUISMAN, cit., 177: «for the establishment of Article 83 (1) as a legal basis, it is insufficient that the conduct merely falls within the scope of one of the listed 'euro crimes' […] The requirement of 'particularly serious crime' excludes petty offences or administrative offences from the criminal legislative competence of the EU».
[134] Cf. P. CSONKA – O. LANDWEHR, *10 Years after Lisbon - How "Lisbonised" Is the Substantive Criminal Law in the EU?*, in *eucrim*, 2019, 4, 263-264.

within the limits given by the powers conferred upon the institutions of the Union and with due respect to the principle of subsidiarity[135].

1.3.2. Annex Competence (Art. 83.2 TFEU)

Paragraph two of Article 83 further extends the Union's competences by allowing the adoption of Directives to approximate criminal laws when it is essential to ensure the implementation of Union policy in an area that is already subject to harmonization[136]. The interconnection with other harmonizing measures of non-criminal nature has led scholars to refer to this competence as "annex competence"[137] or "functional criminalization"[138]. The existence of such a competence had been acknowledged by the Court of Justice even before the Lisbon Treaty[139]. The latter is said to have had a widening and limiting effect at the same time[140]. While the Court of Justice's jurisprudence referred generically to "measures which relate to the criminal law of Member States", Article 83(2) uses the narrower, more specific notion of "minimum rules". However, those minimum rules concern not only the definition of the offences but also the type and quantity of the correlated sanctions. In the *Ship-source Pollution* case the Court had instead stated that the European Community could only prescribe that the sanction should be criminal in nature, while any further definition was up to the Member States[141].

As of today, Art. 83 paragraph two has been used as legal basis merely twice[142]. However, given the great number of areas that have been subject to harmonizing measures there is potential for new European criminal law enacted on this basis. The provision has some relevance for European counterterrorism because certain areas that have been subject to harmonizing measures are

[135] The cross-border dimension of terrorism has been pointed out in Chapter I, 2.1.
[136] See A. KLIP, cit., 166.
[137] For instance H. SATZGER, *International and European criminal law*, cit., 88-90.
[138] Cf. S. S. BUISMAN, cit., 176.
[139] See W. BOGENSBERGER, *Article 83 TFEU*, in M. KELLERBAUER – M. KLAMERT – J. TOMKIN (Eds.), *The EU Treaties and the Charter of Fundamental Rights*, Oxford, 2019, 906.
[140] See R. SICURELLA, cit., 64.
[141] See *Ibid.*
[142] Cf. P. CSONKA – O. LANDWEHR, cit., 264; W. BOGENSBERGER, cit., 897. The two Directives are the Market Abuse Directive (2014) and the PIF Directive (2017).

inevitably interconnected with it. For instance, the European Union has adopted Directive 2021/555 on control of the acquisition and possession of weapons. Compliance with the laws that transpose it is crucial to avoid that firearms fall into the wrong hands. To date, article 23 of said Directive merely states that States ought to provide for effective, proportionate and dissuasive penalties, without explicitly requiring them to be criminal in nature. However, if the EU deemed the use of criminal law essential to ensure the implementation it could rely on Article 83 paragraph two to pass the necessary legislation.

1.3.3. Interpretative issues concerning Article 83 TFEU

Some scholars have questioned the compatibility of Article 83 with the principle of conferral, arguing that it is drafted in too ambiguous terms to allow for an effective legality review[143]. One commentator has observed that «due to the vagueness of the enumeration it is hardly foreseeable to what extent domestic criminal law may be approximated on the basis of art. 83»[144]. The cited author draws this conclusion based on the premise that the norm vaguely sketches out areas of crime instead of enumerating specific criminal offences, a solution that he deems plausible considering the nature of competence provision[145].

Furthermore, the expression "minimum rules concerning the definition of criminal offences" is a thorn in the side of critics. The formula has confused commentators since it could be interpreted in two opposite ways. It could mean minimum elements of criminal offences, or minimum level of criminalization[146]. In the first case, Member States could render the offences narrower by adding further elements to its structure (the Directive would serve as an upper limit). In the second case, domestic legislators could eliminate elements, thus rendering the offence broader. The first solution appears to be less appealing since more constitutive elements imply a heavier burden of proof, which could compromise

[143] In that sense R. SICURELLA, cit., 69: «[…] it does not establish precise criteria on which the ECJ could rely to assess the legitimacy of EU legal acts adopted on the basis of this provision».
[144] H. SATZGER, *International and European criminal law*, cit., 86-87.
[145] See *Ibid.*
[146] For an unambiguous interpretation in this latter sense see *Ibid.* 90.

the prosecutorial activity[147]. However, influential scholars have noted with concern that the role of European criminal law as minimum standard of criminalization, in conjunction with the absence of a Union competence for approximation with the aim of decriminalization leads to a growing body of criminal law[148].

In addition to that, the expression is said to empower the European Union to lay hands on the general part of criminal law (i.e. on notions such as "instigating", "attempting", "aiding" or "abetting")[149], which is considered one of the fundamental expressions of national legal traditions. However, up until now the Directives adopted under Article 83 have refrained from interfering with the general part of domestic criminal law, supposedly out of fear of adverse reactions from the Member States[150]. Consequently, whenever a Directive prescribes the punishment of the attempt to commit a given offence, Member States will implement the obligation according to their own, national understanding of the concept[151]. It has been suggested that an indirect approximation of general criminal law could eventually derive from the Court of Justice's jurisprudence, more precisely from decisions which hold that a Member State has not correctly fulfilled obligations to criminalize because of how its general criminal norms are shaped[152].

The Union's securitized criminalization competence comprises also "minimum rules concerning the definition of criminal sanctions". Put differently, the Union can, to a certain extent, influence the legal consequences of a breach of the criminalized conduct by dictating the type of sanction and imposing minimum

[147] In that sense A. KLIP, cit., 167. However, the author recalls the *Spector Photo* case (ECJ, 23.12.2009, C-45/08, in *eur-lex.europa.eu*) in which the CJEU held that, in light of the objective of creating equal opportunities, the Directive on Insider Dealing and Market Manipulation had to be interpreted as an upper limit for criminalization, precluding the Member States to implement it more severely. Nevertheless, the decision allegedly is of exceptional nature and doesn't bear general value.

[148] See H. SATZGER, *International and European criminal law*, cit., 91. On the progressive vertical and horizontal expansion of criminal law (meaning that more and more criminal offences are being introduced and sanctions for pre-existing ones are becoming harsher) cf. also E. R. ZAFFARONI, *Espansione del diritto penale e diritti umani*, in *Dir. Pen. Cont. - Riv. Trim.*, 2019, 4, 110 et seq.

[149] Cf. W. BOGENSBERGER, cit., 898.

[150] Opinion expressed by R. SICURELLA, cit., 70. See also Article 14 of Directive 541/2017, which doesn't define the notions of attempting, inciting, aiding and abetting.

[151] See H. SATZGER, *International and European criminal law*, cit., 91.

[152] Opinion expressed by R. SICURELLA, cit., 70.

thresholds concerning its severity. In the absence of specific indications, the so-called "Greek maize criteria" apply, which means that the chosen sanction must fulfill the requirements of effectiveness, proportionality and dissuasiveness[153]. However, if the European legislator so wishes, he can give more precise instructions by requiring a so-called "minimax" (a minimum for the maximum sanction applicable). While the Union has sticked to this technique of approximation, it has been opined that the wording of Article 83 would allow to foresee "real" minimum penalties (in other words a severity threshold that Member States could not undermine), which would have a greater harmonizing effect[154].

Bogensberger perspicaciously points out that approximation of criminal sanctions is a double-edged sword because of its potential repercussions on the coherence of the legal orders[155]. A total lack of approximation might endanger the coherence of EU criminal law. Conversely, far-reaching approximation could compromise the coherence of national criminal law[156]. The Union should therefore be particularly careful when exercising this power since coherence is said to be a crucial pre-condition for the social acceptance of criminal law[157].

1.3.4. Limiting factors on the Union's approximation competence

The expansion of EU competences in criminal matters goes hand in hand with the compression of national legislative discretion. The Member States' awareness of this circumstance emerges from several expressions with a safeguarding purpose scattered across the Treaties.

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[153] Cf. A. KLIP, cit., 316 et seq.; W. BOGENSBERGER, cit., 898-899, who holds that effectiveness concerns the ability of the sanction to achieve the desired goal, proportionality the correspondence between the sanction and the gravity of the conduct, and dissuasiveness the special and general prevention triggered by the sanction.

[154] In that sense H. SATZGER, *International and European criminal law*, cit., 92.

[155] The concept of horizontal and vertical coherence is described in clear terms by S. S. BUISMAN, cit., 181-182: «In light of horizontal coherence, the Union must ensure that there are no unjustifiable differences between different EU-instruments. Vertical coherence stipulates that the EU legislator should not interfere with the internal consistency of the national criminal law systems without good reason».

[156] See W. BOGENSBERGER, cit., 899.

[157] See H. SATZGER, *International and European criminal law*, cit., 98.

Article 4(2) TEU states: «The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government». According to an influential scholar[158], this national identity clause reshapes the relationship between European criminal law and national constitutional law by diluting the primacy of the former. Allegedly, domestic Courts could invoke Article 4(2) TEU in order to let fundamental constitutional principles prevail over EU norms and thus escape the obligations arising under the latter. Such a solution would have the benefit of rendering derogations from EU obligations an expression of EU law itself thus upholding, at least formally, the primacy rule[159].

Directive 2017/541 is very helpful for grasping this issue. Certain offences contained in it raise doctrinal concerns because of the extremely anticipated stage of protection of the legal interest at stake. It could therefore happen that a national judge doesn't feel comfortable applying the norm that transposes the European offence into domestic criminal law because it is deemed to be contrary to national constitutional law, in particular the principles of offensiveness and proportionality. It is therefore crucial that the European legislator pays attention to the fundamental principles of criminal law that are common to the Member States when imposing obligations to criminalize. This is the underlying reason behind the scholarly elaboration of rules for a coherent European criminal policy[160].

The respect for national identity echoes also in Article 67 TFEU[161], which introduces the provisions on the Area of Freedom Security and Justice. Despite not being explicitly mentioned in Article 83 TFEU, the duty of respect for national identity constitutes the most significant – one might be tempted to say overarching – constraint on the Union's approximation competences. In fact, limiting factors such as the emergency brake, national constitutional principles

[158] A. KARGOPOULOS, cit., 136.
[159] See *Ibid.*
[160] These principles will be analyzed in detail in Chapter II, 1.4.
[161] «The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States».

(including standards of fundamental rights protection) and the principle of subsidiarity are all, in one way or another, linked to national identity.

1.3.4.1. The emergency brake (Art. 83.3 TFEU)

Firstly, to counterbalance the limitation of national sovereignty, Article 83 foresees a compensatory, procedural measure in its third paragraph. The provision establishes a procedure that allows Member States to protect themselves against unwanted intrusions[162]. The procedure in question is the so-called "emergency brake"[163]. It allows to veto any draft Directive when it could affect the fundamental aspects of a Member State's criminal justice system. This doesn't preclude the other Member States from adopting it under a special procedure of enhanced cooperation. The concept of "fundamental aspects of the criminal justice system", however, is rather vague. Scholars have argued that Member States have some margin of appreciation in this regard[164], but the CJEU is said to be competent to detect abuses of the emergency brake[165]. It is worth mentioning that the emergency brake has not been pulled by any Member State as of today[166]. However, to prevent this from ever happening, it has been suggested that the Union should apply certain principles of criminal policy[167].

1.3.4.2. National constitutional law

The emergency brake procedure allows representatives of the Member States within the EU institutions to dodge the bullet of being bound by a Directive that would go against fundamental aspects of their criminal justice systems, which arguably fall within the broader concept of national identity. Hence, Article 83(3) has provided for an *ex ante* remedy.

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[162] The emergency brake procedure has been defined as paradigmatic mixture of supra-national and inter-governmental characteristics. In this sense R. SICURELLA, cit., 55.

[163] Article 83(3) TFEU: «Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended […]».

[164] Cf. A. KLIP, cit., 36: «[I]t is clear is clear that it is the Member State concerned that determines whether its criminal justice system is affected».

[165] In that sense H. SATZGER, *International and European criminal law*, cit., 92-93.

[166] See W. BOGENSBERGER, cit., 900.

[167] See H. SATZGER, *International and European criminal law*, cit., 93.

However, once a Directive has been adopted, there is still a way for it to be (indirectly) neutralized *ex post* at the national level. National norms that replicate the content of the Directive could be regarded as contrary to fundamental aspects of the national criminal justice system which have constitutional rank and thus be declared unconstitutional by a national judge. This way Member States could evade the obligation to give full effect to Union law and uphold their core constitutional principles[168]. This circumstance highlights that while Member States generally accept the primacy of Union law, which has been claimed by the Court of Justice starting from the landmark cases *Van Gend & Loos* and *Costa*[169], this acceptance is not absolute. There are still certain aspects of national constitutional law that some Member States are eager to protect[170].

This attitude is referred to as "doctrine of counter-limits" in the Italian legal scholarship[171]. It indicates that while the Italian constitutional court respects the limitations of sovereignty deriving from the submission to the primacy rule, this concession is counterbalanced by the absolute primacy of core principles of national constitutional law. The definition of those core principles is up to the constitutional Court itself, which therefore reserves the right to "counter-limit" the powers of the European legislator[172]. The origins of the counter-limit doctrine go back to the *Frontini* case of 1973, but the most prominent case law on the matter is a relatively recent string of cases that is commonly referred to as the "Taricco saga". On that occasion the Italian constitutional Court engaged in an active dialogue with the European Court of Justice through the preliminary reference

[168] In that sense A. BARLETTA, cit., 217 who claims that respect for fundamental rights and supreme principles as understood in the constitutional traditions of the Member States halt the primacy of Union law.
[169] Cf. V. BARSOTTI et al., cit., 208.
[170] See E. SPAVENTA, *The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures*, Brussels, European Parliament Policy Department for Citizen's Rights and Constitutional Affairs, 2016, 9: «National courts, and especially the German and Italian Constitutional Courts, became understandably concerned that the Union institutions could escape any fundamental rights scrutiny».
[171] For a concise but clear explanation of the doctrine of counter-limits see V. BARSOTTI et al., cit., 214 et seq.
[172] Cf. G. SOLDATI, *Legalità nazionale, principio di prevalenza e controlimiti: il caso Taricco*, in A. MASSARO (Ed.), *Diritto penale europeo: effetti e conseguenze sul sistema penale nazionale*, 1st Edition, Padua, 2020, 77.

procedure. It is said to have, in a subtle manner, threatened to apply the legality principle, as interpreted at the national level, as a counter-limit[173].

The Italian constitutional Court is not alone in following this cautious approach. In fact, the doctrine that has just been analyzed is quite similar compared to the so-called *Solange* judicature[174]. "Solange" is German and translates to "as long as", which already captures the essence of the approach of the German constitutional Court: the *Bundesverfassungsgericht* accepts the limitations of sovereignty, thus allowing Union law to prevail over national law, as long as the European Union grants a level of fundamental rights protection that is equivalent to the one ensured at the national level. Scholars[175] have claimed that the German constitutional Court is among the most defensive Courts in Europe, as it has constantly shown concern about the potential violation of fundamental rights through EU legal acts. The similarity with the counter-limits doctrine is highlighted by the fact that the first *Solange* judgement, which was passed in 1974, explicitly recalled the abovementioned *Frontini* ruling of the Italian constitutional Court[176]. In 2015 the German court has made use of this self-attributed prerogative to verify compatibility of Union law with its constitutional identity for the first time by refusing to execute a European Arrest Warrant that was based on an *in absentia* trial in Italy[177].

The lesson that can be drawn from the Taricco saga and the *Solange* case-law is that core principles of national constitutional law can indeed constitute a real obstacle for the implementation of Union law. While the above-mentioned judicial cases did not involve Directives adopted under Article 83 TFEU, it is conceivable that those principles could equally hamper the implementation of

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[173] In this sense S. ALLEGREZZA, *On Legality in Criminal Matters between Primacy of EU Law and National Constitutional Traditions. A Study of the Taricco Saga*, in V. MITSILEGAS – A. DI MARTINO – L. MANCANO (Eds.), *The Court of Justice and European Criminal Law - Leading Cases in a Contextual Analysis*, Chicago, 2019, 173-174: «The request thus formally reopens the judicial dialogue but, at its very heart, what the Italian judges are asking for is a confirmation of the supremacy of national constitutional rights when dealing with criminal law. Shorn of its kind wording, the gentle invitation […] sounds more like an ultimatum».

[174] Cf. A. BARLETTA, cit., 269 et seq. who uses the phrase "resistance of national sovereignty".

[175] See PIETRO FARAGUNA, *Il Bundesverfassungsgericht e l'Unione Europea, tra principio di apertura e controlimiti*, in *Dirit. Pubblico Comp. Ed Eur*., 2016, 2, 432.

[176] See *Ibid.* 434.

[177] Cf. *Ibid.* 454 et seq.

such legal acts. Precisely for this reason, a pondered use of the approximation competence that respects the core principles of national constitutional legal orders is indispensable. This is where the guidelines for a European Criminal Policy come into play.

1.4. A European Criminal Policy

Whereas the approximation of criminal laws *per se* is an appreciable goal that could benefit mutual trust between Member States and hence improve judicial cooperation between them[178], the dangers of an uncontrolled process of criminalization must not be downplayed. The choice of rendering certain acts criminal should not be made without a thorough, preliminary process of evaluation that weighs up the benefits of criminalization against its costs[179]. In the previous paragraphs it was hinted a few times that, when foreseeing obligations to criminalize, the European legislator should bear in mind fundamental principles of criminal law which are common to the Member States in order to avoid that his efforts are neutralized during the stage of application of the Europeanized criminal provisions[180].

Academics have noted with regret that «a uniform set of principles for criminalization at the EU level has not been developed as to date»[181]. Within EU institutions, efforts to elaborate such principles have been scarce and never resulted in the adoption of legally binding acts[182]. The issue is given significantly more attention in legal scholarship, which has made great efforts to fill this void. For instance, a group of European penologists from various Member States has

[178] As a matter of fact, the offences contained in the Directive serve as "benchmark for cooperation and information exchange between national authorities". In that sense EUROPEAN COMMISSION, *Evaluation of Directive (EU) 2017/541*, cit., 1.
[179] See EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 707: «[C]riminal law legislation must adhere to the highest standard of democratic legitimacy and the rule of law (Rechtsstaatlichkeit) […] Europe needs a balanced and coherent concept based on a number of fundamental principles».
[180] Cf. H. SATZGER, *International and European criminal law*, cit., 87 where the author stresses that the European Union should follow «accepted criminal law standards, such as those developed by [the European Criminal Policy Initiative]».
[181] S. S. BUISMAN, cit., 162.
[182] Opinion shared by A. KLIP, cit., 220: «This means that criteria for criminalization have not been formulated at all […] However, by the end of 2009, the Council formulated model provisions that should guide the Council's criminal law deliberations».

given birth to the "European Criminal Policy Initiative" which elaborated the "Manifesto on European Criminal Policy"[183].

Another important contribution, which has been cited several times already, was made by Sanne Buisman. According to this Dutch commentator, the European legislator should reflect on three issues before making the call for criminalization: legitimization, justification, competence. Once these three conditions are met, the European institutions can proceed. However, also in this final phase the institutions ought to act according to what the scholar calls "offence construction principles" – guidelines which essentially aim at ensuring that the European legislators respects the same boundaries a national legislator should respect in the field of criminal law.

Buisman lays out the fundamental aspects of an ideal European criminal policy in a well-structured and precise manner. Her suggestions therefore deserve a deeper analysis and will serve as a guideline for the following paragraphs.

1.4.1. The principles of harm and guilt

The underlying reason behind the introduction of criminal offences is to deter individuals from causing a wrongful harm to a legal interest which is deemed worthy of penal protection. In case of particularly valuable legal interests (such as those at stake in the field of counterterrorism), even causing a mere risk of harming them can suffice to legitimate criminal prosecution[184].

Based on these preliminary remarks, the basic structure of a criminal offence can be broken down into two fundamental elements: a (potentially) harmful conduct, which constitutes the objective element of the offence (*actus reus*) and a subjective element of guilt, which pertains to the cognitive sphere of the individual (*mens rea*)[185]. These two structural features can be seen as expressions of two principles that represent an inherent limit for the choices of criminalization of national and European legislators.

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[183] See H. SATZGER, *International and European criminal law*, cit., 96 et seq. The cited Author was among the contributors to the Manifesto.
[184] Cf. S. S. BUISMAN, cit., 166: «[C]riminalisation is only legitimate in case of 'wrongful conduct that causes some (risk of) harm'».
[185] See A. KLIP, cit., 200 et seq.

The harm principle essentially translates into a negative obligation to refrain from criminalizing conducts that do not cause any (appreciable risk of) harm to a legal interest. Comparable principles are solidly rooted in the legal traditions of the Member States. For instance, German scholars have elaborated the so-called *Rechtsgutslehre*[186], which literally translates to "doctrine of legal goods". The Italian doctrine uses the term *principio di offensività*[187], which stands for "principle of offensiveness". Notwithstanding the terminological differences, the content of the theories is substantially equivalent[188].

Buisman states that a conduct can be defined as harmful when it «has a negative effect on something substantial»[189]. The harmful conduct must affect a qualified legal interest – a *Rechtsgut,* to use the German doctrine's terminology. It is widely accepted that only fundamental interests are worthy of being protected through criminal sanctions[190]. However, it has been observed that this proposition is very vague, leading to difficulties in the identification of legal interests which are worthy of penal protection[191]. Consequently, the capacity of the *Rechtsgutslehre* or the harm principle to act as an effective legitimacy threshold for criminalization is said to be rather limited[192].

Looking at the issue of qualified legal interests from the perspective of the European Union, it has been opined that there are two core EU *Rechtsgüter:* the financial interests of the Union alongside the environment[193]. Furthermore, the Union is allegedly entitled to protect further legal interests falling outside the

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[186] For a critical academic contribution concerning that doctrine read E. HILGENDORF, *Punitivität und Rechtsgutslehre: Skeptische Anmerkungen zu einigen Leitbegriffen der heutigen Strafrechtstheorie*, in *Neue Kriminalpolitik*, 2010, 22/4, 125–131. The article provides thought-provoking remarks on modern criminal law systems in the light of the harm principle.

[187] See G. MARINUCCI – E. DOLCINI – G. L. GATTA, *Manuale di diritto penale: parte generale*, 8th Edition, Milan, 2019, 10, where the Authors state: «non vi può essere reato senza offesa a un bene giuridico, cioè a una situazione di fatto o giuridica, carica di valore, modificabile e quindi offendibile per effetto di un comportamento dell'uomo».

[188] A detailed exposition of the German doctrine can be found in T. A. ZWEIGLE, cit., 60 et seq.

[189] Cf. S. S. BUISMAN, cit., 167.

[190] See in that sense *Ibid.* 168; moreover cf. H. SATZGER, *International and European criminal law*, cit., 97, who infers this rule from the principle of proportionality: «[…] criminal provisions may only be introduced in order to protect a fundamental interest of the Union […] whose violation bears the risk of considerable harm to individuals or to society as a whole».

[191] View expressed by E. HILGENDORF, cit., 126.

[192] In that sense *Ibid.* 126-127.

[193] Cf. S. S. BUISMAN, cit., 169.

scope of the abovementioned core values[194]. Firstly, interests that relate to the good functioning of the internal market could classify as EU *Rechtsgüter*. Furthermore, human and fundamental rights as enshrined in the Charter of Fundamental Rights (including *inter alia* the rights to life, personal integrity, liberty and security, which undoubtedly could be affected by terrorist offences) are mentioned as legal goods that deserve protection through European criminal law too. However, the cited Author shows awareness of the potential risks of an excessively generous selection of EU *Rechtsgüter*[195].

Once a European legal interest has been deemed worthy of protection through criminal law the question arises up until which point the legislator can anticipate that protection. A harmful conduct is often preceded by preparatory acts that might already put the protected interest at risk, which could induce legislators to make those acts criminal (so-called "inchoate", "precursor" or "preparatory" offences). In this regard, the Council of the European Union has urged the Union to «abstain from criminalization at an unwarrantably early stage»[196]. The Council's admonition is particularly interesting for the purposes of this dissertation, given that the Directive on combating terrorism is often criticized precisely because, according to some critical legal scholars[197], it provides for ultra-anticipated criminal offences. In that context it is worth mentioning André Klip's claim that «under Union law, an attempt to carry out a preparatory offence is not accepted»[198]. As shall be seen, the counterterrorism Directive is not in line with this limitation.

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[194] Cf. *Ibid.* 170.

[195] See *Ibid.* 171 and 172: «To prevent the scope of "core" EU criminal law from being exceeded, the requirement of a "cross-border element" could play an important limiting role […] the further the *Rechtsgut* is outside of the scope of "core" EU criminal law, the more evidence is needed to legitimise EU criminal law protection of the *Rechtsgut* at hand».

[196] *Ibid.* 167.

[197] *Ex multis* cf. F. ROSSI, cit., 148 et seq. The Author argues that the European obligations lead to national criminal offences which sanction mere intentions or substantially non-harmful acts that should be considered to fall within the scope of fundamental freedoms. On a similar note EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 711, where certain terrorism related offences are classified as "super-preventative criminal law" and it is stated that «[s]uch extended criminal liability ("Vorverlagerung der Strafbarkeit") abandons the requirement of even an abstract danger for a legally protected interest and hence is not compatible with the European principle of proportionality (and derived from that the principle of ultima ratio) which is an essential guideline for criminal policy».

[198] See A. KLIP, cit., 207.

Having carefully dissected the principle of harm it is time to move on to the subjective element of wrongfulness. Buisman defines wrongfulness as «deliberate, reckless or negligent violation of the interest of other persons (or the state)»[199]. From this definition it can be inferred that when the cited Author uses the term "wrong", she evidently alludes to what other scholars[200] call the principle of guilt or culpability. The latter holds that individual guilt constitutes both the basis and the limit for criminal prosecution[201]. By stating that «European legislation requiring the Member States to criminalise certain acts must be based, without exception, on the principle of individual guilt»[202], the scholars of the European Criminal Policy Initiative seem to categorically exclude any room for strict liability in European criminal law[203]. In other words, the criminalized conduct must be intentional or at the very least negligent, which essentially implies that culpability should be regarded as blameworthiness[204]. However, it has been observed that European criminal law usually focuses exclusively on intentional offences[205].

In the European legal tradition intent is generally understood as comprising the components of knowledge and deliberate willingness[206]. There are, however, different types of intent. One of these is specific intent (*dolus specialis*), which occurs when the offence gives relevance to the goal of the conduct, notwithstanding the irrelevance of its actual achievement[207]. This type of intent has been highlighted because «[t]he "crime of acts or threats of violence, the

[199] S. S. BUISMAN, cit., 168.
[200] Cf. H. SATZGER, *International and European criminal law*, cit., 97; EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 707-708.
[201] In that sense E. HILGENDORF, cit., 127.
[202] See EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 707.
[203] In the same sense A. KLIP, cit., 203.
[204] Cf. M. E. BADAR, *The concept of Mens Rea in international criminal law: the case for a unified approach*, Oxford, 2013, 133.
[205] See A. KLIP, cit., 202. Criminalizing negligent conduct is possible only in particularly serious cases according to V. SCALIA, cit., 101.
[206] See M. E. BADAR, cit., 130 and 161. In Germany the two components are called "*Wissen und Wollen"*, in France "*conscience et volontè"*, in Italy "*conoscenza e volizione"*.
[207] Cf. *Ibid.* 137. In Germany specific intent is called "*besondere Absicht"*, in Italy "*dolo speciale"*.

primary purpose of which is to spread terror among civilian population" falls within the realm of "specific intent crimes"[208].

To conclude the analysis of the principle of guilt a few remarks on legal entities need to be made. As seen in Chapter one, both the Council of Europe and the European Union require Member States to establish liability for legal entities involved in terrorism-related offences. This liability can be civil, administrative or even criminal in nature, which raises an important issue: culpability of legal entities cannot be determined in the same way as for natural persons[209]. Looking at secondary Union law it could seem as if legal entities were subject to strict liability[210]. However, at least the liability for lack of supervision or control has been read as requiring an element of negligence[211]. In the end, the *mens rea* of legal entities must be ascertained according to national rules which can differ significantly from Member State to Member State[212].

1.4.2. The principles of proportionality and effectiveness

The introduction of a provision of substantive criminal law being legitimate in light of the previously outlined elements (wrong, harm, legal interest) does not automatically mean that such a choice is justified. The justification of criminal law has been linked to the principles of proportionality and effectiveness[213].

The proportionality principle is a general principle of Union Law and explicitly codified in the Treaty on the European Union, which stipulates that

[208] See *Ibid.* 426.
[209] Cf. EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 708.
[210] See Article 17 Directive 2017/541: «1. Member States shall take the necessary measures to ensure that legal persons can be held liable for any of the offences referred to in Articles 3 to 12 and 14 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person […] 2. Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 of this Article has made possible the commission of any of the offences referred to in Articles 3 to 12 and 14 for the benefit of that legal person by a person under its authority […]».
[211] In that sense A. KLIP, cit., 209-210.
[212] For the Italian system read R. SABIA, *I reati di criminalità organizzata, con finalità di terrorismo e di eversione dell'ordine democratico*, in G. LATTANZI (Ed.), *Responsabilità da reato degli enti. Diritto sostanziale*, Turin, 2020, 393 et seq.; ID., *Delitti di terrorismo e responsabilità da reato degli enti tra legalità e esigenze di effettività*, in *Dir. Pen. Cont. - Riv. Trim.*, 2017, 1, 208 et seq.
[213] In this sense S. S. BUISMAN, cit., 172.

«Union action shall not exceed what is necessary to achieve the objectives of the Treaties»[214]. Therefore, this fragment of the doctrinal criminal policy guidelines can be said to have received sufficient recognition within binding Union legislation.

The principle of proportionality is one of the most relevant to bear in mind when carrying out a critical examination of Directive 2017/541[215]. Therefore, a complete understanding of its contours and origins is essential. The principle was originally elaborated by the German administrative and constitutional jurisprudence. German lawyers coined the notion of *Grundsatz der Verhältnismäßigkeit* (principle of proportionality) and broke it down into three criterions: appropriateness (*Geeignetheit*), necessity (*Erforderlichkeit*) and prospective proportionality (*Angemessenheit*)[216].

Before examining each of those individually a preliminary observation needs to be made. In the previous paragraph the principles concerning the legitimization of European criminal law were analyzed. The key finding was that substantive criminal provisions must have a legitimate purpose[217], namely protecting a legal interest from a wrongful harm. One influential scholar[218] argued that the requirement of a legitimate purpose, can be inferred from the principle of proportionality. This means that appropriateness, necessity and prospective proportionality must be ascertained with a view to the objective pursued by the criminal provision.

According to the appropriateness test, measures which are not suitable for achieving their purpose must be regarded as unacceptable[219]. While it might be tempting to presume criminal laws' appropriateness for protecting a *Rechtsgut*, it

[214] See Article 5(4) TEU; cf. also A. KLIP, cit., 35 et seq.
[215] In that sense F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 313 et seq.
[216] For an in depth exposition read T. A. ZWEIGLE, cit., 73 et seq.
[217] The requirement of a legitimate purpose is generally recognized as a fundamental cornerstone of the European criminal policy. In that sense EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 707.
[218] See H. SATZGER, *International and European criminal law,* cit., 97.
[219] Compare with S. S. BUISMAN, cit., 173; see also E. HILGENDORF, cit., 127: «Der Verhältnismäßgkeitsgrundsatz begrenzt die staatliche Strafgewalt daher jedenfalls insofern, als zur Erreichung des gesetzgeberischen Ziels ungeeignete Gesetze nicht zulässig sind».

has been observed that in practice criminal prosecution can trigger adverse consequences[220].

The necessity criterion, on the other hand, obliges to choose the least restrictive measure amongst those available for the achievement of the goal (*Gebot des mildesten Mittels)*. Criminal law is obviously the most intrusive measure[221]. In fact, a provision of substantive criminal law always entails a compression of personal liberty and potentially also other fundamental rights or freedoms (e.g. freedom of expression)[222]. Therefore, it should be used subsidiarily[223] (principle of *ultima ratio*[224]). In other words, when there are alternative, less intrusive measures that are equally or even more suitable for achieving the objective, they should be afforded precedence[225]. However, it has been pointed out that, similarly to the criterion of appropriateness, there seems to be a dangerous tendency to presume the necessity of criminal law, rendering it the *prima* or even *sola ratio*[226]. This tendency has been observed with certain preparatory offences related to terrorism too[227].

The final element of prospective proportionality prescribes that the appropriate and necessary measure must not have excessive effects on affected

[220] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 76 et seq.; also, P. CIRILLO, *Il volto dei reati di opinione nel contrasto al terrorismo internazionale al tempo di Internet*, in *Dir. Pen. Cont. - Riv. Trim.*, 2019, 2, 94: «Il rischio di incriminare condotte lontane da un'offesa, ancorché nella forma del pericolo, del bene giuridico protetto è quello di far apparire facilmente sproporzionato il ricorso alla pena stessa, soprattutto laddove vi sia una scarsa probabilità che il comportamento vietato si traduca in lesione effettiva. In questi casi, è del tutto lecito dubitare dell'efficacia rieducativa di una tale sanzione criminale. Anzi, punire il singolo facendone un mero strumento per finalità di prevenzione generale (negativa) rischia di risultare criminogeno: di indurre, cioè, a processi di radicalizzazione, opposti a quelli sperati».

[221] Cf. in this sense E. HILGENDORF, cit., 127.

[222] For critical observations on "opiniative criminal offences" see P. CIRILLO, cit., 92.

[223] In that sense E. HILGENDORF, cit., 127.

[224] See S. S. BUISMAN, cit., 173: «the Union legislator may only approximate the substantive criminal law of its Member States if all other measures have proven insufficient to safeguard a fundamental interest».

[225] See R. LAHTI, *Towards a principled European criminal policy: some lessons form the Nordic countries*, in J. B. BANACH-GUTIERREZ – C. HARDING (Eds.), *EU criminal law and policy: values, principles, and methods*, New York, 2017, 62.

[226] In this sense E. HILGENDORF, cit., 127.

[227] The offence of public provocation of terrorist offences is rather problematic, given that preventive measures such as online content moderation by internet service providers might be an equally efficient measure that is significantly less invasive of personal liberty. In that sense EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 711: «the European legislator should give – in accordance with the principle of good governance – a detailed justification why he did not impose a less severe measure, such as increasing monitoring of the internet or obligating operators of websites».

individuals[228]. In other words, the costs of criminalizing (i.e. the compression of fundamental rights and freedoms) must not outweigh its benefits. When assessing the reasonableness of this balancing act the importance of the protected *Rechtsgut* must be considered[229].

The second principle for justifying criminal law mentioned by Buisman is effectiveness[230], which she defines as «the capability of something to accomplish the desired result»[231]. Thus understood, effectiveness doesn't seem to be too different from the proportionality principle's sub-criterion of appropriateness. It has been claimed, once again, that effectiveness of European criminal law tends to be presumed[232].

1.4.3. Competence and subsidiarity

Once a decision to criminalize can be regarded as legitimate and justified according to the abovementioned criteria the Union can enact the necessary provisions, under the condition that it does not go beyond its sphere of competence and respects the principle of subsidiarity. The competence to approximate criminal laws through Directives has already been analyzed *supra*[233]. To summarize what's been said before, the Union's competence to approximate criminal law is limited to selected areas of crime (including terrorism). Also, it can approximate criminal laws to ensure the effectiveness of Union policies in areas that have been subject to harmonization measures. The provisions establishing those competences (paragraphs 1 and 2 of Article 83 TFEU) do not make any explicit reference to the principle of subsidiarity. However, the terms used in those norms ("special need", "particularly serious", "proves essential") can be read as an implicit reference.

The principle of subsidiarity is a general principle of Union law that applies to all areas of law. However, with specific regard to criminal law some

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[228] Cf. S. S. BUISMAN, cit., 174.
[229] See *Ibid.*
[230] Cf. *Ibid.* 175: «criminal law must be the most effective and cost-efficient measure available».
[231] *Ibid.* 176.
[232] See *Ibid.*: «There seems to be a presumption at the EU level that criminal law is effective […] Such a heavy reliance on the "magic of criminal law" may lead to over-criminalisation […]».
[233] See Chapter II, 1.3.

scholars[234] have extrapolated an autonomous "principle of minimally invasive treatment of criminal law" (*Strafrechtsspezifischer Schonungsgrundsatz*) from Article 83, which could be seen as a sort of enhanced subsidiarity principle. An influential academic second-guesses the necessity of such an autonomous, stricter principle. According to him the wording of the provision merely serves as a reminder of the importance of the principles of subsidiarity and proportionality in the field of European criminal law[235].

1.4.4. Offence construction principles

The preceding paragraphs dealt with the question under which conditions the Union can criminalize a conduct. The offence construction principles, on the other hand, aim at providing guidance for the Union legislator once those conditions are met and he effectively engages in normative activity by putting together the "building blocks" of the criminal offence. The two main pieces that make up the structure of a criminal offence have been mentioned already. On the one hand there is an objective element (*actus reus*) – an action or omission – on the other hand a subjective element (*mens rea*)[236]. When describing those elements, the European legislator should follow a certain methodology and ensure qualitative standards that can be summarized in three offence construction principles.

1.4.4.1. Coherence

The first offence construction principle mentioned by Buisman is the principle of internal subsidiarity, according to which the institutions of the European Union are compelled to analyze whether the existing legislation already covers the conduct which they intend to criminalize[237]. Whereas Buisman uses the notion of "internal subsidiarity", other scholars refer to the principle of horizontal

[234] Cf. H. SATZGER, *International and European criminal law*, cit., 77; A. KLIP, cit., 37.
[235] Cf. W. SCHROEDER, cit., 146-147. Some scholars cast doubt on the justiciability of the principle of subsidiarity though. In this sense R. SICURELLA, cit., 72.
[236] See A. KLIP, cit., 200 et seq.
[237] In that sense S. S. BUISMAN, cit., 181-182.

and vertical coherence to describe equivalent ideas[238]. The former stipulates that the Union should not interfere with the internal consistency of national criminal law without good reason. The latter, on the other hand, compels the European legislator to pay regard to the framework provided by preceding European legislation to keep the European legal order coherent[239].

1.4.4.2. Legality

The second and arguably most important offence construction principle is the principle of legality. The *nullum crimen, nulla poena sine lege* rule is a fundamental element of primary EU law explicitly codified in Article 6(3) TEU, Article 49 of the Union's Charter of Fundamental Rights[240] as well as in Article 7 of the European Convention on Human Rights. It is recognized as having the status of general principle of Union law[241] and it was declared to be an absolute imperative by the Court of Strasbourg, meaning that the High Contracting Parties are not allowed to derogate from it even in emergency situations[242].

The principle is generally broken down into four sub-principles, although it has been highlighted that not all of these are directly relevant for the criminalization process at the EU level[243]. First of all, for an individual (or entity) to be held criminally liable there needs to be a written norm describing the criminal offence (*lex scripta*)[244]. Moreover, said description must be sufficiently precise and clear, in order for the individual to be able to foresee the consequences

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[238] See EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 709; H. SATZGER, *International and European criminal law*, cit., 98.
[239] As observed by H. SATZGER, *International and European criminal law*, cit., 98.
[240] Art. 49 CFREU: «1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that shall be applicable. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations. 3. The severity of penalties must not be disproportionate to the criminal offence».
[241] Cf. A. KLIP, cit., 179.
[242] See A. M. SALINAS DE FRÍAS, cit., 115.
[243] In that sense S. S. BUISMAN, cit., 182.
[244] Cf. *Ibid.*

of his or her actions (*lex certa*)[245]. However, the Court of Strasbourg acknowledges that legislators should be allowed to produce rules in terms that are general enough to cover a vastity of specific cases, which entails inevitable interpretational doubts that should be dissipated via judicial application[246] . In other words, the interpretative activity of courts can legitimately contribute to the satisfaction of the requirement of foreseeability, notwithstanding the prohibition to stretch the scope of the criminal provision beyond the limits of its wording via interpretation by analogy (*lex stricta*)[247]. Finally, the criminal norm cannot be applied retroactively to facts that were committed before its entry into force (*lex praevia*)[248].

These sub-principles are obviously addressed at national legislators, given that only national law can serve as legal basis for criminal prosecution (*nullum crimen, nulla poena sine lege parlamentaria*)[249]. In other words, «it is the national implementing criminal law that must comply with all the requirements of the principle, not the Union act that imposes the obligation to implement»[250]. However, with the necessary adaptations that take account of the interplay between European and national legislators[251], the abovementioned rules are relevant in the EU criminalization process as well.

