

ENNHRI Statement

on the EU Commission Report on the Directive 2017/541 on combating terrorism (COM(2021)701 final)

The European Network of National Human Rights Institutions (ENNHRI) brings together over 40 National Human Rights Institutions (NHRIs) across Europe (23 in EU Member States). NHRIs are state bodies, independent from the government, mandated to promote and protect human rights. They are accredited by reference to the UN Paris Principles to ensure their independence, effectiveness and pluralism. ENNHRI supports European NHRIs through capacity building, information sharing, engaging with regional human rights mechanisms, and intervening in human rights developments in Europe.

The Directive (EU) 2017/541 issued on 15 March 2017 on combating terrorism required the Commission to present a report to the European Parliament and the Council by 8 September 2021 to assess the *"added value of this Directive with regard to combating terrorism"* and to evaluate *"the impact of this Directive on fundamental rights and freedoms, including on non-discrimination, [and] on the rule of law"* (art. 29). The Commission requested the European Union Agency for Fundamental Rights (FRA) to carry out research for that assessment. On 18 November 2021, both the Commission and FRA published their reports¹. At the same time, the Commission Staff Working Document² was made public.

¹ [Report from the Commission to the European Parliament and the Council based on article 29 \(2\) of Directive \(EU\) 2017/541](#) of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 18 November 2021, COM(2021) 701 final; [FRA Report on Directive \(EU\) 2017/541 on Combating Terrorism-Impact on Fundamental Rights and Freedoms](#).

² [Commission Staff Working Document](#) on the evaluation of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, accompanying the Report from the Commission to European Parliament based on article 29 (2) of the Directive, 18 November 2021, SWD/2021/324 final.

ENNHRI sets out below recommendations to Members of the European Parliament in order to strengthen, at EU level, the consideration of fundamental rights in the fight against terrorism. An analysis with more contextual information on ENNHRI's analysis is provided in the Annex to this statement (see below).

ENNHRI raises two key points as a preliminary matter:

- The focus of the Commission report is primarily to demonstrate the added value of the Directive in the fight against terrorism and its effectiveness. Yet in doing so, the Commission almost entirely leaves out the evaluation of the potential human rights' impacts or other negative implications of the Directive.
- The methodology used in preparing the report does not sufficiently take into account the impact the Directive and related domestic legislation have on the enjoyment of human rights. Where the impact is actually considered in the report, it is based mainly on views collected from a very diverse, yet limited group of stakeholders without adopting a general human rights view on the whole. This is problematic and disregards both the European Parliament's wish to have the human rights impact evaluated and the findings of the FRA report prepared for this purpose.

[In its report](#), FRA came to notable findings on the impact of counter-terrorism measures on lawful activities, and the need for effective safeguards during investigations. According to FRA, the Directive lacks:

- objective criteria to establish a terrorist intent;
- clarity about the scope of the offences introduced or modified by the Directive which may affect lawful professional activities, such as the work of journalists or researchers;
- effective safeguards in the use of special powers of investigation dedicated to terrorism and related offences;
- when applying the Directive, there is a risk of discrimination against specific groups, in particular Muslims, which is not remedied in the Directive, nor considered in Commission report.

ENNHRI supports FRA's recommendations to remedy these shortcomings.

In addition, ENNHRI recommends:

1. including a human rights based approach when evaluating the added value and impact of EU anti-terrorism legislation.
2. an ambitious human rights-based EU counter-terrorism agenda that also effectively encompasses right-wing terrorism and a harmonisation of definitions,

in accordance with the principle of legality and respecting fundamental rights, of violent extremism activity and terrorist offences to avoid in particular disparate treatment of different types of terrorism;

3. an EU action plan with associated resources to address the links between security services, extreme right-wing political parties, and extreme right-wing violence;
4. strengthening the protection of victims' rights to support, counselling and information, while ensuring EU evaluation of the practical implementation of measures intended to protect the rights of victims and including more participation of victims and victim support groups in EU assessment and development of standards
5. taking into account human rights impact assessments, including FRA's report, when monitoring the implementation of the recently agreed expansion of Europol's powers with respect to its development of artificial intelligence, or its collection, use and sharing of personal data;
6. the establishment of independent observatories on terrorism-related legislation within Member States to collect the information needed for assessing how counter-terrorism legislation is implemented.

While countering terrorism is vital to protecting our rights, freedoms and democracy, EU policy-makers should do so in full compliance with fundamental rights. ENNHRI is willing to cooperate further with the European Parliament, the Commission, and FRA to make this a reality.

Annex: ENNHRI analysis on the Commission report

Focus of the Commission report

The Commission's report focuses on demonstrating the added value of the Directive on the fight against terrorism and improving its operational relevance, but, unfortunately, dedicates little to no attention to human rights and rule of law implications.

