



L&RS Note

Combating Terrorism and the Potential Challenges posed by EU Directive 2017/541

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Abstract

This *L&RS Note* examines some of the key provisions and implications of the EU's Directive on combating terrorism ([Directive 2017/541](#)). Directive 2017/541 is a revision of the EU's counter-terrorism measures aimed at enhancing security and establishing terrorist offences addressing the issue of foreign terrorist fighters (FTFs). The *Criminal Justice (Terrorist Offences) Bill*, currently listed on the Government's 2018 summer legislative programme, will give effect to Directive 2017/541.

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Glossary

[Directive 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA](#): is referred to in this Note as Directive 2017/541.

Terrorism: The author acknowledges that whether there is a settled definition of terrorism is a matter of considerable debate.¹ For the purpose of this Note, terrorism should be understood as any activity coming under the definition of “terrorist activity” in [s. 4 of the Criminal Justice \(Terrorist Offences\) Act 2005](#). This is set out below.

“terrorist activity” means an act that is committed in or outside the State and that -

- (a) if committed in the State, would constitute an offence specified in [Part 1 of Schedule 2](#), and
- (b) is committed with the intention of—
 - (i) seriously intimidating a population,
 - (ii) unduly compelling a government or an international organisation to perform or abstain from performing an act, or
 - (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a state or an international organisation;

Framework Decision: A Framework Decision was an EU legislative instrument, used exclusively in the area of police and judicial cooperation in criminal justice matters. Framework Decisions were abolished under the Lisbon Treaty. They required Member States to achieve particular results without dictating the precise method by which the result was to be achieved. A Framework Decision, while legally binding on the Member State, was not capable of direct effect (i.e. it could not be relied on as creating legally enforceable rights and obligations in national courts).

United Nations Security Council Resolution [UNSCR]: This is a UN resolution adopted by the fifteen members of the Security Council, the body with primary responsibility under the UN Charter for maintaining international peace and security. Generally resolutions adopted by the Security Council under Chapter VII of the Charter (action with respect to threats to the peace, breaches of the peace, and acts of aggression) are considered binding.

¹ Searching for “terrorism” in Murdoch’s Irish Legal Companion provides the following, “There is currently no definition of terrorism in Irish law. The term “terrorist activity” is however defined, see [Criminal Justice \(Terrorist Offences\) Act 2005 s.4](#). In the UK, “terrorism” is defined as “use of violence for political ends and includes the use of violence for the purpose of putting the public or any section of the public in fear”: [Emergency Provisions \(Northern Ireland\) Act 1978](#). The word “terrorism” owes its origins to the Reign of Terror during the French Revolution and the use of the guillotine by the French revolutionaries.”

Foreign Terrorist Fighters [FTFs]: [UNSCR 2178](#) defines FTFs as “individuals who travel to a State other than their State 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.”

ISIL: The Islamic State of Iraq and the Levant, also known as Da’esh, the Islamic State of Iraq and Syria (ISIS) and Islamic State (IS), is a terrorist organisation which gained prominence in 2014 following its declaration of the formation of a worldwide caliphate operating from captured territory in Iraq and Syria.

Internet-based evidence: Internet-based evidence refers to the use of online services by terrorists, which can be admitted into evidence by a court of law in the course of a trial for terrorist offences. Examples include the use of videos posted to social media or messages sent in online forums that are used to promote terrorism.

Summary

This *L&RS Note* examines some of the key provisions and implications of [Directive 2017/541](#). It will provide a brief background to the law on terrorist offences, first from an international perspective and then from an Irish perspective. It will then outline the key provisions of the Directive with a short paragraph on whether there is an equivalent provision in Irish law meeting the requirements of the Directive. The final section will consider possible challenges that may arise in relation to the implementation of this Directive.

EU Directive

Directive 2017/541 updates the EU position on terrorist offences and calls on Member States to establish criminal offences aimed at targeting Foreign Terrorist Fighters (FTFs) and those who assist them.

The Directive establishes three new offences:

1. Receiving training for the purpose of terrorism (Article 8);
2. Travelling for the purpose of terrorism (Article 9); and
3. Organising or otherwise facilitating travelling for the purpose of terrorism (Article 10).

The Directive requires Member States to establish appropriate support systems for victims of terrorism and provides considerable detail as to the types of services and information that should be publically available.

Receiving training for terrorism

In relation to the offence of **receiving training for terrorism** the following issues arise:

- i. How to best capture self-taught methods of training for the purposes of terrorism in legislation?
- ii. Whether the offence should be a standalone offence or should it be tied to the offence of “receiving instruction or training in the making or use of firearms or explosives” that exists under the [Offences against the State Act 1939](#)? and
- iii. Should provision for this offence include a lawful authority defence?

Travelling for the purpose of terrorism

In relation to the offences of travelling for the purpose of terrorism and organising or otherwise facilitating travelling for the purpose of terrorism the following issues arise:

- i. How best to balance this offence with the chilling effects it may have on journalists and aid workers travelling to conflict zones? and
- ii. Whether the offences should be broadly construed giving flexibility to security and enforcement officials in their application of the offences? and
- iii. Should the offences be narrowly defined so as to provide more certainty in the types of offending that will be captured by the offence?

Policing and enforcement

In relation to the policing and enforcement of these new offences challenges may arise due to difficulties in gathering reliable evidence. Cross-border cooperation and internet-based evidence offer potential solutions to these challenges.

Introduction

On 15 March 2017, the European Parliament and the Council of the EU adopted [Directive 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA \(Directive 2017/541\)](#). While the Directive is not binding,² Ireland will opt in and introduce new laws designed around this Directive.³ At the time of writing the *Criminal Justice (Terrorist Offences) Bill*, which will give effect to the Directive, is listed in the Government Legislative Programme Spring/Summer 2018.⁴ The deadline for the Directive to be transposed into national law is 8 September, 2018.

The Directive seeks to give effect to obligations arising from the 2015 [Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism](#) and the adoption of the 2014 [UN Security Council Resolution 2178](#) (UNSCR 2178), which called on Members to criminalise the act of travelling abroad for the purpose of carrying out, financing, or providing training related to terrorist activities. **The main focus of the Directive is the establishment of minimum rules on the definition of criminal offences in the area of terrorist offences, offences related to a terrorist group and offences related to terrorist activities with a view to addressing issues arising from FTFs.**

Given the importance of enhancing security and ensuring international cooperation among our European partners in combating terrorism, an understanding of the aims and objectives of the Directive will be of benefit in determining the direction Ireland takes when it comes to legislating for terrorist offences and developing an effective counter-terrorism policy. This Note will examine the relevant law in relation to terrorist offences from both an international and Irish perspective focusing on the provisions of the Directive and how Irish law and policy in the area could be strengthened.