At the EU level, the *lex certa* principle does not impede the European provisions to hold a certain vagueness. Still, they need to be sufficiently clear for Member States to implement the directives correctly[252]. Also, the level of required clarity seems to be dependent on the objective of the European legal instrument. According to the scholars of the European Criminal Policy Initiative, when it «seeks to fully harmonise the proscriptions in the Member States, it should satisfy

[245] See H. SATZGER, *International and European criminal law*, cit., 97.
[246] See ECtHR, *Kafkaris v Cyprus*, cit., §141: «Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen"».
[247] Compare with S. S. BUISMAN, cit., 183; A. KLIP, cit., 180.
[248] See A. M. SALINAS DE FRÍAS, cit., 118-119.
[249] See EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 708: «[T]he competence to adopt criminal law provisions remains the preserve of the Member States (i.e. their national Parliaments)».
[250] Cf. A. KLIP, cit., 182.
[251] See *Ibid.* where the Author highlights the dependence of European criminal law on implementing legislation at the national level.
[252] See S. S. BUISMAN, cit., 182.

the lex certa requirement in the same way as if it were a [national] criminal law provision»[253]. The *lex praevia* rule, on the other hand, prohibits the Union from obliging Member States to criminalize a given conduct retroactively[254]. The Manifesto on European Criminal Policy mentions the *lex mitior* principle as an exception to the non-retroactivity rule. Hence, national judges can legitimately be expected to apply implementing legislation retroactively where it is more favorable than the pre-existing legal framework[255]. Another implication of the principle of legality is that substantive criminal laws need to be the result of a democratic rule-making process. Instruments of harmonization of national criminal law, such as Directives adopted under Article 83 TFEU, gain democratic legitimacy through the legislative co-decision procedure, which enhances the European Parliament's powers, as well as through constant exchange of information with national parliaments[256].

1.4.4.3. Effectiveness

Besides internal subsidiarity and legality, Buisman mentions effectiveness as an offence construction principle. Her understanding of effectiveness is essentially based on the "prosecutability" of the offence[257]. In other words, the offence should be construed in a way that does not lead to evidentiary problems. The Union can allegedly contribute to the achievement of this objective by using detailed definitions in its legal acts of approximation[258]. With specific regard to the Directive on combating terrorism, it has been pointed out that certain offence descriptions raise significant problems when it comes to the prosecutorial activity[259].

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[253] EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 708.
[254] See S. S. BUISMAN, cit., 183.
[255] In that sense EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 708.
[256] In that sense *Ibid.*
[257] See S. S. BUISMAN, cit., 183-184.
[258] Opinion expressed *Ibid.* 184.
[259] Cf. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 32: «Evidential issues concerning terrorism and related offences inherently derive from the nature and legal descriptions of these offences, interview findings suggest. That includes the definitions of the crimes of public provocation, receiving terrorist training and travelling for the purpose of terrorism».

1.4.4.4. Retrospective proportionality

The final offence construction principle is retrospective proportionality, which concerns the appropriateness of the sanction foreseen for the offence. As shown above, the European institutions' competence to set minimum rules includes not only the description of criminal offences but also the correlated sanctions. The Union can therefore set "minimum-maximum penalties", which have to be proportionate to the severity of the crime[260]. Buisman holds that the legal order as a whole must be coherent. Consequently, different crimes that are comparable in terms of severity must be addressed with similar penalties ("ordinal proportionality")[261]. However, if the entire legal order were characterized by excessively disproportionate sanctions, the criterion of ordinal proportionality would be unsatisfactory. Hence, «[c]ardinal proportionality requires to determine the outer limits of sentencing, without looking at the system as a whole, but solely looking at the seriousness of the crime itself»[262].

2. Human Rights

In the previous paragraph it was shown that the European Union has a limited competence in criminal matters and how this competence is ideally exercised in conformity with fundamental principles of criminal law (principles of harm and guilt, proportionality, legality) that national legal traditions are built upon in order to prevent resistance of any form by national authorities to the process of approximation (be it in a preventative manner through the emergency brake or *ex post* via judicial neutralization of national provisions that implement definitively enacted Directives). Along the same line of reasoning, respect for fundamental rights as recognized by the common legal traditions of the Member States proves essential for the legitimacy and acceptance of Union law, particularly in a field such as criminal law which is inextricably linked to fundamental rights[263]. An influential scholar observes that this is because «the

[260] See EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 708.
[261] Cf. S. S. BUISMAN, cit., 184.
[262] *Ibid.* 185.
[263] See A. KARGOPOULOS, cit., 126: «Criminal law, whether substantive or procedural, is indispensably associated with fundamental and human rights». Respect for fundamental rights as

penal instrument has both the power to protect and to compress fundamental rights»[264].

Some scholars[265] consider fundamental rights as an integral part of the general principles of criminal law. Accordingly, respect for the fundamental rights enshrined in the Union's Charter is seen as a vital component of the guidelines for a European Criminal Policy[266]. Indeed, it could be argued that there is an interplay between the general principles of criminal law and fundamental rights, the former's primary purpose being the safeguarding of the latter.

The doctrinal principles for a European Criminal Policy ultimately derive from the constitutional legal traditions of the Member States and hence can be regarded as an elaboration of the general obligation to respect the national identity of the Member States. Similarly, in the field of fundamental rights the constitutional traditions of the Member States were, and to a certain extent still are, an important point of reference for the European Court of Justice[267]. The latter was the key player in the emergence of fundamental rights protection within the European Union. While initially the European communities were seen as a purely economic community with no competence whatsoever with regards to fundamental rights protection, over time it became clear that the necessity of safeguarding the rights of European citizens against Union acts could no longer be ignored[268]. Notwithstanding the fact that the original Treaties did not make any

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an essential element of the Rule of Law is emphasized by H. SATZGER, *International and European criminal law*, cit., 50.

[264] P. DE HERT, *EU criminal law and fundamental rights*, in V. MITSILEGAS – M. BERGSTRÖM – T. KONSTADINIDES (Eds.), *Research handbook on EU criminal law*, Cheltenham, 2016, 105.

[265] See V. SCALIA, cit., 101: «[T]he rights protected by the Charter are to be considered general principles of criminal law, limiting the exercise of the competence attributed to the EU legislative bodies in this field […] they represent reliable criteria by which to assess the necessity/need of criminal sanctions».

[266] See *Ibid.*

[267] See Article 6(3) TEU: «Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law».

[268] Cf. F. PAOLUCCI, *Il cammino dei diritti umani nella cornice dell'Unione Europea*, in A. MASSARO (Ed.), *Diritto penale europeo: effetti e conseguenze sul sistema penale nazionale*, 1st Edition, Padua, 2020, 211-212: «Si è passati da un'Unione che prevedeva la mera creazione di uno spazio di libertà, sicurezza e giustizia, spazio in cui il cittadino era tanto più operatore commerciale quanto meno era concepita una vera e propria base di tutela di detti diritti, a un concetto di Comunità in senso ben più ampio. Ben presto si comprese come solo assicurando una protezione dei diritti fondamentali, protezione che per altro era già prevista in ambito nazionale, si

reference to fundamental rights, the Court started to draw inspiration from the national constitutional legal traditions to apply fundamental rights as general principles of Union law[269]. The most prominent cases that contributed to the qualification of fundamental rights as sources of Union law were *Stauder, Internationale Handelsgesellschaft, Nold* and *Hauer*[270]. In 2000, the Charter of Fundamental Rights of the European Union was adopted in order to make the jurisprudence of the Court of Justice on the matter more predictable[271]. The Charter does not have exhaustive nature[272], meaning that the European Court can still elaborate rights which are not mentioned in it and recognize them as general principles of EU law stemming from the common legal tradition of the Member States or from international law, and in particular the European Convention on Human Rights[273]. However, critical commentators[274] have noted that the Court of Justice shows reluctance when it comes to drawing inspiration from national constitutions in order to raise the level of fundamental rights protection within the Union[275].

In any case, given their value of general principles, fundamental rights are placed above secondary legislation in the hierarchy of sources of Union law[276]. This implies that «respect for fundamental rights […] represents a limit to EU legislative action, as it does not allow the adoption of legal rules that are not in compliance with individuals' rights protected by the supranational legal

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avrebbe avuto la possibilità di rafforzare detto spazio economico di circolazione di beni, servizi e persone e di trasformarlo in qualcosa di completamente differente».

[269] See E. SPAVENTA, cit., 10: «As far as the identification of fundamental rights was concerned, the Court of Justice relied on a plurality of sources: in particular great weight was given to the common constitutional traditions of the Member States».

[270] Compare with P. DE HERT, cit., 106-107; F. PAOLUCCI, cit., 215-216.

[271] Cf. P. DE HERT, cit., 107; F. PAOLUCCI, cit., 223.

[272] In this sense H. SATZGER, *International and European criminal law*, cit., 50: «However, fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States continue to apply as general principles of Union law […] independently from the guarantees laid down in the CFR».

[273] An important normative point of reference in this regard is Article 6(3) TEU: «Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law». The ECHR's role of privileged source of inspiration is highlighted by F. PAOLUCCI, cit., 218.

[274] In that sense A. KARGOPOULOS, cit., 132.

[275] See V. SCALIA, cit., 107: «[…] when security needs are at stake, the CJEU is more likely to lower the standard of protection for fundamental rights».

[276] Cf. K.-D. BORCHARDT, cit., 91.

system»[277]. As shall be seen, the same is true for national measures of implementation of European criminal law.

2.1. The Charter of Fundamental Rights

As mentioned above, the Charter codified the jurisprudence of the Court of Justice on fundamental rights. Whereas initially the Charter served as a mere source of inspiration, with the entry into force of the Lisbon Treaty it was elevated to a binding source of primary Union law[278]. Today, Article 6(1) of the TEU holds that: «The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties».

2.1.1. Scope of application of the Charter

From the above follows that the Charter constitutes a parameter of legitimacy for the Directive on combating terrorism and more generally for Union law[279]. Compliance with the Charter is to be secured by the European Court of Justice, which according to an influential scholar[280] comes close to the functions typically exercised by a Constitutional Court. However, acts of the Union are not the only ones being subject to the Court's fundamental rights scrutiny. Under certain conditions its jurisdiction includes also acts of national authorities. Indeed, Article 51(1) of the Charter states: «The provisions of this Charter are addressed to the institutions and bodies of the Union […] and to the Member States only *when they are implementing Union law*».

The power to scrutinize compliance of domestic measures with fundamental rights standards raises the concern of undue influence in matters that are outside of the competences of the Union. This phenomenon has been referred to as "competence creep"[281]. The second paragraph of article 51 (as well as article

[277] See V. SCALIA, cit., 101.
[278] See F. PAOLUCCI, cit., 223.
[279] Cf. H. SATZGER, *International and European criminal law*, cit., 53.
[280] See V. SCALIA, cit., 101.
[281] Term used by E. SPAVENTA, cit., 14.

6 of the TEU) aims at mitigating these fears by excluding an expansion of Union competences through the Charter[282].

The wording of Article 51 is undoubtedly ambiguous. The formula "only when implementing Union law" gave rise to a heated academic debate. On the one hand, some national courts, including the German *Bundesverfassungsgericht*[283], are fierce supporters of a narrow interpretation according to which Member States implement Union law in the sense of Article 51 only when the national legislator has no margins of discretion or when Union law is enforced administratively[284]. On the other hand, there are scholars who argue that the expression covers any kind of situation where a Member State fulfils its obligations under Union law, be it primary or secondary[285]. Those academic commentators tend to distinguish between two types of obligations: an "agency situation", where the Member State is required by Union law to take action and a "derogation situation", which occurs when a Member State derogates from one of the fundamental freedoms protected under Union law (for instance by imposing restrictions on the freedom of movement). In the subsidiary case where «a national criminal measure neither aims to secure compliance with an obligation laid down in EU law nor constitutes a derogation from the substantive law of the EU, such a measure does not fall within the scope of EU law and, accordingly, cannot be examined in the light of the Charter»[286].

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[282] See Article 51(2) CFR: «The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties».

[283] For a brief analysis of the German Federal Constitutional Court's reasoning see T. LOCK, *Fishing for Better Rights Protection: The Court of Justice on the Application of the Charter in the Member States and the Reach of ne bis in idem*, in V. MITSILEGAS – A. DI MARTINO – L. MANCANO (Eds.), *The Court of Justice and European Criminal Law - Leading Cases in a Contextual Analysis*, Chicago, 2019, 250-251. It is interesting to note that the case examined by the *Bundesverfassungsgericht* dealt specifically with counterterrorism measures. See also V. SCALIA, cit., 106: «Such a judgment patently shows the will of the German Constitutional Court to hinder CJEU interpretation concerning its jurisdiction on national law, in particular when criminal law is at stake – especially concerning the fight against terrorism».

[284] Cf. H. SATZGER, *International and European criminal law*, cit., 54. Conversely, whenever there is a margin of discretion the national measures of implementation allegedly escape the fundamental rights scrutiny of the CJEU and can only be tested against the national system of fundamental rights protection.

[285] Cf. L. KOEN – J. A. GUTIÉRREZ-FONS, *The European Court of Justice and fundamental rights in the field of criminal law*, in V. MITSILEGAS – M. BERGSTRÖM – T. KONSTADINIDES (Eds.), *Research handbook on EU criminal law*, Cheltenham, 2016, 10 et seq.; T. LOCK, cit., 247 et seq.

[286] See L. KOEN – J. A. GUTIÉRREZ-FONS, cit., 14.

The situation arising under Directive 2017/541 is evidently an agency situation. However, whenever Member States introduce criminal offences that go beyond what is required by the Directive and those offences constitute a limitation of a freedom protected by the Treaties, the derogation situation could bring that national legislation under the scrutiny of the Court of Justice.

The case law of the European Court of Justice seems to be more in line with the broad interpretation[287], since it assumes «a relatedness to EU law [and hence the applicability of the Charter] as soon as the relevant [national] provision serves an aim of the Union that Union law obliges the Member States to protect»[288]. According to this European interpretation – whose compatibility with the subsidiarity principle has been questioned[289] – national laws transposing the offences described in Directive 2017/541 would constitute an "implementation of EU law" and should therefore be susceptible to scrutiny by the European Court of Justice[290].

This is the theoretical premise. In practice however, it can be hard for the European judges to exercise this power effectively and directly, given that individuals are not entitled to file a direct application to the European Court of Justice, except in very specific circumstances that rarely occur[291]. Hence, the extent to which the European Court exercises its fundamental rights scrutiny depends heavily on the willingness of national courts to engage in a judicial dialogue through the preliminary reference procedure. If national judges adopt a reluctant attitude and feel that they can grant fundamental rights protection themselves, individuals have no remedy to obtain a preliminary ruling[292]. As will be seen, this distinguishes the Court of Justice of the European Union from the European Court of Human Rights, which is open to individual complaints once the requirement of exhaustion of national remedies is fulfilled[293]. However, the

[287] See T. LOCK, cit., 245 and 247: «[…] the Court adopted a wide understanding of the scope of the Charter […] the Court confirmed that the Charter continued in this vein, despite the seemingly narrower formulation – "when implementing Union law - used».
[288] H. SATZGER, *International and European criminal law*, cit., 55.
[289] See *Ibid.*
[290] In that sense V. SCALIA, cit., 101.
[291] Cf. *Ibid.* 102.
[292] See C. LACCHI, cit., 680.
[293] See V. BARSOTTI et al., cit., 223.

Court of Justice itself recognizes «a direct and immediate effect of the Charter provisions, binding national judges to check autonomously the compliance of domestic legislation with fundamental rights»[294]. Hence, whereas judicial review of secondary Union law with the Charter as parameter of lawfulness is an exclusive competence of the European Court of Justice, domestic legislation can – or better must – be tested directly by national judges against the guarantees enshrined in the Charter.

2.1.2. Scope of guaranteed rights and level of protection

Having established that, considering the case-law of the European Court of Justice, the Union's Charter is relevant for Directive 2017/541 and the national measures of implementation[295], it is necessary to look at the scope of the rights enshrined in the European "bill of rights". In this regard, the Charter's Article 52(3) creates a link to the European Convention on Human Rights by stating that, insofar as there's an overlap between the rights protected by the Charter and the Convention, the meaning should be the same as the one laid down in the latter (so-called "conformity clause"[296]). The rules enshrined in the Convention reach a significant level of preciseness thanks to the judicial interpretation of the Court of Strasbourg[297]. However, this does not preclude the Union from providing more extensive protection. In other words, the Convention, as interpreted by the European Court of Human Rights, has been described as the minimum standard of protection, the «lowest common denominator regarding human and fundamental rights within the EU Member States»[298].

Similarly, the level of protection granted at the Union level does not preclude Member States from applying a higher standard. Nevertheless, in

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[294] V. SCALIA, cit., 105.
[295] See *Ibid.*: «According to such an interpretation of Art. 51, para. 1 of the Charter, CJEU scrutiny could be extended to any piece of national law adopted within the scope of Arts. 83, paras. 1 and 2, and 325 TFEU, arguing that fundamental rights protection represents a necessary preliminary condition for the application of EU law, especially in a field such as criminal law, where the most important individual rights can be significantly affected». Cf. also A. KARGOPOULOS, cit., 131.
[296] Cf. A. KARGOPOULOS, cit., 129.
[297] In that sense V. SCALIA, cit., 105-106, who underscores the complementary and supplementary role of the ECHR system in the protection of fundamental rights within the EU.
[298] See H. SATZGER, *International and European criminal law*, cit., 51.

Åkerberg Fransson the European Court of Justice specified that this must not compromise the primacy, unity and effectiveness of European Union law[299]. For some national courts, this limitation is a bitter pill to swallow which might bear significant conflict potential[300]. In the light of the previously outlined notions the following scenario could be hypothesized: the European Court, reached by a request for a preliminary ruling, suggests an interpretation that is aimed at ensuring the effectiveness of Union law but conflicts with fundamental rights standards of the Member State of the judge who issued the preliminary reference. The domestic judge could then bring the European ruling under the scrutiny of the national constitutional court, eventually triggering the neutralization of Union law[301].

It has been stated before that, for the sake of protecting qualified legal interests, criminal law provisions compress fundamental rights. This raises the issue to which extent such compressions are legitimate. The Charter foresees three pre-conditions that need to be satisfied when a right or freedom is limited[302]. First of all, the limitation needs to be provided for by law. Secondly, fundamental rights or freedoms cannot be compressed beyond their essence. Finally, the limitation needs to be necessary and genuinely pursue an objective of general interest recognized by the Union or aim at protecting the rights and freedoms of others[303]. The importance of these requirements in the context of criminal law is

[299] In that sense T. LOCK, cit., 249-250.

[300] See H. SATZGER, *International and European criminal law*, cit., 56: «The emphasis on effectivity rather than on national protection of fundamental rights may potentially lead to serious conflicts […] This proves particularly true when the national position on the protection of fundamental rights that is subdued by the priority of effectiveness of EU law is of such high importance that it is regarded as an integral part of the respective state's constitutional identity, and thus cannot be surrendered from that state's point of view».

[301] This recalls the doctrine of counter-limits and the *Solange* jurisprudence analyzed above (Chapter II, 1.3.4.2).

[302] See Article 52(1) of the Charter: «Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others».

[303] This last requirement seems to recall the principle of proportionality. Cf. P. DE HERT, cit., 111.

emphasized by an autonomous provision of the Charter dealing with the principles of legality and proportionality[304].

2.2. The European Convention on Human Rights

Within the European Union, the most important international treaty in the field of human rights is undoubtedly the European Convention on Human Rights[305]. The Union's accession to the Convention is a Treaty obligation under Article 6(2) TEU[306]. Although the Union is not formally a party to the Convention yet, it already exerts an important influence on European criminal law. The Court of Luxembourg has due regard to the jurisprudence of the European Court of Human Rights when interpreting the Union's Charter[307]. As stated above, rights and freedoms that are protected by both the Convention and the Charter must be given at least the level of protection granted by the Court of Strasbourg.

For the time being, individuals cannot file applications to the European Court of Human Rights to directly call into question acts of the Union. This is because the Union itself has not yet completed the process of accession to the ECHR[308]. However, for provisions in the field of substantive criminal law (such as Directive 2017/541), which are not directly applicable against individuals, the EU's accession to the ECHR system appears to be irrelevant: given that the Union's Member States are all signatories of the Convention, individuals who are directly affected by national criminal laws that implement the Directive on combating terrorism are already entitled to file a direct application and thereby

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[304] See Article 49 of the Charter: «1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable. […] 3. The severity of penalties must not be disproportionate to the criminal offence».

[305] See A. KARGOPOULOS, cit., 129.

[306] Cf. M. LECERF, *Completion of EU accession to the European Convention on Human Rights*, in *https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-completion-of-eu-accession-to-the-echr*.

[307] See A. KARGOPOULOS, cit., 129: «[…] the CJEU is obliged to follow the rulings of the Strasbourg Court in the interpretation of any corresponding Charter rights». In the words of H. SATZGER, *International and European criminal law*, cit., 171: «The interpretation of the Charter […] is based on the interpretation of the Convention».

[308] Cf. P. DE HERT, cit., 109; V. SCALIA, cit., 106, who argues that after the CJEU's opinion 2/13 the accession is at a standstill. On a similar note H. SATZGER, 2018 cit., 174.

bring their case in front of the Court of Strasbourg[309]. This circumstance empowers the ECtHR to exert some influence over Europeanized criminal law, although the Court of Strasbourg is known for showing a certain judicial restraint by leaving a significant margin of appreciation to the High Contracting Parties[310].

Whereas Union law has a privileged position within the legal order of the Member States, the Convention constitutes an "ordinary" international treaty. However, each Contracting State can choose autonomously which rank to attribute to it in the national hierarchy of sources of law and how to deal with domestic legislation conflicting with the ECHR[311]. In this regard, the Member States of the European Union have adopted diverging solutions[312].

Generally speaking, it is recognized that it is superior to ordinary legislation. However, while some States put the Convention at the same rank as the national Constitution[313] or even above it[314], others consider it to be at an intermediate level between constitutional and ordinary law[315]. Either way, national criminal laws need to be in line with the Court of Strasbourg's jurisprudence. This implies that to avoid putting Member States in an uncomfortable position, measures of approximation of criminal laws adopted by the European Union should also be compatible with the ECtHR case law.

2.3. Specific Rights and Freedoms and European counterterrorism

Having outlined the European system of human rights it is time to look at some specific rights which are most directly affected by the Union's Directive 2017/541[316]. Obviously, since the Directive has an incriminating effect, the most

[309] See Article 34 ECHR: «The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right».
[310] Cf. J. KLABBERS, *International law*, 2nd Edition, Cambridge, 2017, 126.
[311] See V. BARSOTTI et al., cit., 223.
[312] See H. SATZGER, *International and European criminal law*, cit., 173.
[313] See *Ibid.* Austria is mentioned among the countries that have adopted this approach.
[314] See *Ibid.* Among others the Netherlands, Luxembourg and Belgium.
[315] Cf. *Ibid.* The author mentions Spain and France as examples. Italy has chosen this path as well.
[316] Amongst the most directly affected Charter rights the report of the EU's Agency for Fundamental Rights mentions the right to liberty and security, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association, the right to

immediately affected right is the right to personal liberty. However, there are some other rights which are being collaterally compressed because of the criminalization of certain conducts[317]. It is those rights that will be the object of examination in the following paragraphs.

It has been stressed many times that the Directive on combating terrorism aims at preventing terrorism at an anticipated stage. This objective is *inter alia* pursued by disrupting the process of radicalization and recruitment for terrorism at its very beginning. The anticipated use of the penal instrument manifests itself through provisions that criminalize conducts which *per se* do not cause any immediate harm but could lead other individuals to perform harmful acts. However, there is an actual risk of prosecuting individuals for preparatory acts of terrorism when in fact they are exercising a legitimate right or freedom (such as freedom of expression and information or freedom of association)[318]. In other words, there's a fine line between licit and illicit behavior that needs to be defined clearly. Furthermore, the choice of criminalizing acts that would otherwise fall within the scope of a fundamental right or freedom must pass the stress test that has been referred to *supra*[319]. The following paragraphs will investigate the scope of a selection of specific rights and freedoms that are limited by criminal offences provided for in Directive 2017/541 in order to grasp their essence, which needs to be respected for the compression to be lawful. This examination will rely mainly on the case law of the Court of Strasbourg which, as shown in the previous paragraphs, represents the minimum standard of protection and an important point of reference for the European Court of Justice.

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non-discrimination, freedom of movement and the principles of legality and proportionality of criminal offences and penalties. See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 5.

[317] See COUNCIL OF EUROPE, *Guide to the case-law of the European Court of Human Rights - Terrorism*, in *https://www.echr.coe.int/Documents/Guide_Terrorism_ENG.pdf*, 19: «Owing to the specific nature of terrorist-type crimes and offences, the Court is often called upon to balance a State's interest in suppressing terrorism with, in particular, the freedoms of religion, expression and association».

[318] Cf. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 7: «[…] preparatory offences […] criminalise activities defined by a combination of terrorist intent and ordinary behaviour such as using online communication channels, consulting written or online material, or travelling».

[319] See Chapter II 2.1.2. Several Articles of the ECHR include comparable clauses by prescribing that limitations of the respective rights must be prescribed by law, be "necessary in a democratic society" and pursue a legitimate aim.

2.3.1. Freedom of Expression and Information

In a democratic, liberal society freedom of expression is a core element of pluralism[320]. Freedom of expression refers to the right to share one's opinions and beliefs with other people as well as to receive and impart information and ideas without State interference. It is explicitly recognized by both the Charter of Fundamental Rights (Article 11)[321] and the ECHR (Article 10)[322]. The Court of Strasbourg has stated that «this right is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those ideas that offend, shock or disturb, or which may be divisive, as an inherent requisite to the pluralism, tolerance and broad-mindedness which shape a democratic society»[323]. In other words, freedom of expression also protects ideas and information that are not mainstream and even radical. Notwithstanding the broadness of this right, it is not absolute. The Convention expressly holds that it may be restricted – if necessary even through the instrument of criminal law[324]. The conditions for such a restriction to be legitimate resemble the ones mentioned in Article 52(1) of the European Union's Charter of Fundamental Rights: it must be provided for by law, be "necessary in a

[320] See COUNCIL OF EUROPE, *Guide on Article 10 of the European Convention on Human Rights - Freedom of Expression*, in *https://www.echr.coe.int/documents/guide_art_10_eng.pdf*, 11.
[321] CFREU Article 11: «1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected».
[322] ECHR Article 10: «1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers […] 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime […]».
[323] A. M. SALINAS DE FRÍAS, cit., 133.
[324] In that sense COUNCIL OF EUROPE, *Guide on Freedom of Expression*, cit., 19 where it is stated that criminal convictions constitute an interference with the freedom of expression within the meaning of Article 10(2) ECHR according to the ECtHR's case law.

democratic society" and pursue a legitimate aim, amongst which national security, public safety and the prevention of disorder or crime are explicitly mentioned.

The Court of Strasbourg leaves some margin of appreciation to the High Contracting Parties when determining the line between acceptable and non-acceptable expressions, but it still reserves its right to control that they abide by their obligations stemming from the Convention. During the assessment concerning the compatibility of a restriction with the freedom of expression, the requirements of being provided for by law and pursuing a legitimate aim are usually met. In fact, given that the general, restrictive measures stemming from the Directive on combating terrorism are substantive criminal norms, non-compliance with the lawfulness requirement would be addressed as a violation of Article 7 and not Article 10 of the Convention[325]. As for the legitimacy of these measures, the aim of preventing terrorism falls within the legitimate aims pointed out in the second paragraph of Article 10. Therefore, it is primarily the test of "necessity in a democratic society" that allows the Court to effectively counter arbitrary interferences by State authorities. For it to be passed there needs to be a true, pressing social need for the restriction. In other words, the restriction needs to be proportionate to the legitimate aim pursued and backed by sufficient and relevant reasons[326].

The extent to which an interference can be said to be proportionate depends also on the context in which the information or opinion is shared. And so «the Court has remarked that there is small room for restrictions on freedom of political speech or debate on questions of public interest where the public may have a legitimate interest»[327]. On the other hand, «where public remarks incite violence against a private individual, a public official or a sector of the population the state authorities enjoy a wider margin of appreciation in examining the need for interference with freedom of expression»[328].

[325] Article 7 ECHR codifies the *nullum crimen, nulla poena sine lege* principle.
[326] See ECtHR, 25.11.1997, n. 18954/91, in *www.hudoc.echr.coe.int (Zana v. Turkey), §51;* compare with A. M. SALINAS DE FRÍAS, cit., 135.
[327] A. M. SALINAS DE FRÍAS, cit., 135.
[328] *Ibid.* 136-137.

Also, the vastity of the audience that might potentially be reached is a factor to be borne in mind when verifying the proportionality of the interference. Finally, it can be difficult to discern between proper incitement to violence (or terrorism) and harsh criticism. The Court has found a virulent style or a hostile tone alone to be insufficient to qualify for incitement to terrorism[329]. What needs to be proven is the existence of glorification of violence or the incitement to hatred, revenge, recrimination or armed resistance[330]. «This incitement will be considered contrary to Article 10 ECHR whatever the form adopted for conveying it, even in the case of a cartoon with caption that appeared in a periodical supporting the terrorist attacks against the twin towers in the USA»[331].

2.3.2. Freedom of Assembly and Association (Art. 11 ECHR)

Another fundamental right that might be compromised by the European counterterrorism legislation is the freedom of assembly and association[332], which has been argued to constitute a "collective form of freedom of expression"[333]. Consequently, the core of the case-law on Article 10 ECHR applies to Article 11 as well[334].

Article 3 of the Directive on combating terrorism lists the destabilization or destruction of fundamental political or constitutional structures among the terrorist aims. According to the Court of Strasbourg, associations that seek to change the organization of the State (which could include getting rid of certain constitutional structures) fall within the scope of the freedom of association as long as those objectives are pursued through peaceful and democratic means and the proposed changes are themselves compatible with fundamental democratic principles[335]. Generally speaking, the Court holds that «exceptions to Article 11

[329] In that sense *Ibid.* 138.
[330] See *Ibid.* 139.
[331] *Ibid.* 140.
[332] See Article 11 ECHR: «1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others […] 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime […] or for the protection of the rights and freedoms of others».
[333] In that sense A. M. SALINAS DE FRÍAS, cit., 146.
[334] Opinion expressed *Ibid.*
[335] See *Ibid.* 147.

ECHR where political parties are concerned must be strictly construed. Accordingly, the contracting states have only a limited margin of appreciation»[336]. This restrictive case-law is evidently concerned about the oppression of political parties that exercise legitimate opposition against the government by arbitrarily labelling them as terrorist groups and subjecting their members to criminal prosecution.

2.3.3. Freedom of Movement (Art. 2 Protocol 4)

Finally, the Member States' obligation to criminalize travelling for the purposes of terrorism, which derives both from international and Union law, implies a restriction of the freedom of movement. The right has been explicitly acknowledged by the Council of Europe through Protocol 4 to the Convention[337]. In the Union's Charter it is found in Article 45[338]. The Court of Strasbourg has claimed that freedom of movement is essential for the full development of a person's private life. It attaches particular importance to cross-border travelling when the individual has family or economic or professional ties in other countries[339].

As with the previous two rights, there is again the three-step test to determine the compatibility of restrictions with the fundamental right: lawfulness, legitimacy, necessity. Essentially, when restricting the freedom of movement national authorities must strike a fair balance between public interest and the

[336] *Ibid.* 148.
[337] See Article 2 of the Protocol: «[…] 2. Everyone shall be free to leave any country, including his own. 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».
[338] CFREU Article 45: «1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States. 2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State».
[339] See ECtHR, 06.12.2005, Application n. 29871/96, in *hudoc.coe.int (İletmiş v. Turkey)*, § 50: «At a time when freedom of movement, particularly across borders, is considered essential to the full development of a person's private life, especially when, like the applicant, the person has family, professional and economic ties in several countries, for a State to deprive a person under its jurisdiction of that freedom for no reason is a serious breach of its obligations».

individual's rights[340]. This requirement can be said to be fulfilled «if there are clear indications of a genuine public interest which outweigh the individual's right to freedom of movement»[341].

[340] See ECtHR, 23.02.2017, Application n. 43395/09, in *hudoc.coe.int (De Tommaso v. Italy)*, § 104.
[341] See ECtHR, 19.04.2018, Applications n. 6477/08 & 10414/08, in *hudoc.coe.int (Hajibeyli and Aliyev v. Azerbaijan)*, § 63.

CHAPTER III

THE DIRECTIVE ON COMBATING TERRORISM

1. The accelerated adoption of Directive 2017/541

In Chapter one it was shown that the Directive on combating terrorism constitutes a sort of "follow-up" of Framework Decision 2002/475/JHA as amended by Framework Decision 2008/919/JHA. Since its entry into force, the Directive has replaced the two above mentioned Decisions and now constitutes the key measure in the fight against terrorism at the Union level[1]. The legislative process of this act has been described as "rushed"[2]. Allegedly, the accelerated adoption was triggered by the increasing amount of terrorist attacks that were happening in Europe at that time (particularly in France) and the growing threat represented by the terrorist organization "Islamic State of Iraq and Levant" (also known by the acronyms "ISIL", "ISIS" or "Daesh")[3]. Accordingly, legal scholars have referred to the Directive as a paradigm of emergency legislation[4].

In Chapter two democratic legitimacy was highlighted as one of the elements of the Rule of Law. From this point of view, the stronger position of the European Parliament granted within the ordinary legislative process foreseen for the adoption of Directives seems to denote an appreciable step forward for terrorism-related European criminal law. The pre-existing legal framework was based on acts whose adoption process was dominated by the Council of Ministers, the European Parliament having very limited powers. Nevertheless, the concrete circumstances of the legislative process relating to Directive 2017/541 have led numerous scholars and organizations dedicated to the protection of fundamental

[1] In that sense C. ANDREEVA, *The EU's counter-terrorism policy after 2015—"Europe wasn't ready"—"but it has proven that it's adaptable,"* in *ERA Forum*, 2020, 20/3, 346.
[2] See T. GHERBAOUI – M. SCHEININ, cit.: «The adoption process of the Directive was characterised by long periods of inertia interrupted by phases of panic triggered by external developments […] its rushed and opaque finalisation was a political response to the flow of European foreign fighters to the armed conflict in Syria and Iraq». See also H. DUFFY – R. PILLAY – K. BABICKA, cit., 5.
[3] Cf. R. FARINPOUR, *A snapshot of recent developments regarding EU counterterrorism policies and legislation*, in *ERA Forum*, 2021, 22/3, 363.
[4] See in this sense M. E. GENNUSA, *Tutto in una definizione? La nuova direttiva antiterrorismo dell'Unione europea e i confini del terrorismo*, in *Quad. Costituzionali*, 2017, 3, 652.

rights to reprove the European institutions[5]. These critics go as far as stating that «the process for adopting the proposal avoided all of the elements of good law-making»[6]. More precisely, the Commission, the Council and the Parliament were criticized for having proceeded in a "trialogue" behind closed doors, thereby precluding stakeholders from actively participating in the discussion[7].

These deficiencies in terms of transparency and accountability are further aggravated by the complete lack of a preventive impact assessment. Starting from 2015, the Commission has solemnly undertaken the duty to carry out such preventive impact assessments by including them in the Better Regulation Agenda. Nevertheless, in the specific case of Directive 2017/541 it failed to honor this commitment. No thorough justification was given, the Commission's explanatory memorandum simply stated that «[g]iven the urgent need to improve the EU framework to increase security in the light of recent terrorist attacks including by incorporating international obligations and standards, this proposal is exceptionally presented without an impact assessment»[8]. The compensatory *ex post* impact assessment required by the Directive's Article 29 was not enough to silence the criticisms of human rights protectors[9].

From all the above follows that, whereas the Directive has enhanced the democratic legitimacy and consequently the social acceptance of European criminal law in the field of counterterrorism[10], the rushed adoption process has led to a few shortcomings that leave room for improvement. If the European legislator wishes to gain further democratic legitimacy, the observations and suggestions of

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[5] See for instance EUROPEAN DIGITAL RIGHTS, *The time has come to complain about the Terrorism Directive*, in *https://edri.org/our-work/the-time-has-come-to-complain-terrorism-directive/*.

[6] *Ibid.*

[7] In that sense EUROPEAN DIGITAL RIGHTS, *Terrorism Directive: Document pool*, in *https://edri.org/our-work/terrorism-directive-document-pool/*.

[8] EUROPEAN COMMISSION, *Proposal for a Directive of the European Parliament and the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism*, in *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0625&from=EN*, 12.

[9] Cf. M. E. GENNUSA, cit., 652-653. Harsh criticism towards the Commission's evaluation report was expressed by T. GHERBAOUI – M. SCHEININ, cit.

[10] Compare with F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 157-158, who mentions the full justiciability by the Court of Justice (through preliminary references and infringement proceedings) as a factor that increases the Directive's democratic legitimacy.

human rights defenders and legal scholars concerning this piece of legislation should be taken seriously and eventually implemented.

2. The Structure of the Act

The legal framework arising under the Directive corresponds in large parts to the pre-existing one[11], which is why the case-law and the academic comments concerning the Framework Decisions and the correlated, national measures of implementation still have some relevance for the Directive and will be taken into consideration in the subsequent paragraphs. As a matter of fact, the latter has partially preserved the structure of the former: both legal acts distinguish between terrorist offences (Article 3 of the Directive), offences related to a terrorist group (Article 4 of the Directive) and offences related to terrorist activities (Articles 5-12 of the Directive)[12].

These provisions are followed by general provisions (Articles 13-23) dealing, *inter alia*, with the relationship between the principal offences listed in Article 3 and the inchoate offences contained in the subsequent Articles; aiding, abetting, inciting and attempting to commit certain offences; penalties and mitigating circumstances for natural persons; liability and sanctions for legal persons.

Article 1, which defines the subject matter, already makes clear that criminalization is not the sole purpose of the Directive. It also contains provisions with a reparatory aim dealing with the protection, support and assistance of victims of terrorism (Articles 24-26) – an aspect that was totally ignored by the Framework Decision[13]. However, notwithstanding their undisputable importance, those provisions will not be considered since the focus of this dissertation is on substantive criminal law.

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[11] See S. DE LUCA, cit., who underlines that the terrorist offences listed in Article 3 are the same as those listed in the Framework Decision, the only exception being the offence of illegal system or data interference (para. 1 letter i). Allegedly, the most significant differences compared to the previous framework emerge in the context of the offences related to terrorist activities.

[12] Cf. M. E. GENNUSA, cit., 652.

[13] See A. CAIOLA, *The European Parliament and the Directive on combating terrorism*, in *ERA Forum* 2017 18/3, 415.

The Directive's preamble contains 43 recitals, some of which come in useful for dissipating interpretational doubts. The same is true for Article 2 which contains definitions relating to a few selected notions.

3. Legal Basis and Subsidiarity

In the proposal submitted by the Commission, both Article 83(1) and 82(2)c TFEU were mentioned as the legal basis for the Directive[14]. In the final version published in the official journal, however, the latter was omitted. This is because the procedural provisions concerning the victims of terrorism, which could have justified the reference to the Union's competence in procedural criminal law, play an admittedly marginal role in the Directive. The fact that merely three out of 31 provisions deal with this issue is already a clear indicator in that sense. Also, it has been observed[15] that those three provisions merely complete a framework that is predominantly provided by another legal act (Directive 2012/29/EU). These circumstances allow to conclude that the primary purpose and content of the Directive concerns criminalization of terrorism-related offences. Since, according to established case-law of the European Court of Justice[16], acts of the Union should be based on a single legal basis and only exceptionally on a plurality of them, the choice of Article 83(1) TFEU as the sole legal basis seems to be reasonable[17].

The Commission's explanatory memorandum adduced sufficient reasons to justify Union action, thereby making the act compatible with the subsidiarity principle. Allegedly, the main added value is that «EU-wide definitions would

[14] See EUROPEAN COMMISSION, *Proposal for a Directive on combating terrorism*, cit., 8-9: «Terrorism is a serious crime with a cross-border dimension by reason of its nature, impact and the need to combat it on a common basis. Article 83(1) of the Treaty on the Functioning of the European Union (TFEU) is therefore the appropriate legal basis for this proposal […] The inclusion of provisions related to the victims' rights require an addition of the relevant provision as a legal basis. Article 82(2) TFUE enables the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to establish minimum rules concerning the rights of victims of crime. Point c) of Article 82(2) TFUE should be therefore added as an additional legal basis».

[15] Cf. A. CAIOLA, cit., 416.

[16] *Ex multis* see ECJ, 08.09.2009, C-411/06, in *eur-lex.europa.eu*; ECJ, 06.11.2008, C-155/07, in *research.wolterskluwer-online.de*; ECJ, 10.01.2006, C-178/03, *ivi*.

[17] In that sense A. CAIOLA, cit., 417: «[…] the sole Article 83(1) TFEU can be considered as being the correct legal basis for the proposal since the fight against terrorism by means of harmonisation or approximation of criminal law is clearly the predominant component of the act».

facilitate a common understanding and benchmark for cross-border information exchange and cooperation in police and judicial matters»[18]. Furthermore, the Commission claimed that «the scope of the offences […] needs to be sufficiently aligned to be truly effective»[19], which purportedly can be better achieved at the Union level. These arguments seem to have convinced large parts of the legal doctrine[20], although there are also partially dissenting academic opinions[21].

4. Addressees and (Legitimate) Purpose of the Directive

As already abundantly underlined, the Directive is addressed at national legislators, who need to take the necessary measures to ensure that the conducts described by the European legislator are punishable as criminal offences and with penalties that respect the severity threshold prescribed by the Union. At this point, a brief clarification needs to be made. Not all Member States of the European Union are subject to the effects of the Directive. Denmark and Ireland[22] have a differentiated position which, in the absence of an explicit opt-in, makes the Directive inapplicable to them[23]. Until then, the previous legal framework continues to apply to these Member States[24].

