
Fernando Miró Linares, Ana Belén Gómez Bellvis, Elena Beatriz Fernández Castejón
International and European Union
Legal Framework of Counter-
Radicalisation
The present report present and analyses the most significant legislation affecting radicalisation. Specifically, it analyses the evolution of legal counter-terrorist instruments as well as those related to hate crimes and discrimination offences from an international perspective, aiming to provide a broad, global and up-to-date approach.

Accordingly, three main international areas have been selected: the European Union, the Council of Europe and the United Nations, given the importance of such institutions upon issuing the general guidelines that must be complied with by all their participant States.

The report shall conclude that terrorist attacks since and including 09/11 have led to a substantial change in the legislative trend. Indeed, we have verified that at first, States were reluctant to abide by international legal standards, and to cede part of their sovereignty in terrorism matters, while nowadays most of them are fully committed to the fight against radicalisation and terrorism. There has been an enlargement of the concepts of terrorism and hate. Furthermore, since Madrid attacks in 2004 and London attacks in 2005, a preventive approach has been adopted, above all because of the use of Internet by radicals. Finally, the main consequence of such evolution is the limitation of fundamental rights in favour of safety.

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INTRODUCTION

Over the last decade, the concepts of “radicalisation” and “anti-radicalisation” have become central (Sdwick, 2010) to international legislation. Jihadist violent radicalisation and extremism has been a particular area of focus, following attacks on several Member States of the European Union (Kudlacek, et. al., 2017). Despite no consensus has been reached with regard to a definition of radicalisation (Schmid, 2013), those who study the phenomenon of terrorism are focused on its content, referring most of the definitions to a process. In this sense, while the term radicalisation in the literature was used in the past to describe a person or a group of persons who supports radical political ideas (in contrast with more moderate politics) at present the term is used to refer to an accession process to extremist and violent political movements (Meleagrou-Hitchens & Kaderbhai, 2017).

Likewise, the definitions used by governmental and intergovernmental entities have not reached a consensus yet, except for the fact that they have a common understanding of that radicalisation implies to some extent a process. The European Union defines radicalisation as “the phenomenon of people embracing opinions, views and ideas which could leads to acts of terrorism” (Commission of the European Communities, 2005, p. 2).

Similarly, the 2014 Danish Action Plan for the prevention of radicalisation and extremism explains that radicalisation is not a clearly defined concept, but a process that takes various forms, and with a wide range of causes. Nevertheless, it explains that “it can assume forms such as support for radical views or extremist ideology, and it can lead to acceptance of violence or other unlawful acts as a means to achieve a political/religious goal” (The Danish Government, 2014, p. 5).

1 Thus, Sdwick (2010) explains that: «Before 2001, “radicalisation” was rarely referred to in the press, although the term was occasionally used in academia, generally in what is identified below as its “relative” sense. The greatest increase in frequency of use of “radicalisation” in the press was between 2005 and 2007, timing that strongly suggests that the term’s current popularity derives from the emergence of “home-grown” terrorism in Western Europe, notably the London bombings in July 2005».
On its nineteenth report of the 2010-2012 session, under the title *Roots of violent radicalisation*, the Government of United Kingdom defines radicalisation as “the process by which a person comes to support terrorism and forms of extremism leading to terrorism” (House of Commons, 2012, p. 4).

Scholarly efforts to define radicalisation have also produced varied results. For example, Schmid attempts to offer a comprehensive and functional definition, thus improving on what he saw as incomplete existing efforts, defines radicalisation as:

An individual or collective (group) process whereby, usually in a situation of political polarisation, normal practices of dialogue, compromise and tolerance between political actors and groups with diverging interests are abandoned by one or both sides in a conflict dyad in favour of a growing commitment to engage in confrontational tactics of conflict-waging. These can include either (i) the use of (non-violent) pressure and coercion, (ii) various forms of political violence other than terrorism, (iii) acts of violent extremism in the form of terrorism and war crimes. The process is, on the side of rebel factions, generally accompanied by an ideological socialization away from mainstream or status quo-oriented positions towards more radical or extremist positions involving a dichotomous world view and the acceptance of an alternative focal point of political mobilization outside the dominant political order as the existing system is no longer recognized as appropriate or legitimate (Schmid, 2013, p. 18).