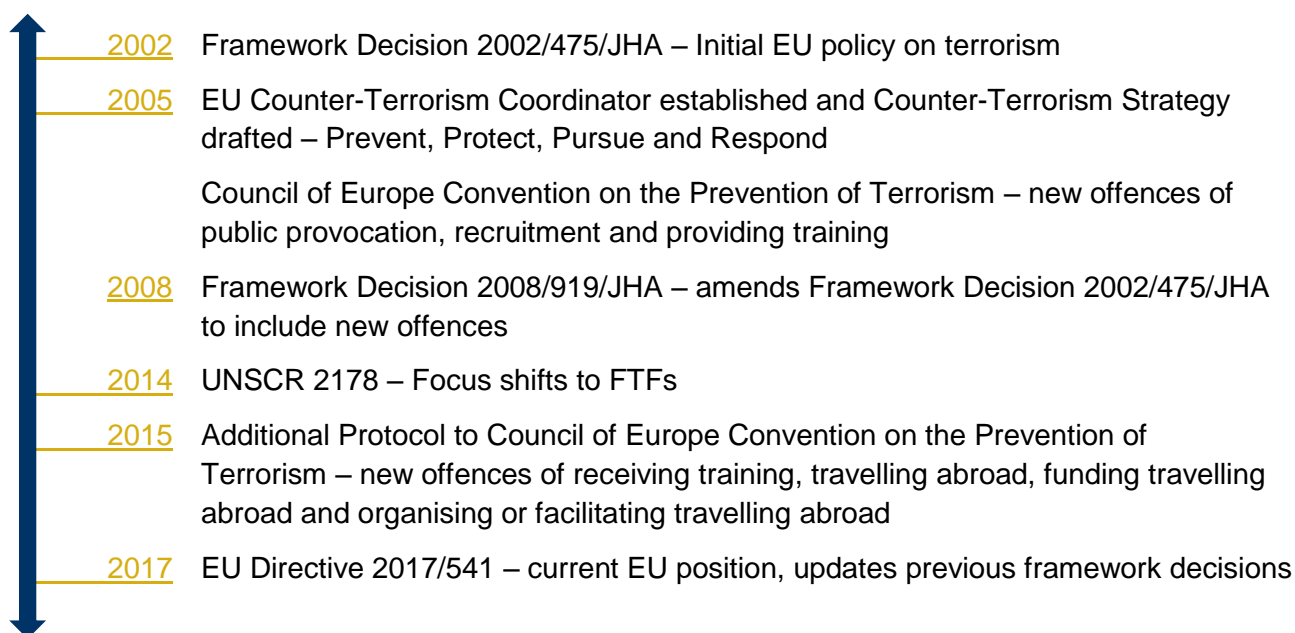
² [Protocol 21 of the Treaty on the Functioning of the European Union](#) provides for the position of Ireland and the UK in the area of freedom, justice and security. This notes that where EU Directives come under the area of freedom, justice and security, Ireland is not bound by the measures. However, Ireland may opt in to the adoption of such measures by notifying “the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, that it wishes to take part in the adoption and application of any such proposed measure.”

³ See, <https://www.irishtimes.com/news/crime-and-law/new-anti-terror-laws-to-be-introduced-1.3116059>.

⁴ It is listed under the category of “all other legislation” with the status of the legislation being described as “preparatory work is underway.” See, https://www.taoiseach.gov.ie/DOT/eng/News/Government_Press_Releases/Government_Legislation_Program_Spring_Summer_2018.html.

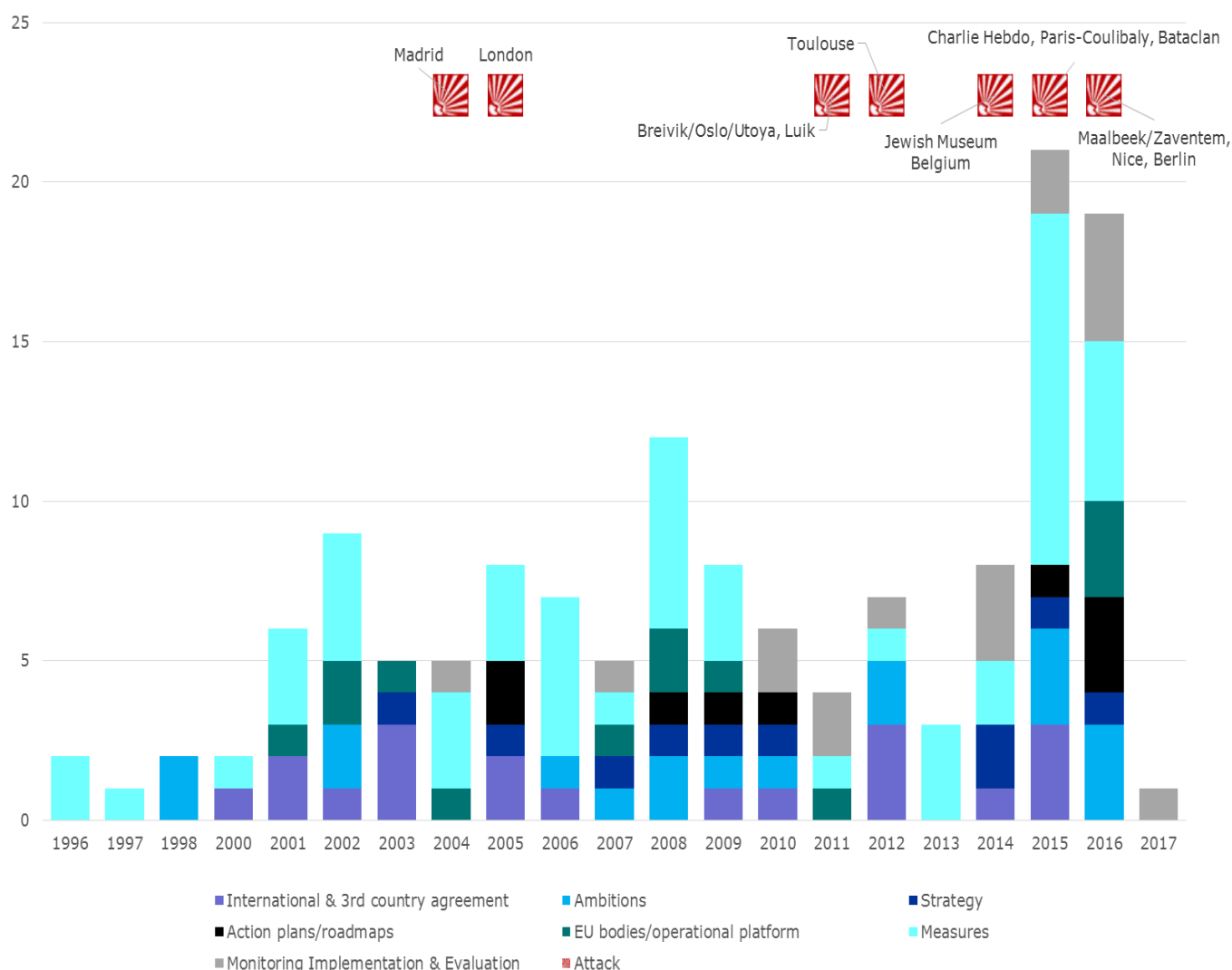
International Terrorism and the Background to Directive 2017/541

Figure 1. Timeline of key dates and international instruments



A number of significant international developments have occurred in the last 20 years which can all be seen as shaping the background to the Directive. Figure 2 (below) indicates that spikes in EU measures can be traced to various acts of terror. This section focuses on how these developments have come to influence the approach taken by the EU in formulating a coordinated response to counter-terrorism and the main tools used to implement the policies adopted.⁵ This section will set out a brief background to the Directive tracking the developments in this area of law from an international perspective from the reaction to the 9/11 terrorist attacks in the US through to the adoption of the Directive 2017/541.

⁵ It is beyond the scope of this paper to address in detail the extensive number of counter-terrorism research and policy bodies which have arisen within the EU since 2001. However, for more on this area a comprehensive analysis up to January 2017 is provided by the European Parliament, Directorate-General for Internal Policies Study, “*The European Union’s Policies on Counter-terrorism: Relevance, Coherence and Effectiveness*” available at <http://www.europarl.europa.eu/committees/en/libe/subject-files.html?id=20160303CDT00561>. The report is accessible through the EP Studies and briefings tab.