The Directive's preamble and the Commission's explanatory report are useful for understanding the underlying *ratio legis*. Recital 2 defines terrorism as «one of the most serious violations of the universal values of human dignity, freedom, equality and solidarity, and enjoyment of human rights and fundamental freedoms» as well as «one of the most serious attacks on democracy and the rule of law». Those are the legal interests, the *EU Rechtsgüter*, that the Directive as a

[18] EUROPEAN COMMISSION, *Proposal for a Directive on combating terrorism*, cit., 10.
[19] *Ibid.*
[20] For instance S. DE LUCA, cit., who stresses that the same cannot be said about the principle of proportionality.
[21] In that sense S. GLESS, *The two Framework Decisions. A critical approach*, in F. GALLI – A. WEYEMBERGH (Eds.), *EU counter-terrorism offences: what impact on national legislation and case-law?*, Brussels, 2012, 37: «the establishment of an EU parameter for terrorism, which will hereafter encompass all forms of alleged terrorist activities, might go beyond the scope of Art. 83 TFEU, because it obliges all EU Member States to fight internal national activism according to the EU standards, and thus impinges of a State's sovereign right to solve internal conflict issues according to its own agenda».
[22] The United Kingdom also wasn't bound by the Directive. However, given that it has lost its Member State status following "Brexit", the British opt-out is no longer relevant.
[23] See Recitals 41 and 42 Directive 2017/541.
[24] Cf. S. DE LUCA, cit.

whole seeks to protect. In practice, this objective is achieved through the approximation of national criminal laws on terrorism, which facilitates information exchange and cooperation between national authorities[25]. It is therefore beyond dispute that the Directive pursues a legitimate aim. In fact, all the offences enshrined in it seem to comply with the principle of harm[26]. It is hard to deny that they all describe acts that either constitute a direct harm to a *Rechtsgut* or which could give a causal contribution for such harm to occur at a later stage. Nevertheless, in some cases the risk is so minimal, the remoteness between the incriminated conduct and the actual harm so considerable, that this begs the more important question whether such anticipated criminalization can be justified[27]. This issue is especially pertinent when it comes to the "offences related to terrorist activities".

Another specific reason that triggered the adoption of the Directive was the rising threat posed by returning foreign terrorist fighters[28]. Towards the end of 2015 the Commission found that «Member States are increasingly faced with the phenomenon of an increasing number of individuals who travel abroad for the

[25] See Recital 3 Directive 2017/541 which states that «a harmonised definition of terrorist offences serves as a benchmark for information exchange and cooperation between national authorities». The recalled measures of cooperation comprise, *inter alia*, the European Arrest Warrant (Council Framework Decision 2002/584/JHA) and Joint Investigation Teams (Council Framework Decision 2002/465/JHA). See also J. BURCHETT – A. WEYEMBERGH – G. THEODORAKAKOU, cit., 37, who see the facilitation of judicial cooperation based on a common definition of terrorism as the primary objective of the Directive. The Authors also highlight that the Directive is useful for the implementation of further EU legal instruments such as Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online and the application of targeted sanctions.

[26] However, in Chapter II, 1.4.1. it was shown that the harm principle is considered by some as a rather lax criterion.

[27] Cf. in that sense P. ASP – S. DREW, *Evaluation of the Framework Decision 2002/475/JHA on combatting terrorism, as amended by Framework Decision 2008/919/JHA on the basis of the Manifesto for a European Criminal Policy*, in *http://www.crimpol.eu/wp-content/uploads/2012/04/ECPI-Evaluation-Framework-Decisions-2002-475-JHA-and-2008-919-JHA-EN.pdf*, 4. The authors are sceptic about the fairness of labelling possession of weapons with terrorist intent as a consummated terrorist offence. As a matter of fact, the act could have been punished just as well as an attempt of committing a terrorist offence.

[28] See N. PAUNOVIC, *New EU Criminal Law Approach to Terrorist Offences*, in *EU Comp. Law Issues Chall.*, 2018, 2/2, 531: «[…] the challenges posed by foreign terrorist fighters have called for new measures specifically addressed to tackle this evolutionary threat. In particular, it was necessary to effectively criminalize the travel of individuals to receive terrorist training as well as the dissemination of propaganda and the interaction with potential recruits through the Internet». See also Recital 4 of the Directive: «The terrorist threat has grown and rapidly evolved in recent years. Individuals referred to as "foreign terrorist fighters" travel abroad for the purpose of terrorism. Returning foreign terrorist fighters pose a heightened security threat to all Member States».

purposes of terrorism and the threat they pose upon their return»[29]. It concluded that the European legal framework needed to be reviewed to bring it in line with new international standards and obligations (see Chapter I, 5.1.) and to adapt it to the new challenges deriving from the evolving terrorist threat[30].

5. The obligations to criminalize

The primary objective of the Directive is to oblige Member States to criminalize certain conducts and to qualify them as terrorist offences. As shown in the previous chapter, the European Union is competent to set minimum rules concerning the definition of criminal offences and penalties. Consequently, the Directive does not, in principle, preclude national legislators from going beyond what is required from them[31]. The next paragraphs will examine each EU-offence individually and provide insights into some of the correlated national implementation measures. This way it will become clear that national legislators are rather keen to use their margin of discretion to foresee offences that are broader than those included in the Directive. Aware that this could lead to "over-criminalization" with adverse effects on human rights, the European legislator reminds national authorities of their duty under Article 6 TEU to respect fundamental rights as enshrined in the Charter, the ECHR and other sources of international law[32]. Although this reminder is praiseworthy, it has been noted that from a legal point of view it is superfluous, given that fundamental rights apply automatically, by virtue of being EU primary law[33].

A first, general remark before analyzing each EU-offence individually: many of them have been criticized for their breadth and indeterminacy, which makes them difficult to reconcile with the principle of legality[34]. The International Commission of Jurists has identified national legislatures as the «first line of

[29] EUROPEAN COMMISSION, *Proposal for a Directive on combating terrorism*, cit., 2.
[30] See *Ibid.* 4.
[31] Cf. J. BURCHETT – A. WEYEMBERGH – G. THEODORAKAKOU, cit., 36-37: «[…] the EU can set the definition of minimum punishable conduct but cannot prevent Member States from adopting broader incriminations or harsher penalties».
[32] See Recital 35 and Article 23(1) of Directive 2017/541.
[33] In that sense, A. CAIOLA, cit., 415.
[34] See H. DUFFY – R. PILLAY – K. BABICKA, cit., 5.

defence against overreaching criminal law»[35]. At the same time, however, it acknowledges that it is up to the judiciary to make up for potential deficiencies in the law, eventually by neutralizing it[36].

5.1. Terrorist offences

In chapter one it was highlighted that there is no universally accepted general definition of terrorism. The European Union, however, has made efforts to elaborate such a definition, which today can be inferred from Article 3 of the Directive[37], which is labelled "Terrorist offences". The provision's paragraph one contains an exhaustive list of intentional acts that – if by their very nature or the context in which they are committed may seriously damage a country or an international organization, and[38] if committed with one of the specific aims (*dolus specialis*) listed in the subsequent paragraph – must be defined as terrorist offences by the Member States. This is a unique feature of Article 3[39], given that all the other Articles simply require to ensure that the described conduct "is

[35] *Ibid.* 6.
[36] In that sense *Ibid.*
[37] See Article 3 Directive 2017/541: «1. Member States shall take the necessary measures to ensure that the following intentional acts, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation, are defined as terrorist offences where committed with one of the aims listed in paragraph 2: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage-taking; (d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons; (g) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (i) illegal system interference, as referred to in Article 4 of Directive 2013/40/EU of the European Parliament and of the Council (19) in cases where Article 9(3) or point (b) or (c) of Article 9(4) of that Directive applies, and illegal data interference, as referred to in Article 5 of that Directive in cases where point (c) of Article 9(4) of that Directive applies; (j) threatening to commit any of the acts listed in points (a) to (i). 2. The aims referred to in paragraph 1 are: (a) seriously intimidating a population; (b) unduly compelling a government or an international organisation to perform or abstain from performing any act; (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization».
[38] The *actus reus* and the *mens rea* are cumulative requirements.
[39] See EUROPEAN COMMISSION, *Evaluation of Directive (EU) 2017/541*, cit., 7.

punishable as a criminal offence", without demanding the explicit use of the "terrorist label"[40].

The definition of the Directive is almost identical to the one provided for by the Framework Decision[41]. Under the validity of the latter, it has been observed[42] that "terrorist offences" form the basis for the definition of all offences mentioned in the Union act. It seems as if this observation is still valid under the new European legislation. Notwithstanding this definitional connection it must be stressed that, pursuant to Article 13 of the Directive, for an inchoate or preparatory offence to be punishable it is irrelevant if one of the terrorist offences is actually committed thereafter[43].

5.1.1. The three elements of the EU definition of terrorism

A careful reading of Article 3 reveals that the European definition of terrorism can be said to consist of three core elements[44]. It relies on an interplay between two elements which are objective in nature (*actus reus*) and a subjective one (*mens rea*)[45]. The first objective element is represented by the material acts referred to in paragraph one. These comprise acts that the general public would –

[40] Not every national legislator has taken this obligation to heart. For instance, in Germany the "intentional acts" referred to in Article 3 of the Directive are punishable under "common" criminal law, and their preparation under an all-encompassing provision that is not specifically tailored to terrorism. See Chapter I, 5.3.2 and A. CORNFORD – A. PETZSCHE, *Terrorism Offences*, in K. AMBOS et al. (Eds.), *Core Concepts in Criminal Law and Criminal Justice*, 1st Edition, Cambridge, 2019, 174.

[41] In that sense H. DUFFY – R. PILLAY – K. BABICKA, cit., 18. The only novelty is the insertion of the term "radiological" in letter f, as well as illegal system or data interference (letter i). See also EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 19.

[42] Compare with E. DUMITRIU, *The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism*, in *Ger. Law J.* 2004, 5/5, 592; EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 33; F. GALLI, *Terrorism*, in V. MITSILEGAS – M. BERGSTROM – T. KONSTADINIDES (Eds.), *Research handbook on EU criminal law*, Cheltenham, 2016, 411.

[43] See Article 13 Directive 2017/541: «For an offence referred to in Article 4 or 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 are concerned, to establish a link to another specific offence laid down in this Directive».

[44] Cf. F. GALLI, cit., 404; S. GLESS, cit., 36; G. MORGANTE – R. DE PAOLIS, *Implementing the EU Directive 2017/541 on Combating Terrorism in a Sustainable Balance Between Efficiency, Security and Rights: The Case Study of the Participation to a Terrorist Group*, in *Glob. Jurist*, 2022, 22/1, 54.

[45] In that sense M. CANCIO MELIÀ, *Terrorismusbegriff und Terrorismusdelikte*, in A. PETZSCHE – M. HEGER – G. METZLER (Eds.), *Terrorismusbekämpfung in Europa im Spannungsfeld zwischen Freiheit und Sicherheit: historische Erfahrungen und aktuelle Herausforderungen*, 1st Edition, Baden-Baden, 2019, 172; also F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 138.

in the light of attacks that have received widespread coverage by the media – refer to as terrorist attacks (e.g. seizure of aircraft, extensive destruction of infrastructure likely to endanger human life), but also less obvious ones (e.g. illegal data interference). Threatening to commit any of the listed acts can qualify as terrorist offence as well[46]. It has been observed[47] that those acts are a partial reflection of the sector-specific conventions adopted at the UN level[48], although the list of material acts elaborated by the Union seems to have a wider scope. However, the broadness of this first element of the EU definition is counterbalanced by the other two elements[49].

In fact, the second objective element introduces a qualitative requirement of the material act, by prescribing that the act must surpass a certain threshold of seriousness[50]. More specifically, it must have, by virtue of its nature or the context in which it is committed, the potential to cause serious damage to a Country or an International Organization. In the Commission's original proposal, this element was subjectivized, meaning that the concrete consequences of the act would have

[46] See Article 3(1)(j) Directive 2017/541. Some would have wished for a more restrictive provision on threatening to commit a terrorist offence. See in this sense F. GALLI – A. WEYEMBERGH (Eds.), *EU counter-terrorism offences: what impact on national legislation and case-law?*, Brussels, 2012, 18; EUROPEAN DIGITAL RIGHTS, *Recommendations for the European Parliament's Draft Report on the Directive on Combating Terrorism*, *EDRi*, in https://edri.org/files/counterterrorism/CounterTerror_LIBEDraftReport_EDRi_position.pdf, 7, where the following formula is proposed: «*seriously* threatening to commit any of the [terrorist offences], *on the basis of objective, factual circumstances*». In other words, EDRi proposed to move part of today's Recital 8 into the legally binding section of the act.

[47] Cf. E. DUMITRIU, cit., 593 et seq.

[48] Those conventions deal with criminal phenomena that directly or indirectly cause a serious threat for human life, physical integrity or personal liberty. In that sense A. VALSECCHI, *I requisiti oggettivi della condotta terroristica ai sensi dell'art. 270 sexies c.p. (prendendo spunto da un'azione dimostrativa dell'animal liberation front)*, *Diritto Penale Contemporaneo*, in https://archiviodpc.dirittopenaleuomo.org/upload/1361385163Nota%20Valsecchi%20Trib%20Firenze.pdf, 6.

[49] See E. DUMITRIU, cit., 595. This observation was made under the previous legal framework, but it can be extended to the Directive. The author uses a striking metaphor to describe the difference between the UN and the EU definition: «The Framework Decision could thus be compared with a fisher's net which would be broader than the international conventions' "net" (in that it covers a larger spectrum of terrorist acts) but whose meshes would be wider (seriousness and specific aim criteria). This approach reduces the risk of a "politically oriented", and thus potentially abusive, use of the terrorist offences regime».

[50] See H. DUFFY – R. PILLAY – K. BABICKA, cit., 9: «"Terrorism" prosecutions should be brought only for sufficiently serious criminal conduct, and never for *de minimis* contributions or for conduct that is not "genuinely terrorist" in nature […] for the crime of "terrorism" to retain its distinct significance it is essential that the net is not so broad as to cover those offences which are adequately addressed as ordinary criminal offences».

been irrelevant, the focus being on what the author of the act intended to happen. In the end, the solution of looking objectively at the consequences of the act, rather than at what the perpetrator planned, gained the upper hand, primarily because it is much easier to assess[51]. Two scholars of the European Criminal Policy Initiative have observed that it might be challenging for national legislators to transpose this vague requirement into a «fully intelligible prerequisite for an offence»[52]. Consequently, there might be a risk of conflation between terrorism and ordinary offences. The same scholars also questions whether the act of possessing weapons is reconcilable with this requirement[53].

The subjective element, which further restricts the scope of the definition, is the specific aim of the intentional act. Intent has been identified as the key element of the EU definition of terrorism[54]. This is not unproblematic given that it pertains to the cognitive sphere of the individual and hence is challenging for prosecutors to prove. Once again, this can make it difficult to discern between terrorism and "ordinary" criminal offences, which compromises legal certainty[55]. To prevent arbitrariness, Recital 17 specifies that «[t]he intentional nature of an act or omission may be inferred form objective, factual circumstances». Human rights organizations have welcomed this safeguarding clause, although during the drafting process it has been suggested that the term "should" instead of "may" would have been preferable[56].

Paragraph two defines the three specific aims that render the intentional act a terrorist offence, and which are alternative in nature: seriously intimidating a population; unduly compelling a government or an international organization to perform or abstain from performing any act; seriously destabilizing or destroying the fundamental political, constitutional, economic or social structure of a country

[51] In that sense E. DUMITRIU, cit., 495-496.
[52] P. ASP – S. DREW, cit., 7. This opinion was expressed when the Framework Decision was still in force, but it has been repeated by others also when it was replaced by the Directive. See M. GUTHEIL et al., cit., 40-41.
[53] Cf. P. ASP – S. DREW, cit., 10.
[54] In that sense F. GALLI, cit., 405; F. GALLI – A. WEYEMBERGH, cit., 216.
[55] See M. GUTHEIL et al., cit., 19: «[…] criminalising "intent or motivation" rather than an action depends on interpretation and may lead to confusion on how to penalise offenders».
[56] See EUROPEAN DIGITAL RIGHTS, *Recommendations for the European Parliament's Draft Report on the Directive on Combating Terrorism*, cit., 12. The debate is of marginal relevance though, given that it doesn't concern a legally binding provision.

or an international organization. The EU's Agency for Fundamental Rights has remarked that whereas the first two aims are in line with those used in some international conventions[57], the third one allegedly «has no counterpart in international law»[58]. Consequently, while the requirement of specific intent narrows the scope of the European definition, the provision of an additional, yet alternative specific aim potentially widens it again. Regarding the aim of "unduly compelling", it has been pointed out[59] that the adverb "unduly" is too generic and that more specific formulas could have been used. Part of the legal doctrine[60] has criticized the alternative nature of the specific aims altogether, suggesting that they should be rendered cumulative. An Italian scholar[61] has adduced two reasons to support this criticism. On the one hand, allowing Member States to choose which aim or aims to integrate into the national measures of implementation leads to divergent solutions which in turn could undermine the Directive's harmonizing *ratio*. On the other hand, it is claimed that the only definition that truly reflects the empirical characteristics of terrorism would be one based on all three of the specific aims.

5.1.1.1. Terrorism and International criminal law

A tricky issue of qualification arises when an act, as defined *supra*, is committed in a context of armed conflict[62]. In that case, the conduct could constitute either a manifestation of the right to participate as a freedom fighter in

[57] Allegedly, the most important Convention that the EU used as a baseline for its own definition was the UN Convention for the Suppression of Terrorism Financing, which partially parts with the sectorial approach by introducing a general clause that is based on the two specific aims of intimidating or compelling. In that sense F. GALLI, *Terrorism,* cit., 405-406.
[58] See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 10.
[59] See EUROPEAN DIGITAL RIGHTS, *Recommendations for the European Parliament's Draft Report on the Directive on Combating Terrorism*, cit., 6: « 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».
[60] For instance M. CANCIO MELIÀ, *Terrorismusbegriff und Terrorismusdelikte,* cit., 174.
[61] F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 153.
[62] Cf. Recital 37 of the Directive: «This Directive does not govern the activities of 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, activities of the military forces of a State in the exercise of their official duties». The provision replicates what is stated in Article 26(5) of the Council of Europe Convention on the Prevention of Terrorism. For a critical view on the judicial practice in France, which is said to repeatedly fail to take into account the context of armed conflict see H. DECOEUR, cit., 314 et seq.

the hostilities[63], or a crime under international law. It is important to highlight that international law does not foresee terrorism as such as an autonomous crime[64], supposedly because of the divergences at the international level when it comes to the definition of terrorism[65]. Nevertheless, an act of terrorism can, under certain circumstances, amount to a crime against humanity or a war crime[66], which are self-standing crimes under international humanitarian law and should be prosecuted accordingly. To get a better understanding of the potential qualification of acts of terrorism as international law crimes the notions of war crime and crime against humanity must be briefly examined.

Whereas war crimes necessarily presuppose a context of armed conflict, crimes against humanity can be perpetrated also during peace time[67]. The former essentially consist in serious violations of international humanitarian law by individuals subject to that body of law. Article 8 of the Statute of the International Criminal Court contains an extensive list of such violations[68]. Hence, an act that fulfils the requirements of Article 3 of the Directive, but at the same time is subsumable under Article 8 of the ICC Statute, will be excluded from the Directive's scope of application and instead be addressed as a war crime. To determine the applicable law, it is crucial to assess whether a given situation can be regarded as an armed conflict as defined under international law or not[69] and

[63] See S. CRISPINO, *Finalità di terrorismo, snodi ermeneutici e ruolo dell'interpretazione conforme*, in *Dir. Pen. Cont. - Riv. Trim.*, 2017, 1, 229.

[64] In that sense, G. WERLE – F. JEßBERGER, *Principles of International Criminal Law*, Oxford, 4th Edition 2020, 65. Cf. also with G. ACQUAVIVA, *Terrorism*, in A. CASSESE (Ed.), *The Oxford Companion to International Criminal Justice*, Oxford, 2009, 535. «[I]nternational criminal tribunals, when convicting individuals of the war crime of terrorism under these provisions, are keen to stress that the concept they are applying is specific to armed conflicts and has *sui generis* features». On a different note, the Special Tribunal for Lebanon argued that transnational terrorism constitutes a crime under customary international law. See STL (AC), 16.02.2011, STL-11-01/I, in *www.refworld.org*.

[65] See G. WERLE – F. JEßBERGER, cit., 65; M. DI FILIPPO, *Terrorist Crimes and International Co-Operation: Critical remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes*, in *Eur. J. Int. Law*, 2008, 19/3, 564.

[66] Cf. in that sense, G. WERLE – F. JEßBERGER, cit., 65; M. MANCINI, entry *Crimini internazionali*, in *Treccani - Diritto on line*, 2019; M. DI FILIPPO, cit., 565 et seq.

[67] See G. GUAGLIARDI, *Crimini di Guerra*, in M. MASUCCI (Ed.), *Strutture del diritto penale internazionale: interpretazione, applicazione, fattispecie*, Turin, 2017, 193.

[68] For instance, see Article 8(2)(b)(i): «Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities».

[69] See H. DUFFY – R. PILLAY – K. BABICKA, cit., 12: «An armed conflict exists only when there is use of force between states, or for a non-international conflict, sufficient intensity of hostilities and

whether the individual is linked to the parties involved in the hostilities. If that assessment turns out negative, the act ought to be prosecuted as terrorist offence and not as international crime[70], except where it can be qualified as crime against humanity (see *infra*).

In 2017, the European Court of Justice delivered a decision which indirectly dealt with the issue of acts of terrorism in the context of armed conflict[71]. In that case, the applicants contested the inclusion of the "Liberation Tigers of Tamil Eelam" on the list of entities and persons involved in terrorist acts and whose assets are to be frozen. Allegedly, the contested measure was based on acts that were committed in the context of an armed conflict and hence could not qualify as "terrorist acts" for the purposes of the EU system of targeted sanctions. The Court seems to have failed to seize the opportunity for clarification, arguing that the invoked exclusion clause «is irrelevant for the purposes of interpreting the concept of 'terrorist acts' as referred to in Common Position 2001/931 and Regulation No 2580/2001»[72] and concluding that «actions by armed forces during periods of armed conflict, within the meaning of international humanitarian law, may constitute 'terrorist acts' for the [preventative and not punitive] purposes of those acts of the European Union»[73].

Anyways, even outside the context of an armed conflict (i.e. during peace time or when the perpetrator is not linked to the belligerent parties), a terrorist offence in the sense of Article 3 might qualify as offence under international criminal law. That would be the case if the act had a massive impact on human

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degree of organization of the parties to those hostilities». According to H. DECOEUR, cit., 314-315 this assessment requires «to answer a number of complex questions of law and fact […] many of these questions have not received a definite or unanimous response». Cf. also L. VIERUCCI, *Armed conflict*, in A. CASSESE (Ed.), *The Oxford Companion to International Criminal Justice*, Oxford, 2009, 247 et seq. where the ICTY's understanding of the notion in the *Tadic* case is quoted: «an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State».

[70] See H. DUFFY – R. PILLAY – K. BABICKA, cit., 8-9.

[71] See ECJ, 12.03.2019, C-221/17, in *eur-lex.europa.eu (M.G. Tjebbes and others v Minister van Buitenlandse Zaken)*.

[72] *Ibid.* § 85.

[73] *Ibid.* § 97.

rights, so that it could be regarded as a crime against humanity[74]. Article 7 ICC Statute is a useful point of reference to understand this type of international crime. In essence, it defines crimes against humanity as «inhumane acts causing great suffering, or serious injury to body or to mental or physical health […] when committed as part of a widespread or systematic attack directed against any civilian population». The key element to discern an act that would classify as crime against humanity from a terrorist offence that would be prosecuted under domestic criminal law is the notion of "widespread or systematic attack". "Widespread" is to be understood as a quantitative requirement of the terrorist acts, in the sense that they should have an impact on a large geographical area or determine a significant number of victims. The qualitative requirement of "systematicity" indicates a high degree of premeditation. Although the wording of the provision might suggest that those requirements are alternative, a systematic interpretation leads to the conclusion that they cannot but be cumulative[75].

5.1.1.2. The "Sharia4Belgium" case

A specific case that concerned the distinction between terrorism and international law crimes was the so-called "Sharia4Belgium" case[76]. To give a bit of context, the facts of the case will be briefly summarized.

In the Belgian neighborhood of Molembeeck, the jihadist terrorist cell "Sharia4Belgium" radicalized young individuals, predominantly of Belgian nationality, recruited them to join the fight against the regime of Bashar al-Assad of certain terrorist organizations in Syria (among which "Jabhat-Al Nusra" and "Majlis Shura Al-Mujahidin") and facilitated their journey abroad and back to Europe.

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[74] In that sense, G. WERLE – F. JEßBERGER, cit., 67. For a deeper understanding of the notion of crimes against humanity see G. FIORELLA, *I crimini contro l'umanità*, in M. MASUCCI (Ed.), *Strutture del diritto penale internazionale: interpretazione, applicazione, fattispecie*, Turin, 2017, 147 et seq.

[75] Cf. G. FIORELLA, cit., 169.

[76] For a succinct analysis read L. DELLA TORRE, *Tra guerra e terrorismo: le giurisprudenze nazionali alla prova dei foreign fighters*, in *Dir. Pen. Cont. - Riv. Trim*., 2017, 2, 170 et seq. and T. VAN POECKE – F. VERBRUGGEN – W. YPERMAN, *Terrorist offences and international humanitarian law: The armed conflict exclusion clause*, in *Int. Rev. Red Cross*, 2021, 103, 311 et seq.

Consequently, Belgian prosecutors pressed charges for terrorism related offences. The defensive strategy of the tried individuals' lawyers was to invoke the armed conflict exclusion clause (contained in Article 141-*bis* of the Belgian criminal code[77]) to obtain a declaration of lack of jurisdiction by the Court of Antwerp, in front of which the case was pending. The Court, however, rejected this line of reasoning with an interesting, allegedly quite innovative[78] approach. It shifted the focus from the victims of the violent acts perpetrated by the Jabhat-Al Nusra and Majlis Shura Al-Mujahidin to the latter. According to the Belgian judges, there was in fact a non-international armed conflict taking place in Syria. However, the local groups with which the Members of Sharia4Belgium were affiliated could not qualify as actors subject to the rules of international humanitarian law. Amongst the reasons for this conclusion the Court mentioned the absence of a clearly recognizable structure and command line (to ensure accountability for eventual violations of international humanitarian law) as well as the manifest unwillingness of those groups to respect the rules of international humanitarian law.

5.1.2. Selected critical aspects

Overall, the criminal offences contained in Article 3 seem to be less problematic than the "offences related to terrorist activities"[79]. Whereas the latter tend to criminalize acts that *per se* are neutral but become harmful due to the terrorist intent behind them, the former are almost all based on material acts that are intrinsically harmful. Put differently, terrorist intent becomes the distinguishing factor between lawful activity and crime, as far as offences under Title III are concerned, and between ordinary and terrorist crime, when it comes to the offences of Article 3. The different qualification is not a merely dogmatic

[77] Art. 141-*bis* c.p.: «Le présent titre ne s'applique pas aux activités des forces armées en période de conflit armé, tels que définis et régis par le droit international humanitaire, ni aux activités menées par les forces armées d'un Etat dans l'exercice de leurs fonctions officielles, pour autant qu'elles soient régies par d'autres règles de droit international».
[78] In that sense, L. DELLA TORRE, cit., 171.
[79] Cf. Chapter III, 5.3.

issue, given the harsher legal consequences that must be attached to terrorist offences[80].

Nevertheless, Article 3 is no stranger to criticism either. The most frequent criticism relates to the «overly capacious definition of terrorism»[81]. Although the process of national implementation can eventually improve the clarity and foreseeability of the terrorist offences, it could also happen that the European definition is simply rubber stamped or even implemented in vaguer terms, thus further broadening it[82]. Such «overly broad and vague definitions […] carry the potential for unintended human rights abuses and have been deliberately misused to target a wide variety of civil society groups, persons and activities»[83]. In other words, if left too broad, terrorist offences could become an arbitrary tool for the neutralization of "unpleasant" groups, in particular political opponents[84].

Secondly, the fact that "terrorist intent" is the key element of the definition is rather problematic[85]. It is impossible to know with absolute certainty what is going on in a person's mind. Ideally, intent should be inferred from objective, factual circumstances. However, some have voiced concerns that in practice intent

[80] See Article 15(2) Directive 2017/541: «Member States shall take the necessary measures to ensure that the terrorist offences referred to in Article 3 […] are punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special intent required pursuant to Article 3, except where the sentences imposable are already the maximum possible sentences under national law».

[81] Cf. T. GHERBAOUI – M. SCHEININ, cit. Plenty of other scholars, institutions and organizations share this point of view: For instance C. PÎRVULESCU, *Opinion of the European Economic and Social Committee on the proposal for a Directive on combating terrorism*, in *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52016AE0019*, § 3.2.2.1.; EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 6; M. GUTHEIL et al., cit., 19. However, there are also scholars who emphasize that a certain indeterminacy of the EU definition is inevitable, given that it constitutes a "minimum definition" in the sense of Article 83 TFEU. See in this sense F. ROSSI, *Il contrasto al terrorsimo internazionale nelle fonti penali multilivello*, cit., 154, according to whom any specification that is necessary to provide effective interpretational guidance is ultimately up to the Member States.

[82] Part of the Italian legal doctrine laments how difficult it is to clearly draw the line between terrorist and ordinary offences. Allegedly, the indeterminacy of the national definition leads to diverging judicial interpretations. The European definition (which is narrower than the Italian one) is seen as a helpful source for hermeneutical guidance. In that sense S. CRISPINO, cit., 227.

[83] H. DUFFY – R. PILLAY – K. BABICKA, cit., 20. See A. VALSECCHI, cit. for a critical review of the judicial qualification of acts of arson committed by an extremist animal rights activist as terrorist offences.

[84] This danger seems to be further enhanced by the inclusion of the threat to commit a terrorist offence in the list of material acts (see letter j).

[85] In the words of a scholar, interviewed by the EU's Agency for fundamental rights: «When the whole weight of a crime falls on a subjective element, then we have a problem». See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 34.

might be established based on subjective criteria or even presumed[86], thus reversing the burden of proof in violation of the presumption of innocence.

Another cause of concern is that national authorities might consciously or unconsciously interpret religious belief as an indicator of terrorist intent, which could have discriminatory effects on certain communities[87]. Allegedly «the disproportionate impact of many terrorism prosecutions on persons of the Muslim population in Europe is well documented»[88]. Whereas national criminal laws are generally said to be formulated in a non-discriminatory way, there seems to be a significant risk of indirect discrimination in the way those laws could be applied[89]. In the worst-case scenario this could go as far as establishing terrorist intent based on an individual's appearance rather than his or her deeds[90].

Whereas individuals holding certain religious beliefs seem to be more likely to be tried for terrorist offences, the Commission has highlighted that on the other hand national authorities seem to show a certain reluctance when it comes to qualifying right-wing terrorism as such[91]. Supposedly, the discrepancy between the number of investigations and adjudications for right-wing terrorism goes hand in hand with the tendency to treat violent acts of these groups and individuals as hate crimes rather than terrorist offences[92]. The recent attacks in Paris against Kurdish activists and their qualification by national prosecutors seem to confirm this trend[93].

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[86] See *Ibid.* 7.

[87] According to some, the Muslim community is at particular risk of being the target of discriminatory prosecution. Also, individuals of Arabic origin might be presumed to be of Islamic faith, simply based on their name. In that sense *Ibid.* 36. It is worth mentioning that the Union's Charter of Fundamental Rights explicitly codifies the principle of non-discrimination (Article 21) as well as the freedom of thought, conscience and religion (Article 10).

[88] H. DUFFY – R. PILLAY – K. BABICKA, cit., 17.

[89] In that sense M. GUTHEIL et al., cit., 22-23.

[90] See H. DUFFY – R. PILLAY – K. BABICKA, cit. ,18: «[…] when judges are assessing the case, certain types of evidence that have nothing to do with culpability may be cited as evidence. For instance: the length of a beard, or wearing a hijab, or wearing shorter trousers may be taken to form part of a picture of someone's criminality. Judges might not even be aware of all such small indications taking place throughout the trial, but these may influence the decision in a discriminatory way».

[91] Cf. EUROPEAN COMMISSION, *Evaluation of Directive (EU) 2017/541*, cit., 24.

[92] See *Ibid.*

[93] See *Shooting in Paris leaves three Kurdish activists dead, Macron condemns "heinous attack,"*, 2022, in *https://www.lemonde.fr/en/france/article/2022/12/23/shooting-in-central-paris-leaves-two-dead-four-injured_6008847_7.html*.

A final, very concerning issue is the potential of the broad European definition to encompass also acts committed by Freedom Fighters against dictator regimes that do not respect the fundamental values of democracy[94]. An influential academic[95] has observed that this is the consequence of the choice of the European legislator to use a "politically neutral" definition which omits any reference to democratic values or the Rule of Law. The case-law in certain Member States of the European Union shows that this is not a merely theoretical problem. For instance, the German Federal Court of Justice accepted, allegedly with a certain reluctance[96], the applicability of §89a StGB (which criminalizes preparatory acts for the commission of violent offences that endanger the State) even to acts directed against undemocratic or otherwise illegitimate regimes. Nevertheless, it implicitly acknowledged the awkwardness of this affirmation by demanding judicial restraint in the prosecution of such cases[97]. Aware of this issue, some Member States have departed from the politically neutral definition by adding specific exclusion clauses when the acts are committed with "noble" aims[98].

5.1.3. Terrorist offences in national law

Looking at the legal landscape across the Member States of the Union it becomes apparent that the European definition of terrorism has been implemented in different ways. This phenomenon was already highlighted in the final paragraphs of Chapter I, but it deserves to be analyzed in greater detail now that the general notions and principles dissected in Chapter II are clearer. Some national legislators have adopted narrow definitions, others have used normative techniques that significantly broaden the scope of the category of terrorist

[94] In that sense F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 152.
[95] Cf. S. GLESS, cit., 38: «A definition detached from any reference to values (like democracy or Rechtsstaat) or reasons for committing the terrorist act (like freedom fighting) leads to problems if a State wishes – maybe for good reasons – not to condemn certain violent acts as terrorist acts». The cited Author illustrates the problem by mentioning certain Nobel Peace laureates (such as Nelson Mandela) whose actions could fall under such a definition.
[96] In that sense A. CORNFORD – A. PETZSCHE, cit., 174.
[97] See *Ibid.* 175.
[98] Compare with S. GLESS, cit., 46, who mentions § 278(c)(3) of the Austrian StGB as an example.

offences – in some cases at the very limit of or even beyond what can be deemed to be acceptable according to the general principles of criminal law. The focus will be primarily on the Italian system of criminal justice, but other legal orders will also be considered. A cross-cutting observation that can be made for several national legal orders is that the domestic definition of "terrorist offences" often preceded the European one and hasn't been changed after the introduction of the latter.

5.1.3.1. Italy

As seen *supra*[99], Italy is among the Member States that have opted for a definition of terrorism which is broader than the European one. Whereas the Directive strictly "selects" the material acts that can constitute a terrorist offence (in the presence of the other two elements), the Italian legislator has refrained from carrying out such a "pre-selection" and simply transposed the European definition of "terrorist aim" into *Article 270-sexies c.p ("Condotte con finalità di terrorismo")*. The provision also requires that the conduct must, by nature or context, be suitable for causing serious damage to a country or an international organization, thus also emulating the generic objective element included in Article 3 of the Directive. Nevertheless, this restriction does not preclude extensive interpretations of the notion "conducts with terrorist aim" which is at the core of the Italian system of counterterrorism[100]. The low degree of specificity regarding the *actus reus* and the centrality of the terrorist intent (*mens rea*), have led one commentator to refer to these offences as «highly (if not exclusively) unbalanced towards the subjective side»[101]. Such objectively indetermined offences create tensions with the principle of legality, which can only be eased through corrective,

[99] See Chapter I, 5.3.1.
[100] In that sense, L. BRIZI, cit., 18-19, who observes that the provision has a differentiating purpose (between offences aggravated by the terrorist intent and other offences which are identical in terms of the material act) but also a constitutive one (it incriminates acts that would otherwise be perfectly legal).
[101] See *Ibid.* 18. The fear expressed by one of the scholars interviewed by the EU's Agency for Fundamental Rights (see Chapter III, Footnote 85) therefore seems to have become reality.

restrictive interpretations[102]. However, the penumbra of ambiguity which covers the objective element of terrorist offences leads to interpretational divergences[103].

For instance, an investigative judge in Florence relied on what a critical academic[104] has defined as an "excessively extensive" interpretation to qualify the setting on fire of eight vehicles inside a factory farm, committed by an individual who claimed to be acting on behalf of the "Animal Liberation Front", as a "conduct with terrorist aim" in the sense of Article 270-*sexies* c.p. The judge's reasoning was that the act had the potential to cause extensive destruction to a private property likely to result in major economic loss[105] and therefore could be subsumed under the European list of material acts. *A fortiori,* the conduct should be considered to cover the (broader) objective element of the national criminal offence. As for the subjective element, the motivation given by the judge was admittedly "expeditious"[106], given that the aim of seriously destabilizing or destroying the economic and social structures of the country was inferred from the programmatic objectives of the Animal Liberation Front rather than individually assessed[107]. From the standpoint of the critical scholar[108], only exceptionally serious destructions, capable of negatively affecting the national economy, hence endangering the general well-being and public order should be prosecuted as offences with terrorist aim. Allegedly, in this specific case, only the right to property of the owner of the damaged vehicles was affected, without the aforementioned, macro-economic consequences.

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[102] Cf. *Ibid.* 17. See also H. DUFFY – R. PILLAY – K. BABICKA, cit., 20: «The definition of terrorism under Article 3 of the Directive is broad […] Compliance with international human rights law principles of legality, prescription by law and necessity and proportionality requires both further specification in national legislation, and clear and restrictive judicial interpretation». Since the Italian legislator seems to have failed in his task of rendering the European provisions more specific the restrictive role of the judiciary becomes even more important. In their assessment of terrorist intent, Italian judges have been confronted with a miscellaneous case-law (anarchist groups, animal rights activists, football fans). See in this sense S. CRISPINO, cit. 235.

[103] The difficulty of implementing the requirement of seriousness into a fully intelligible norm was highlighted by P. ASP – S. DREW, cit., 7.

[104] See A. VALSECCHI, cit., 5.

[105] See Article 3(1)(d) of Directive 2017/541, former Article 1(1)(d) FD 2002/475/JHA

[106] In that sense A. VALSECCHI, cit., 5, commenting on Tribunale di Firenze (Uff. GIP), ord. 09.01.2013.

[107] The case therefore demonstrates what has been criticized in the Report of the Union's Agency for Fundamental Rights. Judicial authorities tend to settle for weak evidence to prove terrorist intent.

[108] A. VALSECCHI, cit., 7.

The case demonstrates the ambivalence of interpretation in light of Union law. Whereas the judge relied on the European definition to subsume the act under the national provision, the critical scholar used the same interpretative technique, but came to the exact opposite conclusion. Even though the European provisions definitely constitute an auxiliary point of reference for the interpretation of the domestic provision, thus compensating its vagueness, an even clearer definition at the EU level could increase this benefit.

5.1.3.2. Spain

The Spanish definition of terrorist offences goes, again, beyond the boundaries set by Article 3 of the Directive. A study which was completed in 2014 disclosed that Spain was the country with the highest number of judicial decisions that dealt with terrorism-related offences[109], which already hints that the national conception of terrorism is rather broad. In fact, among Spanish scholars[110] it has been claimed that nobody among the neighboring European Countries and the European Union has adopted a definition that comes close to the broadness of the domestic one.

The notion is defined by *Artículo 573 Código Penal*. A textual comparison with Article 3 of the Directive is already sufficient to understand that the Spanish legislator has gone way further than the European one[111]. Whereas both use the same normative technique, based on the combination of a list of material acts and specific, alternative aims, in both aspects the Spanish provision is broader. For instance, crimes that harm "moral integrity", "sexual liberty" or "the Crown", do not seem to be covered by the Directive. On the other hand, the European terrorist

[109] Cf. F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 231.
[110] Cf. M. CANCIO MELIÀ, *The reform of Spain's antiterrorist criminal law and the 2008 Framework Decision*, in F. GALLI – A. WEYEMBERGH (Eds.), *EU counter-terrorism offences: what impact on national legislation and case-law?*, Brussels, 2012. 108: «If one compares the terrorism offences in the Spanish PC above with the content of the 2002 Framework Decision and the legislation in nearby countries' legal systems, it is clear that none of the latter systems have a range of terrorist offences comparable to those set out in Spanish criminal law. The Spanish system is especially broad in this area of legislation, as has even been recognised in case law».
[111] In that sense N. CORRAL-MARAVER, *Der europäische Einfluss auf das spanische Terrorismusstrafrecht, insb. Umsetzung der EU-Richtlinie 2017/541*, in A. PETZSCHE – M. HEGER – G. METZLER (Eds.), *Terrorismusbekämpfung in Europa im Spannungsfeld zwischen Freiheit und Sicherheit: historische Erfahrungen und aktuelle Herausforderungen*, 1st Edition, Baden-Baden, 2019, 265.

aims are basically copy-pasted in the national provision, together with the generic aim of seriously altering public order[112].