Article 29 of the Directive provides that the report must analyse *"the added value of this Directive with regard to combating terrorism"* as well as *"the impact of this Directive on fundamental rights and freedoms, including on non-discrimination, on the rule of law, and on the level of protection and assistance provided to victims of terrorism."*

The Commission working paper and the FRA report (both of which were part of the process to prepare the Commission report) include numerous remarks on the legislation's impact on fundamental and human rights.

In its report, FRA makes notable remarks on the impact of counter-terrorism measures on lawful activities, and the need for effective safeguards during investigations. According to these, the Directive lacks:

- objective criteria to establish a terrorist intent;
- clarity about the scope of the offences introduced or modified by the Directive which may affect lawful professional activities, such as the work of journalists or researchers;
- effective safeguards in the use of special powers of investigation dedicated to terrorism and related offences.

Also, as noted by FRA, when applying the Directive, there is a risk of discrimination against specific groups, in particular Muslims, which is not remedied in the Directive, nor considered in the Commission report. In addition, this point was already pointed out by civil society organisations such as the [European Network Against Racism](#).

Human rights and the rule of law are mentioned only in the margins of the Commission's report and receive very little attention. The details of the findings of the human rights impact evaluation, the methodology, and FRA's recommendations are not included in the Commission report. Nor has the Commission made any recommendations to improve the situation. The findings and criticism are included in the [Commission Staff working document](#), but were not included in the final official report. The working paper is not directly available online in connection with the report, which makes it hard to find. This is a serious shortcoming which makes the insufficient

attention to human rights protection in the Directive and its implementation invisible and may undermine the importance of FRA's report and its findings.

The part of the report relating to the definitions of terrorist offences is a good example of what follows from the insufficient consideration given to human rights and the overall focus on the operational dimension of the Directive. For example, the lack of clarity of certain norms - such as participation in a terrorist group - is examined as an operational problem for the actors supposed to implement and use these norms, rather than as a matter pertaining to the principle of legality and due process guarantees affecting the human rights of the person in question.

In its report, the Commission expresses a generally positive view of the impact of the Directive. It comes to this conclusion after acknowledging that the Directive has had *"clear added value with regard to combating terrorism"* and that *"the limitations [on fundamental rights and freedoms] largely meet the requirements of necessity and proportionality."* Given the absence of an underlying examination in the pages leading up to this particular statement, it is not clear how or if such conclusions are justified.

Methodology applied by the Commission

The Commission's methodology:

- inadequately assesses the impact of counter-terrorism measures on human rights;
- relies on the contributions of diverse stakeholders who do not consider the overall human rights implications of the Directive;
- pays limited attention to FRA's specific human rights evaluation of the Directive and to the criticism by international observers, including the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

The Commission's [methodology](#) for the evaluation admits to a lack of hard data on fundamental rights issues. It also states that this can be attributed *"to the fact that Member States do not regularly monitor this aspect"*.

To remedy the lack of hard data, other information is thus necessary for the evaluation. The Commission has chosen to collect "views of a wide variety of stakeholders", including "Member States' authorities responsible for the implementation of the Directive, the Commission, the European External Action Service, the Fundamental Rights Agency (FRA), Europol, Eurojust, civil society, academia and think tanks, and the general public."

The report states that *"most stakeholders [...] did not consider the implementation of the Directive to be problematic from a fundamental rights perspective."* It is worth noting, though, that many of the stakeholders consulted belong to counter-terrorism units and similar entities focusing primarily on preventing terrorism rather than protecting human rights. This conclusion was drawn despite the fact that both FRA and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, among many other international observers, have repeatedly pointed out the shortcomings of the Directive and its significant impact on human rights.

This problem could have been alleviated through a better integration of FRA's findings on the impact of the Directive on human rights, or by emphasising the limitations of the study in the main report and not confining them to the [Commission staff working document](#). Those findings, however, find limited echo in the final report. The Commission could also have included the repeated criticisms of international observers over the shortcomings of the Directive. For instance, the UN Special Rapporteur has consistently warned about [the lack of a clear definition of violent extremism](#) and [the risk for the principles of legality and proportionality of some of the offences defined in the Directive](#). The [Council of Europe has also expressed concern](#) about the impact of the legislation transposing the Directive on freedom of expression.

The Commission's evaluation report overlooks concerns raised and concludes that *"most stakeholders [...] did not consider the implementation of the Directive to be problematic from a fundamental rights perspective"*, which, in ENNHRI's opinion, may be incomplete and misleading, given the evaluation's methodology.

Missed opportunities for the Commission to improve EU legislation on combating terrorism

Need for human rights based counter-terrorism agenda addressing all forms of terrorism

The Commission needs to:

- implement an ambitious human rights-based counter-terrorism agenda that also encompasses right-wing terrorism;
- harmonise and further clarify definitions of violent extremism activity and terrorist offences to avoid disparate treatment of different types of terrorism, while ensuring that fundamental rights are respected;
- examine the links between security services, extreme right-wing political parties, and extreme right-wing violence and draw up an action plan to tackle this issue.