In addition, McCauley & Moskalenko (2008) define radicalisation as a process of change in terms of beliefs, feelings and behaviours that involves increasing justification for a group’s violence and demands for sacrifice in its defence. Also, these authors introduced a distinction in the scope of this field, which deserves special emphasis. That is, the difference between activism, as a movement of people or groups inside legal frameworks and without violent political acts, and radicalism as an outlaw movement using violent means (McCauley & Moskalenko, 2011). This difference is based on the idea of that being radical is not the same as being a violent radical, that is to say, not everyone supporting a radical ideological-political stream will end up committing acts of terrorism (Gupta, 2008).
All ideas above are crucial to the development of the conceptual and legislative framework of the present document. One of its key claims is that it is precisely the difference between sympathizing with a series of ideas, even if they go against the law, and, on the other hand, taking illegal action based on such sympathy. This should delimit the governmental or supranational intervention scope on the basis of the typical relative risk created by a conduct in the subject to affect specific interests.

Equally key to this report is its departure from the current consensus in the literature that radicalisation is not limited to one political movement but can occur through different ideologies, groups and religions (Carbonell, 2015). This is accommodated by the definitions listed above, which stipulate only that phenomenon of radicalisation implies a process in which an individual or a group of people the phenomenon of people embrace extremist and violent political ideas and opinions which aim to secure the rule of unique thought about diversity, with the consequent materialization into violent acts.

The current international legislation is focused on jihadist terrorism and the radicalisation of individuals on the basis of jihadist ideology. But it is important to emphasise that, as stated in the Communication from the Commission to the European Parliament and the Council concerning terrorist recruitment: addressing the factors contributing to violent radicalisation (Commission of European Communities, 2005), this legislation is also suitable for all forms of violent radicalisation, whether of a nationalist or anarchist nature, or separatist, far-right wing or far-left wing. Thus radicalisation as it is understood in this report covers groups and organizations like the MLKP (Marxist–Leninist Communist Party – still active) of Turkish origin, anarchist insurrectionary groups of Spanish origin, or individuals or far-right groups like Breivik, the murder from Oslo, who perpetrated the attacks on July 22nd, 2011, motivated by hatred of immigration, multiculturalism or Islam. It is also worth noting that, despite common assumptions that acts committed by far-right and far-left or similar ideologies have been supplanted by jihadist terrorism, crime rates indicate the opposite (Cohen-Villaverde & Blanco-Navarro, 2014). For this reason, we have included relative legislation on hate
crimes related to the prohibition of discrimination, therefore in line with the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: supporting the prevention of radicalisation leading to violent extremism (European Commission, 2016):

Countering discrimination, including on the grounds of religion or belief, race or ethnic origin, tackling hatred and stigmatisation of communities, and combating hate crime and serious forms of hate speech are all key elements in this respect. Member States need to enforce EU legislation on combating racism and xenophobia and discrimination on grounds of religion or belief and agreement is now needed on the Commission proposal to complete the anti-discrimination framework on the grounds of inter alia religion. Community leaders and social society need to be supported to foster exchanges and joint projects between different communities. The Commission has allocated EUR 4.5 million in 2016 to projects to create better understanding between communities, including religious communities, to prevent and combat racism and xenophobia through interreligious and intercultural activities (pp. 11-12).

Thus, for instance, as a result of the various jihadist attacks perpetrated in the European Union, many Arabs and Muslim living in European territory have become victims of violent acts and different crimes Islamophobically motivated (Raxen, 2016). Regarding these kind of conducts against certain groups, the communication from the European Commission (2016) understands that “the drivers conducive to radicalisation may include a strong sense of personal or cultural alienation, perceived injustice or humiliation reinforced by social marginalisation, xenophobia and discrimination…” (p.3).