Allegedly, the result of this catch-all definition is the potential qualification as terrorist offences of acts that do not, by any means, constitute serious violence against individuals[113]. In fact, Spanish prosecutors initiated criminal proceedings against Catalonian groups that had organized blockages of highways and railway stations. Even though there was no violence against individuals, the prosecution charged them with terrorist offences. In the end, the judges rejected the charges for terrorism and downgraded them to ordinary offences of public disorder. The Spanish judicial authorities can, in this case, be praised for having adopted a restrictive interpretation[114], although the broadness of legislation is no guarantee that it will happen in every case.

5.1.3.3. France

As seen in Chapter I, 5.3.3., the French definition of terrorist offences is another example of a broader definition than the European one. At this point it shall be shown that the French legislator tried to extend the list of criminal offences that can qualify as "terrorism" but faced judicial resistance.

In 1996, the French *Conseil constitutionnel* set an important precedent. Essentially, the Court ruled that the national legislator does not have absolute discretion when it comes to the selection of the criminal offences which can, by virtue of the terrorist aim, be "upgraded" to terrorist acts[115]. It stated that the material act of aiding the illegal entry, movement or residence of a foreigner does not constitute an immediate threat to persons or goods, that it is not directly linked

[112] See *Art. 573.1(2a) c.p.: «alterar gravemente la paz pública»*. This provision strongly resembles the French *421-1 c.p.* (already touched upon in Chapter I, 5.3.3.) which uses the formula «*troubler gravement l'ordre public par l'intimidation ou la terreur»*.

[113] See M. CANCIO MELIÀ, *Terrorismusbegriff und Terrorismusdelikte*, cit., 174; see also N. CORRAL-MARAVER, cit., 265, according to whom virtually any conduct that constitutes a "serious offence" (which admittedly is a very vague criterion for restricting the definition) could potentially qualify as terrorist offence, including illicit trafficking of drugs.

[114] In this sense M. CANCIO MELIÀ, *Terrorismusbegriff und Terrorismusdelikte*, cit., 174.

[115] Cf. Cons. Const., 16.07.1996, n. 96-377 DC, in *www.conseil-constitutionnel.fr*, § 9: «[…] en estimant que l'infraction […] est susceptible d'entrer dans le champ des actes de terrorisme tels qu'ils sont définis et réprimés par l'article 421-1 du code pénal, le législateur a entaché son appréciation d'une disproportion manifeste».

to the commission of an act of terror and that in this latter case the act would be sufficiently covered by other provisions[116]. Therefore, the attempt of extension was considered to be unconstitutional. In doing so, the Court implicitly revealed the pre-conditions for the inclusion in the list of the material acts.

5.2. Offences relating to a terrorist group

The conducts described within the provisions of the Directive that come immediately after Article 3 are all potential precursors to the commission of a terrorist offence. Given the severe consequences of the latter, the penal response can be legitimately anticipated to a stage where no actual harm (i.e. terrorist offence) has occurred yet, but it might occur in the foreseeable future[117]. This observation applies to the "offences relating to a terrorist group" as well[118]. It can be inferred from Article 13 of the Directive, which makes it abundantly clear that «[f]or an offence referred to in Article 4 […] to be punishable, it shall not be necessary that a terrorist offence be actually committed».

National criminal laws have been dealing with terrorism in its collective form for a long time. As seen above[119], this form of terrorism was the prevailing one during the '70s. This is reflected in the counterterrorism legislation of that time, which didn't really consider lone-actor terrorism. For instance, the first terrorism-related criminal offence to be introduced in the Italian legal order in 1980 was *Articolo 270 bis c.p.*, which deals precisely with associations constituted for the commission of acts with terrorist aim. Nowadays, individual actors or loosely organized terrorist groups without a strict hierarchical structure are on the

[116] See *Ibid.* §8: «[…] à la différence des infractions énumérées à l'article 421-1 du code pénal, l'article 21 incrimine non pas des actes matériels directement attentatoires à la sécurité des biens ou des personnes mais un simple comportement d'aide directe ou indirecte à des personnes en situation irrégulière […] ce comportement n'est pas en relation immédiate avec la commission de l'acte terroriste […] qu'au demeurant lorsque cette relation apparaît, ce comportement peut entrer dans le champ de la répression de la complicité des actes de terrorisme , du recel de criminel et de la participation à une association de malfaiteurs prévue par ailleurs».

[117] In that sense A. CORNFORD – A. PETZSCHE, cit., 172.

[118] See F. GALLI, *Italian counter-terrorism legislation. The development of a parallel track ("doppio binario")*, in F. GALLI – A. WEYEMBERGH (Eds.), *EU counter-terrorism offences: what impact on national legislation and case-law?*, Brussels, 2012. 91: «In Italy, the shift of criminal liability upstream from the commission of any harm has been firstly achieved by the application of 'association for terrorist purposes' offences which have played a central role in the repression of terrorism since the 1980-90s».

[119] See Chapter I, 2.

rise[120]. This led to an evolution of the criminal law on terrorism, which now deals with those phenomena too. Nevertheless, even today the provisions which incriminate offences relating to a terrorist group are still said to be at the very heart of national criminal anti-terror legislations[121]. In fact, when preparatory acts of terrorism (e.g. travelling for the purposes of terrorism) are committed in an associative context, it is likely that the offence of participation in a terrorist group – which is usually punished with heavier penalties – absorbs the former, since national criminal laws often contain subsidiarity clauses in favor of the latter[122].

5.2.1. Structure of the European offence

Article 4 obliges the Member States to punish the direction of a terrorist group, as well as the participation in its activities[123]. The normative content of the provision is complemented by Article 2, which defines the legal concept of "terrorist group", which needs to be dissected before analyzing the criminalized conducts.

5.2.1.1. The notion of "Terrorist group"

«Terrorist group means a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences»[124]. Structured group, on the other hand, indicates «a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership

[120] Cf. C. ANDREEVA, cit., 346.
[121] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 235; A. PETZSCHE, *Erneute Ausweitung des deutschen Terrorismusstrafrechts dank Europa? Zum Umsetzungsbedarf der EU-Richtlinie 2017/541*. 211; V. NARDI, cit. 117.
[122] For instance, Articles 270 *quarter* – *quinquies.1* of the Italian criminal code (dealing with recruitment, organization of travelling, training and financing of acts for terrorist purposes) are all in a relationship of explicit subsidiarity with the "catch-all", associative offence contained in Article 270 bis.
[123] See Article 4 Directive 2017/541: «Member States shall take the necessary measures to ensure that the following acts, when committed intentionally, are punishable as a criminal offence: (a) directing a terrorist group; (b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group».
[124] Article 2(3) Directive 2017/541.

or a developed structure»[125]. Substantially, these provisions are identical with Article 2 of Framework Decision 2002/475/JHA. This latter provision has been said to draw on the provisions of national criminal codes and on the EU definition of "criminal organization" which was established by the Council's Joint Action 98/733/JHA[126] and later replaced by Council Framework Decision 2008/841/JHA. Allegedly, the current European definition of criminal organization combines elements of the Joint Action with the UN definition contained in the so-called "Palermo Convention"[127]. Since terrorist groups can be regarded as a specific type of criminal organization and the two definitions partially overlap, it is useful to take the academic literature on organized crime into account.

The legal concept of "terrorist group" (just like the concept of criminal organization) relies on the "negatively defined"[128] notion of "structured group", whose fundamental aim is to set occasional cooperation between individuals for the purpose of committing a specific terrorist offence apart from terrorist groups in the proper sense. In the first case, the involved individuals should be tried, depending on the facts of the case, for participation in a (consummated or attempted) terrorist offence, or in an offence related to terrorist activities, but not for participation in a terrorist group. However, the vague criteria on which the definition of terrorist groups is based, together with the complete lack of positive definitional features[129] seem to hinder the establishment of a clear division between these two concepts[130].

By defining terrorist groups as "structured groups", Article 2 of the Directive implies that there needs to be a minimum level of organizational structure. At this point, additional emphasis must be put on the term "minimum", since it is explicitly stated that a strongly organized, hierarchical structure is *not*

[125] *Ibid.*
[126] Cf. E. DUMITRIU, cit., 597; F. GALLI, *Terrorism*, cit. 406.
[127] See F. CALDERONI, *A Definition that Could not Work: the EU Framework Decision on the Fight against Organised Crime*, in *Eur. J. Crime Crim. Law Crim. Justice*, 2008, 16/3, 275.
[128] In that sense *Ibid.*; E. DUMITRIU, cit., 598.
[129] See F. CALDERONI, cit., 271.
[130] In that sense *Ibid.* 277-278.

necessary[131] (first negation). It seems clear that the goal of this broad definition is to keep up with the evolution of the terrorist threat, which has seen a shift towards loosely organized terrorist cells. This seems to open the door for very extensive interpretations of the notion, even though it becomes a bit more intelligible due to the numeric requirement of at least three members. Moreover, the group must *not* be «randomly formed for the immediate commission of an offence» (second negation), which supposedly implies that the terrorist offences must be premeditated[132].

This lastly mentioned (negative) requirement and the (positive) requirements that a terrorist group needs to be "established for a period of time" and that its members need to "act in concert to commit terrorist offences" seem to be two sides of the same coin. These requirements' restrictive capacity has been contested in legal scholarship[133]. Since the intermediary aim of terrorist groups is the commission of terrorist offences (note how the European legislator chose the plural form) and these are characterized by specific aims, it is reasonable to conclude that the ultimate aim of terrorist groups corresponds to those referred to in Article 3(2) of the Directive.

Overall, the Union seems to have opted for a wide definition of terrorist groups encompassing any type of formal or informal structure that is aimed at the commission of terrorist acts[134]. In legal scholarship, diverging opinions have been expressed on the European legislators' choice to embrace such an extensive notion of "structured group". On the one hand, there are some who argue that the concept is not broad enough[135]. On the other hand, there are concerned

[131] This wide understanding of the notion seems to clash with the recommendations expressed by E. SYMEONIDOU-KASTANIDOU, *Towards a New Definition of Organised Crime in the European Union*, in *Eur. J. Crime Crim. Law Crim. Justice*, 2007, 15/1, 102.
[132] Opinion expressed by E. DUMITRIU, cit., 598.
[133] See F. CALDERONI, cit., 271-272.
[134] Cf. E. DUMITRIU, cit., 598.
[135] See in that sense J. BURCHETT – A. WEYEMBERGH – G. THEODORAKAKOU, cit., 41: «[…] the definition of terrorist group in Article 4 of the Directive fails to take into account the changing nature and loosening of the structure of terrorist groups. The definition in the Directive requires a certain degree of organisation that is not often present according to these stakeholders». See also E. SYMEONIDOU-KASTANIDOU, cit., 100.

academics[136] who claim that such a wide understanding blurs the line between collective and individual terrorism. Allegedly, «the vague definition of the notion […] may raise problems relating to the principle of legality and its corollaries of clarity and precision of criminal law. The definition, as it appears, is so vague as to deprive the notion of structured [group] of large part of its selective potential»[137]. Therefore, the specification of the concept at the national level proves essential to comply with the principle of legality[138], although it must not be forgotten that according to the consolidated case-law of the ECtHR judicial interpretation can contribute to the clarification.

5.2.1.2. Direction and participation in terrorist groups

Having clarified the meaning of terrorist group according to Union law and the potential shortcomings of this definition it is time to address the two conducts that constitute "offences relating to a terrorist group" according to Article 4.

The provision foresees two *acti rei*, both of which need to be committed intentionally to be punishable as criminal offences. The basic associative offence is «participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group»[139]. The notion of "participation" is rather ambiguous and needs to be interpreted restrictively to comply with the *lex certa* requirement and the principle of proportionality. Otherwise, it risks criminalizing acts of mere ideological adherence, which do not surpass the threshold of harmfulness, as participation in the activities of a terrorist group[140]. However, participation also includes formally non-criminal support activities[141], some of

[136] For instance F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 137.
[137] F. CALDERONI, cit., 272. This observation was actually made about the notion of "structured association" contained in the Framework Decision on organized crime but given the similarity of the respective provisions it is reasonable to extend this criticism to Directive 2017/541.
[138] See *Ibid.*
[139] Article 4(b) Directive 2017/541.
[140] See F. ROSSI, *Il contrasto al terrorismo nelle fonti penali multilivello*, cit., 137.
[141] See F. CALDERONI, cit., 277.

which are expressly codified in Article 4. Their criminalization is justified as long as they are directly linked to the terrorist activities of the group[142]. Also, the participant must be conscious about the terrorist aims of the group. However, by stating that «[i]ntent should be confined to specific intent to support the group in committing acts of terrorism, *or disregard of knowledge* that acts of terrorism are likely to directly result from such support»[143], the International Commission of Jurists seems to take the position that *dolus eventualis* is sufficient to be punishable for participation in a terrorist group. Also, in light of Recital 38 of the Directive humanitarian activities by impartial humanitarian organizations recognized by international law cannot qualify as contribution to the criminal activities of a terrorist group in the sense of Article 4.

Alongside participation, the Directive obliges to incriminate the direction of a terrorist group. The concept of "direction" seems to be subsumable under the broader notion of participation. However, it seems as if this specific conduct is singled out because occupying a leadership role is seen as more reprehensible than being a "mere" participant. The higher degree of culpability is reflected in Article 15, which sets a higher minimum-maximum penalty for the act of directing the terrorist group[144].

5.2.2. National implementation

Article 4, combined with the relevant definitions in Article 2 uses vague terms which, as seen, require specification by national lawmakers and judges. In the following paragraphs some of the prospected solutions shall be analyzed.

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[142] Cf. H. DUFFY – R. PILLAY – K. BABICKA, cit., 22: «Incidental or unintentional contributions to a terrorist group in direct support of non-terrorist conduct, such as cooking meals, providing other services or goods not directly linked with violent or terrorist acts, and the mere fact of association with other individuals, should not itself be considered to amount to participation without subjective intent to contribute to a crime of terrorism or disregard that that such acts are likely to directly result from such support».

[143] *Ibid.*

[144] See Article 15(3): «Member States shall take the necessary measures to ensure that offences listed in Article 4 are punishable by custodial sentences, with a maximum sentence of not less than 15 years for the offence [of direction] and for the offences [of participation] a maximum sentence of not less than 8 years».

5.2.2.1. Italy

In Italy, Article 270-*bis* c.p. incriminates the promotion, establishment, organization, direction and the financing of terrorist groups, as well as the participation in them[145]. Mere participants are subject to more lenient penalties than members that engage in one of the other mentioned activities. Interestingly, whereas for common criminal organizations and mafia-type organizations the Italian criminal code foresees a numeric threshold of at least three members[146], such a restriction is nowhere to be found in Article 270-bis. In this respect the Italian notion seems to be wider than the European one, although domestic judges might recuperate this requirement by interpreting the provision restrictively in the light of the Directive.

The crucial interpretative pivot that has divided the Italian judiciary is when an individual can be considered to "participate" in the terrorist group. Allegedly, the judicial decisions in this regard can be classified in two main categories.

According to a first, restrictive string of judicial decisions[147], there are three conditions to be fulfilled to hold an individual liable for participation in a terrorist group. Firstly, the existence of a criminal structure that has the means for executing terrorist plots. Once that condition is met, the individual can be held criminally liable for participation only if he or she is a stable member of such an organization and acts in a way that is functional to the commission of a terrorist offence and expresses a certain degree of concretization of the group's criminal program. In other words, the actions must represent an effective contribution towards the realization of the terrorist aims described in Article 270-*sexies*[148].

[145] Cf. F. GALLI, *Italian counter-terrorism legislation*, cit., 91.
[146] See Articles 416 and 416-*bis* c.p.
[147] Decisions in that sense include Cass. Pen., Sez. V, 14.07.2016, n. 48001, in *archiviodpc.dirittopenaleuomo.org*, which recalls Cass. Pen., Sez. V, 08.10.2015, n. 2651, in *www.altalex.com*.
[148] Cf. L. D'AGOSTINO, *I margini applicativi della condotta di partecipazione all'associazione terroristica: adesione psicologica e contributo causale all'esecuzione del programma criminoso*, in *Dir. Pen. Cont. - Riv. Trim.*, 2017, 1, 82-83.

Allegedly, these solutions' safeguarding purpose is commendable, but they seem to contradict the broader definition of the Directive[149].

The second category comprises extensive, "distortive" interpretations which are said to be in line with the European definition[150]. However, this overly broad understanding of "participation in a terrorist group" raises concerns. It can lead to the anticipation of criminal liability to a point where the plans of the association have only been vaguely sketched out, or remotely envisaged and the organization isn't capable of being operative yet, hence not posing an actual danger to collective security. Individuals who merely share ideological values with such a group and are in contact with its members without actively participating in the activities of the group might risk being criminally prosecuted. Such an extensive application of the criminal provision could amount to a violation of fundamental rights, including freedom of assembly, expression, thought, conscience and religion. Also, certain inchoate offences (e.g. receiving training) could become substantially obsolete because the precursor-conduct would in most cases amount to participation in a terrorist group[151].

In 2018, the Supreme Court of Cassation ruled on the matter and applied an interpretation that has been described as a compromise between the two "extremes" that have just been analyzed[152]. This approach has been praised because it aims at striking a reasonable balance between ensuring a high level of security and protecting fundamental rights[153].

The Court confirmed – with a view to the principles of harm and legal certainty – the first requirement of the abovementioned, restrictive case-law: the association must have a level of organization that makes it possible to execute

[149] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 182 et seq.
[150] Two important decisions which scholars subsume under this category are Cass. Pen., Sez. V, 13.07.2017, n. 50189, in *archiviodpc.dirittopenaleuomo.org*, and Cass. Pen., Sez. VI, 19.12.2017, n. 14503, *ivi.*
[151] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 184 et seq.
[152] Cf. *Ibid.* 187.
[153] Cf. G. MORGANTE – R. DE PAOLIS, cit., 94: «The domestic experience of associate crimes and the most recent case law clearly shows how the interpretation of counterterrorism legislation could be guided towards a sustainable balance between public security protection, efficiency and compliance with fundamental rights».

terrorist offences, thus creating a tangible security threat[154]. However, it loosened the second condition of stable membership[155], which usually applies to associative offences[156], to adapt it to the increasingly flexible structure of modern terrorist organizations (especially jihadist groups). The Court stated that the cellular, horizontal and transnational structure of terrorist organizations such as ISIS implies that its members can be tied to each other by loose, sporadic contacts that do not need to be direct or physical. Furthermore, it emphasized that psychological adherence alone is certainly insufficient to qualify as participation in a terrorist group[157]. The effective integration in the organization must be manifested through symptomatic acts that effectively cause a reinforcement of the group's capability of executing its terrorist aims[158].

This intermediary path was substantially reconfirmed in a decision of 2019[159]. On that occasion the Supreme Court held that "non-traditional" organizational schemes – in which the members might not even know each other and maintain exclusively telematic contacts to one another – can still constitute a terrorist group. While upholding the idea that ideological adherence alone is insufficient to be considered a participant in the terrorist group, the Court acknowledged that in practice it is difficult to establish clear criteria for discerning active participation from legally licit, albeit morally deplorable, manifestations of freedom of expression[160].

[154] See Cass. Pen., Sez. II, 27.04.2018, n. 38208, in *www.italgiure.giustizia.it*, (*Waqas)*.
[155] In that sense, L. D'AGOSTINO, cit., 86.
[156] Cf. Cass. Pen., Sez. III, 30.01.2020, n. 11570, in *dirittopenaleuomo.org*.
[157] See H. DUFFY – R. PILLAY – K. BABICKA, cit., 23: «Participation cannot be understood as the mere acquisition of a status, nor can it be inferred from the adherence to a criminal programme or common aspirations with the associates. It has also been clarified in the Italian case law that the "contribution" to the terrorist group must be "an efficient causal contribution to the existence, the survival or the operation of the association».
[158] See Cass. Pen., *Waqas*, cit.
[159] See Cass. Pen., Sez. II, 04.12.2019, n. 7808, in *www.italgiure.giustizia.it (El Khalfi).*
[160] For instance, if a terrorist sets up a group chat to recruit like-minded individuals, the mere acceptance of an invitation to join it might not be sufficient to be considered as a participant. However, if the newly entered individual starts interacting with the group chat, his/her actions might suffice to qualify him/her as a participant in a terrorist group, depending on the concrete way he/she delivers his opinions.

Under Italian criminal law, an individual that is not a direct participant in an associative crime can usually still be convicted for "external support"[161] of the association. However, a scholar[162] argues that the associative crime under Article 270-*bis* c.p. is interpreted so extensively that this results in a *de facto* abolition of the figure of the external supporter when it comes to terrorist associations.

5.2.2.2. Germany

§ 129a of the StGB is said to be the core provision for German counterterrorism[163]. The provision dates back to 1976 and has seen only minor amendments since then, which were aimed at ensuring the implementation of international and European obligations[164].

The German understanding of the concept of "terrorist group" seems very much in line with the European one[165]. However, while for predicate offences under sub-section two the specific terrorist aim is required, this is not necessary for the predicate offences listed in sub-section one[166].

As far as "offences related to a terrorist group" are concerned, §219a covers a variety of conducts, which include participation (as one of its members) in a terrorist association[167], as well as (external) support of such an association[168]. The German approach seems to be based on a narrower understanding of the concept of "participation in a terrorist group" compared to the Italian one. This can be inferred from the fact that the German legislator has explicitly

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[161] Compare with L. D'AGOSTINO, cit., 90 referring to the so-called "*concorso esterno in reato associativo*". The notion is comparable to the German offence of "support of a terrorist group" under §129a, Abs. 5 StGB. Further relevant academic literature on the notion of external support of terrorist associations includes M. MICCICHÈ, *La partecipazione all'associazione terroristica di cui all'art. 270-bis c.p.: tra concorso esterno e reati di supporto.*, in *Giurisprudenza Penale Web* 2019, 4; A. PECCIOLI, *Il concorso esterno nei reati di associazione terroristica*, in R. BARTOLI (Ed.), *Responsabilità penale e rischio nelle attività mediche e d'impresa*, Florence, 2010, 681 et seq.

[162] See L. D'AGOSTINO, cit., 91-92.

[163] In that sense, A. CORNFORD – A. PETZSCHE, cit., 191.

[164] Cf. M. BÖSE, cit., 67-68.

[165] See A. CORNFORD – A. PETZSCHE, cit., 192. The organizational structure is defined via reference to ordinary criminal organizations (§ 129 StGB), a definition which matches Article 2 of the Directive.

[166] Observed by M. BÖSE, cit. 68.

[167] See §129a, sub-sections 1 and 2 StGB.

[168] See §129a, sub-section 5 StGB.

differentiated acts of support by an individual who remains an *extraneus* to the association from active participation by an *intraneus*. Hence, in the German courts' understanding, participation requires integration into the organization, which cannot be accomplished unilaterally, but on the contrary requires an element of reciprocity; in other words, an act of acceptance by the group[169]. Allegedly, «an outsider does not become a member by the promotion of the organisation alone […] Participation as a member is therefore excluded if these actions are not supported by a shared intention that the defendant continue to participate in the organisation»[170]. Once the requirement of integration has been fulfilled, the individual needs to perform acts that actively promote the group's criminal objectives[171].

The offence of "support of a terrorist association", aims at targeting conducts committed by individuals that, for lack of integration, cannot be considered members. The norm covers acts that have a beneficial causal effect on the criminal potential of the association by «enhancing or securing the specific potential threat that the organisation poses»[172]. German judges have excluded that mere endorsement of terrorist groups, justification of their aims or glorification of their acts are sufficient to be punished under §219a Abs. 5 StGB.

The German approach seems to have the benefit of leaving an actual ambit of application to other inchoate offences (public provocation, recruitment etc.), which would be applied sporadically if the offences of participation in and support of a terrorist association were interpreted extensively and thus rendered "omnivorous".

5.3. Offences related to terrorist activities

The Directive's Title III, dedicated to offences related to terrorist activities contains the most innovative provisions compared to the previous Framework Decisions, although they had already introduced certain "offences linked to

[169] Cf. A. CORNFORD – A. PETZSCHE, cit., 194.
[170] *Ibid.*
[171] In that sense *Ibid.*
[172] *Ibid.* 196.

terrorist activities"[173]. These offences constitute an anticipated use of criminal law and allegedly they are the most criticized provisions in legal scholarship[174]. In certain cases, they seem to be strongly subjectivized offences that criminalize substantially harmless, neutral acts merely because of the intentions behind them[175]. This might cause frictions with the harm principle, given that those preparatory acts are far from being intrinsically harmful[176]. These critical remarks stand in stark contrast to the Union's view, which is reflected in Recital 9: «The offences related to terrorist activities are of a very serious nature as they have the potential to lead to the commission of terrorist offences and enable terrorists and terrorist groups to maintain and further develop their criminal activities, justifying the criminalisation of such conduct». The Union seems to give a rather succinct and general justification for the need to rely on criminal law, which underscores the tendency at the EU to presume its effectiveness[177] rather than effectively looking for alternative measures, in conformity with the *ultima ratio* principle.

Also, in the attempt to provide a comprehensive protection against the terrorist threat, the European legislator has created partially overlapping offences[178] without providing guidance on how to solve the eventual applicability of several offences, which might compromise legal certainty.

It is important to note that the Directive does not require the explicit introduction of the offences described in Articles 5-12. What matters is that those EU-offences are punishable as criminal offences under national law, a result which can also be achieved through interpretative subsumption under other offences rather than through legislative introduction of a specific, new offence[179].

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[173] See Article 3 FD 2002/475/JHA as amended by FD 2008/919/JHA. Public provocation to commit a terrorist offence, recruitment for terrorism, providing training for terrorism (but not receiving it), as well as aggravated theft, extortion and drawing up false administrative documents with a view to committing a terrorist offence were all already codified before the Directive came into force.

[174] Cf. F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello* cit., 118.

[175] Opinion expressed *Ibid.* 148.

[176] In that sense T. GHERBAOUI – M. SCHEININ, cit.; Compare also with T. A. ZWEIGLE, cit., 60-61, who suspects that the actual goal behind the penalization of such acts is sending a reassuring signal to the public, rather than providing a proportionate protection of legal interests.

[177] Observation by S. S. BUISMAN, cit., 176.

[178] See T. GHERBAOUI – M. SCHEININ, cit.

[179] This possibility is explicitly acknowledged with reference to travelling for the purpose of terrorism. See in that sense F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali*

5.4. Public provocation to commit a terrorist offence

Terrorism is a criminological phenomenon which is driven by ideology. To gain support for their cause, terrorists often try to incite others to commit terrorist offences. Whereas a few decades ago this tended to happen in restricted social circles, nowadays terrorists can quite easily spread their propaganda among a much wider audience. The cyberspace provides a fertile terrain for the dissemination of messages and content that directly or indirectly advocates the commission of terrorist offences[180]. In this context, the enhanced capability of jihadist terrorists to spread their messages through new technologies and mass media[181] has led experts to coin the term "Cyber Califate"[182]. Although the spreading of such content undeniably takes place predominantly online, radicalization in the real world continues to be a problem too. For instance, according to Europol's Terrorism Situation and Trend Report of 2021, radicalization of individuals in prison is a cause of concern among Member States[183].

Aware of the potential threat deriving from the manipulation of susceptible individuals, the European legislator has addressed the issue by obliging Member States to criminalize "public provocation to commit a terrorist offence"[184], in line

multilivello, cit., 144 who emphasizes that Recital 12 explicitly envisages the possibility for Member States to cover the act of travelling for the purpose of terrorism by criminalizing preparatory acts committed with a view to commit or contribute to a terrorist offence.

[180] Cf. EUROPEAN UNION AGENCY FOR LAW ENFORCEMENT COOPERATION, cit., 5: «The online domain plays a crucial role in enabling violent extremists to spread their propaganda and sow hatred among potentially vulnerable and receptive audiences». See also K. RAMEŠOVÁ, *Public Provocation to Commit a Terrorist Offence: Balancing between the Liberties and the Security*, in *Masaryk Univ. J. Law Technol.*, 14/1, 2020, 125-126. The Author mentions Whatsapp, Viber, Skype, Facebook and Twitter as main platforms for the dissemination of terrorist propaganda.

[181] In that sense V. NARDI, cit., 120.

[182] See E. MAZZANTI, *L'adesione ideologica al terrorismo islamista tra giustizia penale e diritto dell'immigrazione*, in *Dir. Pen. Cont. - Riv. Trim.*, 2017, 1, 29; P. CIRILLO, cit., 84.

[183] Cf. EUROPEAN UNION AGENCY FOR LAW ENFORCEMENT COOPERATION, cit., 16.

[184] See Article 5 Directive 2017/541: «Member States shall take the necessary measures to ensure that the distribution, or otherwise making available by any means, whether online 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 (i) of Article 3(1), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally».

with a comparable obligation established by the Council of Europe in 2005[185]. At the EU level, the offence was first introduced through the Framework Decision of 2008[186] and later refined by Directive 2017/541. The respective provisions of the two acts are similar, although the latter has added a few specifications that attribute a wider scope to the criminal offence[187]. In fact, Article 5 of the Directive seems like an ambitious[188] attempt to ensure complete and effective protection against the potential radicalization of susceptible recipients, while at the same time granting respect for freedom of expression by avoiding over-criminalization. However, the danger of overly broad application of the offence at the domestic level persists[189], with a consequential risk that freedom of expression is compressed beyond the limits of acceptable interference set out by Article 10 ECHR[190].

5.4.1. Terminology

It should be noted that the terminological choices of Article 5 are rather unfortunate. First, the usage of the term "incite" might cause some confusion, since the "incitement" of terrorist offences (and all the other offences contained in the Directive) seems to be already covered by Article 14. This evidently implies that incitement and public provocation are two different, yet similar concepts.

[185] See Article 5 of the CoE Convention on the Prevention of Terrorism: «1. For the purposes of this Convention, "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed. 2. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law».

[186] See K. RAMEŠOVÁ, cit., 128-129; P. CIRILLO, cit., 86; V. NARDI, cit., 122.

[187] Observation by K. RAMEŠOVÁ, cit., 132. However, some additions are mere clarifications and do not really extend the offence's scope compared to the previous version. Cf. A. PETZSCHE, *Erneute Ausweitung des deutschen Terrorismusstrafrechts,* cit., 218-219.

[188] See A. PETZSCHE, *The Penalization of Public Provocation to Commit a Terrorist Offence – Evaluating Different National Implementation Strategies of the International and European Legal Framework in Light of Freedom of Expression*, in *Eur. Crim. Law Rev.*, 2017, 7/3, 243. The Author stresses that «the need to safeguard the conflicting value of free speech while intending to prevent terrorist propaganda creates a difficult context».

[189] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 149, according to whom the formulation of the European norm makes restrictive interpretations of the offence unlikely.

[190] Cf. A. PETZSCHE, *The Penalization of Public Provocation to Commit a Terrorist Offence*, cit., 246.

Moreover, the terms "glorification" and "advocates" further amplify this terminological mess, which needs to be put into order before diving into the examination of the structure of the offence.

First of all, advocation and provocation to commit terrorist acts can be seen as interchangeable formulas. A more complex issue is the difference between incitement in the proper sense (Article 14) and public provocation (Article 5). It has been observed that "incitement" is an ambiguous legal notion for which there is no internationally binding or widely recognized definition[191]. In this sense the Directive is not exceptional, given that it prescribes the punishment of incitement of certain offences without defining the term. Consequently, every Member State implements this obligation according to the national understanding of "incitement". However, a systematic interpretation of the provisions of the Directive and of domestic legal frameworks seems to reveal that incitement refers to acts of exhortation directed towards one or more specifically identified individuals (*ad certam personam*), while public provocation apparently alludes to the spreading of inciting messages among a general audience ("the public") without knowledge of who will actually be reached by the message (*ad incertam personam*)[192].

The European legislator chose a comprehensive approach by stating that those messages can advocate the commission of terrorist offences directly or indirectly. "Glorification of terrorist acts" is explicitly mentioned as an example of indirect public provocation.

5.4.2. Structure of the European offence

Public provocation can be categorized as a causal criminal offence. It is made up of two objective elements (a conduct and an event) and a subjective one[193]. The incriminated event is the danger that one or more terrorist offences

[191] In that sense *Ibid.* 243.
[192] Compare with V. NARDI, cit., 123-124; also P. CIRILLO, cit., 84 and 89, who uses the notion "propaganda *erga omnes*" and states that the message should have an "indefinite diffusive potential". It is also noteworthy that whereas for public provocation Article 13 applies, and hence it is not necessary that a terrorist offence is actually committed, it seems as if the same cannot be said about incitement.
[193] See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 51.

may be committed. This event must be caused through the act of distributing or making available a message *to the public,* which advocates the commission of terrorist offences[194]. As said before, this advocation can be direct or indirect. Article 5 also specifies – in what seems an attempt to catch all the means that could be used to spread propaganda – that the message can be directly distributed or otherwise made available by *any* means, whether online or offline. As for the *mens rea,* the provision requires that those acts are committed intentionally and with the specific aim of inciting the commission of a future terrorist offence[195].

According to Article 13 it is not necessary to establish a link between the public provocation and another specific offence laid down in the Directive. This makes sense, since it is virtually impossible to prove that a specific terrorist attack (or an inchoate offence) was a causal consequence of the inciting message distributed or made available by any means to the public. In the European legislator's assessment, the mere causation of a concrete danger is sufficient to legitimize and justify the penal response. However, the dangerousness of the message must be assessed on a case-by-case basis, considering the specific circumstances of the case[196].

5.4.3. Selected critical aspects

It has been claimed that Article 5 (together with Article 15), poses the greatest threat to freedom of expression given that it directly criminalizes acts of communication[197]. One commentator[198] observed that the problem is not the resort

[194] According to the UN Special Rapporteur on Counterterrorism «the conduct (speech) should increase the likelihood of a terrorist act being committed», see H. DUFFY – R. PILLAY – K. BABICKA, cit., 26.
[195] See *Ibid.*
[196] Cf. Recital 10 Directive 2017/541: «The offence of public provocation to commit a terrorist offence act comprises, inter alia, the glorification and justification of terrorism or the dissemination of messages or images online and offline, including those related to the victims of terrorism as a way to gather support for terrorist causes or to seriously intimidate the population. Such conduct should be punishable when it causes a danger that terrorist acts may be committed. In each concrete case, when considering whether such a danger is caused, the specific circumstances of the case should be taken into account, such as the author and the addressee of the message, as well as the context in which the act is committed. The significance and the credible nature of the danger should be also considered when applying the provision on public provocation in accordance with national law».
[197] See H. DUFFY – R. PILLAY – K. BABICKA, cit., 25. As seen in Chapter II, 2.3.1. such restrictions must comply with the requirements of legality, necessity and proportionality.

to criminal law *tout court*, but how the European legislator chose to criminalize. Indeed, the provision seems to have numerous shortcomings that drive it far away from the ideal European criminal policy. The most frequent criticisms will be analyzed in the following.

As ever so often, the offence of public provocation to commit a terrorist offence has been described as having a very wide and opaque[199] scope of application, *inter alia* due to the formula "by any means", which has sparked criticism because of its indeterminacy[200]. Some argue that the provision is incompatible with the principle of legality, especially with the qualitative requirement of foreseeability, since it fails to effectively put individuals in a position where they know the consequences of their actions in advance[201]. In fact, the distinction between (morally deplorable yet legal) freedom of expression and public provocation to commit a terrorist offence seems extremely labile[202].

The attribution of criminal relevance to indirect forms of public provocation ("*apologie* of terrorism"[203]) seems to aggravate this issue and further expand the already worryingly strong penal response provided for incitement of terrorism, thereby paving the way for unjustified, disproportionate compressions of the freedom of expression[204]. It was shown *supra*[205] that the European Court of Human Rights upholds a very extensive understanding of freedom of expression, which also covers ideas and opinions that are offensive, shocking or disturbing[206].

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[198] P. CIRILLO, cit., 93-94.
[199] Observation by V. NARDI, cit., 129.
[200] Cf. F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 150.
[201] See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 53: «NGOs, academics and defence lawyers across Member States criticise the different forms of the public provocation offence for being unclear, hard to qualify and vague, noting that jurisprudence does not offer clear criteria to distinguish lawful forms of expression from illegal ones».
[202] In that sense K. RAMEŠOVÁ, cit., 135: «The scope of freedom of speech, when it comes to terrorist propaganda, remains blurred due to many indefinite legal terms used, which might be problematic regarding principles of foreseeability and unambiguity of criminal law».
[203] See A. PETZSCHE, *The Penalization of Public Provocation to Commit a Terrorist Offence*, cit., 243. On a comparative note, the UN only requires penalization of direct incitement.
[204] Cf. V. NARDI, cit., 126. In fact Article 5 does not seem to comply with the UN Human Rights Committee's recommendation that «offences of "praising", "glorifying", or "justifying" terrorism should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression», see H. DUFFY – R. PILLAY – K. BABICKA, cit., 24.
[205] See Chapter II, 2.3.1.
[206] The Directive seems to indirectly refer to that case-law through Recital 40: «Nothing in this Directive should be interpreted as being intended to reduce or restrict the dissemination of information for scientific, academic or reporting purposes. The expression of radical, polemic or

Consequently, a «too extensive criminalization would risk having a chilling effect on political speech and on media coverage of terrorism-related news»[207], leading to self-censorship[208]. Ideally, not just any act of glorification or justification of terrorism should be considered to be criminally relevant for the purposes of Article 5. Only acts that cause a concrete danger that a terrorist offence may be committed (according to an *ex ante* assessment) should amount to public provocation. This would ensure respect for the principle of harm and for freedom of expression.

However, the element of concrete danger is itself quite problematic. Allegedly, the inherent evidentiary difficulties (which seem to make the offence difficult to reconcile with Busiman's criterion of effectiveness) leave a great margin of maneuver to judicial authorities[209]. In the absence of objective, universal criteria to guide the judicial assessment[210], the risk of arbitrary decisions[211] that «condemn a specific opinion rather than prevent a real danger»[212] seems real. Although Recital 10 prescribes to assess whether the advocation concretely creates a danger that terrorist offences will be committed based on all circumstances of the case, academics[213] have argued that in this regard judicial practice is at risk of taking evidentiary shortcuts. More precisely, judges might be tempted to presume the dangerousness of the propagated message simply because

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controversial views in the public debate on sensitive political questions, falls outside the scope of this Directive and, in particular, of the definition of public provocation to commit terrorist offences».

[207] A. PETZSCHE, *The Penalization of Public Provocation to Commit a Terrorist Offence*, cit., 242-243.

[208] See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 54.

[209] See P. CIRILLO, cit., 95; V. NARDI, cit., 130.

[210] See P. CIRILLO, cit., 91. A public prosecutor who was interviewed by the Union's Fundamental Rights Agency stated that «There are no provisions or guidelines or other tools, and they have not been further specified by legal provisions. The concepts of provocation and incitement are very subtle and therefore judged on a case-by-case basis. The general criteria have been delineated in jurisprudence and theory but not [specifically in relation] to public provocation or incitement to commit acts of terrorism», see EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 53.
The International Commission of Jurists has pointed to the "Rabat Plan of Action" as (non-binding) source guidance which mentions *inter alia* the following criteria: context, position of the speaker, intent, content and form, extent of speech (see H. DUFFY – R. PILLAY – K. BABICKA, cit., 25). K. RAMEŠOVÁ, cit., 134 also mentions the addressees of the message as a circumstance to be borne in mind.

[211] See V. NARDI, cit., 130.

[212] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 57.

[213] For instance F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 150; P. CIRILLO, cit., 89.

of the terrorist intent of the individual, which in turn could simply be inferred from his or her personal background and the proximity to a terrorist environment (subjectification of the offence due to evidentiary difficulties)[214]. Also, the mere public availability of the message might be seen as an incontrovertible indicator of the event of danger, thereby substantially stripping the latter of its utility as an autonomous constitutive element of the offence[215].

Finally, similarly to the element of danger, the difficulties in proving the subjective element of specific intent might lead to evidentiary shortcuts as well[216]. This and the potentially discriminatory application of the implementing criminal provisions are cross-cutting issues that apply to all terrorist offences, offences related to terrorist groups and offences related to terrorist activities.

5.4.3.1. Specific considerations on proportionality and *ultima ratio*

A last critical aspect, which deserves a deeper examination is the compatibility of the criminal offence with the proportionality principle. Since the vast majority of public provocations to commit terrorist offences happen online[217], it could have been sufficient to prevent those acts by bringing Hosting Service Providers on board and enhancing their role as content moderators[218].

The strong, anticipatory criminal response, coupled with its potentially arbitrary or discriminatory application might lead to the marginalization and alienation of certain groups, thereby actually triggering radicalization (also due to the aforementioned risk of prisons serving as "radicalization hubs")[219]. It could be argued then, that the choices of the European legislator do not satisfy the

[214] Cf. P. CIRILLO, cit., 91.
[215] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 150, who cites the term "dangerousness *in re ipsa*" to describe this judicial approach.
[216] In that sense EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 57 et seq.
[217] For a thorough analysis of the phenomenon of online radicalization see S. HARRENDORF – A. MISCHLER – P. MÜLLER, *Same Same, but Different: Extremistische Ideologien online. Salafistischer Jihadismus und Rechtsextremismus in Social Media*, in A. PETZSCHE – M. HEGER – G. METZLER (Eds.), *Terrorismusbekämpfung in Europa im Spannungsfeld zwischen Freiheit und Sicherheit: historische Erfahrungen und aktuelle Herausforderungen*, 1st Edition, Baden-Baden, 2019, 273.
[218] This criticism was brought forward already during the validity of the Framework Decision of 2008. See EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 711.
[219] Criticism expressed by P. CIRILLO, cit., 94.

requirement of appropriateness to pursue the legitimate aim (*Geeignetheit)*, which can be inferred from the principle of proportionality.