The Commission's report points to a significant limitation in the effectiveness of the Directive 2017/541. According to the report, Member States note that it is often difficult to classify extreme right-wing violence as constituting terrorist acts, as far-right terrorism has certain operational characteristics unlike other forms of terrorism: its supporters and followers are more heterogeneous; there are many close links between new groups and older far-right organisations; and their targets are more varied. Therefore, the conceptual definition of "terrorism" is ill-adapted to extreme right-wing violence, which leads to greater difficulty in demonstrating terrorist intent.

The report also notes a lack of resources used to combat this type of radical violence, as well as a lack of knowledge of its specificities, which hampers the effectiveness of counter-terrorism measures. The report appears to lead to an implicit conclusion: combatting far-right terrorism is not a sufficiently high priority in terms of resource allocation.

ENNHRI finds this conclusion deeply concerning. The threat that **far-right terrorism** represents for our democracies has significantly grown in the last few years. The Counter-Terrorism Committee Executive Directorate (CTED) of the United Nations Security Council [recently noted](#) the growing frequency and lethality of attacks motivated by extreme right-wing or xenophobic violence, their increasingly transnational character, and the sophistication of far-right terrorists' use of the internet to recruit and radicalise individuals. [Other experts also point](#) to the lack of studies - especially academic ones - on this issue, while also highlighting the link between the aforementioned surge in extreme right-wing violence and the widespread electoral success of extreme right-wing or nationalist political movements worldwide.

To address these issues, the Commission makes several suggestions, mostly aimed at strengthening cooperation between Member States and improving the definition of terrorist offence. The Commission also recommends improving knowledge about violent right-wing extremism and strengthening Europol's mandate to facilitate cooperation with private actors.

The Commission published an [overview of contemporary practices to prevent and counter violent right-wing extremism](#) in 2021; this is aimed at Member States. The report includes a description of the practices of violent right-wing extremist groups and identifies several promising practices that could be implemented to counter their activities. However, the Commission's current evaluation report still seems to underestimate some of the root causes of this problem, and, therefore, the Commission's suggestions may not sufficiently solve the problems identified.

For instance, if it follows from the Commission's report that one of the difficulties in combating right-wing extremist violence is the **lack of priority given to tackling this form of radicalism compared to other forms of terrorism, measures to merely**

improve the knowledge of the relevant authorities in the Member States will not be sufficient to address this issue. Instead, it would be necessary to allocate more resources to combat this particular form of terrorism.

Furthermore, the Commission and Member States will need to treat extreme right-wing violence more systematically as terrorist incidents instead of describing them – [legally](#) – as isolated incidents. A [confidential Europol report published in 2019](#), obtained by several German newspapers, complained that many right-wing terrorist acts go unreported because right-wing extremist violence in the EU often goes unrecognised as terrorism or a terror-related incident. Instead, it is often classified under the label of "extremist activity" according to national law. The Commission will need to ensure that this form of terrorist violence is prioritised by all relevant services within the Member States. This can be achieved by means of **agenda-setting, careful funding** and individual **reviews of the counterterrorist framework** within each of the Member States.

The **relationships between far-right terrorism and radical far-right political movements** [should also be examined](#), as should the sympathies that these violent militants have found within the **police, intelligence authorities and the armed forces** of several EU Member States in the recent past. Two examples show the extent to which 'friendliness' within the security services may impede proper investigation of extreme right-wing violence. In Belgium, Serge Lipszyc, the president of Comité R, the Standing Intelligence Agencies Review Committee, [recently stated in an interview](#) that a Belgian far-right terrorist had been able to benefit from the support of active military and police forces to avoid his capture. He remarked that "*in the different strata of the Belgian state, there is a will to favour extremist movements, especially of the far right.*" In Germany, a series of extreme far-right cases among members of Germany's military and police that was uncovered since 2017 have highlighted the [threat of the enemy within](#).

The threat posed by right-wing extremism to the rule of law must be taken seriously. However, the fight against right-wing terrorism must not come at the expense of the protection of human rights. This fight is necessary in the name of the protection of the rule of law and the fight against hate crimes, but it must be carried out with respect for the procedural guarantees of all persons and must have as small an impact as possible on the freedoms of association, expression or demonstration.

All the remarks made in this statement and in the FRA report concerning the negative impact of the Directive and its transposition on human rights must also be taken into account in the development of policies to combat right-wing terrorism.

Need to protect and support victims of terrorism better

The Commission needs to:

- take an official position on and show commitment to the recommendations regarding support and protection of victims of terrorism;
- devote an evaluation to the practical implementation of measures intended to protect the rights of victims and improve harmonisation of protection;
- strengthen the protection of victims' right to information;
- strengthen the participation of victims and victim support groups in the process of assessing and developing of standards.