Figure 2. Strategies, action plans, measures etc. adopted per year, 1996-2017

Source: [European Parliament, Note 5 at p.31](#)

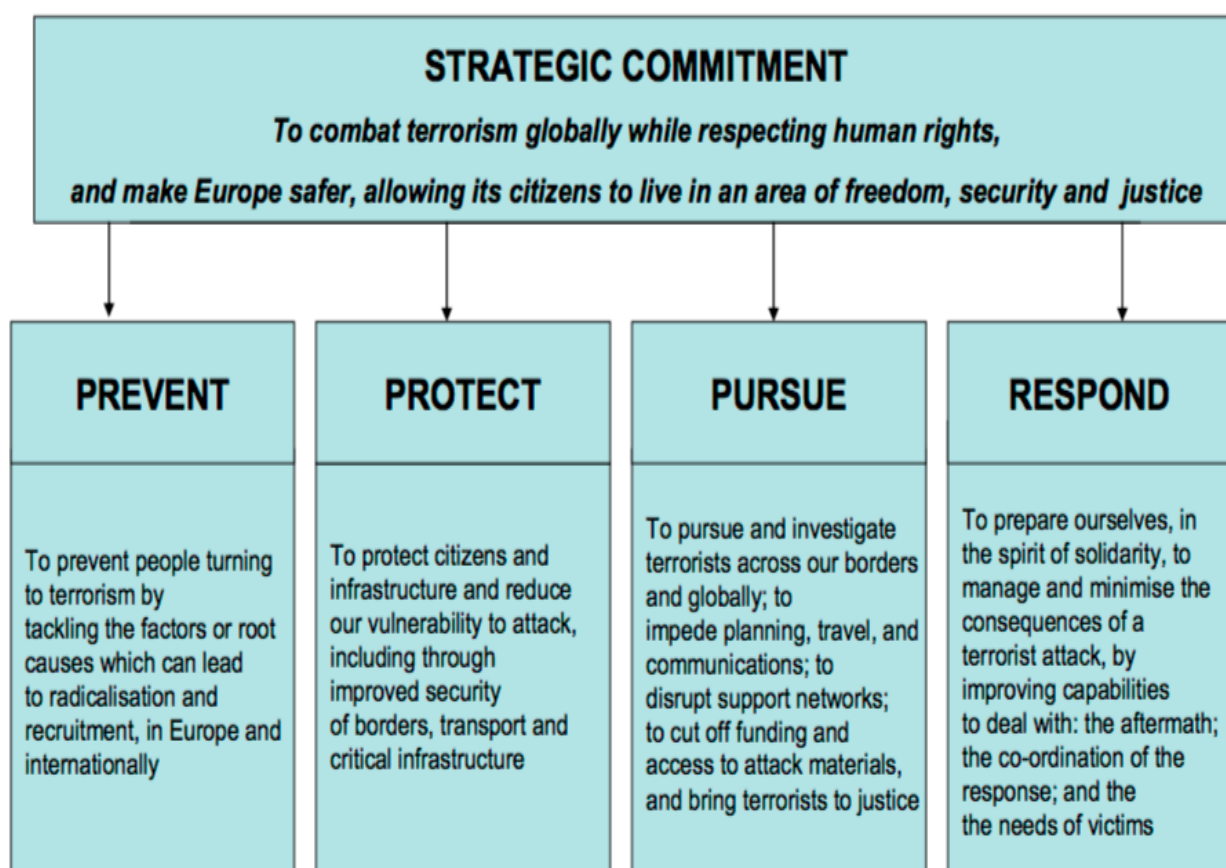
The starting point for any discussion on the development of the EU approach to terrorism arises from [Council Framework Decision 2002/475/JHA](#). This was the coordinated EU response to the 9/11 attacks in the US and sought to harmonise Member States' legislative approaches to counter-terrorism to prevent safe havens emerging for terrorists. It required Member States to introduce criminal provisions penalising terrorism and provided a set list of acts constituting terrorist offences and their corresponding penalties. This list includes offences involving directing or participating in a terrorist group, as well as various forms of criminal conduct engaged in with a terrorist intention. Inciting, aiding and abetting, and attempting a terrorist offence were also provided for.

The Framework Decision also contained a provision on the appropriate assistance for victims and their families. The external nature of the terrorist threat at the time, as perceived by the EU can be seen from the European Council's Action Plan of 2001 which stated "the fight against the scourge

of terrorism will be all the more effective if it is based on an in-depth political dialogue with those countries and regions of the world in which terrorism comes into being.”⁶

Since this initial Framework Decision a number of international developments have resulted in the continued updating of the EU’s policy on counter terrorism. Growing concerns over the internal threat arising from international terrorism have played a larger role in the direction of this policy. Arising out of the attacks in Madrid in 2004 and in London in 2005, the need for a more cohesive policy aimed at home-grown terrorism and preventing radicalisation became apparent. Following the Madrid bombing, the EU established the Counter-Terrorism Coordinator, which drafted the EU Counter-Terrorism Strategy in 2005.⁷ The four pillars of this strategy are set out in Figure 2 (below) with prevention being at the heart of the strategy.

Figure 3. EU CT Strategy



Source: [Council of the EU, Note 7 at p. 4](#)

⁶ European Council, ‘Conclusions and Plan of Action of the extraordinary European Council Meeting on 21 September 2001’ available at https://www.cvce.eu/en/obj/conclusions_and_plan_of_action_of_the_extraordinary_european_council_meeting_21_september_2001-en-a012ede7-96d9-4c37-a7ce-cae949ddf401.html.

⁷ Available at <http://www.statewatch.org/news/2005/nov/eu-counter-terr-strategy-nov-05.pdf>.

Another important background development at this time was the signing of the [Council of Europe Convention on the Prevention of Terrorism in 2005](#).⁸ This Convention called on Member States to:

- introduce offences to criminalise the intentional and unlawful public provocation to commit a terrorist offence;
- criminalise recruitment for terrorism; and
- criminalise providing training for terrorism.

Article 8 of the Convention set out that for the purposes of these offences it would not be necessary for a substantive terrorist offence to be carried out. In 2008, Council Framework Decision 2002/475/JHA was amended by [Council Framework Decision 2008/919/JHA](#) to include the three new offences set out in the Convention. **It can be seen from the addition of these offences that there was a shift in focus towards bringing preparatory activities within the scope of counter-terrorism policy.** With the outbreak of the Syrian civil war and the emergence of a trend of individuals leaving Europe to participate in conflicts in Iraq and Syria the need for changes to how terrorism was conceptually viewed arose again within the international community.

Focus on FTFs

In September 2014, [United Nations Security Council Resolution 2178](#) was adopted which called on all Members to address the issue of FTFs. Two attacks in Paris brought this concern into particular focus as the perpetrators of the attack on the offices of Charlie Hebdo had received training in Yemen, while some of the perpetrators of the attack in the Bataclan were EU citizens who had returned from Syria.⁹

The [Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism](#) was adopted on the 19th of May, 2015. This called on Member States to bolster their existing counter-terrorism regimes by adding the following offences:

- receiving training for terrorism;
- travelling abroad for the purpose of terrorism;
- funding travelling abroad for the purpose of terrorism; and
- organising or otherwise facilitating travelling abroad for the purpose of terrorism.

Unlike UNSCR 2178 the Additional Protocol explicitly calls on Members States to implement the above procedures while respecting existing human rights obligations, noting that States “should furthermore be subject to the principle of proportionality, with respect to the legitimate aims

⁸ Note that the Council of Europe is a separate body (with a focus on upholding human rights) from the EU institutions of the European Council (sets the political direction of the EU) and the Council of the EU (responsible for passing laws).

⁹ See Note 5 at p. 35.

pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.”¹⁰

In December 2015, the European Commission published its proposals for a new Directive to replace and update the EU position as set out in Council Framework Decision 2008/919/JHA.¹¹ Due to the perceived urgency of the required legislation, given the Paris terrorist attacks in November 2015, this proposal for a new Directive was exceptionally presented without an impact assessment.¹² This proposal attracted considerable criticism from civil society groups. They expressed concern at the lack of a human rights safeguard provision in the proposal, the failure to consult stakeholders and the dangers of introducing criminalisation of conduct at too early a stage.¹³

After extensive commentary and debate¹⁴ a number of modifications were made. The final text of Directive 2017/541 was approved by the European Parliament on the 16 February, 2017. At the time of writing the Directive has been transcribed into the national laws of the Belgium, Latvia, Lithuania, Portugal and Slovakia.¹⁵

¹⁰ Council of Europe, [Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism](#), at Article 8.