More importantly though, the obligation to remove or block access to terrorist content online[220], if implemented effectively could be seen as an equally valid preventive measure, thus creating frictions when it comes to the necessity of resorting to criminal law (*ultima ratio*). Indeed, if a message is swiftly removed by the Hosting Service Provider (spontaneously or upon removal order by a public authority) it is unlikely to cause the danger requested by the criminal offence. Judicial authorities should take this temporal factor into account when faced with charges for public provocation online.

Furthermore, it has been argued that «the damage caused by the provisions, with no clear limits of what is allowed and what is not, is probably greater than the expected benefit»[221]. In other words, the offence of public provocation to commit a terrorist offence seems to be deficient when it comes to the criterion of prospective proportionality[222] as well.

5.4.4. National implementation

If Article 5 raises doubts on its compatibility with general principles of criminal law, the same is true for implementing national criminal laws. In some cases, domestic legislators have eliminated certain elements of the EU offence (especially the requirement of danger[223]), which sometimes caused Constitutional and Supreme Courts to step in to bring the national offence back in line with constitutional law. The essentiality of the element of danger for opinionative criminal offences seems to be reflected in the case-law of the European Court of Human Rights as well[224].

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[220] See Art. 21 Directive 2017/541. As can be inferred from Recital 22, the provision does not create obligations for Hosting Service Providers, although private action is strongly encouraged. However, Regulation (EU) 2021/784 has introduced duties of care for Hosting Service Providers and rules concerning their liability for failing to comply with them.
[221] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 54.
[222] See Chapter II, 1.4.2.
[223] Cf. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 59.
[224] Compare with V. NARDI, cit., 125; for a decision by the Italian constitutional court confirming this essentiality, see Corte cost., 23.04.1970, n. 65, in *www.cortecostituzionale.it*; A relevant decision by the Court of Strasbourg in that sense is ECtHR, 09.05.2018, Application n. 52273/07, in *hudoc.echr.coe.int (Stomakhin v. Russia)*.

Also, some Member States consider public provocation in the cyberspace as an aggravating circumstance, due to the enhanced potential for diffusion of the inciting message[225]. Academics are divided on the rationality of such a choice. Whereas some[226] argue that the potential to reach a very wide audience is enough of a reason to justify harsher penalties, others claim that online propaganda might not be the decisive factor in the process of individual radicalization, social contacts with peers being far more important[227].

5.4.4.1. Belgium

The Belgian legislator initially transposed the European offence with the "copy-paste" technique[228]. However, the evidentiary issues concerning the element of a concrete danger of an ensuing terrorist offence referred to previously[229] led to the adoption of a law that modified the offence so that the conduct could be punished independently from the causation of said danger[230]. This triggered the intervention of the Belgian Constitutional Court[231], which quashed the amending law. In its decision, the Court stated that the law, whose declared aim was to simplify the prosecution of the crime, was «not necessary in a democratic society» and «disproportionately compressed the freedom of expression»[232]. It is interesting to note that the Court mentioned the requirement of danger according to Union law, through explicit references to Article 5 and Recitals 10 and 40 of the Directive. This shows that although the Directive is a mere "minimum standard of criminalization", it can indirectly be used as a point of reference to bring punitive excesses at the national level back to an acceptable level.

[225] See for instance Italy (*Articolo 414 co. 3 c.p.*) and France (*Article 421-2-5 c.p.)*
[226] For instance V. NARDI, cit., 124-125.
[227] In that sense K. RAMEŠOVÁ, cit., 133.
[228] Observation by F. GALLI, *Terrorism,* cit., 412.
[229] See Chapter III, 5.4.3.
[230] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit. 152.
[231] Cf. Cour. const., 15.03.2018, n. 6614, in *www.const-court.be*.
[232] See H. DUFFY – R. PILLAY – K. BABICKA, cit., 26.

5.4.4.2. Spain

Spain constitutes another good example of over-implementation of Article 5 of the Directive. In fact, the Spanish criminal code seems to go beyond the European demands. Article 579 *código penal* punishes direct public provocation, whereas Article 578 c.p. criminalizes certain specific forms of indirect public provocation[233].

The wording of the latter, contrary to the former, does not contain any reference to the causation of a risk that a terrorist offence may be committed as a result of the criminalized conduct. Allegedly, this could have adverse consequences[234]. However, in a case dealing with glorification and justification of terrorism, the Spanish Supreme Court[235] upheld an "additive" interpretation of domestic criminal law to introduce the Directive's requirement of danger[236]. A similar judicial adaptation of the norm occurred in 2018, this time in reference to the conduct of discredit, mockery and humiliation of victims of terrorism and their families[237]. As a result of the cited case law, Article 578 c.p. can be said to implicitly include the element of danger.

Furthermore, the wording of the Spanish criminal offence seems to completely omit the element of intent. This led to a jurisprudential dispute between the Supreme Court and the Constitutional Court[238]. The former considered the will or intent of the author of the message to be irrelevant[239] – an interpretation that was rejected by the latter[240].

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[233] See Art. 578.1 c.p.: «El enaltecimiento o la justificación públicos de los delitos comprendidos en los artículos 572 a 577 o de quienes hayan participado en su ejecución, o la realización de actos que entrañen *descrédito, menosprecio o humillación de las víctimas* de los delitos terroristas o de sus familiares, se castigará […]» (emphasis added).
[234] Criticism expressed by N. CORRAL-MARAVER, cit., 269.
[235] Trib. Sup., Pen., 17.05.2017, n. 354, in *www.poderjudicial*.es.
[236] Observed by EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 60.
[237] See Trib. Sup., Pen., 26.02.2018, n. 95, in *vlex.es*. Similarly to the Belgian case (see Chapter III, 5.4.4.1.) the tribunal explicitly referred to Article 5 of the Directive. Compare with N. CORRAL-MARAVER, cit., 269-270.
[238] Cf. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 58.
[239] See Trib. Sup., Pen., 18.01.2017, n. 4, in *vlex.es*.
[240] Trib. Const., 25.02.2020, n. 35, in *www.boe.es*

5.4.4.3. France

France is another example of hyper-criminalization of acts of communication. As seen before[241], the French legislator chose not only to punish those who commit the act of publicly advocating, directly or indirectly, the commission of a terrorist offence[242], but also those who receive (*rectius* consume) such content with a certain frequency[243]. The French constitutional court found this legislative choice to be a disproportionate interference with the freedom of communication and therefore quashed the latter criminal offence[244].

As for the active conduct of indirect public provocation, legal scholarship[245] has shown concern about the extensive interpretations given by the French judiciary, which could disproportionately interfere with freedom of expression. These are a direct consequence of the absence, once again, of the requirement of danger that a terrorist offence may be committed as a result of the provocatory or apologetic messages[246]. This trend of extensive judicial interpretation even led to the incrimination of deliberate possession of apologetic files and documents on a personal computer[247]. However, a few months after that decision, the French Constitutional Court declared that Article 421-2-5 *code pénal* could not be interpreted as including that conduct[248].

5.4.4.4. Germany

German criminal law does not foresee a specific offence of "public provocation to commit a terrorist offence", allegedly because of the lack of a direct definition of terrorism or terrorist offences[249]. Nevertheless, the conduct described at the European level is punishable as a criminal offence (which is what the Directive requires) due to punctual provisions of the StGB, which are not

[241] Cf. Chapter I, 5.3.3.
[242] See *Article 421-2-5 c.p.*, which criminalizes *"provoquer directement"* and *"faire l'apologie"*.
[243] See *Article 421-2-5-2 c.p.* (abolished by declaration of unconstitutionality).
[244] See H. DUFFY – R. PILLAY – K. BABICKA, cit., 26.
[245] Cf. R. CABALLERO, cit.
[246] Compare with EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 59.
[247] See Cour. Cass., 07.01.2020, n. 19-80.136, in *www.dalloz-actualite.fr.*
[248] Cf. Cons. Const., 19.06.2020, n. 2020-845 QPC, in *www.conseil-constitutionnel.fr.*
[249] See A. PETZSCHE, *The Penalization of Public Provocation to Commit a Terrorist Offence,* cit., 249.

exclusively meant for terrorism. In other words, the German legislator refrained from creating a wide-scoped offence of incitement to terrorist acts, instead targeting such acts through a variety of other criminal provisions which describe specific forms of incitement – an approach that has been praised for its parsimony[250]. While judges in other countries might have to interpret the offence of public provocation restrictively to avoid interferences with freedom of expression, in Germany such a restriction has been carried out *ex ante* by the legislative branch[251].

Among the provisions which are mentioned as potential legal basis for the criminal prosecution of acts of public provocation to commit terrorist offences, an important German scholar[252] mentions § 91(1) StGB (encouragement of serious violent offences endangering the state). However, the offence is narrowed down to distribution of written material which by its content can serve as an instruction and awakes or encourages the preparedness to commit such offences (a requirement that resembles the event of danger in Article 5 of the Directive), whereas indirect forms of public provocation are not covered by the norm. Nevertheless, the latter still seem to be punishable as criminal offences under other provisions (§ 111(1) StGB, § 140 StGB or § 131 StGB).

The first provision criminalizes the public incitement (direct or indirect) to crime. However, it requires a certain specificity in the indication of the circumstances of the incited crime (time, place, victims) that, according to *id quod plerumque accidit*, lacks in most public provocations to commit terrorist offences. For the second offence, on the other hand, the implicit or explicit approval of certain crimes is sufficient to convict the perpetrator if the approval constitutes a threat to public peace. The last norm is even broader, in that it criminalizes the simple act of disseminating depictions of violence against persons when this is

[250] In that sense *Ibid.* 253: «The legislator, father than creating an all-encompassing offence, decided that different offences that penalize specific forms of incitement would suffice in order to fulfil its European obligations. This approach is recommendable considering the problems faced by other countries in formulating such offences»; ID., *Erneute Ausweitung des deutschen Terrorismusstrafrechts,* cit. 220.
[251] Cf. A. PETZSCHE, *The Penalization of Public Provocation to Commit a Terrorist Offence,* cit., 254.
[252] See *Ibid.* 249 et seq.

done in a manner expressing glorification, and regardless of the potential impact on the individuals accessing such depictions.

A provision that the cited Author does not mention, but which could equally be used as a basis for the criminal prosecution of certain acts of public provocation to commit terrorist offences is § 86 StGB. Indeed, the norm criminalizes the spreading of propaganda for unconstitutional organizations.

5.5. Recruitment for terrorism

Recruitment for terrorism has been deemed worthy of a penal response by various actors of International Law. The United Nations, as well as the Council of Europe have adopted provisions obliging the contracting parties to criminalize such behavior. In the first case, the most important normative text of reference is the Security Council's Resolution n. 2178[253]. As for the regional international organization, the obligation was introduced in 2005 with the Convention on the Prevention of terrorism[254]. Article 6 of Directive 2017/541 (previously Article 3 of the amended Framework Decision) builds upon those sources of International Law and introduces the obligation for Member States of the European Union to criminalize, explicitly or implicitly, acts of recruitment for terrorism[255].

Once again, the offence falls in the realm of anticipatory criminal law (*Vorfeldkriminalisierung[256]*) with the well-known problems concerning the compatibility with the principles of harm and proportionality, which are further

[253] See Resolution 2178 § 5: «Member States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities».

[254] Cf. Article 6 CoE Convention on the Prevention of Terrorism: «1. For the purposes of this Convention, "recruitment for terrorism" means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group. 2. Each Party shall adopt such measures as may be necessary to establish recruitment for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law».

[255] See Article 6 Directive 2017/541: « Member States shall take the necessary measures to ensure that soliciting another person to commit or contribute to the commission of one of the offences listed in points (a) to (i) of Article 3(1), or in Article 4 is punishable as a criminal offence when committed intentionally».

[256] Compare with E. HILGENDORF, cit., 125.

aggravated by the requirement set by Article 14(3) of Directive 2017/541 to criminalize also the attempt to recruit[257]. Also, as shall be illustrated *infra*, the offence seems to overlap with other offences, thus leading to confusion and legal uncertainty, which in turn could lead to an unequal application of national criminal laws.

5.5.1. Structure of the European offence

Article 6 seems to describe a criminal offence of pure conduct[258], meaning that the incriminated behavior does not need to be causally connected to a specific event (unlike the previously examined offence of public provocation to commit a terrorist offence, which requires an augmentation of the likelihood of ensuing terrorist offences). The criminalized *actus reus* is the solicitation of another person to commit or contribute to the commission of a terrorist offence (except for the solicitation to threaten to commit a terrorist offence, which is explicitly excluded[259]) or an offence relating to a terrorist group.

As for the subjective element, the conduct needs to be carried out intentionally to be punishable. This implies that if the recruiter is at the service of a group, he or she needs to be aware of its terrorist purpose.

In light of the already mentioned Article 13, it is not necessary that a terrorist offence is actually committed to prosecute the recruiter, neither is it necessary to establish a link to another, specific offence laid down in the Directive. In other words, the offence is perfectly autonomous, although in practice it is difficult to imagine an act of recruitment that is detached from participation in a terrorist group[260].

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[257] The European legislator put additional emphasis on this requirement by mentioning its necessity in Recital 16.

[258] This is a widely accepted category of criminal offences throughout national legal traditions (e.g. in Italy, *"reati di mera condotta"*, in Austria "*schlichtes Tätigkeitsdelikt"*).

[259] The European Parliament had recommended this exclusion during the drafting process of the amending Framework Decision of 2008, arguing that a recruitment for the threatening to commit a terrorist offence would be difficult to conceive.

[260] Compare with M. CANCIO MELIÀ, *The reform of Spain's antiterrorist criminal law and the 2008 Framework Decision*, cit., 111. The Author seems to consider this autonomous offence superfluous given that it typically is absorbed by the offence of participation in a terrorist group.

Although not included in the legally binding part of the Directive, it is worth mentioning that in Recital 19 the European legislator suggests that judges should be given the legal tools to take the recruitment for terrorism of minors, being very susceptible individuals, into consideration when handing down their verdicts[261].

5.5.2. Selected critical aspects

The interpretative pivot of Article 6 is the meaning to be attributed to the verb "soliciting". The European legislator used a very ambiguous term without specifying its meaning, thus creating a confusing mosaic of criminal offences that interfere with each other. In fact, there seem to be overlaps between Article 6 and Articles 4, 5 and 14 of the Directive[262], which all use similar terminology ("advocate", "incite", "solicit", "abet") [263]. Hence, the offence of recruitment for terrorism could be seen as casting a shadow on the internal coherence[264] of the European legal order. However, the practical consequences must not be exaggerated. It must not be forgotten that the European Union does not require the introduction of an autonomous offence of recruitment, but rather to ensure its criminalization in which way ever Member States see fit (e.g. by applying other provisions in combination with provisions of general criminal law). Therefore, although the critical voices that question the necessity of this provision are not

[261] See Recital 19 Directive 2017/541: «When recruitment and training for terrorism are directed towards a child, Member States should ensure that judges can take this circumstance into account when sentencing offenders, although there is no obligation on judges to increase the sentence. It remains within the discretion of the judge to assess that circumstance together with the other facts of the particular case».

[262] Compare with F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 191 et seq. who, with a view to the correlated Italian provisions of implementation, illustrates how difficult it is to trace a clear frontier between the offences of recruitment (Art. 270-quater c.p., "*Arruolamento con finalità di terrorismo anche internazionale"*), participation in a terrorist group (Art. 270-bis c.p., "*Associazioni con finalità di terrorismo anche internazionale o di eversione dell'ordine democratico"*) incitement (*"Istigazione"*, both public and private, respectively Articles 414 c.p. and 302 c.p.) and conspiracy to commit a terrorist offence (art. 304 c.p., "*Cospirazione politica mediante accordo"*).

[263] Collins English Dictionary mentions, among the possible meanings of the verb "to solicit", the act of making a request, application or entreaty, but also to provoke or incite a person to do something illegal.

[264] The concept was examined *supra* in Chapter II, 1.4.4.1. The offence construction principle of internal coherence requires to abstain from criminalization of conduct that is already covered by other EU norms.

manifestly ill-founded, Article 6 simply shows the overly zealous attempt to repress any kind of conduct that might increase the risk for terrorist offences to occur[265], to the point where it is not inappropriate to speak of a paranoia of leaving legal loopholes. As a matter of fact, acts of recruitment are, according to *id quod plerumque accidit,* much more likely to be committed in a collective context[266] and therefore they are adequately covered by Article 4. Article 6 aims at covering the rarely occurring cases where the solicitation happens in the absence of the requirements to qualify an association as a terrorist group[267]. A partial excuse for the European legislator's unsystematic approach is the fact that, as seen at the beginning of this paragraph, international law also requires to criminalize recruitment for terrorism[268].

Secondly, prosecutions based on the criminal offence of recruitment for terrorism bear potential to unduly compress certain fundamental rights. Critical scholars[269] mention the rights to freedom of association, expression, assembly, religion or belief, political participation and obviously liberty as potentially endangered ones. According to the well know legitimacy test, their eventual compression needs to be clearly prescribed by law, be necessary in a democratic society and proportionate to the legitimate aim pursued. Also, the provision must be applied equally without discrimination of certain groups.

5.5.3. National implementation in Italy

Since Article 6 of the Directive uses a rather vague terminology that can leave interpreters in a state of confusion and to date there is no clarifying European case-law, the only available option is to turn to national law and its interpretation by domestic Courts to understand what is meant by "recruitment for terrorism" and whether the offence effectively has some utility. In fact, jurists

[265] This shows that the European sources are a paradigm of "pre-emptive" counterterrorism as defined by C. C. MURPHY, cit.
[266] See A. PRESOTTO, *Le modifiche agli artt. 270-quater e quinquies del codice penale per il contrasto al terrorismo,* in *Dir. Pen. Cont. - Riv. Trim.,* 2017, 1, 110: «Il tema dell'arruolamento, pertanto, richiama inevitabilmente a sé il concetto di associazione».
[267] Those criterions have been thoroughly analyzed *supra,* in Chapter III, 5.2.1.1.
[268] See Article 6 o the CoE Convention on the Prevention of Terrorism.
[269] Cf. H. DUFFY – R. PILLAY – K. BABICKA, cit., 28; S. GLESS, cit., 44-45.

have observed that the wording of national offences concerning recruitment for terrorism is sometimes more specific than the European one[270].

In Italy, judicial interpretation has contributed significantly to the clarification of the criminal offence's scope of application. Once again, there has been an over-implementation of the European norm since the Italian legislator has criminalized both the active conduct of recruiting for terrorism and the passive act of being recruited[271]. In doing so he has not given, just like the European legislator, an exact definition of the term "recruiting" ("*arruolare*"). The consequential legal uncertainty and inconsistent application of the provision[272] has been mitigated by the influential, albeit not legally binding, interpretations of the Italian Supreme Court of Cassation[273].

The provision, having been introduced via *decreto legge 144/2005*, predates the European norm, which first came into existence with the Framework Decision of 2008. Therefore, the jurisprudential elaborations are largely autonomous from the European legal order. However, they still provide food for thought on the underlying issues concerning the offences of recruitment for terrorism, and how such criminal provisions could be interpreted to bring them in line with general principles of criminal law. At this point it is worth mentioning that, according to a scholar[274], the introduction of the provision was determined by the *ratio legis* of facilitating the work of prosecuting authorities[275], who, especially at the investigative stage, struggled to find sufficient evidence to

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[270] In that sense H. DUFFY – R. PILLAY – K. BABICKA, cit., 28. For a generic review of the Italian provisions concerning the recruitment for terrorism see FOURNIER et al., *Strafbarkeit der Rekrutierung und Ausbildung von Terroristen*, in *Serie di Pub. Elett. Pareri Ist. Svizz. Dir. Comp.*, 2017, 2, 65 et seq.

[271] See *Articolo 270-quater c.p. (Arruolamento con finalità di terrorismo anche internazionale)*: «Chiunque, al di fuori dei casi di cui all'articolo 270 bis, *arruola* [emphasis added] una o più persone per il compimento di atti di violenza ovvero di sabotaggio di servizi pubblici essenziali, con finalità di terrorismo, anche se rivolti contro uno Stato estero, un'istituzione o un organismo internazionale, è punito con la reclusione da sette a quindici anni [active recruitment]. Fuori dei casi di cui l'articolo 270 bis, e salvo il caso di addestramento, la persona arruolata è punita con la pena della reclusione da cinque a otto anni [passive recruitment]». This last part of the provision was introduced via *decreto legge 7/2015*.

[272] Compare with G. MARINO, *Lo statuto del "terrorista": tra simbolo ed anticipazione*, in *Dir. Pen. Cont. - Riv. Trim.*, 2017, 1, 49.

[273] *Ex multis* see Cass. Pen., Sez. I, 09.09.2015, n. 40699, in *sentenze.altervista.org (Elezi)*; Cass. Pen., Sez. II, 02.02.2017, n. 17772, in *www.italgiure.giustizia.it (Veapi)*.

[274] Cf. A. PRESOTTO, cit., 108-109.

[275] In that sense H. DUFFY – R. PILLAY – K. BABICKA, cit., 28.

proceed based on criminal offences related to terrorist groups (Art. 270-*bis* c.p.), given the shift towards loosely organized forms of terrorism.

The Italian legal order contains other criminal provisions[276] that use the term "*arruolare*", but those are interpreted in a different manner compared to the provision specifically aimed at preventing terrorism[277]. According to the *Corte di Cassazione*, for the purposes of Article 270-*quater* c.p. "recruitment" alludes to acts of recruitment *stricto sensu ("reclutamento")* and not to acts of "enrollment" *("arruolamento")*[278], an interpretation which has been criticized by some[279], allegedly because it is hyper-extensive and compromises the systematic coherence of the Italian legal order. In the Courts reasoning, *"reclutamento"* refers to an act of negotiation between a recruiter and the recruited, which needs to lead to the «conclusion of a serious agreement» to trigger the applicability of the provision which envisages criminal liability for both "contracting parties"[280].

The concept of a «serious agreement» is itself quite ambiguous. Interpreters may wonder when an agreement can be qualified as serious and when not. In the previously cited *Veapi* case, the Italian Supreme Court held that the ideological adherence, coupled with the promise of plain and complete availability to become part of the organization was enough to convict the involved individuals for (active and passive) recruitment for terrorism[281]. More generally, the seriousness of the agreement should be inferred from the authoritative character of the proposal (in the sense that the recruiter must be able to effectively integrate the solicited individual into the organizational structure at a certain point) and the strong determination of the recruit to adhere to the terrorist aims[282]. This latter element indicates, once again, the strongly subjectivized nature of Europeanized offences related to terrorist activities. Allegedly, this could lead to the substantial presumption of the recruit's psychological adherence on the basis

[276] The reference is to Articles 244 c.p. and 288 c.p.
[277] Observation by F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 188-189.
[278] See A. PRESOTTO, cit., 110.
[279] For instance by F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello* cit., 189.
[280] Cf. *Ibid.* 190.
[281] Cf. *Ibid.*
[282] In that sense G. MARINO, cit., 50.

of his personal background rather than on objective facts that pose a tangible threat for the protected legal interests[283].

In light of the previous observations, it is fair to conclude that the Italian offence is at the same time broader and narrower than the European one. Broader, because it also criminalizes passive recruited. Narrower, because it requires something more – the conclusion of a serious agreement – than a "simple" act of solicitation. This solution could be "exported" into Article 6 in order to give it an effectively autonomous scope compared to similar offences, in particular the inciting of terrorist offences.

5.5.3.1. Potential overlap with contiguous criminal offences

As already briefly mentioned *supra*, the difference between the offence of recruitment for terrorism and other contiguous criminal offences is very subtle. Regarding the offences of incitement to commit terrorist offences, recruitment for terrorism and participation in a terrorist group, the observations of one academic[284] are suitable to provide the necessary clarifications. According to the cited author, taken together, the various offences describe a criminological sequence of progressive proximity to a terrorist group. The mere inciter, who is an *extraneus* to the terrorist association for which he sympathizes, is at the lower end of that sequence, far outside the inner circle of "associates". The participant represents the other extreme, being fully integrated in the collective structure. Finally, the "recruit" is something in the middle of those two extremes, someone who is at the verge of entering the inner circle[285]. As stated previously, the introduction of this intermediary figure responds to the need to enable criminal prosecution for facts that are difficult to subsume under "traditional" terrorism-related offences. On the one hand, this could be seen as an unnecessary hypertrophy of criminal law. On the other hand, if the attached penalty is chosen in a way that corresponds to the lower degree of culpability[286], the provision could

[283] See *Ibid.*
[284] The reference is to A. PRESOTTO, cit., 109.
[285] Compare also with G. MARINO, cit., 49. The cited Academic describes the offence of recruitment for terrorism as a "precursor" of the associative offence.
[286] Which is in fact the path chosen by the Italian legislator.

be seen as an improvement of the counterterrorist criminal policy that is coherent with the general principles of criminal law and in particular the criterion of retrospective proportionality. However, these positive remarks can only be confidently upheld if the law is applied consistently by domestic Courts. Given the extremely subtle differences, the correct legal qualification of the facts depends heavily on the judges' sensibility, which implies a concrete risk of unequal treatment[287].

While the just examined sequence (inciter – recruit – participant) might provide some clarification on the side of the recruit, the perplexities concerning the recruiter persist. Can the latter effectively be charged for that autonomous, inchoate offence, or is he/she by his/her very nature a participant of a terrorist group? There are some who give an affirmative answer to this question[288]. However, in theory it is conceivable that an association does not display the attributes of a "terrorist group", in which case the recruiter cannot be a "participant".

5.5.3.2. Case-law on attempted recruitment for terrorism

Article 13(3) of the Directive mentions recruitment for terrorism among the offences that ought to be punishable even when merely attempted. In the Italian legal order, the concept of attempt is contained in the general part of the criminal code[289]. Only felonies can be prosecuted at this anticipated stage. To trigger criminal liability, Art. 56 c.p. requires the presence of two fundamental elements: suitable acts (or omissions) and their being unequivocally directed towards the commission of a felony. It is common knowledge among Italian lawyers that some felonies are not punishable at the stage of attempt, because this would excessively anticipate the penal response. Judges are called upon to carry out this assessment on a case-by-case basis[290].

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[287] Criticism expressed by A. PRESOTTO, cit., 111. On a similar note, F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 192.
[288] Cf. F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 192.
[289] See Article 56 c.p.: «Chi compie atti idonei, diretti in modo non equivoco a commettere un delitto, risponde di delitto tentato, se l'azione non si compie o l'evento non si verifica».
[290] For a deeper analysis of the notion of attempt under Italian criminal law see G. MARINUCCI – G. L. GATTA – E. DOLCINI, *Manuale di diritto penale: parte generale*, 11th Edition, Milan, 2022,

Although (active) recruitment for terrorism already constitutes an anticipatory criminal offence, its compatibility with Article 56 has been acknowledged by the Italian Supreme Court of Cassation[291], probably due to the European indications in that sense. In fact, it is doubtful if the Court would have come to the same conclusion in the absence of such pressure. An influential scholar[292] claimed that the offence of recruitment for terrorism actually targets a preparatory act that precedes the threshold of offences that can be punished in the attempted form. To circumvent this dilemma, the Supreme Court seems to have adopted a contorted line of reasoning. It looked at the offence of recruitment as the result of a process of radicalization which progressively increases the risk of harm for the ultimately protected legal interests. The cited scholar argues that this solution is incompatible with the safeguards of criminal law and pushes Italian counterterrorism towards the model of *Feindstrafrecht*[293].

Besides the issue of excessive anticipation, attempted recruitment further blurs the lines between contiguous criminal offences. In fact, another Italian scholar[294] noted that attempted recruitment is nothing but a specific form of incitement.

5.6. Providing and receiving training for terrorism

Once an individual has been persuaded by any means (for instance through online propaganda or direct recruitment) to embrace a terrorist ideology, the next step is often the acquisition, either autonomously or via other individuals, of the necessary know-how to perpetrate one of the terrorist offences referred to in

550 et seq.; S. DEL CORSO, *Riflessioni sulla struttura del tentativo nella cultura giuridica italiana*, Turin, 2019.

[291] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 193.

[292] *Ibid.* 142 and 193. The Author claims that the Directive's unsparing criminalization of preparatory acts leads to a conflation of two categories of criminal offences that the Italian legal order usually treats differently: preparatory offences and offences of danger. The attempt to commit a preparatory offence is usually not punishable, contrary to the latter category. However, Italian judges seem to turn a blind eye on that rule in order to comply with the European and international obligations.

[293] Cf. *Ibid.* 194. In fact, it seems as if, for the sake of fulfilling the obligations to penalize, ordinary principles of criminal law are derogated. Some criticize such an acritical transposition of supranational norms in the domestic legal order. In that sense V. NARDI, cit., 129.

[294] See G. MARINO, cit., 50-51.

Article 3 of the Directive[295]. Whereas this usually happens in collective contexts and often abroad (in so-called "terrorist-camps"[296]), it is thinkable that both the act of providing and receiving of training are committed by individuals acting on their own. It would not be possible to subsume such scenarios under the traditional offences relating to terrorist groups. For these reasons, the European legislator chose to foresee autonomous inchoate offences.

More specifically, the European Union established two distinct offences: the active offence of providing training for terrorism[297] and the passive offence of receiving training for terrorism[298]. This choice is in line with the system laid out by the Council of Europe. Initially, the latter prescribed to punish only the active offence, but in 2015 the Amending Protocol to the Convention on the Prevention of Terrorism ended up also introducing the passive behavior. Within the European Union, providing training for terrorism was already criminalized with the Framework Decision of 2002. The obligation to incriminate receiving training for terrorism came, shortly after the Council of Europe's Amending Protocol, with Directive 2017/541[299]. The provisions of the latter almost perfectly match those international norms. A peculiarity of Article 8 of the Directive is that it seems to be intended to cover also acts of "self-study"[300]. This is not immediately apparent from the text of the provision itself, but it can be inferred from Recital 11: «Self-study, including through the internet or consulting other teaching material, should

[295] As with public provocation and recruitment, Internet also plays a crucial role when it comes to training for terrorism, especially when self-trained individuals are concerned. In other words, Internet has become a sort of "virtual training camp". In that sense, R. WENIN, cit., 110.

[296] Compare with N. PAUNOVIC, cit., 537. Such a case was examined by the German Federal Court. See BGH, 06.04.2017, 3 StR 326/16, in *dejure.org*.

[297] Article 7 Directive 2017/541: «Member States shall take the necessary measures to ensure that providing instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1), knowing that the skills provided are intended to be used for this purpose, is punishable as a criminal offence when committed intentionally».

[298] Article 8 Directive 2017/541: «Member States shall take the necessary measures to ensure that receiving instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1) is punishable as a criminal offence when committed intentionally».

[299] See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 79, where the offence is described as «one of the major changes that the Directive has introduced».

[300] This approach highlights the effort to keep up with the progressive emergence of "lone wolfs". Compare with R. WENIN, cit., 117.

also be considered to be receiving training for terrorism when resulting from active conduct and done with the intent to commit or contribute to the commission of a terrorist offence». However, the same Recital suggests caution in the application of the offence by stating that «merely visiting websites or collecting materials for legitimate purposes, such as academic or research purposes, is not considered to be receiving training for terrorism under this Directive». This exclusion clause already hints what might be some critical aspects in the practical application of this criminal offence.

5.6.1. Structure of the European offences

5.6.1.1. Providing training

The *actus reus* considered by Article 7 is the providing of instructions on specific methods or techniques which can be used for the purpose of committing or contributing to the commission of a terrorist offence as defined in Article 3 (except for the threatening to commit a terrorist offence, which is logically excluded from the provision's scope of application, in line with the provisions on public provocation to commit a terrorist offence and recruitment for terrorism). Some specific methods and techniques are explicitly mentioned, but the list is clearly non-exhaustive given that it ends with the open formula «or on other specific methods or techniques».

As far as the *mens rea* is concerned, the abovementioned conduct must be held intentionally and with knowledge of the fact that the "trainee" intends to use the skills he/she apprehends to commit a terrorist offence[301].

5.6.1.2. Receiving training

Article 8 is construed as an almost perfect counterpart to Article 7[302]. Consequently, the individual at the receiving end of the divulgence of know-how

[301] Conscious about the possibility that national authorities might go beyond this standard of criminalization, the International Commission of Jurists suggests that negligence should not be sufficient to trigger criminal liability, *dolus eventualis* constituting the psychological threshold to be surpassed for criminally prosecution to be acceptable. See H. DUFFY – R. PILLAY – K. BABICKA, cit., 29: «Intent should be confined to circumstances where there is specific intent to provide or receive training that will contribute to commission of an act of terrorism, or *at a minimum deliberate disregard of knowledge* [emphasis added] that it will do so.

is punished for the simple fact of receiving such instructions with the intention to use them to commit a terrorist offence[303]. If the two provisions were perfect counterparts, then the act of receiving would necessarily require a bilateral relationship. However, as stated above, the term "receiving" is intended to be very wide, also encompassing the autonomous retrieval of instructions that are functional to the commission of terrorist offences, no matter which the source of information is. Nevertheless, the relevance of "self-study" is explicitly mentioned merely in the Directive's Preamble, which contains recitals that might be useful for interpreting the provisions of the Directive but has no binding force[304]. This might explain why some Member States dared not to introduce this specific form of receiving of training.

As always, the subjective element is intent, which means that the trainee must be aware and willing to receive the training. Also, he/she must undergo the training with the *dolus specialis* of using the acquired skills for the commission of a terrorist offence.

Contrary to Article 7, the Directive does not prescribe to criminalize the attempt to receive training for terrorism[305].

5.6.2. Selected critical aspects

Once again, Articles 7 and 8 criminalize acts that are not *per se* harmful. In fact, the acts of providing and receiving information would fall under the scope of fundamental freedoms protected by the European Union's Charter of Fundamental

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[302] Compare with N. KARALIOTA et al., *The new EU counter-terrorism offences and the complementary mechanism of controlling terrorist financing as challenges for the rule of law*, Leiden, 2020, 19: «The criminal offence of receiving training for terrorism (article 8) follows closely the definition of the offence of providing such training, which it largely mirrors, as well as the problems emanating from that definition».

[303] The Italian legal doctrine is sceptic about the extension of criminal liability to the trainee. Allegedly, the criminal norm could lead to the punishment of inoffensive *acti rei*, simply because of the subjective dangerousness of the individual. In that sense R. WENIN, cit., 118. The offence is sometimes improperly referred to as the "passive" counterpart to Article 7. However, this term is misleading since the trainee is still expected to take an *active* part in the training. In that sense N. PAUNOVIC, cit., 537.

[304] Compare with F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 145.

[305] See Article 14(3) of the Directive.

Rights[306] – the right to education (Article 14 CFR), freedom of expression and information (Article 11 CFR), freedom of the arts and sciences (Article 13 CFR) – if they were not committed with the specific intent behind them. Consequently, the criminal offences are highly subjectivized[307] with the correlated evidentiary problems and the risk of interpreting a lawful act as a crime. In the case of Article 7, the weight of the *mens rea* element is even heavier than for the already intent-focused offence provided for in Article 8. This is because in the case of providing training there is a double intent to be proven: on the one hand, the trainee's intention to use the acquired skills for terrorist purposes, on the other hand the trainer's awareness of the instructed individual's "bad intentions"[308].

Furthermore, whereas the liability under Article 7 (providing) seems to be dependent on another individual's culpability under Article 8 (receiving), this reasoning cannot be applied in the opposite way. In other words, even when the person that provides the know-how, unaware of the recipient's terrorist intent, is acting in good faith or fulfilling a contractual duty (the schoolbook example would be a chemistry professor imparting information to his students[309]), this does not preclude the trained individual's liability[310].

The two provisions can be said to be deficient when it comes to the terminological preciseness normally required for criminal law[311]. For instance, how exactly should the expressions "providing and receiving instruction" be interpreted? Also, what is the exact meaning of "specific methods or techniques"[312]? In other words, what kind of knowledge or skills are relevant for

[306] Cf. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 80.
[307] In that sense H. DUFFY – R. PILLAY – K. BABICKA, cit., 29.
[308] Cf. R. WENIN, cit., 125-126.
[309] Compare with the first part of Recital 40 Directive 2017/541: «Nothing in this Directive should be interpreted as being intended to reduce or restrict the dissemination of information for scientific, academic or reporting purposes».
[310] Which means that a collusive, bi- or multilateral relationship should not be essential. However, there is not unanimity on this point. On the contrasting views expressed by the Austrian legal doctrine, see R. WENIN, cit., 124. Those who require the existence of a collusive relationship argue that this would make the criminal offence more compatible with the principle of harm.
[311] See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 80
[312] Compare with one of the key recommendations of the International Commission of Jurists: «National jurisprudence should in particular seek to clarify the scope of the offences as regards the type of training that is subject to criminal sanction, beyond the non-exhaustive list indicated in the Directive, in order to ensure legal certainty, and avoid excessive, arbitrary or discriminatory application of the offence», in H. DUFFY – R. PILLAY – K. BABICKA, cit., 28-29.

the purposes of the two criminal offences? Could a person be convicted for receiving training for terrorism when he or she takes lessons to obtain a driver's license? All these interpretative doubts could lead to extensive applications of the Europeanized provisions, and in turn to illegitimate compressions of fundamental rights.

In the absence of interpretative guidance by the Court of Justice of the European Union, the legislative and judicial implementation of Articles 7 and 8 at the national level is an essential point of reference to be examined. However, before turning the page towards the Europeanized criminal offences and their interpretation by domestic Courts, it is worth examining the answers given by certain scholars[313] to some of the abovementioned interpretative issues.

The cited Academics are concerned about the broad formulation of the European provisions, arguing that «instead of a learning process, throughout which both the trainer and the trainee participate, ["training"] is degraded to simply providing instruction»[314]. To avoid excessive criminalization, the term "instruction" should be interpreted narrowly as something more than the simple passing on of information. In other words, the trainer must also provide guidance to the trainee so that the latter fully assimilates and comprehends the information. Therefore, the simple fact of making "pure information" available to others is insufficient to qualify as providing training for terrorism[315].

Furthermore, the commentators valorize the terms "training" and "*special* methods and techniques" by reading them as indicators of the fact that only the passing on or autonomous retrieval of *specialized* know-how is relevant for the purposes of Articles 7 and 8 of the Directive[316].

Finally, concern is expressed about the relevance attributed to self-study, especially when the instructions are easily available to anyone on the internet. The authors question the compatibility of such an extensive understanding of

[313] For reference, N. KARALIOTA et al., cit., 19 et seq.
[314] *Ibid.* 19.
[315] In that sense *Ibid.*
[316] Cf. *Ibid.* 20. This restrictive interpretation is in fact recommendable. Otherwise, absurd applications of the national criminal offences might be the consequence. For instance, teaching how to ride a bike or how to read could hypothetically be prosecuted as providing training for terrorism.

"receiving instruction" with the principles of proportionality and *ultima ratio*, given the availability of impeditive, administrative measures and the risk of prosecuting accidental access to certain websites[317]. However, actively downloading instructive material might, considering Recital 11, be qualified as receiving training[318].

5.6.3. National implementation

It has been noted that "Europeanized" criminal laws tackling the phenomenon of training for terrorism are rather heterogeneous[319]. An influential scholar[320] has provided a generic overview of the state of implementation across the Union's Member States. The observations were made under the validity of the amended Framework Decision, but they are still partially relevant. Allegedly, Member States can be distinguished into two groups.

The first group has introduced (or maintained) measures which specifically criminalize training for terrorism. In some cases, legislators performed a simple exercise of "copy-paste", by transposing the European norm without any substantial changes. The second group has not introduced specific provisions, holding that general criminal law provisions would be sufficient to allow prosecution for the acts of providing and receiving training.

5.6.3.1. Italy

Italy falls within the first group. The provision of the national criminal code that deals specifically with training for terrorism is Article 270-*quinquies* c.p.[321]. The Italian legislator did not filter the criminally relevant conducts: the

[317] See *Ibid.* 20-21. On a comparable note, H. DUFFY – R. PILLAY – K. BABICKA, cit., 29.
[318] Compare with EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 80. However, R. WENIN, cit., 129 et seq. underscores problems of legal qualification, for instance when files are automatically saved in a computer's temporary directory.
[319] In that sense H. DUFFY – R. PILLAY – K. BABICKA, cit., 29.
[320] See F. GALLI, *Terrorism*, cit., 413.
[321] «Chiunque, al di fuori dei casi di cui all'articolo 270 bis, addestra o comunque fornisce istruzioni sulla preparazione o sull'uso di materiali esplosivi, di armi da fuoco o di altre armi, di sostanze chimiche o batteriologiche nocive o pericolose, nonché di ogni altra tecnica o metodo per il compimento di atti di violenza ovvero di sabotaggio di servizi pubblici essenziali, con finalità di terrorismo, anche se rivolti contro uno Stato estero, un'istituzione o un organismo internazionale, è punito con la reclusione da cinque a dieci anni. La stessa pena si applica nei confronti della

provision criminalizes all three of the previously mentioned behaviors (providing, receiving, self-study). The last amendment to the Article was made in 2015 – which, *inter alia,* codified the conduct of self-study[322] – rendering the provision a predecessor to the new offences of the Directive on combating terrorism[323]. From the wording of the provision, it can be inferred that autonomous retrieval of instructions *per se* is insufficient to trigger criminal liability. The individual must perform acts that unequivocally suggest his intention to commit a terrorist offence. Allegedly, this specification was added to comply with the principle of determinacy of criminal provisions[324].