A second shortcoming pointed out by the evaluation report on Directive 2017/541 concerns the protection and support of victims of terrorism. This Directive further qualify the victims' rights that were initially created by Directive 2012/29/CE on Victims' Rights.

The Commission notes that the Directive has had a more limited impact than initially anticipated - and hoped for – on improving the rights of victims, in particular cross-border victims of terrorism. Many problems remain concerning the **recognition of their rights**. The evaluation also points out the difficulty for victims to know all the rights they are entitled to under the Directive. The report proposes several ways of addressing this problem. However, there seem to be differences between the proposals put forward as part of a study carried out by the consultancy firm hired as part of the evaluation of the Directive, and the suggestions made by Member States³. The Commission struggles to take a position in this respect, which hinders the process of strengthening the effectiveness of victims' rights.

The study recommends the systematic designation of a **single point of contact** for victims of terrorism in each of the Member States. It also recommends the continuation of the EU Centre for Expertise for Victims of Terrorism pilot project, which was due to end in 2022, and the production of a practical guide for victims to make them aware of their rights under European legislation. Finally, the study concludes with a proposal of guidance offered by the Commission on the organisation of memorial services and the identification and registration of victims following a terrorist attack. Some of these suggestions are shared by the Member States - the designation of single points of

³ See: [Report from the Commission to the European Parliament and the Council based on article 29 \(2\) of Directive \(EU\) 2017/541](#) of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 18 November 2021, COM(2021) 701 final.

contact and the strengthening of the European Network on Victims' Rights, an informal network of policy officers within ministries of justice that cooperate in the area of victims' rights. However, they also indicate that they prefer solutions that favour interactions between Member States, rather than those that are the result of a Commission initiative. Faced with the mainly institutional and supranational solutions recommended by the study, Member States prefer to respond with state-level initiatives that depend on their own participation and without strong external control.

In this debate, the Commission has not visibly taken a position. Instead, it has indicated that it will examine all the recommendations that have been made and announced that it will soon take "swift and concrete actions to improve the situation of victims of terrorism." This response seems inadequate. By not announcing any concrete measures, contrary to what it does for all the other points identified for reform in the report, the Commission does not give any guarantee that victims' concerns will be heard. ENNHRI believes that the human rights of victims of terrorist attacks should be defended with all the voluntarism and conviction expected of the Commission on this subject.

Furthermore, many concerns raised by victims' associations and other actors related to Directive 2017/541 do not seem to be reflected in the evaluation report published by the Commission. The international association ["Life for Brussels" notes](#), for example, that the guarantees regarding the right to support, counselling and information are insufficient, and that the lack of adjustment of the rules on the limitation period for lodging a complaint is a major obstacle for victims. The NGO report notes that some European states have good practices in this respect (e.g. a ten-year limitation period), but that there is a real **lack of harmonisation** or clarity in this respect at European level. This runs contrary to the aim of the Directive, which was to reduce the significant disparities in victims' rights. This situation is particularly detrimental for cross-border victims, who may be confronted with several laws without the necessary help to understand the variety of these systems.

Directive 2017/541 has also been the subject of comments by the [Advisory Committee of the Human Rights Council of the United Nations](#) on 9 August 2021. It notes the important progress the Directive represents for victims' rights, but also considers that further efforts are needed. In particular, the Advisory Committee notes that Member States should plan more effectively for emergency responses and improve access to information, commenting that "*States should have in place protocols and mechanisms to respond efficiently to emergencies, including by providing access to reliable information so as to avoid any additional suffering for victims of terrorism and their families.*"

A more fundamental criticism of the Directive is made by the [NGO Victim Support Europe \(VSE\)](#). It believes that the goals and means envisioned within the directive are in themselves insufficient to address the needs and problems of victims. In particular, VSE

stresses the **lack of practical transposition of certain provisions** (it calls for an assessment of how the law is applied in practice and not only in legal provisions), deficiencies in the legislation, and an insufficient strength of the obligations imposed on Member States. The lack of a concrete and precise plan to react to a terrorist attack is, for instance, pointed out. Finally, VSE criticises the lack of stakeholder consultation - including victims and victims' rights associations - at Member State level for determining policies on victims' rights.

In view of these elements, there is a need for **a stronger, more coordinated and clearer reaction** from the Commission. The Commission must state more clearly that it is aware of the shortcomings of Directive 2017/541 and its transposition and send a strong signal in favour of the rights of victims of terrorist attacks. Furthermore, strengthening the participation of the victims themselves and of advocacy groups working on behalf of the victims is necessary, particularly given the criticisms that have been levelled by certain NGOs at the Commission's report.