¹¹ European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism’, Brussels, 2 December 2015, COM(2015) 625 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0625&from=EN>.

¹² *Ibid*, at p. 12.

¹³ S. Voronova, European Parliamentary Research Service, ‘Combating terrorism’, Briefing, EU Legislation in Progress, September 2017, available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608682/EPRS_BRI\(2017\)608682_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608682/EPRS_BRI(2017)608682_EN.pdf), at p. 7.

¹⁴ See European Parliament, ‘Preventing terrorism: clampdown on foreign fighters and lone wolves’, Press release, 16 February 2017, available at: <http://www.europarl.europa.eu/news/en/press-room/20170210IPR61803/preventing-terrorism-clampdown-on-foreign-fighters-and-lone-wolves>.

¹⁵ See <http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32017L0541>.

Background to Irish Legislation on Terrorism

While historically the threat to the State was confined to domestic terrorism, in recent years legislation has been introduced aimed at ensuring there is an adequate framework in place for addressing international terrorism. Irish legislation can therefore be viewed as coming under two broad categories of the [Offences against the State Acts 1939 – 1998](#), which target subversive domestic violence and the [Criminal Justice \(Terrorist Offences\) Act 2005](#) as amended, which was introduced to address EU and international agreements. However, a number of other pieces of legislation supplement this area. These are also designed to ensure Ireland meets its international obligations in respect of counter-terrorism and to ensure there is the appropriate legislative apparatus in place to meet the security needs of the State.

Other relevant pieces of legislation include:

- [Air Navigation and Transport Act 1973](#) (as amended);
- [European Arrest Warrant Act 2003](#) (as amended);
- [Maritime Security Act 2004](#);
- [Criminal Justice \(Mutual Assistance\) Act 2008](#) (as amended);
- [Biological Weapons Act 2011](#);
- *Criminal Records Information System Bill* [upcoming];
- *Criminal Justice (Money Laundering and Terrorist Financing)(Amendment) Bill* [currently before the Houses].

The *Offences against the State Act 1939* and its subsequent amendments cover a range of offences which can be used in cases of terrorism. These offences (and their maximum penalties) include:

- membership of an unlawful organisation¹⁶ (7 years imprisonment);
- training a person in the making or use of firearms (Fine and/or 10 years imprisonment);
- participation in unauthorised military exercises (15 years imprisonment); and
- directing an unlawful organisation (Life imprisonment).

The *Criminal Justice (Terrorist Offences) Act 2005* was introduced in order to create a regime specifically designed to address international terrorism. This Act gives effect to a number of international instruments directed at terrorism and particularly Council Framework Decision 2002/475/JHA. [Section 5 of the 2005 Act](#) can be seen to be complementary to the earlier *Offences against the State Acts* in that it provides that a “terrorist group that engages in, promotes, encourages or advocates the commission, in or outside the State, of a terrorist activity is an unlawful organisation within the meaning and for the purposes of the *Offences against the State*

¹⁶ An unlawful organisation is defined quite broadly under section 18 of the 1939 Act. It should be noted that there is also a power under section 19 of the 1939 Act for the Government to issue a suppression order which acts as conclusive evidence that the organisation against whom the order is made, is an unlawful organisation. These have been made in relation to the IRA (available [here](#)) and the INLA (available [here](#)).

Acts 1939 to 1998 and [Section 3 of the Criminal Law Act 1976](#).” The [Criminal Justice \(Terrorist Offences\)\(Amendment\) Act 2015](#)¹⁷ has introduced the following offences (and punishments):

- public provocation to commit a terrorist offence (Summary – Class A fine¹⁸ and/or 12 months imprisonment, Indictment – Fine and/or 10 years imprisonment);
- recruitment for terrorism (Fine and/or 10 years imprisonment); and
- providing training for terrorism (Fine and/or 10 years imprisonment).

A number of other pieces of legislation are relevant to this area. [Section 12\(1\)\(c\) of the Passport Act 2008](#)¹⁹ allows for the refusal by the Minister for Foreign Affairs to issue a passport where, after consultation with the Minister for Justice and Equality or the Minister for Defence, or both, the Minister is of the opinion the person would be likely to engage in conduct which might prejudice the national security of the State or another state.

The [Criminal Justice \(Money Laundering and Terrorist Financing\) Act 2010](#)²⁰ consolidated existing legislation on money laundering and terrorist financing. It also transposed the [Third Money Laundering Directive \(2005/60/EC\)](#) into Irish law, as well as taking into account the outcome of the Third Mutual Evaluation Report of the Financial Action Task Force.²¹ It extended customer due diligence requirements on the regulated private sector and broadened the offence of money laundering to include the proceeds of all crime. Part 2 of the [Criminal Justice Act 2013](#)²² amended the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*, to strengthen it in light of issues identified relating to Ireland’s anti-money laundering regime. The [Criminal Justice \(Money Laundering and Terrorist Financing\)\(Amendment\) Bill 2018](#) is currently before the Houses of the Oireachtas. It will give effect to the [Fourth Money Laundering Directive 2015/849](#).²³

In relation to Irish policing in the area of counter-terrorism, **security measures** are overseen by the Security and Intelligence Department of An Garda Síochána.²⁴ This is the department responsible for identifying and analysing threats to the security of the State as well as liaising with external international policing agencies, such as Europol. The Special Detective Unit is responsible for the investigation of threats to State security as well as monitoring individuals who are considered to pose a threat. The Defence Forces and An Garda Síochána carry out coordinated

¹⁷ The Bill Tracker page which includes the Bills Digest for this piece of legislation is available [here](#).

¹⁸ A Class A fine is a fine not exceeding €5,000.

¹⁹ The Bill Tracker page which includes the Bills Digest for this piece of legislation is available [here](#).

²⁰ The Bill Tracker page which includes the Bills Digest for this piece of legislation is available [here](#).

²¹ The Financial Action Task Force (FATF) is an international inter-governmental body which sets international standards and develops policies related to anti-money laundering and terrorism financing. More information on Ireland’s involvement with FATF is available at <http://www.fatf-gafi.org/countries/#Ireland>.

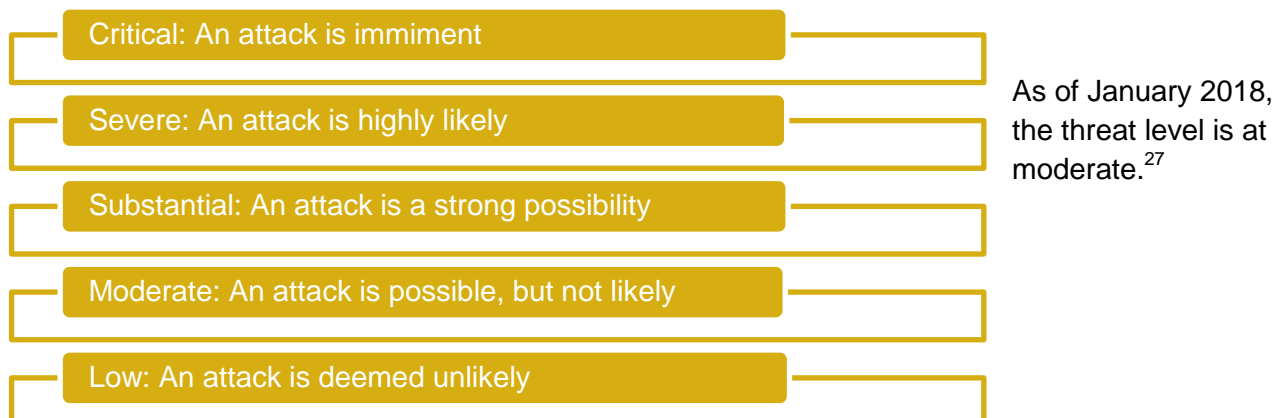
²² The Bill Tracker page which includes the Bills Digest for this piece of legislation is available [here](#).