As far as the relationship to other offences is concerned, the Italian criminal code explicitly solves the problem of the potentially overlapping conducts of training and participation in a terrorist group with a subsidiarity clause in favor of the latter. Recruitment, on the other hand, is subsidiary to the offence of training[325].

Article 270-*quinquies* c.p. has been applied inconsistently by Italian judges. The Supreme Court appears to have changed its interpretation of the provision multiple times, oscillating between appreciably[326] restrictive decisions on the one hand, and very extensive[327] interpretations on the other hand.

In one case that can be categorized among the more restrictive ones[328], the Court upheld a narrow understanding of the criminal offence of providing training for terrorism. It found that the skills (*rectius* "specific techniques or methods"),

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persona addestrata, nonché della persona che avendo acquisito, anche autonomamente, le istruzioni per il compimento degli atti di cui al primo periodo, pone in essere comportamenti univocamente finalizzati alla commissione delle condotte di cui all'articolo 270 sexies. Le pene previste dal presente articolo sono aumentate se il fatto di chi addestra o istruisce è commesso attraverso strumenti informatici o telematici».

[322] For a critical comment that questions the necessity of this legislative operation see A. PRESOTTO, cit., 111 et seq.

[323] Compare with R. WENIN, cit., 118.

[324] Cf. A. PRESOTTO, cit., 112.

[325] See Article 270-quater, comma 2 c.p. This highlights the fact that training constitutes a greater threat for the protected legal interests, a circumstance which is also reflected in the severer legal consequences foreseen by the Italian legislator. In that sense A. PRESOTTO, cit., 111-112.

[326] Restrictive interpretations are recommended by the International Commission of Jurists. See H. DUFFY – R. PILLAY – K. BABICKA, cit., 29.

[327] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 197-198. The cited Author refers among others to Cass. Pen., Sez. I, 12.07.2011, n. 38220, in *archiviodpc.dirittopenaleuomo.org.*

[328] See Cass. Pen., Sez. VI, 20.07.2011, n. 2970, in *archiviodpc.dirittopenaleuomo.org*. *(Garouan)*

which form the object of instruction, must be suitable for the commission of terrorist offences and should be taught for an appreciable time frame[329] that is proportionate to their complexity – a solution that partially mirrors the doctrinal suggestions examined *supra*[330]. By setting this requirement the judges essentially recuperated a certain level of objective dangerousness of the material acts, thereby avoiding an excessive subjectivity of the criminal offence[331]. Furthermore, based on a similar *ratio decidendi*, it stated that when there is no direct relationship between the provider of instructions and the receiver, for the latter to be punishable it should be proven that he or she was at the verge of putting the acquired skills into practice or to share them with people capable of doing so[332].

This latter statement, however, implies that a direct contact between the trainer and the trainee is not essential. Italian scholarship[333] has, indeed, elaborated an interpretation of the provision under examination that valorizes its wording and splits it into two different conducts: training *stricto sensu (“addestramento”)*, and providing of instructions (*“fornire istruzioni”)*[334]. Allegedly, the latter can be committed also *ad incertam personam*, which is what happens when e.g. the instructions are uploaded in the dark web[335]. Hence, the continuity of contacts that characterizes the conduct of “providing training” is not required to be liable for “providing instructions”, an offence that can be

[329] Compare with H. DUFFY – R. PILLAY – K. BABICKA, cit., 29 who summarize the pretorial rule as requiring a «continuous and systematic programme of education».
[330] Cf. final paragraphs of Chapter III, 5.6.2.
[331] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 195-196.
[332] See *Ibid.* 196. This pretorial rule predated the amended version of Article 270-*quinquies* c.p. which expressly codified it.
[333] For an exposition of these theories see R. WENIN, cit., 118-119.
[334] Recent case-law of the Italian Supreme Court seems to confirm this doctrine. Compare with Cass. pen., Sez. I, 05.04.2019, n. 15089, in *www.italgiure.giustizia.it,* where the Court held that the two figures of the “trainer” and the “informer” are different in terms of quality and intensity of the conduct.
[335] This solution seems to contradict the interpretative suggestions provided by N. KARALIOTA et al, cit., 19, as well as the Directive’s requirement of knowledge that the provided skills are intended to be used for terrorist purposes. An alternative solution would be to tackle such behavior via the offences of incitement or public provocation. For instance, in Germany such acts could be subsumed under § 91(1) StGB, which criminalizes the dissemination of «written material which by its content is capable of serving as an instruction to the commission of a serious violent offence endangering the state, if the circumstances of its dissemination are conducive to awakening or encouraging the preparedness of others to commit such an offence», A. PETZSCHE, *The Penalization of Public Provocation to Commit a Terrorist Offence*, cit., 250.

consummated with a single act. It seems as if this way the restrictive interpretation of the first notion is in the end frustrated by the extensive understanding of the second. To counterbalance this, the provided instructions should be accompanied by implicit or explicit messages of inciting terrorism, which render the *dolus specialis* apparent[336].

Turning towards the individual at the receiving end, recent case-law[337] has reaffirmed that self-study is criminally relevant only if the individual performs acts that are materially significant and unambiguously directed towards the commission of a terrorist offence – the mere collection of information coupled with manifestations of ideological adherence being insufficient. In other words, the individual must have started externalizing his terrorist intent via "materially significant" behaviors.

5.6.3.2. Germany

Germany can be said to fall within the second category (Member States that did not foresee specific provisions dealing exclusively with the phenomenon of training for terrorism). Providing and receiving training are included in the exhaustive list of preparatory acts for the commission of a serious violent offence endangering the State (§ 89a StGB).

Concerning the *mens rea* of the conduct of receiving training, an influential German scholar[338] has observed that a triple intent is required: intention to receive training; intention to use the acquired skills to commit a serious offence against life or personal freedom; intention to impair the security of the State by means of that offence. While the wording of the provision might suggest the sufficiency of *dolus eventualis*, the highest federal Court (*Bundesgerichtshof)* has narrowed the offence by requiring an elevated degree of intent ("firm determination" [339]) of the offender to guarantee its compatibility with

[336] Cf. R. WENIN, cit., 127.
[337] See Cass. pen., Sez. V, 09.02.2017, n. 6061, in *www.questionegiustizia.it.*
[338] See A. CORNFORD – A. PETZSCHE, cit., 176-177.
[339] Compare with H. DUFFY – R. PILLAY – K. BABICKA, cit., 29 and EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 85 who refer to judgement BGH, 08.05.2014, n. 3 StR 243/13, in *dejure.org*.

the German Constitution[340]. In fact, since the offence targets objectively neutral conducts and the criminal liability «turns almost entirely on whether the defendant has the required terrorist intention»[341], this was deemed the only acceptable interpretation. A specific case might be useful to better understand this case law.

In 2015, the *Bundesgerichtshof*[342] stated that obtaining instructions in the use of firearms was insufficient to qualify as receiving training for terrorism, despite the defendant's sympathies for a terrorist group, given that the individual appeared to acquire those skills for purposes of self-defense[343].

The German legal order contains another provision which could be seen as at least partially equivalent to the Italian notion of "providing instructions". § 91(1) StGB punishes the supply of information that is suitable for the commission of terrorist offences (*rectius* serious violent offence endangering the State), when it is done in a manner that instigates such commission. In other words, the provision represents a specific form of indirect provocation to commit a terrorist offence[344]. The requirement of "suitability of the information" seems to echo the narrow understanding of the concept of "specific methods or techniques" referred to previously. Although such a normative formulation is certainly appreciable, it still leaves a certain margin of discretion to judicial authorities, which need to elaborate a set of generally accepted, specific criteria to ensure the foreseeability of the norm[345].

5.6.3.3. Spain

Article 575 of the Spanish criminal code deals with receiving training for terrorism. The first paragraph of that provision punishes not only the receiving of training (*"adiestramiento")*, but also the fact of receiving "indoctrination"

[340] Legal scholarship had raised concerns on the compatibility with the principles of harm, definiteness, proportionality and culpability. Compare with A. PETZSCHE, *Erneute Ausweitung des deutschen Terrorismusstrafrechts,* cit., 212.
[341] See A. CORNFORD – A. PETZSCHE, cit., 181.
[342] See BGH, 27.10.2015, n. 3 StR 218/15, in *dejure.org*.
[343] Cf. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 81.
[344] In that sense R. WENIN, cit., 127.
[345] See *Ibid.*

(*"indoctrinamiento"*)[346]. The latter seems to be comparable to the Italian offence of being recruited (*addestramento passivo*)[347], and therefore won't be examined here.

Furthermore, the second paragraph foresees the offence of self-study (and self-indoctrination). It is expressly stated that acts of regular access to certain websites as well as the acquisition or detention of certain documents are covered by the provision when committed with the intention to use the know-how for the commission of a terrorist offence[348]. An influential scholar[349] couldn't but note the similarity between the Spanish norm on regular access to websites hosting terrorist content, and a French provision which was quashed by the *Conseil Constitutionnel*[350], a similarity that provides food for thought on the opportunity of removing such a provision from the legal order or at the very least interpreting it very restrictively to avoid illegitimate compressions of fundamental rights. Although the requirement of regularity, as well as the specific intent might, if correctly applied, serve as a filter of neglectable, harmless behavior, jurists[351] have lamented that the provision does not sufficiently clarify the scope of the subjective element.

[346] Artículo 575.1 c.p.: «Será castigado con la pena de prisión de dos a cinco años quien, con la finalidad de capacitarse para llevar a cabo cualquiera de los delitos tipificados en este Capítulo, reciba adoctrinamiento o adiestramiento militar o de combate, o en técnicas de desarrollo de armas químicas o biológicas, de elaboración o preparación de sustancias o aparatos explosivos, inflamables, incendiarios o asfixiantes, o específicamente destinados a facilitar la comisión de alguna de tales infracciones».

[347] Compare with F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 237.

[348] Artículo 575.2 c.p.: «[…] Se entenderá que comete este delito quien, con tal finalidad, acceda de manera habitual a uno o varios servicios de comunicación accesibles al público en línea o contenidos accesibles a través de internet o de un servicio de comunicaciones electrónicas cuyos contenidos estén dirigidos o resulten idóneos para incitar a la incorporación a una organización o grupo terrorista, o a colaborar con cualquiera de ellos o en sus fines. Los hechos se entenderán cometidos en España cuando se acceda a los contenidos desde el territorio español. Asimismo se entenderá que comete este delito quien, con la misma finalidad, adquiera o tenga en su poder documentos que estén dirigidos o, por su contenido, resulten idóneos para incitar a la incorporación a una organización o grupo terrorista o a colaborar con cualquiera de ellos o en sus fines».

[349] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 237.

[350] See Chapter I, 5.3.3.

[351] Cf. H. DUFFY – R. PILLAY – K. BABICKA, cit., 30.

5.6.3.4. France

France is another example of a legal order that does not foresee a specific offence concerning the phenomenon of training for terrorism. Nevertheless, under French criminal law, the act of receiving (including through self-study) training for terrorism, seems to be covered either by the provision on participation in a terrorist group, or by a provision that is comparable to the German § 89a StGB[352]. The provision in question is *Article 421-2-6 c.p.*, which criminalizes the offence of *"entreprise individuelle"*[353]. Essentially, this Article punishes preparatory acts, aimed towards the commission of terrorism. At a closer look, Article 421-2-6 c.p. seems to be implementing not only Article 8 of the Directive, but also Article 3(1)(f).

An influential scholar[354] observes that preparatory acts under French law require two objective elements. First, a principal material act (*fait matérial principal*), consisting in the possession, procurement or production of objects or substances that pose a threat to others. Furthermore, an accessory material act (*fait matérial complémentaire*) among those exhaustively listed. The latter comprises the act of receiving training or education in the use of weapons or any form of combat, in the manufacture or use of explosive, incendiary, nuclear, radiological, biological or chemical substances, or in the operation of aircraft or ships.

As far as the subjective element is concerned, the two acts must be carried out with the specific aim of seriously disturbing public order through intimidation or terror.

At this point it must be emphasized that the choice of foreseeing a list of exhaustive material acts – the occurrence of one of them constituting a pre-condition to be tried for receiving training for terrorism (*rectius* preparatory acts

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[352] Compare with EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 79.

[353] Article 421-2-6 c.p.: «Constitue un acte de terrorisme le fait de préparer la commission d'une des infractions mentionnées au II, dès lors que la préparation de ladite infraction est intentionnellement en relation avec une entreprise individuelle ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur et qu'elle est caractérisée par […] Le fait de détenir, de se procurer, de tenter de se procurer ou de fabriquer des objets ou des substances de nature à créer un danger pour autrui [et le fait de] S'entraîner ou se former au maniement des armes ou à toute forme de combat, à la fabrication ou à l'utilisation de substances explosives, incendiaires, nucléaires, radiologiques, biologiques ou chimiques ou au pilotage d'aéronefs ou à la conduite de navires».

[354] F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 213.

for the purposes of terrorism) – is certainly appreciable, since it reduces judicial discretion. From a comparative point of view, Italian judges could draw inspiration from this list when verifying the existence of "acts that unequivocally suggest the intention to commit a terrorist offence", which the law requires to punish the (self) trained individual.

In its original formulation, the provision's list of principal material acts was more extensive. However, the French constitutional Court eliminated one of the acts from the list by declaring the Article partially unconstitutional[355]. The reasons given by the Court resemble the interpretative solutions in Italy: only acts that manifest an externalization of the terrorist intent can be considered to be criminally relevant.

5.7. Travelling for the purpose of terrorism

Alongside receiving training for terrorism, the criminal offence of travelling for the purpose of terrorism constitutes one of the major innovations brought about by Directive 2017/541. The new offence underscores one of the main reasons behind the new legislative act of the European Union: the need to stem the flow of foreign terrorist fighters towards conflict zones but also back to Europe[356]. As mentioned in Chapter I, the phenomenon of individuals travelling to

[355] The list of principal material acts originally also contained the act of searching for (*"rechercher"*) objects or substances that pose a danger to others. However, the French constitutional Court (Cons. Const., 07.04.2017, n. 2017-625 QPC, in *www.conseil.constitutionnel.fr*) eliminated that material act, arguing that « by including the material facts that constitute a preparatory act of "searching for ... objects or substances that create a danger to others", without defining the acts that constitute such a search within the framework of an individual terrorist undertaking, the legislature allowed punishment for actions that have not materialised in, by themselves, the desire to prepare for an infraction. If follows from the foregoing that the words "searching for" […] are manifestly contrary to the principle of the necessity of offences and penalties».

[356] See Recitals 4 and 12 Directive 2017/541: «Returning foreign terrorist fighters pose a heightened security threat to all Member States […] Considering the seriousness of the threat and the need, in particular, to stem the flow of foreign terrorist fighters, it is necessary to criminalise outbound travelling for the purpose of terrorism, namely not only the commission of terrorist offences and providing or receiving training but also the participation in the activities of a terrorist group. It is not indispensable to criminalise the act of travelling as such. Furthermore, travel to the territory of the Union for the purpose of terrorism presents a growing security threat. Member States may also decide to address terrorist threats arising from travel for the purpose of terrorism to the Member State concerned by criminalising preparatory acts, which may include planning or conspiracy, with a view to committing or contributing to a terrorist offence. Any act of facilitation

conflict zones to join terrorist groups (in particular to Syria and Iraq to join Daesh[357]) caught the attention of national authorities across the globe. The UN Security Council's attempt to give a swift and decisive response to the issue came mainly in the form of Resolution 2178, adopted shortly after the terror attack that occurred in Brussels in 2014 and obligating the Member States to make use of criminal law to get a hold on this phenomenon[358].

The executive organ of the UN defines foreign terrorist fighters as «individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict». This definition is largely reflected in other sources of law, including Directive 2017/541. The Council of Europe's Additional Protocol of 2015 obliges to criminalize the act of travelling abroad for terrorism and the attempt to do so (Article 4) as well as the funding, organizing or facilitating of such travels (Articles 5 and 6)[359].

5.7.1. Structure of the European offence

The European Union's offence of travelling for the purpose of terrorism is similar to the one foreseen by the Council of Europe, yet different in some respects. Article 9 of the Directive provides for two different offences: outbound (paragraph one) and inbound travelling (paragraph two) for the purpose of terrorism. As usual for European criminal law, for both type of conducts, the required subjective element is intent. Since the two paragraphs describe different material acts, they will be dealt with separately in the following.

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of such travel should also be criminalised». See also EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 67.

[357] Cf. T. A. ZWEIGLE, cit., 39 et seq.

[358] Compare with A. PETZSCHE, *Erneute Ausweitung des deutschen Terrorismusstrafrechts*, cit., 213; F. ROSSI, *La circolarità dei modelli nazionali nel processo di armonizzazione europea delle legislazioni penali antiterrorismo*, in *Dir. Pen. Cont. - Riv. Trim.*, 2017, 1, 179; ID., *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 111.

[359] For that autonomous offence in the EU context, see Chapter III, 5.8.

5.7.1.1. Outbound travelling

Paragraph one compels to criminalize the act of exiting the territory of a Member State for the purpose of terrorism[360]. The terrorist purpose of the journey is to be understood broadly as «the purpose of committing, or contributing to the commission of, a terrorist offence […] the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group [or] the purpose of the providing or receiving of training for terrorism». As with all offences related to terrorist activities, the actual commission of a terrorist offence is irrelevant, which implies that the intent takes the form of *dolus specialis*. Furthermore, in light of the second part of Article 13, it shouldn't be necessary to establish a link between the act of travelling and a concrete offence among the ones laid down in the Directive[361].

Article 14 prescribes to criminalize both inciting (paragraph two) and attempting[362] (paragraph three) to travel abroad for terrorist purposes. Although the provision's paragraph one seems to exclude the criminal relevance of aiding and abetting travelling for terrorism, this exclusion is ostensible. In fact, Article 10 ("organising or otherwise facilitating travelling for the purpose of terrorism") seems to be subsumable under the concept of aiding and abetting.

5.7.1.2. Inbound travelling

Paragraph two aims at ensuring criminal prosecution for those who enter the territory of a Member State of the European Union with terrorist intentions. This is a peculiar choice of the European legislator. The Council of Europe and the United Nations did not foresee a comparable offence, instead merely

[360] See Article 9(1): «[…] ensure that travelling to a country other than that Member State for the purpose of committing, or contributing to the commission of, a terrorist offence as referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving of training for terrorism as referred to in Articles 7 and 8 is punishable as a criminal offence when committed intentionally.

[361] A choice that is criticized by scholars and human rights defenders. Cf. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 68.

[362] This pre-preventative approach is criticized by defense lawyers. Cf. *Ibid.* 69.

prescribing the criminalization of travelling *abroad* towards a different State from the traveler's State of nationality or residence[363].

Article 9(2) allows Member States to choose among two equivalent alternatives[364].

The first option is to criminalize the act of inbound travelling *per se*, when the journey pursues a terrorist purpose[365]. This alternative perfectly mirrors paragraph one.

The other way to implement the European obligation is to criminalize not the act of travelling towards the Member State in and of itself, but rather the undertaking of preparatory acts for the commission of or contribution to a terrorist offence *strictu senso* (Article 3 of the Directive) by a person entering the territory[366].

As far as the interplay with the general provisions of Title IV (in particular Articles 13 and 14) is concerned, the observations on outbound travelling largely apply in this case as well. The only peculiarity is that the second alternative does not need to be punishable when merely attempted.

5.7.2. Selected critical aspects

Travelling constitutes not only a neutral act, but an act that enjoys protection under the freedom of movement[367], which is a fundamental cornerstone

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[363] See *Ibid.* 67; A. PETZSCHE, *Erneute Ausweitung des deutschen Terrorismusstrafrechts*, cit., 223.

[364] The alternative nature is clear since the provision uses the words «ensure that *one* [emphasis added] of the following conducts is punishable».

[365] See Article 9(2)(a): «[…] travelling to that Member State for the purpose of committing, or contributing to the commission of, a terrorist offence as referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving of training for terrorism as referred to in Articles 7 and 8».

[366] See Article 9(2)(b): «[…] preparatory acts undertaken by a person entering that Member State with the intention to commit, or contribute to the commission of, a terrorist offence as referred to in Article 3». This alternative solution was also recognized by the Council of Europe in the explanatory report to the Additional Protocol. In that sense F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 129.

[367] Article 52(1) of the Charter of Fundamental Rights. See Chapter II, 2.3.3. Compare also with H. DUFFY – R. PILLAY – K. BABICKA, cit., 30, who exhort national judicial authorities to apply the europeanized domestic laws on terrorist travels in a manner that respects freedom of movement and other fundamental rights (e.g. freedom of association, assembly and expression, as well as the right to leave one's country, protected by Protocol 4 to the ECHR).

of the European legal order. Consequently, compressions of this freedom cannot go beyond its essence, but rather need to have a clear legal basis and be proportionate to the pursued legitimate aim. According to some[368], the wording of Article 9 is said to be ambiguous, leading to potentially illegitimate encroachments of the right.

Furthermore, the provision seems to attribute criminal relevance only to transnational travelling, while intra-national journeys are deliberately kept outside its scope. While on the one hand this renders the European norm more in line with the criterion of the "cross-border dimension" mentioned in Article 83(1) TFEU, on the other hand it could lead to unreasonable applications of the law: Whereas an individual driving to a village close to the national border wouldn't be considered to be travelling for terrorism, another individual crossing the border by driving a few hundred meters further to a neighboring village would be treated differently[369]. However, an influential scholar[370] downplays these concerns by highlighting that the individual travelling within a Member State usually doesn't go unpunished due to the extensive interpretation of other inchoate terrorist offences.

Legal scholars[371] have raised the issue of the lack of an exclusion clause for individuals travelling to their country of residence or nationality. As seen, the Council of Europe has implicitly established such an exclusion. As a matter of fact, the issue of foreign terrorist fighters returning to their country raises the difficult question on how to deal with them. Individuals who travelled to conflict

[368] See H. DUFFY – R. PILLAY – K. BABICKA, cit., 32: «The offences of travel for the purposes of terrorism enacted under Article 9 carry particular risks of arbitrary, disproportionate and discriminatory interference with the right to freedom of movement […] and the freedom to leave any country, including one's own». Similarly, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 68.

[369] Compare with N. KARALIOTA et al., cit., 30. The Authors criticize the allegedly unjustified differentiation of conducts which express the same criminal demerit.

[370] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 144.

[371] For instance N. KARALIOTA et al., cit., 70: «[T]he close relationship between the person travelling and its place of destination or origin should function as a contra-indicator of the [terrorist] purposes. So the cases of those travelling to their place of nationality or to a place where they have residence or where they have family ties should be checked while examining the ulterior intent with regard to travelling abroad or from abroad». Compare this statement with the case-law of the ECtHR (*İletmiş v. Turkey*) cited in Footnote 339 of Chapter II and with H. DUFFY – R. PILLAY – K. BABICKA, cit., 31 who stress that a *de facto* deprivation of the right to return to a country should be carefully assessed, especially when the individual has strong (e.g. familiar) links to that country.

zones to join certain groups might change their mind and choose to travel back to their country of origin with no bad intentions and still risking prosecution[372].

The first alternative given by the Union (criminalizing travelling itself) might trigger the introduction of strongly subjectivized criminal offences in national criminal systems. This is highly problematic, given the probatory issues when it comes to terrorist intent[373]. In fact, there is a risk that the mere presence in, or the plan to travel to, certain territories with a high density of terrorist activities are in practice found to be incontrovertible proof of the terrorist purpose[374].

Recital twelve's phrase «it is not indispensable to criminalise the act of traveling as such» highlights the European legislator's awareness of these problems[375]. In fact, the second alternative seems like an attempt to mitigate the aforementioned concerns. By obliging to criminalize preparatory acts with a view to committing a terrorist offence, rather than travelling itself, it appears to require that the terrorist intent materializes itself in the form of objective, externally perceivable actions alongside the act of travelling[376]. In other words, the terrorist purpose must leave the individual's *forum internum* and become tangible through acts that cause at least a risk to the protected legal interests (which the act of travelling in and of itself does not)[377]. This solution seems to be more in line with

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[372] According to some, the offence could preclude to change one's mind once the destination is reached. In that sense EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 70.

[373] See *Ibid.* 69 and 73, where a prosecutors' opinion is highlighted, according to which an autonomous offence of travelling for terrorism is merely symbolic, given that sufficient evidence of the terrorist purpose is usually available only once the journey has already been completed. Proving intent is particularly difficult when individuals travel to Europe from conflict zones, since in those contexts it is hard to gather reliable evidence. Such intent must therefore often be inferred from certain elements (communication on social media, content in luggage etc.).

[374] See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 73.

[375] Compare with N. KARALIOTA et al., cit., 34 where the Authors put forward the thesis that this clause was introduced to avoid that traveling to certain third countries (i.e. Syria and Iraq) would automatically be considered as travelling for terrorist purposes.

[376] See F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 144, where a scholarly opinion is cited, according to which the provision's *ratio* is to facilitate the proof of the nexus between the travel and the preparation of terrorist offences. Compare with H. DUFFY – R. PILLAY – K. BABICKA, cit., 31 who suggest that «Judges should interpret and apply the offences […] so that travel only falls within the definition of the offence where it has a sufficient proximate connection to the principal offence of terrorism under Article 3».

[377] Compare with N. KARALIOTA et al., cit., 32. The authors warn that «criminalisation based on […] the "dangerousness" of the individual […] and relating to a "possible crime" grounded on

the principles of harm and proportionality since it avoids the use of criminal law at an excessively anticipated stage.

Nevertheless, the possibility to opt for this technique to criminalize inbound travelling might lead to unequal treatment. Whereas in the case of individuals *entering* the State, their bad intentions would have to be externalized through preparatory acts for the commission or contribution to terrorist offences, individuals *exiting* the State with the same intentions could be prosecuted simply for that (notwithstanding the fact that their intentions should be proven based on objective, factual circumstances). It would be more coherent to foresee analogous treatment for both conducts. One argument for the earlier intervention of criminal law in the case of outbound travelling could be that once the individual has crossed the border, the Member State might not be able to exercise jurisdiction anymore[378].

In Chapter I the famous phrase «one man's terrorist is another man's freedom fighter» was cited. In the context of terrorist travels this phrase is highly relevant. The definitional issues concerning terrorism have direct repercussions on the way the offences under Article 9 are applied. A foreign organization might be considered a terrorist group by some, whereas others see it as a legitimate force in a non-international armed conflict. In the latter case, travelling abroad to join such an association (or coming back) would not fall within the scope of the Directive, given the exclusion clause in Recital 37. While for certain organizations both academics and the public opinion will most likely agree on the terrorist nature[379], in other cases the qualification might be more controversial[380].

Finally, another issue is the risk of mistaking individuals or associations travelling to conflict zones for legitimate reasons for potential terrorists. This

supposed "logical anticipations of objective developments" is historically linked to totalitarian regimes».

[378] See A. PETZSCHE, *Erneute Ausweitung des deutschen Terrorismusstrafrechts,* cit., 225.

[379] Cf. with T. A. ZWEIGLE, cit., 36, who argues that such general agreement is found in the case of ISIS.

[380] See T. VAN POECKE – F. VERBRUGGEN – W. YPERMAN, cit., 313 et seq. The Authors examine the application of the exclusion clause by Belgian Courts in favor of the Kurdistan's Workers Party ("PKK").

might include journalists who want to report on the situation, but also organizations providing humanitarian aid[381].

5.7.3. National implementation

Most Member States of the European Union appear to have adopted criminal laws that are in line with the second technique of penalization of inbound travelling mentioned under Article 9(2)(b). In fact, whereas outbound travelling is explicitly criminalized in numerous States[382], national criminal laws on inbound travelling are difficult to find, presumably because the sources of International Law do not require its incrimination and the Union's additional emphasis on the fact that criminalizing travelling *per se* is "not indispensable". Some legislators did not even foresee explicit criminal offences for outbound travelling on the assumption that there are other, more general provisions which are sufficient to cover acts corresponding to those described in Article 9(1)[383].

5.7.3.1. Germany

Germany is among the Member States that have introduced a specific provision dealing with outbound travelling for terrorist purposes. § 89a(2a) StGB explicitly qualifies the act of travelling abroad for the already examined purposes as a "preparatory act for the commission of a serious violent offence endangering the State".

The objective element of the offence is said to be in line with the Directive, although some suggest interpreting § 89a StGB restrictively as

[381] The latter are explicitly considered by Recital 38: «The provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive, while taking into account the case-law of the Court of Justice of the European Union». See also H. DUFFY – R. PILLAY – K. BABICKA, cit., 31: «Travel for humanitarian purposes, including to support rights to food, health, sanitation or housing should not be interpreted as falling within the scope of the offence»; Similarly, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 68.

[382] See Austria (§ 278g StGB), Germany (§ 89a Abs. 2a StGB) and Spain (Art. 575.3 c.p.).

[383] Compare with H. DUFFY – R. PILLAY – K. BABICKA, cit., 32-33. Examples include the Netherlands and Italy (the latter has expressly criminalized only organization and facilitation of traveling for terrorist purposes, see *Art. 270-quater1. c.p.*). In France, travelling towards conflict zones is allegedly prosecuted under the offence of terrorist criminal conspiracy. In that sense EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 68.

requiring the presence of "terrorist training camps" in the country of destination – an interpretation that is rejected by influential scholarship[384].

An influential German academic[385] carried out an extremely detailed analysis of this provision with the aim of verifying its compatibility with German constitutional law – i.e. the *Rechtsgutlehre*, the theory of legal interests, which also includes the proportionality principle[386]. In a first step, the cited author observed that § 89a(2a) ultimately aims at protecting a plurality of generally accepted legal interests. On the one hand, meta-individual *Rechtsgüter* such as national security, the integrity of an international organization and the constitutional structures of the State, on the other hand individual legal interests such as life, physical integrity and personal liberty. Consequently, he acknowledged that the provision pursues a legitimate aim[387].

He classified the criminal offence as a "typified preparatory offence of abstract endangerment" and noted that the attempt to carry out the preparatory act (the travel) is punishable under German criminal law[388]. He argues that, at a closer look, this leads to the penalization of the attempt to "prepare a preparatory act"[389], a legislative choice that is constitutionally questionable in terms of proportionality[390]. Furthermore, the highly subjectivized offence allegedly risks resulting in the penalization of mere thoughts (*"Gesinnungsstrafrecht"*) and poses huge evidentiary problems[391].

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[384] See A. PETZSCHE, *Erneute Ausweitung des deutschen Terrorismusstrafrechts*, cit. 221-222.
[385] T. A. ZWEIGLE, cit.
[386] For relevant doctrine on the matter consider E. HILGENDORF, cit.; for a comparative analysis, R. HEFENDEHL, *Die Rechtsgutslehre und der Besondere Teil des Strafrechts. Ein dogmatisch-empirischer Vergleich von Chile, Deutschland und Spanien*, in *Z. Für Int. Strafrechtsdogmatik*, 2012, 10, 506 et seq.; for a critical point of view: C.-F. STUCKENBERG, *The Constitutional Deficiencies of the German Rechtsgutslehre*, in *Oñati Socio-Leg. Ser.*, 2013, 3/1, 31 et seq.
[387] See T. A. ZWEIGLE, cit., 114. It is worth reminding that the pursuit of a legitimate aim is among the doctrinal principles for an ideal criminal policy. In that sense EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 707.
[388] The *Bundesgerichtshof* stated, with a certain discomfort, that the configurability of attempted traveling for terrorist purposes as a criminal offence is «at the borderline of what is constitutionally permissible». See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 69 with reference to BGH, 06.04.2017, 3 StR 326/16, in *dejure.org*.
[389] Compare with T. A. ZWEIGLE, cit., 171-172.
[390] The *Bundesgerichtshof* confirmed its proportionality though, see BGH, 08.05.2014, n. 3 StR 243/13, in *dejure.org*.
[391] See T. A. ZWEIGLE, cit., 196.

Supposedly, § 89a Abs. 2a fulfills the proportionality principle's requirement of suitability for the pursuit of the legitimate aim (*Geeignetheit*)[392]. Problems arise, on the other hand, when it comes to the other two criterions of necessity and prospective proportionality. Concerning the former, the availability of other, less intrusive measures has been highlighted[393]. Contrary to the highest federal Court in Germany, the author whose contribution is being outlined here, made a clear statement by concluding that the provision in question is unconstitutional[394]. Allegedly, the degree of anticipation of penal protection is excessive when confronted with the remoteness of the harm to the *Rechtsgut*. Paraphrasing his words, § 89a Abs. 2a StGB constitutes a "disproportionate interference with fundamental rights" and an "excessive criminal protection of legal interests"[395].

Having examined the German provision concerning outbound travelling for terrorist purposes it is time to analyze how Article 9(2) of the Directive is implemented. The act of travelling to Germany for terrorist purposes is not, in and of itself, covered by an explicit criminal provision[396]. It is noted that the vast majority of such cases can be prosecuted under § 129 StGB (participation in a terrorist group), since it is uncommon for a "lone wolf" to travel abroad for terrorist purposes without any logistic support by others[397]. However, in such marginal cases the individual could still be prosecuted for preparatory acts. Allegedly, there is a "gap of criminalization" between the moment the person enters the country and the moment he or she starts executing preparatory acts (e.g. receives training for terrorism)[398]. However, it is claimed that the Directive cannot be interpreted as requiring to fill this gap, since it would conflict with

[392] In this sense *Ibid.* 420-421.
[393] A German scholar highlights, in an advisory opinion to the *Bundestag*, the administrative measure of travel bans, and suggests that the criminal provision should become applicable only once a travel ban has been imposed. See N. GAZEAS, *Schriftliche Stellungnahme zum GVVG-ÄndG,* in *https://www.bundestag.de/resource/blob/366048/7925e5e255ed657dd244b1c0debf1f50/gazeas-data.pdf.*
[394] See T. A. ZWEIGLE, cit., 447 et seq.
[395] Cf. *Ibid.* 449. In the original language, "übermäßiger Rechtsgüterschutz".
[396] See A. PETZSCHE, *Erneute Ausweitung des deutschen Terrorismusstrafrechts,* cit., 223.
[397] In that sense *Ibid.* 223-224.
[398] Cf. *Ibid.* 225.

constitutional principles (guilt, proportionality and *ultima ratio*) that limit the choices of the European legislator[399].

5.7.3.2. Belgium

The Belgian legislator explicitly addresses both phenomena (inbound and outbound travelling for terrorism) in Article 140-*sexies* of the national criminal code. Contrary to Germany, whose provisions on inbound travelling seem to be covered in a manner corresponding to Article 9(2)(b) of the Directive, Belgium criminalizes *per se* the act of entering its national territory with a terrorist intent[400], in line with Article 9(2)(a).

There are two judicial decisions concerning Article 140-*sexies* c.p. which are worthy of being briefly examined here.

In a first case[401], a Court of first instance has adopted a restrictive interpretation, in line with the recommendations of the International Commission of Jurists[402]. It held that the provision only covers situations in which the individual carries out appreciable preparatory acts, whereas a «mere expression of an intention to travel or the start of preparations (e.g. by saving money and searching for contacts) cannot be criminalized»[403].

The "*Ligue des Droits de l'Homme*" raised concerns on the provision's compatibility with the principle of legality and the freedom of movement and issued a constitutional complaint. In its ensuing decision[404], the Belgian constitutional Court seems to have confirmed the previously mentioned case law and declared the concerns as ill-founded.

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[399] See *Ibid.* 226.
[400] Art. 140-*sexies* c.p.: « […] sera punie […] toute personne qui entre sur le territoire national en vue de la commission ou de la contribution à la commission, en Belgique ou à l'étranger, d'une infraction visée aux articles 137, 140 à 140quinquies et 141, à l'exception de l'infraction visée à l'article 137, § 3, 6°».
[401] Trib. corr. Liège, 19.07.2017, in *J.L.M.B.*, 2017/29, 1391-1401.
[402] See H. DUFFY – R. PILLAY – K. BABICKA, cit., 31.
[403] See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 70.
[404] Court Const., 18.01.2018, n. 8, in *www.const-court.be*.

5.8. Facilitation of travelling for the purpose of terrorism

Article 10 of the Directive[405] foresees an ancillary offence to Article 9. Like the latter, this obligation of penalization is not a *unicum* in the international legal landscape. The Council of Europe's Additional Protocol contains a comparable provision (Article 6)[406], as does UNSC Resolution 2178 (§ 6c)[407].

As stated previously, instead of creating a link between Article 9 and Article 14(1) on aiding and abetting, the European legislator chose to elevate such acts to an autonomous offence of "facilitation", evidently influenced by the cited provisions of international law.

5.8.1. Structure of the offence

The objective element of the offence consists in an act of facilitation (e.g. organization) that assists a person in their travel for terrorist purposes). The offender needs to act intentionally and be aware of the aims of the assisted.

By virtue of Article 13 of the above mentioned Directive, it is irrelevant whether a terrorist offence is committed by the assisted and it is not necessary to establish a link between the facilitation and another, concrete offence covered by the Directive. Furthermore, it is not required to penalize the attempt of facilitation.

5.8.2. Selected critical aspects

Since Article 10 is construed via reference to Article 9, the critical issues concerning the latter also affect the interpretation of the former.

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[405] «Member States shall take the necessary measures to ensure that any act of organisation or facilitation that assists any person in travelling for the purpose of terrorism, as referred to in Article 9(1) and point (a) of Article 9(2), knowing that the assistance thus rendered is for that purpose, is punishable as a criminal offence when committed intentionally».

[406] «[…] "organising or otherwise facilitating travelling abroad for the purpose of terrorism" means any act of organisation or facilitation that assists any person in travelling abroad for the purpose of terrorism […] knowing that the assistance thus rendered is for the purpose of terrorism».

[407] «[…] wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training».

The wording of Article 10 of the Directive itself raises further concerns. The term "facilitation" can have many meanings. Scholars[408] recommend a narrow interpretation, given that the conduct is even further detached from the commission of an actual terrorist offence. One possibility could be interpreting the provision as a causal criminal offence, in the sense that the conduct of the offender must determine a tangible and appreciable benefit for the assisted, making it easier for him/her to arrive to destination. Academics[409] have suggested that only specific know-how and the exploitation of qualified connections should be deemed criminally relevant, whereas technically neutral acts such as booking a flight should be outside the provision's scope.

As far as the subjective element is concerned, the fact that the offence relies on another "intent-based" offence (Article 9) creates evidentiary problems. According to scholars[410], this creates a "chain of purposes" to be proven. «[P]roving these purposes requires a dive into the innermost thoughts of the offender, and is extremely ambiguous because of their 'chain'-like nature with very remote future points of reference»[411]. Moreover, it has been argued that the lack of a link to a concrete offence (see Article 13) lowers the selective filter of the elements of intent and knowledge, which paves the way for potentially arbitrary decisions[412]. The International Commission of Jurists urges judges and prosecutors to take the requirement of knowledge of the intentions of the assisted seriously[413].

5.8.3. National implementation in Italy

Unlike other legislators[414], who considered that provisions of general criminal law were sufficient to cover the conduct of facilitation, the Italian

[408] For instance H. DUFFY – R. PILLAY – K. BABICKA, cit., 33.
[409] See N. KARALIOTA et al., cit., 69. The Authors seem to require the facilitating act to be a *conditio sine qua non* for the success of the journey.
[410] Compare *Ibid.* 34 et seq.
[411] See *Ibid.* 35.
[412] See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 69: «Establishing a person's knowledge of another person's intent is difficult for any bona fide judge».
[413] Compare with H. DUFFY – R. PILLAY – K. BABICKA, cit., 33. By requiring «at a minimum deliberate disregard of knowledge», the authors seem to set *dolus eventualis* as a threshold for criminal prosecution.
[414] For instance, relating to Germany, see A. PETZSCHE, cit., 226.

legislator introduced a specific provision. Article 270-*quater*.1 c.p. penalizes the "organization of transfers for terrorist purposes" in cases where those acts cannot be subsumed under Article 270-*bis* c.p. (association for terrorist purposes) and Article 270-*quater* c.p. More precisely, three alternative conducts of facilitation are mentioned: organization, financing, and promoting such transfers.

The scope of the provision was clarified in a case before the Assise Court of Milan[415] which attracted the attention of Italian scholarship[416]. The Court specified, considering the subsidiarity clause in favor of Article 270-*quater* c.p., that a person recruiting others and subsequently organizing their transfer for terrorist purposes would be criminally liable exclusively for recruitment. Moreover, it excluded acts of self-facilitation from the offence's scope, notwithstanding the possibility to consider these as indicators of passive recruitment or participation in a terrorist association.

The Court also clarified that the facilitative conduct should constitute a necessary and indispensable contribution to the success of the transfer. This interpretation seems to be in line with doctrinal recommendations cited *supra*[417].