²³ It is beyond the scope of this L&RS Note to address the law relating to terrorist financing. However, this area is comprehensively covered in the recent Bills Digest for the *Criminal Justice (Money Laundering & Terrorist Financing)(Amendment) Bill 2018*. The Bill Tracker page which includes the Bills Digest for this piece of legislation is available [here](#).

²⁴ See <https://www.garda.ie/en/About-Us/Our-Departments/Security-and-Intelligence1/Security-and-Intelligence.html>.

training exercises to test their response times in the event of a terrorist attack, with one such exercise being recently held in Shannon Airport.²⁵

In relation to the threat level, An Garda Síochána administers a 5 tier system based on the likelihood of an international terrorist attack taking place in Ireland.²⁶ The 5 tiers are:



Preventative measures are overseen by the Garda Racial Inter-Cultural and Diversity Office and its team of Ethnic Liaison Officers.²⁸ They engage in community policing exercises and aim to build relationships of trust and confidence between minority communities and An Garda Síochána. Their aim is to enable the prevention of radicalisation at an early stage and seek to ensure that negative stereotyping of minorities is avoided, particularly in the wake of terrorist attacks worldwide.

Little information is publically available about those who travelled from Ireland that have been involved as foreign fighters in Iraq and Syria. This may be for operational or security reasons. In 2015 reports in the Irish press estimated that 30 individuals had left Ireland to travel to Syria/Iraq.²⁹ It is not publically known how many of those individuals, if any, have returned.³⁰ In 2016 press reports indicated that an Irish individual known as “Khalid Kelly” had blown himself up in a suicide bombing in Mosul as part of ISIL’s defence of the city.³¹ In a Written Answer to a Parliamentary Question on 23 May 2018, relating to ‘foreign conflicts’ the Minister for Justice and Equality noted:

²⁵ See <https://www.irishtimes.com/news/world/terror-attacks/security-services-test-emergency-response-to-terror-attack-1.3433894>.

²⁶ See <https://www.irishexaminer.com/viewpoints/analysis/what-is-the-reality-of-the-threat-posed-by-islamic-extremists-in-ireland-396021.html>.

²⁷ See <https://www.irishtimes.com/news/crime-and-law/no-evidence-dundalk-attack-linked-to-international-terrorism-garda-1.3344857>.

²⁸ See https://ec.europa.eu/home-affairs/node/7430_en.

²⁹ See <https://www.irishexaminer.com/ireland/30-irish-gone-to-syria-and-iraq-wars-305939.html>.

³⁰ The International Centre for Counter-Terrorism estimate that of the total fighters from the EU an average of 14% of fighters are confirmed dead while 30% of fighters have returned to their country of departure. See ICCT, “The Foreign Fighters Phenomenon in the EU – Profiles, Threats & Policies” (2016). Available at: https://www.icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf.

³¹ See <https://www.theguardian.com/world/2016/nov/05/irish-isis-fighter-kills-himself-in-iraq-suicide-bombing>.

“There is also a small number of people, estimated to be in the order of 30 or so, who have travelled from Ireland to fight with jihadist-type groups in the conflict in Syria and Iraq. Unfortunately, a number of those are understood to have lost their lives. The Deputy will understand, of course, that in the circumstances of conflict, it can be difficult to ensure the reliability of information in matters such as these.”³²

In the 2017 National Risk Assessment the Department of the Taoiseach set out the various strategic risks that the country is facing.³³ This report discusses the threat posed to national security by terrorism and notes that due to the weakening of ISIL there is likely to be an increase in FTFs returning home who may pose a threat. The authors of the report consider the impact that an attack similar to the attacks carried out in London and Manchester in 2017, would have if it occurred in Ireland. They note:

“Such an attack here could have significant impact in terms of public safety and security in the short term, and there could possibly be longer-term reputational damage to Ireland as a safe and secure destination to live and work in, and to visit. As an example, tourism in Ireland generates revenues of around €8 billion and supports an estimated 220,000 jobs, and any impacts on the sector could have potentially serious economic consequences.”³⁴

Europol provide an annual European Union Terrorism Situation and Trend Report which considers trends in terrorism across Europe.³⁵ Figure 3 (below) shows the number of attacks and arrests for terrorism in the EU in 2017. Of the 11 arrests for terrorist offences in Ireland, three were related to jihadist terrorism.³⁶

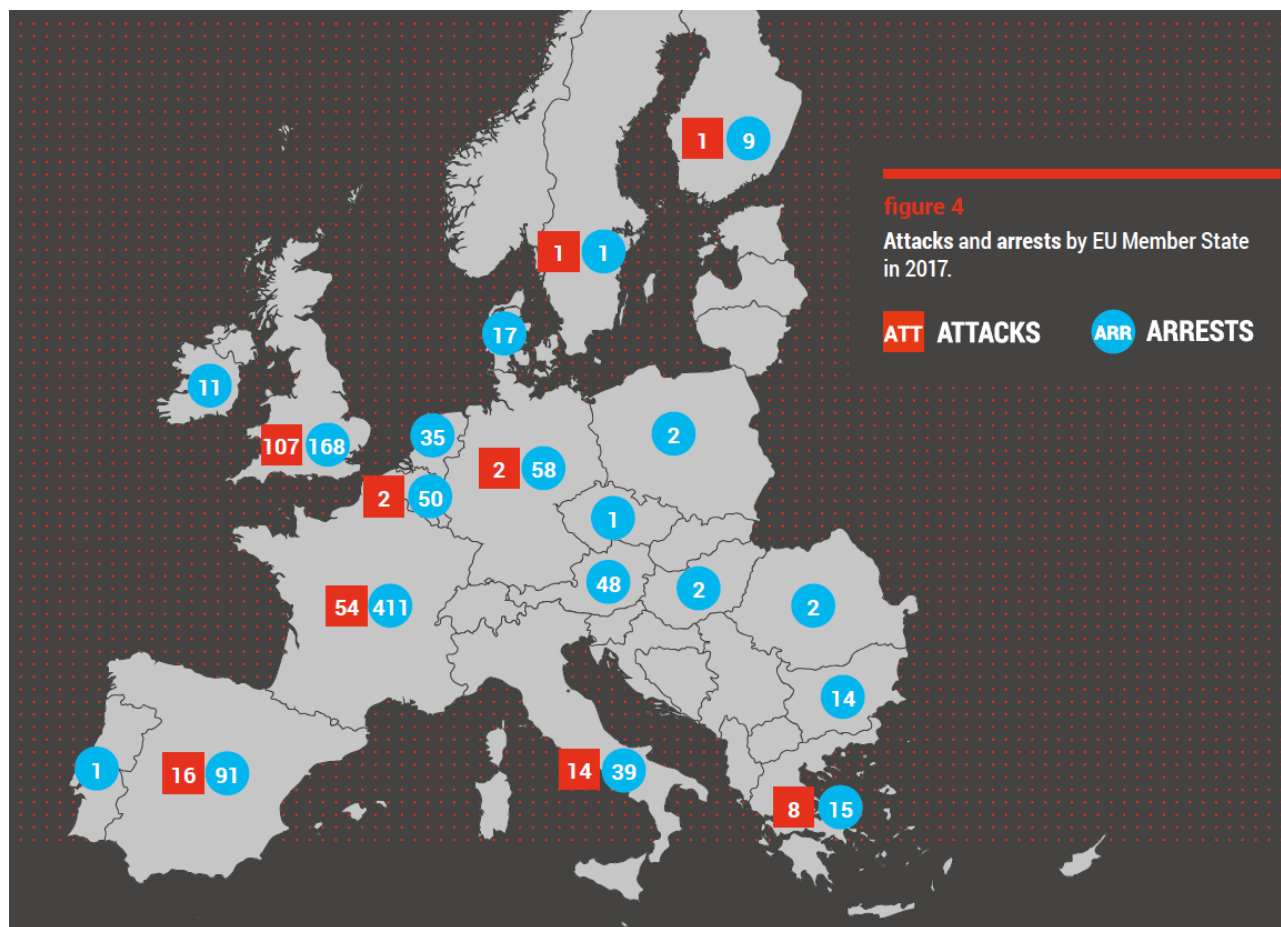
³² See Written Answers (Question to Justice), replying to Sean Sherlock, Question 70 on *Foreign Conflicts*, Dáil Éireann Debate, Wednesday, 23 May 2018. Available at https://www.oireachtas.ie/en/debates/question/2018-05-23/70/#pq_70.