5.9. Terrorist financing

Cutting off the financial resources of terrorists is a crucial part of an effective counterterrorism policy, given their essential role of support of such activities[418]. International Organizations have been pursuing this goal for a long time, even before the attacks on the World Trade Center in 2001 triggered the adoption of new measures. The United Nations, for instance, adopted the "Convention on the Prevention of the Financing of Terrorism" in 1999.

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[415] Cort. Ass., Milano, 19.12.2016, n. 8/16, in *archiviodpc.dirittopenaleuomo.org*.

[416] See G. MARINO, cit., 47 et seq. who stresses the by now well-known risk of evidentiary shortcuts when it comes to proving the facilitator's *dolus specialis*; F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 199-200.

[417] See Chapter III, Footnote 409. Compare this with the much wider understanding of the EU Commission, highlighted in its explanatory memorandum: «The term "organisation" covers a variety of conducts related to practical arrangements connected with travelling, such as the purchase of tickets and the planning of itineraries».

[418] Compare with F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello,* cit., 100; V. ARAGONA, *Il contrasto al finanziamento del terrorismo*, in *Dir. Pen. Cont. - Riv. Trim.*, 2017, 1, 97.

Criminal law is not the only available tool to counter terrorist financing. In fact, there are various measures of non-criminal nature dealing with this issue. Without pretending to be exhaustive, within the European Union it suffices to mention two very important measures of administrative law: the so-called "Anti-Money-Laundering Directive"[419] and the system of Targeted Asset Freezing.

The former's essential purpose is to prevent the use of the Union's financial system for the purposes of money laundering and terrorist financing. This objective is pursued by involving certain private entities and persons (e.g. credit and financial institutions, auditors, notaries, legal professionals, estate agents) via the imposition of certain obligations on them (e.g. customer due diligence, suspicious transaction reporting). Entities in breach of national provisions transposing the AML-Directive should be held accountable through effective, dissuasive and proportionate sanctions. The Union leaves it up to the Member States to choose among administrative or criminal sanctions. The definition of "terrorist financing" for the purposes of the AML-Directive is perfectly identical with the definition in Article 11(1) Directive 2017/541.

As far as targeted asset freezing is concerned, Chapter IV will provide a brief *excursus* on that topic.

The obligation to penalize terrorist financing therefore represents a complementary measure that aims to catch (and punish) financing acts which go through the meshes of the net of the administrative preventive measures[420]. Allegedly, there were various factors giving the input for the introduction of an autonomous criminal offence of financing and influencing its shape: the

[419] Directive (EU) 2015/849, as amended by subsequent Directives. Relevant scholarly contributions on the matter include G. LO SCHIAVO, *The Single Supervisory Mechanism (SSM) and the EU Anti-Money Laundering framework compared: governance, rules, challenges and opportunities*, in *J. Bank. Regul*., 2022, 23/1, 91 et seq.; O. SVENONIUS – U. MÖRTH, *Avocat, rechtsanwalt or agent of the state?: Anti-money laundering compliance strategies of French and German lawyers*, in *J. Money Laund. Control*, 2020, 23/4, 849 et seq.; F. COMPIN, *Terrorism financing and money laundering: two sides of the same coin?*, in *J. Financ. Crime*, 2018, 25/4, 962 et seq.; V. MITSILEGAS – N. VAVOULA, *The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law*, in *Maastricht J. Eur. Comp. Law*, 2016, 23/2, 261 et seq.

[420] See Recital 14 Directive 2017/541: «Directive (EU) 2015/849 […] establishes common rules on the prevention of the use of the Union's financial system for the purposes of money laundering or terrorist financing. In addition to this preventive approach, terrorist financing should be punishable in the Member States».

increasingly influential recommendations of the "Financial Action Task Force" (an informal, intergovernmental body of experts), Resolutions 1373 and 2178 of the UNSC and the Council of Europe's Additional Protocol of 2015[421]. Most importantly though, the already mentioned UN Financing Convention, whose penalization obligations are mimicked by Directive 2017/541.

5.9.1. Structure of the European offence

The objective acts criminalized by Article 11 of the cited Directive are providing or collecting, by any means, directly or indirectly, funds for terrorism. These acts must be carried out with the intention or the knowledge that the funds will be used for the commission of or contribution to any offence covered by Articles 3-10 of the Directive. The subjective element of intent therefore concerns not only the material act carried out by the offender, but also the (potential) future destination of the funds.

The notion of "funds" is specified in Article 2 as «assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit»[422].

The general provisions of Article 13 only partially apply to terrorist financing. According to paragraph two of Article 11, for terrorist financing to be punishable it is irrelevant whether the funds are in fact used, in full or in part, to commit or contribute to the commission of any of the offences in Articles 3, 4 and 9. Consequently, it makes sense to argue *a contrario* that the residual offences in the Directive (e.g. training or recruitment) must actually be committed to punish the individual who sponsors them[423].

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[421] Cf. N. KARALIOTA et al., cit., 22. The influence of the FATF's recommendations is examined in B. WEIßER, *Der Einfluss der Financial Action Task Force auf die deutschen Strafvorschriften zur Terrorismusfinanzierung*, cit., 229 et seq. See also G. PAVLIDIS, *Financial action task force and the fight against money laundering and the financing of terrorism: Quo vadimus?*, in *J. Financ. Crime*, 2021, 28/3, 765 et seq.

[422] Compare with UN Financing Convention Article 1(1).

[423] See N. KARALIOTA et al., cit., 24 et seq.

Furthermore, the provision adopts a wide understanding of the concept of knowledge of the destination of the funds by stating that it is *not* required that the offender knows for which specific offence the funds are to be used. In other words, merely making funds available, with knowledge that eventually they will be used for terrorist purposes, is considered sufficient to trigger criminal liability, even when the offender does not know what the funds will be used for specifically[424].

Article 14 attributes criminal relevance to aiding and abetting, inciting and attempting[425] terrorist financing. The obligation to punish attempted terrorist financing implies that when the preventive system established through the AML-Directive is effective and a financial transaction for terrorist purposes is impeded, this does not preclude the criminal liability of the individual who unsuccessfully tried to fund terrorism.

5.9.2. Unresolved issues

The provision's compatibility with the legality principle has been called into question by some experts who argue that it is deficient in terms of foreseeability[426]. In fact, despite the terminological clarifications in Article 2, there are still some interpretational ambiguities. For instance, what exactly does "collecting" as opposed to "providing" mean? Apparently, it refers to an activity that precedes the stage where the funds are made available to others. Hence, the provision includes an act that is even remoter from an actual harm to protected legal interests. Legal scholars[427] therefore appear to be firm in their position that

[424] According to the Commission, this is in line with the recommendations of the Financial Action Task Force. Cf. in that sense V. ARAGONA, cit., 97. The great influence of the "FATF" soft law (*de facto* hard law) and the issues concerning the deficit of democratic legitimacy of the intergovernmental body are highlighted by F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 103 et seq.; B. WEIßER, *Der Einfluss der Financial Action Task Force auf die deutschen Strafvorschriften zur Terrorismusfinanzierung*, in A. PETZSCHE – M. HEGER – G. METZLER (Eds.), *Terrorismusbekämpfung in Europa im Spannungsfeld zwischen Freiheit und Sicherheit: historische Erfahrungen und aktuelle Herausforderungen*, 1st Edition, Baden-Baden, 2019, 229 et seq.

[425] In line with Article 2 §4 of the UN Financing Convention

[426] In that sense H. DUFFY – R. PILLAY – K. BABICKA, cit., 34.

[427] Cf. N. KARALIOTA et al., cit., 26-27: «The only case that could be considered to entail at least an abstract endangerment of a legal interest is an active act of ensuring funds, such as collecting funds from third persons […] As a result, it would not be possible to deem punishable cases where

the term should be interpreted restrictively to avoid incompatibilities with the proportionality principle.

Moreover, the construction of Article 11 as a (almost) perfectly autonomous offence leads again to a problematic anticipation of the penal response as well as to evidentiary difficulties when it comes to the *mens rea* of the offender[428]. The risk is to punish an act simply because of the intentions of the offender, independently from its suitability to contribute indirectly to terrorism[429]. The International Commission of Jurists recommends restrictive criminalization of mere acts of financing where there is «specific intent to contribute, directly or indirectly, to the commission of the principal offence of terrorism, or at a minimum, deliberate disregard of knowledge that one's actions will do so»[430].

Finally, the just cited organization highlights that the provision risks negatively affecting the work of humanitarian organizations and human right defenders and more generally obstructing transfer of resources for legitimate reasons[431].

5.9.3. National implementation

5.9.3.1. Italy

In Italy, Article 270-*quinquies*.1 c.p. implements the International and European obligations to penalize the financing of terrorism. The provision seems to cover both conducts mentioned in Article 11 of the Directive and to even go beyond the latter's requirements. In fact, its second paragraph also foresees the acts of "depositing" and "safekeeping" of funds. However, those acts are punishable with more lenient custodial sentences than the acts mentioned in the first paragraph (collecting, providing, making available). The national provision contains explicit subsidiarity clauses in favor of Articles 270-*bis* c.p. and 270-

persons simply save at their bank account what they can spare from their monthly salary, even if they intend to use this money to finance other persons for terrorist purposes».

[428] Allegedly, this could lead to risks of arbitrary or discriminatory application of the implementing national offences. In that sense, H. DUFFY – R. PILLAY – K. BABICKA, cit., 34.

[429] Cf. N. KARALIOTA et al., cit., 24.

[430] H. DUFFY – R. PILLAY – K. BABICKA, cit., 34. In other words, it is not commendable to criminalize below the threshold of *dolus eventualis*, which has happened in Spain though. See Chapter III, 5.9.3.3.

[431] See *Ibid.* 34-35.

quater.1 c.p. Hence, under Italian criminal law, financing travelling for terrorist purposes falls under the domestic provision implementing Article 10 of the Directive ("Organising or otherwise facilitating travelling for the purpose of terrorism"). Also, unless there is no sufficient "*affectio societatis"* the sponsor of a terrorist group will be legally qualified as one of its participants and held liable for that offence[432].

It has been argued that the new offence (introduced in 2016) purports to protect the national *ordre public* but also international security[433]. Allegedly, the criminal offence is one of presumed endangerment of those legal interests and the subjective element comprises the specific intent (*dolus specialis*) to finance conducts with terrorist purpose[434]. The cited author critically labels Art. 270-*quinquies*.1 c.p. as "symbolic" and "indeterminate". Supposedly it leaves wide margins of discretion to the judiciary in violation of the principles of legality and criminalizes behavior that is far from harmful for the protected legal interests[435].

5.9.3.2. Germany

The normative point of reference in Germany is § 89c StGB. It is labelled "Terrorist Financing" and hence constitutes one of the few provisions of the national criminal code that use the "terrorist label". The norm only addresses the financing of offences corresponding to Article 3 of the Directive, while the financing of the other offences in the Directive is covered by other provisions, eventually in conjunction with general criminal law norms.

The German legislator foresees three types of relevant conduct: collecting, receiving and making available funds for the direct commission of a terrorist offence or the commission of such an offence by others[436].

The *Bundesgerichtshof* has issued decisions that significantly clarify the offence's scope. In a recent judgement[437], it specified that "collecting" includes –

[432] Cf. V. ARAGONA, cit., 102.
[433] In that sense, *Ibid*.
[434] See *Ibid.*
[435] Cf. *Ibid.* 103 et seq. The criticism concerns especially the notion of "collecting funds", which, if interpreted extensively as not requiring a certain degree of continuity and organization of the activity, risks criminalizing substantially harmless behavior.
[436] Self-financing seems to be covered by § 89c Abs. 2 StGB.

beside obtaining funds from others – the gathering of funds already in one's possession. On the other hand, receiving goods in the context of a bilateral exchange (*quid pro quo*) without an incrementation of one's funds does not constitute receipt of funds for the purposes of § 89c StGB[438]. Moreover "receipt" must not be interpreted as requiring exclusive property rights over the good, shared property being sufficient to integrate the offence's constitutive element[439]. Furthermore, the Court recently held[440] that participation and support of terrorist groups (respectively § 129a Abs. 1 StGB and § 129a Abs. 5 StGB) can be applied together with participation in the preparation of a serious violent offence endangering the State (§ 89a StGB) and terrorist financing (§ 89c StGB). Neither are the two latter provisions in a relationship of reciprocal exclusivity. In other words, an individual providing money for the travel of another individual for terrorist purposes will be held liable for terrorist financing and participation in the preparation of a serious violent offence endangering the State and eventually also for support of or participation in a terrorist association.

5.9.3.3. Spain

Spain has once again overshot the penalization benchmark set by the European Union[441]. The nation criminal offence on terrorist financing can be found in *Articulo* 576 *c.p.* An in-depth analysis of the provision is not possible here, which is why one peculiar aspect of the norm will be singled out.

The fourth paragraph[442] of the Article foresees criminal liability for who, being obliged to cooperate with national authorities in the prevention of terrorist

[437] BGH, 20.05.2021, 3 StR 302/20, in *juris.bundesgerichtshof.de*
[438] Cf. in that sense also BGH, 20.04.2021, 3 StR 302/20, in *juris.bundesgerichtshof.de* recalled in BGH, 14.07.2021, 3 StR 132/21, *ivi*.
[439] BGH, 3 StR 132/21, cit.
[440] See BGH, 09.08.2022, 3 StR 500/21, in *juris.bundesgerichtshof.de*
[441] Cf. N. CORRAL-MARAVER, cit., 266.
[442] «El que estando específicamente sujeto por la ley a colaborar con la autoridad en la prevención de las actividades de financiación del terrorismo dé lugar, por imprudencia grave en el cumplimiento de dichas obligaciones, a que no sea detectada o impedida cualquiera de las conductas descritas en el apartado 1 será castigado con la pena inferior en uno o dos grados a la prevista en él».

financing[443], impedes the detection or prevention of such activities. The concerning part of that provision is that it does not require the offender to act intentionally, "gross negligence" being sufficient. The discretionary margins in distinguishing gross and simple negligence are admittedly significant.

6. General provisions

Having meticulously analyzed the terrorist offences, offences related to a terrorist group and to terrorist activities, the examination of Directive 2017/541 can be concluded with a view to some of the general provisions in Title IV. The latter is preceded by Article 12, which foresees three residual offences related to terrorist activities that shall merely be cited here[444].

Some general provisions have already been duly taken into consideration during the exposition of the specific criminal offences. It suffices to remind that Article 13 essentially renders the offences under Article 4 and Title III autonomous – in the sense that they are punishable independently from the commission of a principal terrorist offence under Article 3 – and that Article 14 prescribes the penalization of incitement of all offences, as well as aiding, abetting and attempting to commit some of them, according to the domestic understanding of those notions.

However, the more interesting provisions are Articles 15, 17 and 20.

6.1. Penalties for natural persons

The European obligations examined in paragraph five of this Chapter are an expression of the Union's indirect competence in criminal matters under Article 83(1) TFEU. As seen in Chapter two, the latter comprises not only the prerogative to set "minimum rules" on the definition of offences, but also on the

[443] The provision seems to primarily target legal and natural persons listed in Article 2 of Directive 2015/849.

[444] « Member States shall take the necessary measures to ensure that offences related to terrorist activities include the following intentional acts: (a) aggravated theft with a view to committing one of the offences listed in Article 3; (b) extortion with a view to committing one of the offences listed in Article 3; (c) drawing up or using false administrative documents with a view to committing one of the offences listed in points (a) to (i) of Article 3(1), point (b) of Article 4, and Article 9».

legal consequences of the harmonized criminal offence. In this regard the Directive has largely kept the system of the Framework Decision in place[445].

Article 15(1) starts off with a generic obligation to ensure effective, proportionate and dissuasive criminal penalties for the criminal offences in the Directive. This first paragraph can be read as a simple reminder of the "Greek Maize" case law[446]. The Member States' margin of discretion on the choice of the penalties can be regarded as having already been curtailed by the requirement of their criminal nature. In the subsequent paragraphs of Article 15, these generic criteria are rendered more specific for some of the offences.

For terrorist offences under Article 3 (and offences under Article 14) Member States must foresee custodial sentences that are harsher than those imposable under national law for comparable "ordinary offences" (i.e. offences that have the same objective elements but lack the specific terrorist aim), unless the latter are already sanctioned with the maximum possible sentences under national law. Hence, in terms of both type and severity of the legal consequences for the transgressors, legislators' discretion is limited.

The Directive sets differentiated minimum-maximum penalties for the offences related to terrorist groups. Leaders of terrorist groups must be punishable with a minimum-maximum custodial sentence of 15 years, whereas for mere participants that threshold is lowered to a minimum-maximum of 8 years of custodial sentence.

Although the wording of the last part of Article 15(3)[447] is slightly different from the previous Article 5(3) of the Framework Decision[448] and admittedly a bit ambiguous, the only reasonable interpretation is that the Directive reconfirmed the old rule: the offence of directing a terrorist group aimed at merely threatening to commit terrorist offences requires a minimum-maximum custodial sentence of merely 8 years.

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[445] Cf. N. CORRAL-MARAVER, cit., 263.
[446] See Chapter II, 1.3.3.
[447] «Where the terrorist offence referred to in point (j) of Article 3(1) is committed by a person directing a terrorist group a referred to in point (a) of Article 4, the maximum sentence shall not be less than 8 years».
[448] «In so far as the offence referred to in Article 2(2)(a) refers only to the act in Article 1(1)(i), the maximum sentence shall not be less than eight years».

This means that the criticism expressed by legal scholars[449] towards the penalty system provided for by the Framework Decision has not been taken to heart by the European legislator. Academics had observed that while lowering the minimum-maximum penalty for directing a terrorist group whose purpose is to merely threaten to commission of terrorist offences with a view to the principles of proportionality and culpability is commendable, the fact that the minimum-maximum for mere participation in such a group is kept unaltered poses frictions with those same principles and the criterion of horizontal coherence, since leader and followers are put on the same footing.

It is noteworthy that the Framework Decision already caused an awkward situation for the Finnish legislator that might make it (and consequently also the Directive) susceptible to criticism in terms of its vertical coherence: the minimum-maximum of 15 years is severer than the longest deprivation of liberty that Finnish judges can impose for a single offence under domestic criminal law (12 years)[450].

The last paragraph of Article 15 prescribes to ensure that when national judges hand down a sentence for recruitment or training for terrorism, they can take the fact that the offence was directed towards a child into account. Article 16 describes activities which are symptomatic of the offender's repentance and that Member State can foresee as mitigating circumstances. Finally, it is worth mentioning Recital 39, which also serves as a reminder for judges that the implementation of criminal law measures under the Directive should be proportional to the nature and circumstances of the offence. It has been noted that in some States judicial discretion for sentencing terrorism-related offences is very limited to ensure the dissuasiveness of penalties[451]. Furthermore, when there is a strongly anticipated penal response (as is the case with many offences under Title III of the Directive), elevated penalties are at risk of being disproportionate[452].

[449] Cf. EUROPEAN CRIMINAL POLICY INITIATIVE, cit., 712; P. ASP – S. DREW, cit., 5-6
[450] See P. ASP – S. DREW, cit., 9.
[451] In that sense, H. DUFFY – R. PILLAY – K. BABICKA, cit., 44.
[452] See *Ibid.* To mention an example, in Italy organizing transfers for terrorism (*Art. 270-quater.1 c.p.*) is punishable with a custodial sentence ranging between five and eight years.

6.2. Liability of legal persons

The European Union, like other International Organizations[453], has realized that ensuring liability of legal persons is a useful tool for tackling transnational crimes such as terrorism[454]. However, among European scholars there is a dispute whether legal entities can be *criminally* liable. In fact, general principles of criminal law such as the *mens rea* requirement are difficult to reconcile with a legal entity. Therefore, in a few Member States only natural persons can be convicted for a criminal offence ("*societas delinquere et puniri non potest"*)[455]. Most Member States, however, have made efforts to adapt the general notions of criminal law to the peculiar context of legal persons and established systems of corporate liability that are regarded as criminal or at least "para-criminal" by legal scholars[456].

Aware of this controversy, the European legislator merely compels the Member States to hold legal entities accountable when a terrorism-related offence is committed to their benefit[457], without prescribing the nature of the sanction. The chosen sanction can therefore be criminal, administrative or civil in nature, but it must in any case respect the "Greek Maize" criteria[458].

Furthermore, Article 17 of the Directive requires a subjective link between the natural person carrying out the offence and the legal entity. There are two

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[453] See Article 10 of the CoE Convention on the Prevention of Terrorism.

[454] Cf. N. SELVAGGI, *Ex crimine liability of legal persons in EU legislation. An Overview of Substantive Criminal Law*, in *Eur. Crim. Law Rev.*, 2014, 4/1, 47. However, critical scholars have underscored that, in the specific case of terrorist offences, cases of corporate liability are extremely rare or even non-existent. Cf. R. SABIA, *Delitti di terrorismo e responsabilità da reato degli enti tra legalità e esigenze di effettività*, cit., 210.

[455] For instance, Germany has a system of merely administrative liability for legal entities. For a succinct examination read G. DE SIMONE, *Profili di diritto comparato*, in G. LATTANZI - P. SEVERINO (Eds.), *Responsabilità da reato degli enti. Vol. I. Diritto sostanziale*, Turin, 2020, 34 et seq.

[456] Cf. N. SELVAGGI, cit., 52. For an exposition of the varying points of view in the Italian doctrine on the nature of the domestic system of corporate liability see G. DE SIMONE, *Il problema della responsabilità delle persone giuridiche nell'ordinamento italiano*, in G. LATTANZI – P. SEVERINO (Eds.), *Responsabilità da reato degli enti. Vol. I. Diritto sostanziale*, Turin, 2020, 45 et seq. 45.

[457] Arguably, it is difficult to imagine that a person committing an offence with the typically ideological or political intentions that characterize terrorism also aspires to create an economic benefit for a legal entity. Cf. R. SABIA, *Delitti di terrorismo e responsabilità da reato degli enti tra legalità e esigenze di effettività*, cit., 220.

[458] See Article 18 Directive 2017/541: «[…] ensure that a legal person held liable pursuant to Article 17 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines […]».

options: either the offender occupies a leading position within the legal person ("identification principle"[459]), or he/she is under the authority of the latter and the lack of supervision or control by a person in a leading position has made the commission of the offence possible (*culpa in vigilando* or "vicarious liability"[460]).

6.3. Investigative tools

The last provision of the Directive's Title IV that deserves to be briefly touched upon is Article 20, in the part where it obliges to «take the necessary measures to ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases, are available to persons units or services responsible for investigating or prosecuting the offences referred to in Articles 3 to 12».

Since the provision is concerned with measures of procedural and not substantial criminal law, the examination will be concise. It suffices to stress that the term "effective" can be confidently interpreted as a synonym for "invasive"[461]. The risk is that, in the concrete application (i.e. investigation) of the criminal offences under the Directive, beside the already mentioned fundamental rights and freedoms, the right to respect for personal life[462] is compromised beyond the limits of what can be deemed acceptable[463]. In fact, the risk for disproportionate compressions is a direct result of the broadness of the European criminal provisions in the field of counterterrorism, which cover also preparatory acts[464]. For instance, in extreme cases an individual looking up a certain website, liking a post on social media, or entering a certain environment, eventually out of curiosity

[459] Cf. N. SELVAGGI, cit., 54.
[460] *Ibid.*
[461] This can be inferred from the specifications in Recital 21: «[…] Such tools should, where appropriate, include, for example, the search of any personal property, the interception of communications, covert surveillance including electronic surveillance, the taking and the keeping of audio recordings, in private or public vehicles and places, and of visual images of persons in public vehicles and places, and financial investigations». There seems to be large spread agreement among national stakeholders that those invasive measures are necessary. In that sense, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 26.
[462] For an analysis of the ECtHR caselaw on the right in the context of counterterrorism see A. M. SALINAS DE FRÍAS, cit., 121 et seq.
[463] Cf. Recital 36: «This Directive is without prejudice to the Member States' obligations under Union law with regard to the procedural rights of suspects or accused persons in criminal proceedings».
[464] See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 26.

or even unintentionally, could end up being wiretapped or subjected to other invasive investigatory measures[465]. The proportionality of the latter relies heavily on the reasonableness of the national authority that authorizes them. However, it has been observed[466] that, in practice, investigative authorizations are granted with particular ease when it comes to terrorism-related offences.

[465] For an overview of investigative powers in relation to terrorism across the Member States see M. GUTHEIL et al., cit., 40 et seq.
[466] Observation by EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit., 27.

CHAPTER IV

EXCURSUS: ASSET FREEZING AND CRIMINAL LAW

1. Relevance for European criminal law

In the previous Chapter, targeted asset freezing was briefly mentioned as an administrative, complementary measure for preventing terrorist financing. This Chapter shall provide space for a more detailed examination of the topic. One might wonder why such an analysis was included in a dissertation that primarily focuses on a measure of substantial European criminal law. As shall be seen, asset freezing can be described as a measure that is closely connected to criminal law (i.e. the Directive on combating terrorism), if not as spilling over into that branch of law[1]. The goal is to focus not so much on the specific aspects of the procedure for listing and de-listing, but rather on the reasons that render the measure a close relative of criminal law.

A succinct exposition of the context in which the measure originated shall be the starting point. Consequently, the process of "blacklisting" at the UN and EU level shall be sketched out. Thereafter, the academic debate on the administrative or criminal nature of asset freezing will be examined, followed by considerations on the practical consequences of an eventual qualification as punitive measure. The famous "Kadi" caselaw shall be analyzed to visualize the theoretical premises in a more practical context. To conclude, the aspect of interconnection between blacklists and criminal trials will be addressed, as well as the recently introduced reform that could lead to further approximation of criminal law with a view to ensuring compliance with the prohibition to make funds available to listed persons.

[1] Cf. F. GALLI, *The freezing of terrorists' assets: preventive purposes with a punitive effect*, in A. WEYEMBERGH – F. GALLI, *Do labels still matter? Blurring Boundaries between Administrative and Criminal Law. The influence of the EU*, Brussels, 2014, 66, where targeted sanctions are referred to as a "shadow system" of criminal justice». See also F. MAZZACUVA, *Le pene nascoste: topografia delle sanzioni punitive e modulazione dello statuto garantistico*, Turin, 2017. The issue is strongly linked to the Engel criteria, which are analyzed *infra*, Chapter IV, 4.1.1.

2. The origins of targeted sanctions against terrorism

Asset freezing is a specific measure which has its origins in International Law and has come to play a crucial role in the field of counterterrorism. It falls under the broader notion of "targeted sanctions" (also "smart sanctions", as opposed to "blunt sanctions"[2]), which was already mentioned during the examination of the United Nations' legal counterterrorism framework[3]. Smart sanctions have the benefit of "targeting" specific individuals, therefore avoiding the undesirable consequences of economic sanctions against entire States. The latter are problematic since they can affect the whole population for the deeds of a potentially oppressive government[4]. Starting from 1993, the UN Security Council has been adopting Resolutions which obliged the Member States to apply targeted sanctions to certain groups posing a threat to international security[5]: the system of "blacklisting" was born. Although it is particularly relevant in the field of counterterrorism, it should be borne in mind that it is not used exclusively in this particular matter[6]. For the purposes of this dissertation, it suffices to take one UN-blacklist into consideration that is specifically addressed at the Taliban, Al-Qaeda and Daesh. Moreover, pursuant to Resolution n. 1373 there is a general obligation to freeze assets of natural and legal persons involved in terrorism[7] which in the EU is implemented through an additional ("autonomous") blacklist.

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[2] See M. GESTRI, *Quali rimedi a tutela degli individui colpiti dalle sanzioni anti-terrorismo?*, in Y. GAMARRA CHOPO (Ed.), *Lecciones sobre justicia internacional*, Zaragoza, 2009, 79.

[3] See Chapter I, 5.1.1.3.

[4] That awareness settled in after the economic sanctions imposed on Iraq in the 1990s. In that sense I. CAMERON, *EU anti-terrorist sanctions*, in V. MITSILEGAS – M. BERGSTROM – T. KONSTADINIDES (Eds.), *Research handbook on EU criminal law*, Cheltenham, 2016, 546; M. DE GOEDE, *Blacklisting and the ban: Contesting targeted sanctions in Europe*, in *Secur. Dialogue* 2011, 42/6, 501; W. KALECK, *Terrorismuslisten: Definitionsmacht und politische Gewalt der Exekutive*, in *Krit. Justiz*, 2011, 44/1, 64; J. KLABBERS, *International law*, 2nd Edition, Cambridge, 2017, 196; C. C. MURPHY, cit., 116; J. VESTERGAARD, *Restrictive measures in the fights against terrorism: The UN System and the European Courts*, in *New J. Eur. Crim. Law*, 2019, 10/1, 87.

[5] Cf. C. BATTAGLINI, *Le misure patrimoniali antiterrorismo alla prova dei principi dello stato di diritto*, in *Dir. Pen. Con. - Riv. Trim.* 2017, 1, 56. See also M. SOSSAI, *Sanzioni delle Nazioni Unite e Organizzazioni Regionali*, Rome, 2020, 19 et seq., according to whom at the UN level there is a trend of "progressive individualization" of sanctions.

[6] See C. BATTAGLINI, cit., 56. According to M. SOSSAI, cit., 21, targeted sanctions can be subdivided into three categories: sanctions against terrorist groups, against the distribution of weapons of mass destruction and for the resolution of armed conflicts (especially internal ones).

[7] For comparison, an overview of this "two-tier" regulatory framework against the financing of terrorism is provided by C. M. PONTECORVO, *Countering Terrorism Financing at the Time of*

3. The terrorism Blacklists

3.1. UN Lists

In 1999, the UN Security Council established a system of targeted sanctions against the Taliban regime. The latter had ignored the diplomatic exhortations to surrender Osama Bin Laden and his associates to American authorities to be tried for acts of international terrorism. Furthermore, the territory of Afghanistan under Taliban control was allegedly being used to provide shelter and training to terrorists and to plan terrorist plots.

As a reaction, precisely for the purpose of avoiding a victimization of large parts of the Afghan population, the Security Council established a so-called "Sanctions Committee"[8], which was entrusted with the task to elaborate and administer a "blacklist" of persons and entities directly or indirectly linked to the Taliban to be targeted through sanctions which included travel bans and the freezing of their assets[9]. This sanctioning system was modified several times over the years, both in terms of the persons and entities subject to it and the specific sanctions to be imposed. With Resolution n. 1390 it was extended to Osama bin Laden and Al-Qaeda Members[10], as well as to natural and legal persons linked to them. Resolution n. 2253 expanded its scope to also cover individuals, groups, undertakings or entities associated with Daesh[11]. Any UN Member State can propose persons or entities to be added to the blacklist. Such proposals must be accompanied by an exposition of the reasons for listing and the nature of the evidence supporting the allegation[12] and require the Sanctions Committee's approval[13]. However, the evidence can be kept secret if its disclosure could

ISIL: Trends and Pitfalls in the Evolution of the UN Security Council Two-Tier Framework, in *Ord. Int. e Dir. Um.* 2019, 2, 242 et seq.

[8] See UNSC Res. 1267 (1999) § 6.

[9] See UNSC Res. 1267 (1999) § 4.

[10] The expansion of the sanctions regime to members of a globally active organization has been described as "legally problematic". In that sense, C. M. PONTECORVO, cit., 243. The 1267 system became thus became the first to have a global reach.

[11] For an examination of the UNSC's initiatives against Daesh see *Ibid.* 248 et seq.

[12] Cf. M. DE GOEDE, cit., 502.

[13] In that sense, M. GESTRI, cit., 82.

threaten national security[14]. According to the 1267 Committee guidelines a criminal charge or conviction is not necessary to be listed[15].

Roughly two years after the introduction of the sanctions against the Taliban, in the aftermath of the attacks on the World Trade Center, the Security Council's Resolution n. 1373 introduced a general obligation to introduce legislation against people suspected of financing terrorism[16]. The Resolution - *inter alia* - obliged Member States to freeze[17] the assets of such persons and established another Committee[18] to oversee the Resolution's implementation. An influential scholar[19] questioned the utility of using targeted sanctions against networks of terrorists that are not in control of a territory.

The UN 1267 Sanctions Committee usually inserts individuals, groups or entities on its blacklist based on the information it receives from national authorities. Blacklists exist also at the domestic level, and an insertion in a national list of suspected terrorists can lead to the inclusion in the UN list. On the other hand, an individual listed at the UN level will usually be listed at the national level. Therefore, the two levels are tightly interconnected[20]. In the next paragraphs it shall be seen how the European Union is involved in the implementation of the UN obligations. In fact, the Member States of the Union chose to implement their international obligations through intergovernmental and supranational sources of law adopted in the institutional context of the Union[21].

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[14] M. DE GOEDE, cit., 502.
[15] See C. C. MURPHY, cit., 118.
[16] Cf. I. CAMERON, cit., 547. Due to its general character, the Resolution has been referred to as the first "legislative" UNSC Resolution. See C. M. PONTECORVO, cit., 246.
[17] See UNSC Res. 1373 § 1c: «Freeze without delay funds and other financial assets or economic resources of persons who commit or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such person and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities».
[18] See UNSC Res. 1373 § 6.
[19] I. CAMERON, cit., 547.
[20] Cf. INTERNATIONAL COMMISSION OF JURISTS, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, Geneva, 2009, 113; F. GALLI, *The freezing of terrorists' assets: preventive purposes with a punitive effect*, in A. WEYEMBERGH – F. GALLI, *Do labels still matter? Blurring Boundaries between Administrative and Criminal Law. The influence of the EU*, Brussels, 2014, 48.
[21] See C. C. MURPHY, cit., 122 et seq.

3.2. EU Lists

At the EU level, there are two terrorism-related blacklists. One implements the UN sanctions regime against Al-Qaeda and Daesh (UNSC Resolution 1267 and correlated Resolutions), the other is an "autonomous"[22] list that implements the generic obligation *ex* Resolution n. 1373 to freeze the funds of terrorist suspects[23]. Although the two systems differ under certain aspects, the practical consequences of an insertion on one of the lists are the same[24].

3.2.1. Restrictive measures against ISIL and Al-Qaeda

The first list is based on two legal acts: Council Decision (CFSP) 2016/1693 and the Council Implementing Regulation (EU) 2016/1686. Article 3(1) of the former states: «All funds, other financial assets and economic resources, owned or controlled, directly or indirectly, by persons, groups, undertakings and entities designated and subject to an asset freeze by the UNSC […] shall be frozen». Therefore, this list appears to simply duplicate the UN blacklist established with Resolution n. 1267. However, at a closer look, the Council of the EU can, based on Article 3 of the Implementing Regulation[25], autonomously designate individuals or entities to be added to this list. Such a designation or modifications of the list require a unanimous decision of the Council upon proposal from a Member State or the High Representative of the Union for Foreign Affairs and Security Policy[26]. The Council's decision must be communicated to the listed person or entity to enable them to present observations[27]. Member States can also give the necessary input for de-listing[28].

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[22] In that sense, *ex multis* I. CAMERON, cit., 545; N. KARALIOTA et al., cit., 49.

[23] Resolution 1373 does not explicitly require an administrative blacklisting system to implement that obligation, but that is the interpretation given by the Financial Action Task Force. Cf. I. CAMERON, cit., 563.

[24] See N. KARALIOTA et al., cit., 56.

[25] The provision contains a detailed list of reasons that justify the inclusion of persons, groups, undertakings and entities onto the list.

[26] See Article 5(1) Council Decision (CFSP) 2016/1693.

[27] See Article 5(2) Council Decision (CFSP) 2016/1693.

[28] See Article 5(4) Council Decision (CFSP) 2016/1693: «[…] if a Member State considers that there has been substantial change of circumstances affecting the designation of a listed person or entity, the Council, acting by a qualified majority on a proposal from that Member State, may decide to remove the name of such person or entity from the list in the Annex».

3.2.2. Specific measures to combat terrorism

The autonomous EU list for targeted asset freezing is again based on two Union acts: Council Common Position 2001/931/CFSP and the Council Regulation (EC) 2580/2001. It can be inferred from the Common Position's Recital 3 that this system purports to implement the obligations under UNSC Resolution n. 1373. According to Article 3 of the Common Position it applies «to persons, groups and entities involved in terrorist acts and listed in the Annex». A textual comparison shows that the concept of "terrorist act"[29] is almost identical to the notion of "terrorist offence" under Article 3 of Directive 2017/541[30]. For a person to be considered "involved" in such an act, attempt or facilitation are sufficient[31]. A criminal conviction in that sense is not necessary. The Council can list even mere suspects, as long as there is a competent authority's decision to initiate investigations or prosecution against the listed individual or entity and that decision is based on serious and credible evidence or clues[32]. The concept of "competent authority" is, however, not limited to the judiciary[33]. According to the extensive interpretation given by the Court of Justice[34], what matters is that the decision is taken in any proceeding that has a counterterrorist purpose in the broad sense. This paves the way for blacklisting based on decisions taken by the executive power, which in turn can be based on information that has been obtained by security services outside the safeguarding context of a criminal

[29] The notion is defined in Article 1(3) of the Common Position with the usual combination of objective, material acts and specific terrorist aims.

[30] Allegedly the Common position draws on the language of the previous Framework Decision on combatting terrorism and in particular its definitions of "terrorist offence" and "terrorist group". In that sense, C. C. MURPHY, cit., 124.

[31] Cf. Article 1(2) Common Position.

[32] See Article 1(4) Common Position: «The list […] shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list».

[33] Cf. C. C. MURPHY, cit., 141-142.

[34] See GC, 16.08.2014, Joined Cases T-208/11 and T-508/11, in *eur-lex.europa.eu,* § 113: «Common Position 2001/931 does not require that the decision of the competent authority should be taken in the context of criminal proceedings *stricto sensu*, even if that is more often the case. However, […] the purpose of the national proceedings in question must none the less be to combat terrorism in the broad sense».

proceeding. Listing decisions based on intelligence are particularly problematic because the evidence supporting the decision tends to be kept secret for reasons of national security, which makes it difficult for the listed individual or entity to contest the measure and for Courts to carry out an effective judicial review of its lawfulness[35].

Persons, groups or entities designated by the UN Security Council as involved in terrorism may be included in the list, although the term "may" signals that this is not mandatory, which highlights the autonomy of the EU list. Being inserted on a blacklist has significant fundamental rights implications, which is why the Council is obliged to review the list periodically, at least once every six months, to ensure that there are grounds for keeping individuals and entities on the list. However, it has been claimed that the renewal of listings is *de facto* automatic[36].

4. The freezing of assets

Once a person or entity has been listed by the Council, all funds, financial assets or economic resources are frozen and none of those shall be made available, whether directly or indirectly, to the listed person or entity. In other words, the latter are put in a position of complete financial and economic isolation[37]. Generally speaking, the asset freeze is absolute – it covers the listed person's or entity's property in its entirety[38]. However, there are some exceptions[39], which include the possibility to use the frozen funds for essential human needs of the listed natural person or a member of his or her family – such as food, medicine, rent – when such use has been authorized by a competent authority in a Member State.

Welcome as these safeguarding clauses may be, it is obvious that the consequences of such a measure are still so severe that they can effectively turn an

[35] Cf. F. GALLI, *The freezing of terrorists' assets*, cit., 50.
[36] In that sense INTERNATIONAL COMMISSION OF JURISTS, cit., 117.
[37] See Article 1(2) of Regulation (EC) 2580/2001 which defines asset freezing as «the prevention of any move, transfer, alteration, use of or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management».
[38] Cf. N. KARALIOTA et al., cit., 51.
[39] See Articles 5 and 6 of Council Regulation (EC) 2580/2001.

individual's life upside down, especially when the asset freeze stretches over a considerable timeframe[40]. An influential scholar's observations are useful to grasp the devastating effects of an asset freeze: «[L]ife in modern society is rendered effectively impossible for individuals who become included on the UN or EU lists: they cannot work or have a job, as they cannot receive payment into their bank accounts; they cannot receive financial support from friends or sympathizers […] they cannot travel, drive or support their families»[41]. This situation has been strikingly referred to as a "civilian death penalty"[42]. Other scholars[43] have assimilated prolonged asset freezing to permanent criminal confiscation.

All these scholarly observations should be taken seriously and stimulate a critical investigation on the true nature of asset freezing.

4.1. Penal, para-penal or administrative measure?

The European sources concerning asset freezing carefully avoid the term "sanctions"[44]. Instead, they refer to it as "specific measure to combat terrorism" or "restrictive measures". As shall be seen in the next paragraphs, the formal label attached to a measure that compresses fundamental rights is not decisive though. The European Court of Justice has constantly denied that asset freezing has a punitive purpose, instead referring to it as a purely preventive measure[45]. While some scholars[46] accept this approach, others[47] have questioned its correctness, arguing that asset freezing undeniably contains punitive elements.

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[40] Arguably, the temporal indeterminacy of the preventive measure, combined with its highly afflictive nature, risks transforming it into a punitive measure. Cf. in that sense M. SOSSAI, cit., 25.
[41] M. DE GOEDE, cit., 502.
[42] See *Ibid.*
[43] Cf. H. AL-NASSAR et al., *Guilty Until Proven Innocent? The EU Global Human Rights Sanctions Regime's Potential Reversal of the Burden of Proof*, in *Secur. Hum. Rights* 2021, 32/1-4, 12.
[44] However, it has been noted that in other documents concerning the restrictive measures the term "sanctions" is used. In that sense, N. KARALIOTA et al., cit., 47.
[45] *Ex multis* see ECJ, *M.G. Tjebbes and others vs. Minister van Buitenlandse Zaken,* cit.; ECJ, 18.07.2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P *(Kadi II appeal)*, in *eur-lex.europa.eu*.
[46] See for instance A. KLIP, cit., 86 et seq. The author refers to asset freezing as provisional administrative measure. On a similar note, C. C. MURPHY, cit., 137-138.
[47] *Ex multis,* N. KARALIOTA et al., cit., 56 et seq.; H. AL-NASSAR et al., cit., 10 et seq.; F. GALLI, *The freezing of terrorists' assets,* cit., 50 et seq.