³³ Department of the Taoiseach, *National Risk Assessment 2017: Overview of Strategic Risks*. Available at: https://www.taoiseach.gov.ie/eng/Publications/Publications_2017/National%20Risk%20Assessment%202017%20-%20Overview%20of%20Strategic%20Risks.pdf.

³⁴ *Ibid*, at p. 20.

³⁵ See Europol, *European Union Terrorism Situation and Trend Report (TE-SAT) 2018*. Available at: <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-2018-tesat-2018>. Note that this report does not capture figures from the UK.

³⁶ *Ibid*, at p. 55. The other 8 arrests related to what Europol describe as Separatist terrorism (dissident republicanism).

Figure 3. Number of terrorist attacks and arrests in EU countries in 2017

Source: [Europol, Note 35 at p. 10](#)

Key Provisions of Directive 2017/541

This section goes through each of the key provisions of Directive 2017/541 focusing on the new aspects that this Directive is aiming to introduce into national legal systems. As the Directive replaces Council Framework Decision 2002/475/JHA a lot of the areas of the Directive are repetitions of earlier provisions. This section focuses on what new measures will be required from Member States and whether there are existing provisions in Irish law to address the requirements of the Directive.

- **Article 4: Offences relating to a terrorist group** – This Article provides that Member States should introduce the necessary measures to criminalise, where carried out intentionally, the directing of a terrorist organisation and the participation in the activities of a terrorist group (which includes supplying information or resources with the knowledge that such participation is contributing to the criminal activities of the terrorist group).

The offence of directing an unlawful organisation is provided for under Section 6 of the Offences against the State (Amendment) Act 1998. The offence of engaging in terrorist activity is found in Section 6(1) of the Criminal Justice (Terrorist Offences) Act 2005.

- **Article 5: Public provocation to commit a terrorist offence** – This Article requires Member States to criminalise the intentional distribution of messages aimed at inciting others to carry out terrorist offences or glorifying previous terrorist offences.

Section 4A of the Criminal Justice (Terrorist Offences) Act 2005 provides for the offence of public provocation to commit a terrorist offence.

- **Article 6: Recruitment for terrorism** – This Article requires Member States to prohibit the intentional solicitation of individuals for the purpose of carrying out terrorist activities.

Section 4B of the Criminal Justice (Terrorist Offences) Act 2005 provides for the offence of recruitment for terrorism and is broadly in the same terms as Article 6. It equates this offence with an offence under Section 3 of the Criminal Law Act 1976. This provides for the offence of incitement or invitation to join an unlawful organisation, and has a maximum penalty of a term of imprisonment not exceeding 10 years.

- **Article 7: Providing training for terrorism** – This Article requires Member States to criminalise the provision of training in methods, techniques or use of weapons and/or hazardous materials for the purposes of carrying out a terrorist offence.

Section 4C of the Criminal Justice (Terrorist Offences) Act 2005 sets out the offence of training for terrorism in Irish law. This section also allows the Minister to create regulations further

defining and specifying the precise materials and training in respect of same which would fall under this section. At the time of writing no such regulations are in place.

- **Article 8: Receiving training for terrorism** – This Article requires Member States to criminalise the receiving of training for terrorism, with training for terrorism defined in the same terms as set out in Article 7 of the Directive.

At present there is no specific provision in Irish law relating to the receiving of training for terrorism. However, [Section 12 of the Offences against the State \(Amendment\) Act 1998](#) provides for an offence of training persons in the use or making of firearms or explosives which describes a person who “receives instruction or training in the making or use of firearms or explosives,” as being guilty of an offence. Section 12(2) of the 1998 Act provides for a defence of lawful authority.

- **Article 9: Travelling for the purpose of terrorism** – This Article requires Member States to criminalise travelling abroad for the purposes of carrying out a terrorist offence, participating in terrorist activities or giving or receiving of training for terrorism. Article 9(b) requires for the criminalisation of preparatory acts undertaken by a person entering a Member States with the intention to carry out a terrorist offence. These provisions are aimed at disrupting terrorist activity before a substantive offence can be carried out.

At present there is no specific offence of travelling abroad for the purpose of terrorism in Irish law. Certain aspects of the criminalisation of taking preparatory acts for a terrorist offence may be covered under the definition of terrorist-linked activity in the 2005 Act, as amended.³⁷

- **Article 10: Organising or otherwise facilitating travelling for the purpose of terrorism** – This Article requires Member States to criminalise acts carried out by people with the intention of facilitating another person’s travel for the purpose of terrorism.

At present there is no specific offence in Irish law of facilitating travel for the purpose of terrorism, but similar to Article 9 above, aspects of the facilitation of travel, such as providing false documents to a person to travel abroad, could be captured by the 2005 Act.

- **Article 11: Terrorist Financing** – This Article requires Member States to take necessary actions to prevent the financing of terrorism and requires Member States to criminalise the collection or provision of funds for terrorism.

³⁷ For example, using a false document to travel abroad in contemplation of carrying out a terrorist offence would be captured under the definition of “terrorist-linked activity” in [Section 4 of the Criminal Justice \(Terrorist Offences\) Act 2005](#), as amended. See [Schedule 2, Part 3](#).

Measures to combat terrorist financing are covered by the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.³⁸ Section 13 of the Criminal Justice (Terrorist Offences) Act 2005 provides for the offence of financing terrorism.

- **Article 12: Other offences related to terrorist activities** – This Article provides that aggravated theft, extortion and drawing up or using false administrative documents with a view to carrying out an offence under Article 3 are included as offences related to terrorist activities.

These other offences are covered in Part 2 and Part 3 of Schedule 2 of the 2005 Act.

- **Article 13: Relationship to terrorist offences** – This Article provides that for any of the offences in Articles 4 and Title III, it will not be necessary that a terrorist offence actually be carried out.

This is already the case in relation to terrorist-linked activity as set out in Section 4(3) of the 2005 Act.

- **Article 14: Aiding and abetting, inciting and attempting** – This Article requires Member states to criminalise aiding and abetting any of the offences under Articles 3 to 8, and 11 and 12. Member States are required to criminalise inciting any of the offences under Articles 3 to 12. Article 14 also requires Member States to criminalise attempting to commit any of the offences listed in Article 14(3). This is a restatement of the similar requirement under Article 4 of Council Framework Decision 2008/919/JHA.

Section 6 of the 2005 Act criminalises attempts to engage in any of the offences. Section 7 of the Criminal Law Act 1997 provides for the criminalisation of aiding, abetting, counselling or procuring of an indictable offence.

- **Article 19: Jurisdiction and prosecution** – This Article establishes the links between the offence, offender and the Member State that are necessary for the offence to be prosecuted in a Member State. Where an offence falls within the jurisdiction of more than one Member State this Article requires Member States to cooperate in relation to the prosecution of offenders and where necessary to have recourse to Eurojust to facilitate this cooperation.
- **Article 23: Fundamental rights and freedoms** – This Article clarifies that the Directive does not modify any of the fundamental rights and legal obligations under Article 6 of the Treaty on European Union.

³⁸ See Note 20.

- **Title V: Provisions on Protection of, Support to, and the Rights of Victims of Terrorism** – This Part of the Directive focuses on the systems that ought to be in place in relation to the support of victims following a terrorist attack. Article 24 requires that the specific needs of victims of terrorism to be taken into account, with services being available immediately following a terrorist attack and for as long as necessary thereafter to victims. The Directive requires support services to be “confidential, free of charge and easily accessible to all victims of terrorism.” Article 25 requires Member States to have regard to the need to protect victims of terrorism from intimidation and retaliation in the context of criminal proceedings taken against individuals accused of terrorist offences. Article 26 obliges Member States to provide for victims of terrorist attacks while they are resident in Member States other than where the offence was committed and envisages a degree of coordination and cooperation between national support bodies to ensure that all victims receive the support they require. The types of support that are required under the Directive include:

- Psychological and emotional support, such as trauma and counselling;
- The provision of information relating to rights; and
- Assistance relating to financial compensation claims available to victims of terrorism under national law.

The *Criminal Justice (Victims of Crime) Act 2017* transposed into Irish law the EU Victims Directive.³⁹ This sets out minimum standards for the protection, support and rights of victims of crime. Part 2 of the 2017 Act sets out the duties of An Garda Síochána in respect of the provision of information to victims. Part 3 provides for the protection of victims during the criminal process. Under *Section 15 of the 2017 Act* in carrying out an assessment of a victim for the purposes of determining whether they require special protection or measures, the Garda is to have regard to “the particular vulnerability of victims of terror.”⁴⁰

³⁹ [Directive 2012/29/EU](#) of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

⁴⁰ [Section 15\(2\)\(f\) of the Criminal Justice \(Victims of Crime\) Act 2017](#).

Potential Challenges for Ireland Posed by Directive 2017/541

This section focuses on the possible challenges which may arise in relation to the transposition of Directive 2017/541 into Irish law. These include where measures already exist in Irish law, whether adopting a specific approach and creating a new offence is preferable to incorporating the existing offence within the new terrorist legislation. This section also examines the difficulties that exist in relation to the collection of evidence and the prosecution of returning FTFs.

Receiving Training

The principal new terrorist offences that are set out in the Directive are those provided for in Articles 8, 9 and 10. The purpose of these provisions is to criminalise actions that are carried out in advance of a substantive terrorist attack so as to prevent the substantive attack from arising.

In relation to the Article 8 offence of receiving training for terrorism no specific offence exists under Irish law. A similar offence exists in relation to training in the making of firearms and explosives under [Section 12 of the Offences against the State \(Amendment\) Act 1998](#). However, while this covers receiving training, the existing offence under Section 12 of the 1998 Act would not be sufficient to cover all the types of training that take place for terrorism, i.e. training related to a terrorist act where the offender does not use firearms or explosives. This has become increasingly relevant with the growing “weaponisation of ordinary life” for the purposes of carrying out terrorist attacks.⁴¹

The offence of providing training for terrorism under [Section 4C of the 2005 Act](#), as amended, provides for a broader range of activities to be covered and includes a catch-all type provision allowing for the Minister to create Regulations to cover other methods and techniques not specified in the legislation. As with Section 4C, in order for any similar provision to be effective, the Regulations criminalising those aspects of training not explicitly covered in the Act⁴² would need to be sufficiently broadly drafted to cover training in the use of the increasing range of everyday materials and methods that can be applied for terrorist ends.

Another aspect of this area which requires consideration is where training for terrorism involves **self-taught methods** and **where the person is acting alone**. For example, Recital 11 of the Preamble of the Directive suggests that an activity such as downloading an online manual on explosive materials for terrorist purposes should be considered receiving training for terrorism, whereas the collection of materials for academic or other legitimate purposes would not be captured by this offence. While the intent of any person coming within this offence will need to be that of a person receiving training with the intention of carrying out a terrorist offence, a lawful

⁴¹ The weaponisation of ordinary life refers to the use of everyday tools and vehicles for violent ends. Recent examples of this include the use of a truck in the Berlin Christmas Market terror attack and the use of a hired van and knives in the 2017 July London Bridge attack.

⁴² See [Section 4C\(1\)\(a\) of the 2005 Act](#).

authority provision⁴³ in the legislation could also be used to ensure that any such offence is sufficiently narrow so as to be confined only to cases involving terrorist activity.

Broad or narrow approach to offences

The Article 9 and Article 10 offences of travelling and facilitating travelling for the purposes of terrorism also pose difficulties in relation to the prosecution of such offences.

The Meijers Committee,⁴⁴ writing about the proposals for the Directive question whether there is a need for these offences. Their opinion was that these proposals were too broad and that restrictions on freedom of movement ought to be limited to very specific circumstances. They express concern that the provisions could have a chilling effect on journalists and humanitarian workers making it more difficult for them to reach conflict zones. They also note there could be a shifting of the onus onto ordinary people to prove that they are not travelling for an unlawful purpose.⁴⁵ The Committee also raised concerns with the move towards the criminalisation of ordinarily ‘innocent’ acts, such as taking a chemistry course or buying fertiliser, would now be brought under increased scrutiny and the risks that this could result in discrimination. They note:

“Thus, because the *actus reus*⁴⁶ cannot make the difference, a person’s alleged intention (*mens rea*) plays an even greater role, and in the field of terrorism there is a greater risk that the authorities may derive such an intention (in part) from ideologies and/or religious beliefs. In the current societal context, that means that there is a genuine risk that Muslims will be disproportionately targeted in practice.”⁴⁷

Despite the protection offered in Article 23 in relation to human rights, there are concerns that the Directive could lead to poorly defined terrorism offences which can be abused by prosecuting authorities for political ends.

The negative effects of an overly-broad application of counter-terrorism laws can be seen in a recent report by Amnesty International on how counter-terrorism laws have restricted the right to freedom of expression in Spain.⁴⁸ They suggest that vaguely defined laws prohibiting the ‘glorifying of terrorism’ and the ‘humiliation of victims of terrorism’ have been used to target political speech,

⁴³ For example, the provision in [Section 12\(2\) of the Offences against the State \(Amendment\) Act 2018](#).

⁴⁴ This is a standing committee of experts on international refugee, migration and criminal law. See <http://www.commissie-meijers.nl/en>.

⁴⁵ Meijers Committee, “Note on a Proposal for a Directive on Combating Terrorism”, (March 2016) at para 13. Available at http://www.commissie-meijers.nl/sites/all/files/cm1603_note_on_a_proposal_for_a_directive_on_combating_terrorism.pdf.

⁴⁶ The *actus reus* of an offence is a voluntary act or omission, directly attributable to the accused in the commission of an offence.

⁴⁷ Note 45, at p. 4.

⁴⁸ Amnesty International, “Tweet ... if you dare: How counter-terrorism laws restrict freedom of expression in Spain” (March, 2018). Available at: <https://www.amnesty.org/en/documents/eur41/7924/2018/en/>.

particularly in the form of online social media. The punishments for these offences include imprisonment for up to three years, fines and disqualification from work in the public sector. Activists, journalists and musicians who have covered politically divisive material have come under the scope of the Spanish prosecutor. They note that:

“[S]uch misuse of counter-terrorism provisions leads people to engage in self-censorship for fear that they may be targeted. The criminalization of such a wide range of expression has a general chilling effect and can create an environment where individuals are afraid of expressing unpopular views, or even making controversial jokes.”⁴⁹

Paulussen and Pitcher consider the various approaches adopted by different countries to prosecuting FTFs following UNSCR 2178.⁵⁰ They note that despite many countries being part of common international treaties and agreements there is considerable variance as to the approaches taken at national level in respect of legislating, prosecuting and punishing terrorist offences.

Some countries, such as the US,⁵¹ use broadly defined offences which cover many different types of offending and allow for a flexible approach to be taken by the judiciary and prosecuting authorities. By contrast, countries such as the UK, the Netherlands, Germany and Australia have all adopted approaches where specific terrorist offences are used, providing greater clarity and guidance as to the necessary elements for the given offences.⁵²

In Australia there are several provisions which are applicable to FTFs and which seek to criminalise various aspects of the involvement of FTFs. One example is the “Declared area offence.”⁵³ This offence is carried out by individuals who intentionally enter or remain within an area declared by the Minister for Foreign Affairs as a ‘designated area’ unless that person is present there for a legitimate purpose such as providing humanitarian aid or providing news reports.⁵⁴

In order to satisfy the legality principle of Irish constitutional law,⁵⁵ and to ensure that any chilling effects relating to legitimate purposes are limited, it would be preferable if clear and precise legislation were adopted in relation to the transposition of these offences.