4.1.1. The Engel criteria

The academics who dare to contradict the Court of Justice tend to evoke the European Court of Human Right's caselaw which upholds a substantial understanding of the *matière pénale*. The reference here is to the so-called "Engel criteria"[48], according to which the formal qualification of a measure as non-penal is not decisive. If a Member State chooses to qualify the application of an asset freeze as a matter of criminal law, then the procedural and substantial safeguards of criminal law foreseen by the European Convention on Human Rights apply in any case. However, making the applicability of fundamental safeguards for human rights dependent on the formal label attached to a certain measure (e.g. a freezing order, in the vest of a ministerial decree, labeled as administrative measure) risks paving the way for arbitrary compressions of fundamental rights. Legislators could deliberately qualify a measure as non-penal, with the intention to escape the more stringent safeguards[49].

To avoid such abusive practices, the Court of Strasbourg has found that a measure which has been formally labelled as administrative (or civil) can still qualify as substantially criminal based on two additional criteria: the nature of the offence, and the nature and severity of the sanction. The two criteria are alternative, meaning that a measure may be regarded as a criminal sanction based on only one of them. Nevertheless, it is also possible to reach such a conclusion based on a comprehensive approach that considers both substantial criteria cumulatively[50].

The criterion of the nature of the offence imposes to verify whether the measure compressing fundamental rights is applicable only to a specific group of people with special status or indiscriminately to any citizen[51]. In the latter case, this would be a first indicator – albeit not an incontrovertible one – of the punitive nature. However, even when the measure is applicable to a restricted group of

[48] The criteria originated in the famous case *Engel and others vs. the Netherlands* (ECtHR, 08.06.1976, joined Applications n. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 in *hudoc.echr.coe.int*).
[49] See N. KARALIOTA et al., cit., 54 who suggest that this might just be the case with asset freezing.
[50] Cf. H. AL-NASSAR et al., cit., 10-11.
[51] In that sense, *Ibid.* 11.

individuals, an elevated degree of severity would be enough to attract it into the *matière pénale*.

In fact, according to one commentator[52], the judges of the Court of Strasbourg have always paid more attention to the severity of the measure rather than to the nature of the offence. This third *Engel* criterion supposedly requires examining the length and intensity of the interference with fundamental rights[53]. It has been observed that in the light of this assessment even measures which deprive individuals of their personal liberty for a rather short, neglectable period might not surpass the severity threshold to be considered punitive[54].

In the end, as demonstrated in the *Öztürk vs. Germany*[55] case, what really matters is the purpose of the measure, whose punitive character can be inferred alternatively from its severity or from the nature of the underlying transgression, or from a combination of the two.

4.1.1.1. Applying the criteria to asset freezing

In the light of these criteria, scholars[56] voicing the opinion that asset freezing constitutes a "criminal charge" for the purposes of the European Convention on Human Rights are on the rise. The judges in Luxembourg seem to oscillate between positions that are inclined to accept those academic opinions and more formalistic interpretations. In one case[57], while stubbornly upholding the premise of the preventive and not punitive nature, the Court of Justice at least acknowledged that under certain circumstances it is difficult to ignore the significant impact that asset freezing can have on individual freedoms. That

[52] F. MAZZACUVA, cit., 14-15.
[53] In that sense, F. GALLI, *The freezing of terrorists' assets*, cit., 52.
[54] Cf. F. MAZZACUVA, cit., 18, recalling ECtHR, 23.3.1994, Application no. 14220/88 (*Ravnsborg vs. Sweden*), in *hudoc.echr.coe.int*, § 35. This could be an argument against the qualification of asset freezing as criminal sanction, given that it is designed to be a temporary measure. However, the predicated temporary character is sometimes contradicted by effectively prolonged applications of the measure.
[55] ECtHR, 21.2.1984, Application no. 8544/79 (*Öztürk vs. Germany*), in *hudoc.echr.coe.int*.
[56] For a narrow selection of the relevant doctrine see above, Footnote 47.
[57] See CJEU, *Kadi II appeal*, cit., § 132: «Notwithstanding their preventive nature, the restrictive measures at issue have, as regards those rights and freedoms, a substantial negative impact related, first, to the serious disruption of the working and family life of the person concerned due to the restrictions on the exercise of his right to property which stem from their general scope combined, as in this case, with the actual duration of their application, and, on the other, the public opprobrium and suspicion of that person which those measures provoke».

decision was rendered in the appeal judgement of *Kadi II.* The Court of First Instance had been notably more open and explicit[58]. An influential scholar[59] considers the latter's decision as an attempt to hypothesize the qualification of asset freezing as a substantially criminal sanction.

That hypothesis is to be seriously taken into consideration, given the severe consequences of having one's assets frozen over a long period of time, together with the significant stigmatization, reputational damage and social exclusion[60] that comes with the insertion on a blacklist. Critical scholarship[61] claims that although the portrayed purpose of asset freezing is to preventively cut off financial flows towards terrorists, *de facto* it pursues a symbolic function of banishment and exclusion. It could therefore be argued that, in consideration of the second substantial Engel criterion (nature and severity of the measure), asset freezing should be subsumed under the notion of "criminal charge" for the purposes of the European Convention on Human Rights[62].

Furthermore, the (suspected or proven) facts based on which the measure is applied largely correspond to acts that the European legislator has selected as worthy of criminal prosecution (see Directive 2017/541)[63]. This might be an

[58] See GC, 30.09.2010, T-85/09 (*Kadi II*), in *eur-lex.europa.eu,* § 150: «It might even be asked whether – given that now nearly 10 years have passed since the applicant's funds were originally frozen – it is not now time to call into question the finding […] according to which the freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. The same is true of the statement […] that the measures in question 'are preventative in nature and are not reliant upon criminal standards set out under national law'. In the scale of a human life, 10 years in fact represent a substantial period of time and the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one».

[59] M. CERFEDA, *Le "nuove" misure di congelamento nazionali e il traffico di capitali volti al finanziamento del terrorismo*, in *Dir. Pen. Cont. - Riv. Trim.* 2018, 1, 28-29.

[60] See INTERNATIONAL COMMISSION OF JURISTS, cit., 117.

[61] See M. DE GOEDE, cit., 500-501. Similarly, F. GALLI, *The freezing of terrorists' assets,* cit., 66, who describes targeted sanctions as «a modern form of indefinite banishment on the basis of largely secret evidence and in a pre-crime logic».

[62] In that sense, F. GALLI, *The freezing of terrorists' assets,* cit., 52.

[63] This overlap raises the question whether the administrative system of asset freezing is really necessary, given that criminal procedure allows judicial authorities to seize assets in preparation of a possible criminal prosecution, albeit with heightened procedural safeguards (in particular a stricter standard of proof). Cf. J. VESTERGAARD, cit., 91.

additional argument in support of the qualification as criminal charge based on the "nature of the offence"[64].

4.1.1.2. Relevant ECtHR caselaw

Unfortunately, to date the Court of Strasbourg's caselaw has not directly examined targeted asset freezing under the lens of the Engel criteria. However, there have been applications, which could have been used as an opportunity to provide clarification on this dispute, but they were dismissed on procedural grounds because the Court found that the applicants lacked the status of victims pursuant to Article 34 of the ECHR, the applications therefore being inadmissible[65].

In the absence of decisions on the specific matter, the only option is to resort to caselaw on comparable measures to draw conclusions by analogy. Scholars[66] have suggested caselaw concerning preventive measures under Italian law (which include seizure and confiscation) as a useful point of reference.

The Court of Strasbourg seems to consider both seizure and confiscation as measures that are preventive and therefore do not amount to a criminal charge. Given the similarities of those measures with asset freezing, an influential academic[67] doubts that the Court would come to a different conclusion when scrutinizing the nature of asset freezing. On the other hand, other commentators[68] point towards the dissenting opinion of judge Pinto de Albuquerque in the case of *De Tommaso vs. Italy*[69]. Supposedly, the dissenting judge argued that the Court had failed to correctly apply the Engel criteria, and that the Italian preventive measures should have been considered as having a punitive nature. It has been suggested that the same line of reasoning could be applied to asset freezing[70]. In

[64] Cf. C. C. MURPHY, cit., 138. Nevertheless, the author argues that this argument is outweighed by the «ostensibly preventive and temporary nature of the action».
[65] See A. KLIP, cit., 288-289.
[66] See H. AL-NASSAR et al., cit., 9-10; F. GALLI, *The freezing of terrorists' assets,* cit., 52. Relevant caselaw includes ECtHR, 22.02.1994, Application n. 12954/87, in *hudoc.echr.coe.int* (*Raimondo vs. Italy*) and ECtHR, *De Tommaso vs. Italy*, cit.
[67] F. GALLI, *The freezing of terrorists' assets,* cit., 52.
[68] For instance, H. AL-NASSAR et al., cit., 13; M. CERFEDA, cit., 29.
[69] See ECtHR, *De Tommaso vs. Italy*, cit.
[70] Cf. H. AL-NASSAR et al., cit., 13.

fact, the preventive purpose of a measure is by no means an obstacle for their simultaneous punitive nature. The many inchoate offences in the field of terrorism bear testimony to this statement.

Other scholars[71] highlighted that while the Court denied the punitive nature of confiscation in *Raimondo vs. Italy* – which might suggest that asset freezing, being an allegedly milder measure than confiscation, probably would not be considered as a criminal charge either – in another case[72] a confiscatory measure under UK law was qualified as a criminal sanction.

From all the above follows that the Engel criteria, clear as they might seem at first glance, require assessments that are tightly linked to individual sensitivity and can therefore lead to highly divergent outcomes. It is therefore difficult to predict what the Court of Strasbourg would decide, should it ever be confronted with the question whether asset freezing amounts to a criminal charge for the purposes of the ECHR or not[73].

4.2. Criminal law safeguards

Having examined the controversy on the preventive or punitive nature of asset freezing, one might wonder why that debate is necessary at all. As shall be illustrated here, the issue of qualification is not a merely dogmatic one. It has very significant, practical implications.

If one were to agree with those who opine that asset freezing *de facto* constitutes a criminal penalty (according to the autonomous interpretation of that concept given by the Court of Strasbourg), the application of the measure (i.e. the listing process) would have to respect the stronger substantial and procedural safeguards provided for criminal law by the European Convention on Human Rights[74]. These consist in the guarantees of legality and non-retroactivity in criminal matters (Article 7 ECHR) alongside due process standards (Article 6

[71] See N. KARALIOTA et al., cit., 62-63.
[72] ECtHR, 09.02.1995, Application n. 17440/90, in *hudoc.echr.coe.int* (*Welch vs. the United Kingdom*)
[73] Cf. N. KARALIOTA et al., cit., 63.
[74] However, there are scholars who argue that the listing systems do not even satisfy the civil due process standards (Article 6(1) ECHR). For instance, C. C. MURPHY, cit., 139.

ECHR). The latter ensure that the proceeding is in line with the Rule of Law[75] and include the right to access the case file and to be heard, the presumption of innocence – which in turn implies an elevated standard of proof (*in dubio pro reo*) – and the availability of an effective judicial remedy.

Under both aspects, the European asset freezing system seems to be highly deficient[76]. In terms of legality, it inherits and exacerbates the vagueness and the lack of foreseeability of the criminal offences related to terrorism[77]. These issues are aggravated by the low standard of proof required for the application of the measure[78]. As seen, mere suspicion of facilitating terrorist offences is sufficient. Furthermore, the proceedings for listing and consequential asset freezing clearly do not respect the elevated standards of a criminal trial foreseen by the Convention, since they can be based on clues obtained by secret services without prior judicial assessment concerning their reliability[79]. Once the assets have been frozen, with a view to the right to effective judicial protection, the targeted individual should be informed about the decision and its underlying reasons. Otherwise, it would be difficult to confute the suspicion of being involved in terrorism and eventually obtain a de-listing. While ideally that notification includes a precise formulation of the matters of fact and law that led to the listing, in practice it will often contain general assertations without a detailed motivation of the decision, and evidence of the facts may not be disclosed for reasons of

[75] In that sense, H. SATZGER, *International and European criminal law,* cit., 195.
[76] Cf. C. C. MURPHY, cit., 115: «These sanctions entail the worst effects of pre-emptive action on the individual: subjecting them to a system that seriously infringes their rights but in a way that appears to be immune to swift correction by the legal process […] the system is not based on clearly defined rules and they deprive those targeted of even the most basic due process».
[77] See C. C. MURPHY, cit., 142-143. According to the cited scholar it is problematic that persons that are merely associated with persons suspected of terrorist acts could be listed, leading to a sort of "guilt by association" that is difficult to defend. Allegedly, despite the partial clarifications via UNSC Resolution n. 1822 § 2 of the notion of being "associated with" Al-Qaeda or Da'esh, the latter remains very vague, in breach of the principle of legality. Cf. in that sense M. GESTRI, cit., 83. C. M. PONTECORVO, cit., 243 argues that defining membership or association with an open-ended terrorist network like Al-Qaeda is "complicated by definition".
[78] See, with reference to the Italian system of asset freezing, M. CERFEDA, cit., 30.
[79] Cf. F. GALLI, *The freezing of terrorists' assets,* cit., 47: «Often based on intelligence information that the law does not permit to be used in criminal proceedings or that cannot be disclosed to the public, it seems that well-established and more onerous evidentiary requirements are being to some extent bypassed by a network of procedures found in administrative law».

national security[80]. That negatively affects the concrete capability of a Court to carry out an effective judicial review.

These issues become even more concerning when the EU list implementing the UN blacklist is concerned. The 1267 Sanctions Committee originally completely disregarded the procedural rights of the listed individuals. Nevertheless, given the primacy of UNSC Resolutions over other international obligations, its designations had to be implemented. Initially, this unsatisfactory situation was tolerated, although the Council of Europe has referred to it as «unworthy of International institutions such as the UN and the EU»[81]. In fact, it has been critically observed[82] that blacklisted individuals seem to get stripped of the most fundamental procedural rights, which leads to the following paradox: a serial killer has more rights than a blacklisted person. Whereas the former would be able to have access to the allegations and the evidence against him/her and prepare a defensive strategy for trial, the latter can find him-/herself in a confusing state of uncertainty, not knowing the exact reasons for being subjected to an asset freeze[83]. Being removed from the 1267 sanctions list initially required the support of a national government, rendering delisting a diplomatic rather than judicial process[84]. Even today, a proper judicial remedy does not exist at the UN level.

It was only a matter of time before the Security Council would face resistance that has been much acclaimed by human rights defenders[85]. For instance, the European Court of Justice started pushing for stronger procedural safeguards in the UN listing system, which has effectively seen some

[80] See *Ibid.* 49.
[81] See INTERNATIONAL COMMISSION OF JURISTS, cit., 117.
[82] In that sense, M. DE GOEDE, cit., 504-505.
[83] See *Ibid.* 505, where blacklisted Youssef Nada's situation is described as follows: «Nada shows his desperation, which arises not so much from the accusations against him but from the *absence* of accusations against him, against which he could defend himself».
[84] Cf. C. C. MURPHY, cit., 141.
[85] Cf. J. VESTERGAARD, cit., 87. See also ECtHR, 12.09.2012, Application n. 10593/08, in *hudoc.echr.coe.int* (*Nada vs. Switzerland*) § 212, which recalls the findings in ECJ, 03.09.2008, joined cases C-402/05 P and C-415/05 P, in *eur-lex.europa.eu* (*Kadi I appeal*). In his separate, concurring opinion, Judge Malinverni praises the approach of the Court of Justice with the following words: «That judgment of the Luxembourg Court may be described as historic, as it made the point that respect for human rights formed the constitutional foundation of the European Union, with which it was required to ensure compliance, including when examining acts implementing Security Council resolutions». Moreover, some UN Member States allegedly refer to the lack of transparency of the procedure as a justification for partial non-compliance with the sanctions regime. See in that sense, M. GESTRI, cit., 80.

improvements, but still does not fully satisfy critical scholars[86]. One of the most prominent decisions of the Court led to the annulment of the decision of the Council of the European Union which had included Mr. Yassin Abdullah Kadi on the European blacklist implementing the UN blacklist. The case has attracted widespread attention among jurists and shall be examined in more detail since it also addresses many of the previously mentioned issues.

5. The Kadi Saga

The European Court of Justice's caselaw concerning the insertion of Mr. Kadi on the EU sanctions list – following the inclusion on the UN list drawn up to implement the targeted sanctions against associates of Al-Qaida – provides an excellent opportunity to illustrate the procedural and substantial shortcomings of the asset freezing system.

5.1. Kadi I

In 2001, the US Office of Foreign Assets Control added Mr. Kadi to the national list of terrorist suspects[87]. Shortly after that, Kadi's name landed also on the UN 1267 sanctions list and finally also on the latter's duplication in the EU legal framework. Consequently, his assets were frozen and other targeted sanctions were imposed upon him. He chose to bring his case before the European Court of First Instance by contesting the Council Regulation based on which he had been listed, arguing that he had become «the victim of a serious miscarriage of justice»[88] and that his rights to respect for private property, to a fair hearing and to an effective judicial review had been breached[89]. «According to the applicant, the Community institutions cannot abdicate their responsibility to respect [these] fundamental rights by taking refuge behind decisions adopted by the [UN]

[86] See for instance M. CERFEDA, cit., 25-26.
[87] Allegedly, the USA have a leading role in the 1267 sanctions regime. Cf. in that sense, C. M. PONTECORVO, cit., 244.
[88] See CFI, 21.09.2005, T-315/01 (*Kadi I),* in *eur-lex.europa.eu* § 136. Compare with the comments of M. GESTRI, cit., 90 et seq.
[89] *Ibid.* § 139.

Security Council, especially since those decisions themselves fail to respect the right to a fair hearing»[90].

The Court rejected the applicant's claims, arguing that the impugned Regulation implemented sources of international law which, by virtue of Article 103 of the UN Charter, prevail over community law. It affirmed that it had only limited jurisdiction over the lawfulness of those superior sources (only their compliance with *jus cogens*)[91]. While carrying out that indirect review it explicitly referred to asset freezing as «a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof» and consequently excluded that there had been a violation of the right to respect for private property[92]. Also, while acknowledging the absence of judicial remedies at the UN level, it did not consider that as contrary to *jus cogens*[93].

Essentially, the Court of First Instance's position can be described as obedient *vis-à-vis* the Resolutions of the UN Security Council and weak in terms of judicial review of those sources.

Kadi presented an appeal against the just examined decision, thus bringing the case to the attention of the Court of Justice[94]. In their groundbreaking decision, the European judges overturned the previous interpretation by affirming that the Court has full jurisdiction to review *all* community acts, including those giving effect to a Resolution of the UN Security Council, in terms of their compatibility with fundamental rights[95]. In other words, the Court seems to have applied the *Solange* doctrine[96] to define the relationship between UN and EU law[97].

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[90] *Ibid.* § 150.
[91] In that sense, *Ibid.* §§ 225-226. Perplexity on that point was expressed by I. CAMERON, cit., 551, who considers it a «total failure to understand the human rights problems caused by these sanctions».
[92] Cf. CFI, *Kadi I,* cit., §§ 248 and 252. This can be interpreted as an implicit statement against the claim that asset freezing constitutes a criminal sanction.
[93] See *Ibid.* § 285-286.
[94] CJEU, *Kadi I appeal*, cit., For comparison, see the observations on the judgement made by M. GESTRI, cit., 89 et seq.
[95] See *Ibid.* § 326.
[96] The term was coined in two famous cases pending before the *Bundesverfassungsgericht*, the latest being BVerfG, 05.05.2020, 2 BvR 859/15, 1651/15, 2006/15, 980/16, in

During the full judicial review of the community act, which the Court of First Instance had failed to carry out, the Court of Justice claimed that there had been an obvious violation of Kadi's right to be heard, and the right to effective judicial review[98]. It stressed that the European authorities should have communicated the reasons for the listing decision to Mr. Kadi, at least *ex post*, since that is necessary for the effectiveness of both of those rights[99]. When the disclosure of the information upon which the decision is grounded cannot be granted because of security concerns, Courts should find technical solutions which accommodate both interests[100].

As far as the nature of the asset freeze is concerned, the Court essentially reiterated the findings of the appealed decision by classifying it as a "temporary precautionary measure". However, in the light of its general and prolonged application it admitted that it constituted a "considerable restriction"[101] on the right to property that, given the aforementioned violation of procedural rights, was not justified. However, the effects of the impugned act were temporarily maintained, in the expectancy that the Sanctions Committee would provide the grounds for the decision of listing Mr. Kadi.

5.2. Kadi II

Following the final *Kadi I* decision, a request was forwarded to the 1267 Sanctions committee to provide a summary of the reasons for Kadi's inclusion in the blacklist, which in fact was provided thereafter. In his response, Kadi tried to confute the allegations and assertations against him and requested the disclosure of evidence supporting the grounds for the listing decision. The Commission

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www.bundesverfassungsgericht.de. Compare with P. HILPOLD, *So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European 'Popular Spirit,'* in *Camb. Yearb. Eur. Leg. Stud*. 2021, 23, 159 et seq.; S. PLATON, *The 'Equivalent Protection Test': From European Union to United Nations, from Solange II to Solange I*, in *Eur. Const. Law Rev*. 2014, 10/2, 226 et seq.

[97] See also M. SOSSAI, cit., 72, who underscores that the CJEU has adopted a typical dualist approach towards international law.

[98] Cf. CJEU, *Kadi I appeal*, cit., § 334.

[99] In that sense, *Ibid.* §§ 336-338

[100] Cf. *Ibid.* § 344.

[101] See *Ibid.* § 358.

decided to maintain Kadi on the EU duplicated list and argued that the disclosure of evidence was not required by the *Kadi I* judgement.

The case was brought before the General Court, which found that the UN system still failed to offer guarantees of effective, independent and impartial judicial review, despite the introduction of the focal point mechanism and the office of the Ombudsperson[102]. Contrary to the Commission's position, the lack of evidence in the communication of the grounds for listing was a thorn in the side of the Court[103]. Allegedly «no balance was struck between [Kadi's] interests, on the one hand, and the need to protect the confidential nature of the information in question, on the other»[104]. Furthermore, as already stated before[105], the General Court openly questioned the non-punitive character of asset freezing by quoting the UN High Commissioner for Human Rights[106].

The General Court's ruling in favor of Kadi was appealed, leading to the final chapter of the Kadi saga, which has been labelled as "a vindication of the rule of law"[107]. The Court of Justice[108] reaffirmed that it could exercise a (tendentially) full judicial review of the Union act implementing the UN obligations[109]. Furthermore, it stressed that the Courts of the EU have the responsibility to ensure that decisions applying targeted asset freezing are taken on a sufficiently solid factual basis. If necessary for that examination, the Courts should request additional information or evidence, even when deemed confidential by the authorities[110]. If the non-disclosure of information or evidence is justified by overriding reasons of security, an appropriate balance between the interests at stake should be found[111].

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[102] GC, *Kadi II*, cit., § 127-128.
[103] See *Ibid.* § 181.
[104] *Ibid.* § 173.
[105] See Chapter IV, 4.1.1.1.
[106] GC, *Kadi II*, cit., § 150: «Because individual listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming permanent which, in turn, may amount to criminal punishment due to the severity of the sanction […] This poses serious human rights issues, as all punitive decisions should be either judicial or subject to judicial review».
[107] Cf. J. VESTERGAARD, cit., 89.
[108] CJEU, *Kadi II appeal*, cit.
[109] See *Ibid.* § 68.
[110] Cf. *Ibid.* § 119-120 and 125.
[111] See *Ibid.* § 128.

In the specific case of Mr. Kadi, the Court of Justice concluded that the summary provided by the Sanctions Committee did not justify the adoption of restrictive measures at the EU level. Although some of the adduced reasons seemed to be sufficiently specific, the lack of information or evidence supporting those grounds rendered the listing decision's factual basis insufficient[112].

5.3. Impact of the Kadi caselaw

The Kadi saga and similar caselaw of the Courts of the European Union have had a significant impact on the system of asset freezing. The judicial efforts to uphold the procedural and substantial rights of blacklisted individuals have triggered improvements of both the UN framework on targeted sanctions and the corresponding EU listing systems[113].

For instance, *Kadi I* allegedly influenced the establishment of the Ombudsperson at the UN level[114]. While that is certainly a step in the right direction, it was shown that the European Courts, alongside critical scholars[115], are still not satisfied with the procedural safeguards. The current EU legal framework concerning the "duplicated UN list" has incorporated some of the pretorial rules elaborated by the Court of Justice[116]. The safeguards in the procedure for the EU's autonomous list were positively influenced by the Kadi caselaw too[117].

Moreover, the caselaw of the Kadi saga seems to have influenced jurisdictions beyond the European Union. In *Nada vs. Switzerland*, the European Court of Human Rights explicitly recalled the jurisprudence of the Court of Justice when it held that Swiss authorities had discretion in the choice of the means for giving effect to the UN resolutions and were not precluded from

[112] In that sense, *Ibid.* § 163.
[113] See C. BATTAGLINI, cit., 61; F. GALLI, *The freezing of terrorists' assets*, cit., 57 et seq.
[114] Cf. J. VESTERGAARD, cit., 88.
[115] Cf. M. SOSSAI, cit., 26, who highlights that neither the Sanctions Committee nor the Security Council are bound by the recommendations expressed by the Ombudsperson.
[116] Although not explicitly mentioned, Recital 14 of Council Decision 2016/1693 seems to recall the Kadi caselaw.
[117] See CFI, 04.12.2008, T-284/08, in *curia.europa.eu*, § 74, which strengthened the standard of judicial review in the autonomous listing system by recalling *Kadi I*.

reviewing the compatibility of implementing acts with fundamental rights[118]. In turn, the *Nada* case was recalled by the Court of Justice in *Kadi II*[119], which demonstrates the willingness of the two Courts to back each other up with the intent of consolidating a caselaw that pushes for stronger procedural safeguards in the asset freezing system. Despite the undeniable improvements brought about by the Courts of the European Union, there are also scholars who condemn that caselaw due to its alleged acquiescence of a deliberate evasion of even higher procedural standards in criminal matters[120].

6. Criminal Law and Blacklists

While the controversy on the nature of asset freezing seems to be destined to remain an open-ended question, the proximity between that (formally) administrative measure and criminal law is undeniable. To conclude this chapter, two more "points of contact" between the two branches shall be illustrated.

An influential scholar[121] has noted that blacklists might exert some influence over national criminal investigations, prosecutions and trials. Allegedly there is a tendency to consider the appearance on a blacklist as evidence for pre-trial measures. According to Italian caselaw, a blacklist cannot be used as evidence in a trial, but merely as an investigative starting point[122]. Otherwise, the higher standard of proof in criminal matters would be circumvented. Nevertheless, it could happen that "lazy" or biased judges *de facto* attribute a high probative value to the presence of a group or individual on a blacklist[123].

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[118] See ECtHR, *Nada vs. Switzerland*, cit., §§ 176 and 212.
[119] Cf. CJEU, *Kadi II appeal*, cit., § 133.
[120] In that sense I. CAMERON, cit., 565-566: «The CJEU case law has thus approved applying what is a legitimate standard of proof for a temporary executive measure *pending* a trial – the freezing of the assets of a person or entity suspected of a serious offence – to what is in effect a *permanent* executive-imposed 'penalty' intended as an *alternative to trial*. Seen in this way, the CJEU's case law on terror sanctions has been undermining, rather than strengthening, the rule of law». For a similar plea to re-establish the primacy of the criminal justice system see F. GALLI, *The freezing of terrorists' assets,* cit., 66 et seq.
[121] See F. GALLI, *The freezing of terrorists' assets*, cit., 56.
[122] Cf. H. DUFFY – R. PILLAY – K. BABICKA, cit., 38; M. C. NOTO, *Il terrorsimo internazionale e le sanzioni del Consiglio di Sicurezza nella giurisprudenza italiana: il caso Daki*, in *Riv. Dir. Int. Priv. e Proc.* 2008, 3, 735. See also M. GESTRI, cit., 83.
[123] Compare with J. VESTERGAARD, cit., 91.

A final overlap between asset freezing and criminal law resides in the possibility of using the latter as a tool to ensure compliance with the prohibition to make funds available or to provide financial services to blacklisted individuals. Both EU lists contain provisions obliging Member States to foresee effective, proportionate and dissuasive penalties for those who circumvent the asset freezing system[124]. For the time being, it is not explicitly required to resort to criminal law for that purpose. However, it is worth mentioning that the Commission recently proposed to identify the violation of Union restrictive measures (including asset freezing) as an area of crime in which the Union can define minimum rules concerning the definition of criminal offences and sanctions pursuant to Article 83 TFEU[125]. On the 28th of November 2022, that proposal was accepted, and became Union law through Council Decision (EU) 2022/2332. This paves the way for an even greater interconnection between asset freezing and criminal law.

[124] See Article 15 of Council Implementing Regulation (EU) 2016/1686 and Article 9 of Council Regulation (EC) 2580/2001.
[125] See COM (2022) 247 final.

CONCLUSIONS

The main research question of this dissertation was whether two of the most important elements of the European counterterrorism policy – the "Directive on combating terrorism" and the system of targeted asset freezing – are in line with the principles of the Rule of Law. Throughout the analysis of the respective legal frameworks, it became clear that there are considerable shortcomings that leave room for improvement.

The rushed legislative process that led to Directive 2017/541 underscores its nature of emergency legislation[1]. Whereas the stronger involvement of the European Parliament compared to Framework Decision 2002/475/JHA enhances the democratic legitimacy of the counterterrorism policy, a more transparent and inclusive normative procedure would have been commendable and could have benefitted the quality of this piece of legislation.

As far as the Directive's adherence to the general principles of criminal law is concerned, a frequently recurring criticism is that the wording of some of its provisions is very vague and relies on indefinite and unprecise terms, which might incentivize national legislators to implement the obligations through equally ambivalent provisions[2]. However, in response to those critical opinions it must be acknowledged that the task of elaborating minimum rules on the definition of criminal offences and penalties is a tricky one. In fact, the European legislator is called to perform a complicated balancing act: whereas it is true that the usage of broad terms could eventually trigger a hyper-criminalization at the national level, at the same time it leaves room for interpretation and therefore also for restrictive implementation. This margin of discretion could be seen as a positive aspect of the Directive which renders it more acceptable in the light of the subsidiarity principle.

On the other hand, a very precise language might considerably restrict the Member State's margin of discretion during the implementation process by

[1] Among the many scholars referring to the Directive as a paradigm of emergency legislation cf. M. E. GENNUSA, cit., 652.
[2] Cf. F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 163 et seq.

leaving no doubts on where the line of the minimum standard of penalization lies. However, this is not necessarily a bad thing, because although such a clear definition might leave less room for restrictive implementation, in the event of "over-implementation" by national legislators – which is not precluded by minimum rules and in fact, as seen throughout the dissertation, is quite common – the European provisions could be used by national Courts as a point of reference in support of restrictive interpretations of the domestic criminal provisions[3]. Therefore, the requests for a more precise language are worthy of being corroborated.

The Directive introduces obligations to penalize certain very serious offences, to explicitly qualify them as terrorist offences when committed with a specific terrorist aim, and to ensure harsher criminal penalties compared to those applicable if the same offence were committed without the specific intent. Moreover, it urges Member States to anticipate the penal response by repressing acts that precede such a terrorist offence. The call for ensuring such inchoate liability is justified by the increased likelihood for a consummate terrorist offence to occur as a consequence of the criminalized precursor-conduct. The inchoate offences include the participation in a terrorist group and other preparatory offences such as travelling, training or recruiting for terrorism (so-called "offences related to terrorist activities"). There are some overarching issues which indiscriminately concern all of the offences, but also peculiar issues relating to certain offences.

The specific aims of acts of terrorism constitute the core element of the general definition of terrorism elaborated by the European legislator. Said definition is inferable from the minimum rules on "terrorist offences" (Article 3 of the Directive). The latter are based on a list of objective, material acts that usually constitute an offence under domestic criminal law. Those acts are "upgraded" to terrorist offences if committed with the just mentioned specific terrorist intent. This normative technique leads to a notion that is focused on a subjective element, rather than on objective facts. In turn, this creates evidentiary problems that risk

[3] Cf. A. VALSECCHI, cit.

being "solved" through probatory shortcuts that could *de facto* reverse the burden of proof. In fact, terrorist intent might be presumed based on inconclusive external traits or habits of the individual. The risk of arbitrary or discriminatory criminal prosecutions is evident[4]. Essentially, such a legislative choice puts, maybe a bit naively, a lot of faith in the fair application of the criminal laws by judicial authorities[5]. These should refrain from applying the harsher criminal law provisions concerning terrorism and subsume the facts under the more lenient, "ordinary" criminal offences instead, when there are not sufficient relevant, objective facts that clearly suggest the presence of a terrorist aim behind one of the material facts listed in the Directive (*in dubio pro reo*). It might have been a better choice to thoroughly analyze the specific *modus operandi* of terrorists and select, based on such an analysis, peculiar objective elements to insert in the minimum definition of terrorist offences. This would have notably facilitated telling terrorist and "ordinary" offences apart, thus yielding greater legal certainty.

Furthermore, with the proclaimed intention of rendering the European definition of terrorism politically neutral, no exculpatory clause for violent acts committed against undemocratic regimes was foreseen. This could result in the application of terrorist offences to legitimate freedom fighters. The scholarly suggestion to add such a clause, as has happened during the implementation process in some Member States, deserves to be supported[6].

The lack of precision in the definition of terrorist offences has inevitable negative repercussions on the inchoate offences foreseen by the Directive. In fact, although being autonomous criminal offences, their common *raison d'être* is essentially the augmentation of the risk that a terrorist offence will eventually be committed. Thus, these offences are inevitably linked to the constitutive elements of the terrorist offences, and in particular to the specific terrorist intent. The problems concerning the latter therefore come up again also in the context of the

[4] These issues are stressed throughout the entire report of the Union's Agency for fundamental rights. See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, cit. The guidelines for legal practitioners elaborated by the International Commission of Jurists ('ICJ') also repeatedly stress that prosecutors and judges should infer intent from objective facts and avoid discriminatory applications of domestic implementing legislation. See H. DUFFY – R. PILLAY – K. BABICKA, cit.
[5] This circumstance makes the recommendations of the ICJ so vital.
[6] The supported opinion has been expressed by S. GLESS, cit., 46.

inchoate offences related to terrorist groups or to terrorist activities. However, it was shown that those offences pose additional problems, besides those inherited by the principal, consummate terrorist offences.

The European concept of terrorist group is so extensive that the offences related to terrorist groups risk absorbing many of the offences related to terrorist activities, rendering the latter merely symbolic filler-provisions that are doomed to remain inapplicable or applicable in very exceptional cases that involve individuals acting almost completely on their own. In fact, the potentially very wide understanding of what amounts to participation in a terrorist group causes a further retraction of the ambit of application of offences related to terrorist activities. The vagueness of the term leaves room for very different solutions, although restrictive interpretations[7] are advisable in order to enable a differentiation between someone who is an effective participant of the group and someone who might even support the group but cannot be considered as a real member of it yet. This doesn't mean that the latter should go unpunished, and that's where the subsidiary offences related to terrorist activities could come into play and gain scope of application.

Although they have the positive effect of rendering punishable preparatory acts carried out by "lone wolfs" with a view to committing or contributing to the commission of a terrorist offence, the offences related to terrorist activities are arguably the most problematic category in the Directive. While an anticipated penal response to terrorism is undoubtedly necessary, these inchoate offences push the anticipation to a stage that might be excessive[8]. It is worth reconsidering if all the offences under Title III are really necessary, given that some of them represent a paradigm of hyper-preventive criminal law that is difficult to reconcile with the principle of proportionality[9]. The European legislator seems to resort unsparingly to criminal law to prevent any conceivable risk that a terrorist act might be completed eventually. The assumption that criminal law is always the

[7] A proposal in this sense has been put forward by G. MORGANTE – R. DE PAOLIS, cit., 94 et seq.
[8] Cf. F. ROSSI, *Il contrasto al terrorismo internazionale nelle fonti penali multilivello*, cit., 148 et seq.
[9] Cf. with T. A. ZWEIGLE, cit., 490 et seq., who radically excludes that the German offence of traveling for the purpose of terrorism is compatible with the Rule of Law and the German basic law.

best option for that purpose is erred. There are alternative, equally valid measures that did not receive the consideration they deserved. The result is a puzzle of partially overlapping inchoate offences that criminalize substantially neutral behavior simply because of the intention behind it. Such purely subjective crimes, highly deficient in terms of objective harmfulness, can confidently be subsumed under the disparaging notion of "thought crimes" (*Gesinnungsstrafrecht*) if judicial authorities do not apply corrective interpretations.

Consistent with other acts of European Criminal Law, the Directive carefully avoids interfering with notions of general criminal law such as "attempt". It merely compels legislators to criminalize some of the offences also in the attempted form. There is probably widespread agreement that attempting to detonate a bomb in a public square should lead to the imprisonment of the individual who was responsible for the failed terrorist plot. Therefore, the penalization of attempted "terrorist offences" is (in most cases) unproblematic. However, is it really necessary, justified or even possible to criminalize the attempt to travel for terrorist purposes? What acts could possibly be a decisive indicator of an attempt to travel? Moreover, the travelling for terrorist purposes is already an act that is extremely remote from the actual harm. That strong anticipation of criminal law would be pushed way beyond the boundaries of acceptability in the light of general principles of criminal law if the offence could be committed in the attempted form.

Overall, several provisions of Directive 2017/541 depart from the guidelines on an ideal European criminal policy. The big picture is therefore one of a derogatory criminal law that focuses on the prevention of actual harms[10] rather than responding repressively to them once they have occurred. The title of this dissertation – Repression and Prevention of Terrorism under EU law – was deliberately chosen to highlight this peculiar approach. "Repression" is a word that bears a certain negative connotation that perfectly sums up the critical aspects of the Directive. While it can mean using force to control people (or criminological phenomena), it also refers to the process of keeping certain

[10] See C. C. MURPHY, cit., who uses the term "pre-emptive counterterrorism" to describe such a risk-based approach.

thoughts out of one's conscious mind. The obligation to criminalize neutral acts because of the intentions of the individual could in fact, if implemented in a certain way, be seen as a repression of pure thoughts or intentions that have not been appreciably externalized into objectively harmful behavior. Such an approach would clearly go against the most basic principles of the Rule of Law[11]. If, as stated in the Preamble of the Directive, terrorism represents one of the most serious attacks on the Rule of Law, this does by no means legitimize a fight against it that disregards the very principles it seeks to protect. The European counterterrorism policy must adhere to the Rule of Law to avoid a "Martyr-effect" among communities that could feel increasingly marginalized due to an excessive horizontal and vertical expansion of criminal law.

As far as the administrative tool of asset freezing is concerned, it is hard to disagree with those who call into question its formal label of temporary preventive measure[12]. Practice has shown that although portrayed as temporary, the current framework allows authorities to keep the assets of individuals, groups or entities frozen over extensive periods. In that case, the intensity of the interference with the right to property might just be enough to attract the measure into the substantial concept of criminal law as defined by the European Court of Human Rights. The asset freezing system should therefore be modified either by stopping the trend of temporary measures becoming *de facto* permanent, or by increasing the procedural safeguards so that they respect the criminal law guarantees[13]. Otherwise, a similar, yet exactly opposite situation compared to the one under the criminal counterterrorism policy might arise: an ostensibly preventive measure becomes insidiously repressive. Prevention and repression are at risk of becoming two inseparable, undistinguishable parts, two sides of the same coin.

National legislators, judges and law-enforcement should remain vigilant. Currently, the trend seems to be that national authorities are overly obedient when it comes to certain obligations arising under Union law. The obligations to

[11] Scholars have warned that totalitarian regimes tend to use criminal law as a tool to neutralize an individual simply because of his internal attitude based on logical anticipations of objective developments. In this sense N. KARALIOTA et al., cit., 32.
[12] *Ex multis* F. GALLI, *The freezing of terrorists' assets*, cit., 51 et seq.
[13] Cf. I. CAMERON, cit., 565-566.

criminalize have not simply been implemented, but rather over-implemented at the national level. While this is a physiological consequence of the Directive being a mere minimum standard of criminalization, it should not be forgotten that primary Union law, and the Directive itself for that matter, also oblige to respect fundamental rights. In that sense, the cases of *Kadi* and *Nada* provide food for thought. Member States should approach the European obligations in a manner that resembles the Court of Justice's approach to the obligations, stemming from UN law, which compel to freeze terrorist suspects' funds: consider the margins of discretion left by vague terms as an opportunity for restrictive implementation that is respectful towards fundamental rights. Where an interpretation of the European norms that is consistent with the general principles of criminal law and sufficiently safeguards fundamental rights is not practicable, the Member States should gather the courage to confront the European institutions with this dilemma instead of uncritically complying with the obligations[14]. After all, even the European legislator is not enlightened and can be in the wrong.

[14] This opinion is also held by V. NARDI, cit., 129.

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