⁴⁹ *Ibid*, at p. 15.

⁵⁰ Paulussen & Pitcher, “Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges” ICCT Research paper (Jan 2018). Available at: <https://icct.nl/wp-content/uploads/2018/01/ICCT-Paulussen-Pitcher-Prosecuting-Potential-Foreign-Fighters-Legislative-Practical-Challenges-Jan2018.pdf>.

⁵¹ *Ibid*, at p. 16, the example is given of the offence under the US Patriot Act of ‘providing material resources or support to designated terrorist organisations’ which is used to prosecute a wide range of offending.

⁵² *Ibid*, at pp. 17-20.

⁵³ See <https://www.nationalsecurity.gov.au/WhatAustraliaisdoing/Pages/DeclaredAreaOffence.aspx>.

⁵⁴ *Ibid*, at the time of writing there is only one active designated area, Mosul district, Ninewa province in Iraq.

⁵⁵ The legality principle is a principle of constitutional law which requires that where legislation will interfere with fundamental rights then it must be expressed in sufficiently clear and precise language. An example of where legislation was struck down for being too vague is *King v. Attorney General* [1981] IR 233. This principle is particularly important in

Victims of terrorism

In relation to the protection of victims of terrorism, the Directive envisages a comprehensive support system which addresses the specific needs of victims of terrorism. To achieve this, Recital 29 in the Preamble to the Directive suggests that Member States set up a “single and updated website with all relevant information and an emergency support centre for victims and their family members providing for psychological first aid and emotional support.”

The UK provides an example of a country which provides clear information to victims of terrorism through a single website that contains links to the wide range of services offered to victims of terrorism.⁵⁶ In Ireland there is no dedicated body for providing assistance to victims of terrorism. The HSE, the Department of Foreign Affairs and various victim support bodies all engage in some level of victim support.⁵⁷ The failure to provide for a coordinated system with specialist services for victims of terrorism in Ireland has been criticised by Maria McDonald,⁵⁸ who notes that in the event of an attack in Ireland the HSE would be incapable of providing the necessary psychosocial support to victims.⁵⁹

Collection of evidence

The collection of evidence for terrorist offences relating to FTF activities is an area which poses difficulties for law enforcement agencies. This may be particularly pertinent in Ireland where the depth of resources available to tackle an issue such as FTFs may not be as expansive as it is for larger jurisdictions. Issues can arise in relation to the investigation of crimes committed by those who have travelled abroad to unstable regions where the collection of reliable evidence may not be possible.

Paulussen and Pitcher in examining the challenges posed by the collection of evidence relating to FTFs consider how battlefield evidence, internet-based evidence, cross-border legal cooperation and secret information can be utilised in an efficient manner by investigating and prosecuting authorities.⁶⁰ In relation to the gathering of evidence, internet-based evidence and cross-border legal cooperation would be of particular relevance to Irish authorities. The use of social media by

the context of legislation relating to terrorism, as this often involves broad restrictions on various rights in the interest of providing greater security.

⁵⁶ See <https://victimsofterrorism.campaign.gov.uk/>.

⁵⁷ See Conor Gallagher, “State ‘is not doing enough for terror attack victims’” *The Irish Times* (28 August, 2017) <https://www.irishtimes.com/news/social-affairs/state-is-not-doing-enough-for-terror-attack-victims-1.3201519>.

⁵⁸ Maria McDonald is a barrister and the head of the Victims’ Rights Alliance, which is an organisation encompassing a number of victim support and human rights groups which was set up to ensure the implementation of the Victims Directive into Irish law within the correct time frame.

⁵⁹ See Note 57.

⁶⁰ See Note 50, at p. 26.

individuals involved in terrorism has been used by police in the UK in order to intercept and successfully prosecute a considerable number of terrorist offences.⁶¹

In relation to cross-border legal cooperation into the investigation of terrorism, this arises in a number of ways. At an EU level there are a number of agencies such as Europol and Eurojust which provide support to Member States, with both of these organisations issuing reports on FTFs and counter-terrorism policy documents on a frequent basis. An example of how cross-border cooperation can be used to provide the necessary evidential basis for prosecutions can be seen in the Australian prosecution of Adam Brookman where information gathered by US and Norwegian authorities is being used to prosecute an Australian nurse alleged to have been carrying out guard duty and assisting ISIL during his time in Syria.⁶²

⁶¹ The Crown Prosecution Service publishes summaries of successful terrorist prosecutions. In many of these cases the tracking of social media accounts by the police played a role in the prevention of terrorist offences. For example, see *R v. Akeem Samuels* where the accused was using Instagram and Twitter to encourage terrorist activity, available at <https://www.cps.gov.uk/counter-terrorism-division-crown-prosecution-service-cps-successful-prosecutions-end-2006>.

⁶² "FBI evidence to be used against alleged Isis nurse Adam Brookman," *The Guardian*, (23 May, 2016), available at <https://www.theguardian.com/australia-news/2016/may/23/fbi-evidence-to-be-used-against-alleged-isis-nurse-adam-brookman>.

Conclusion

With the collapse of ISIL's 'caliphate' following the capture of Mosul,⁶³ the threat posed by individuals returning from Iraq and Syria is likely to feature quite heavily on the security agenda of the EU and may result in further developments at the international stage.

While the threat to Ireland from FTFs may be relatively low, the importance of implementing Directive 2017/541 in a timely fashion ought to remain a priority as the introduction of measures to address FTFs is required under UNSCR 2178. As these measures will also address some of the shortcomings in relation to existing offences aimed at the prevention of terrorist attacks, the implementation of this Directive offers a chance to ensure that security officials and investigation bodies will be appropriately equipped to best deal with the challenge of FTFs as they arise, as opposed to waiting for an attack to occur and subsequently enacting legislation in what is often a highly charged emotional context where human rights concerns may be overlooked. In this respect the Soufan Centre⁶⁴ note:

"Allocating more resources to security is not always the answer; the focus has to be on reducing the threat to manageable levels rather than increasing the capacity of the State to surveil its citizens, a policy that in any case may be more likely to increase terrorism than to reduce it."⁶⁵

Caution should be advised in relation to the transposition of the Directive into Irish law, with Articles 8, 9 and 10 in particular, introducing new elements with the potential for quite broad ranging offences which could have a significant chilling and restrictive impact on the ordinary life of citizens. Legislative challenges may arise in respect of using a sufficiently broad provision to cover a wide range of areas in which training for terrorism can be provided while being sufficiently narrow as to be constitutional. Greater provision will also need to be made for victims of terrorism, in the form of providing dedicated support service for victims of terrorism.

Potential challenges may also arise in relation to the collection and admissibility of evidence gathered in respect of FTFs. Cross-border cooperation and internet-based evidence may prove to be useful sources of information which can be used in order to meet these challenges. In addressing the legislative challenges, sufficient emphasis should also fall on the Article 23 safeguard in Directive 2017/541 to ensure that fundamental rights and legal obligations are not ignored.

⁶³ See "Islamic State: collapse on the battlefield," *The Irish Times* (16 October, 2017) available at <https://www.irishtimes.com/opinion/editorial/islamic-state-collapse-on-the-battlefield-1.3255019>.

⁶⁴ The Soufan Center is a non-profit organisation which carries out research, analysis, and strategic dialogue related to global security issues and emergent threats.

⁶⁵ The Soufan Center "Beyond the Caliphate: Foreign Fighters and the Threat of Returnees" (October, 2017) at p. 26. Available at <http://thesoufancenter.org/>.



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