An awareness of the role of the Internet and its influence on the radicalisation has shaped international and EU legislation. In this matter, some claim that the problem of radicalisation cannot be currently understood without an appreciation of the role of the internet (Cano Paños, 2016). Experts also argue that the internet can be an effective tool with which to radicalize and recruit members for a cause (Thompson, 2011; Wright, 2008). This is largely due to the characteristics of cyberspace itself (Miró-Llinares, 2012), because, as Correa and Sureka point out, “the ease of publishing and assimilating content on the Internet via social media and video sharing websites
amongst others coupled with high information diffusion rates has led to faster content dissemination and larger audience reach” (Correa & Sureka, 2013, p. 3). The most recent regulation of radicalisation reflects a concern with the role of the Internet.

In other words, the tendency of people to radicalise in part online has been reflected in international legislation. This is especially true of those published after the 3/11 terrorist attacks in 2004 in Spain, as well as the London attacks in July 2005, which referred to the importance of the Internet both for the dissemination of radical material and content, and for the radicalisation process. Hence, even if they are not strictly terrorist offences, a number of preparatory or prior acts have been understood as dangerous themselves and thus deserving of criminalization by a variety of legislation. As will be outlined below, this is the case with respect to laws against publishing contents that glorify and justify violence and whose precise content could potentially incite the commission of violent acts or those acts that involve an impact on fundamental rights; or conduct such as indoctrination or recruitment (Hare & Weinstein, 2010).
1 APPROACH

The main goal of the present document is to present the findings of the study and analysis of the more representative international anti-radicalisation legislation in the field of criminal law in the European Union, the Council of Europe and the United Nations Organization. The purpose of this report is to provide an international legal framework concerning radicalisation. Most of the deliverables of Pericles will be based on concepts and contents related to such a phenomenon, thus knowing the legal international limits remains crucial, not only to achieving coherence between the project outputs, but also to providing LEAs with the necessary legal information on the matter. To this end, three remarks about the content of the present document should be noted.

In first place, as mentioned above in the introduction, both the regulation on radicalisation offences related to terrorism and the regulation of acts that lead to violent acts that deny fundamental rights, have been considered. Regarding terrorist legislation, although the relevant instruments emphasise the necessity of tackling jihadist radicalisation as a matter of urgency, it is perfectly applicable to that terrorism motivated by reasons other than religion. This is because terrorism is one of the most serious violations of the values of human dignity, freedom and equality, as well as one of the most serious offences to democracy and the rule of law.

Secondly, there have been chosen three specific international areas to develop this report. First, the European Union, whose legislation from and legal instruments are directly binding on its Member States. The report addresses those instruments that, in accordance with article 288 of the Treaty on the Functioning of the European Union, are mandatory for the Member States, and more specifically the Directives that oblige Member States to take steps towards certain achievements albeit via
means of their own choice; and Decisions that are mandatory on every single element\(^2\). However, it is necessary to note beforehand that the creation and implementation of specific measures to tackle radicalisation depends on the sovereignty of each Member State, since only they can fight against this problem on the ground, and since they are in a better position to detect and prevent the relevant conduct. The EU scope aims to help address the transnational component of such phenomenon by offering harmonized regulation against radicalisation, terrorism and hate which can be applied in every Member State (Monar, 2007; Voicescu & Iordache, 2014). Additionally, not only the EU regulation related to terrorist and hate of fences have been included, but also the European legislative instruments more relevant and of mandatory observation in terms of judicial and police cooperation, which comprises the regulations related to information exchange and transnational investigation measures.

The objective of many of the regulations adopted within the European Union was to materialize the commitments acquired by the instruments produced by both institutions the Council of Europe and the United Nations. Indeed, the European Union worked together with the Council of Europe and the United Nations to ensure that it reflected mandatory conventional regulation issues by the former and the compulsory measures issued under Chapter VII of the latter. Continuity was also important because several Member States had opted to adopt offences and measures previously foreseen by instruments from the Council or Europe and the United Nations, before they were typified by the European Union under new instruments.

Thirdly, not only the current provisions in terrorist matter have been analysed, but also the preceding legal instruments, some of them still in force while others have been replaced by new provisions. This has been developed in such a way with the purpose of offering a comprehensive framework that reflects the evolution and the context of the current legislation.

\(^2\) However, according to the article 288 of the TFEU, if the Decision refers to specific recipients, it will only be mandatory for them.
Finally, in addition to the EU legislation on terrorism and hatred, binding all EU Member States, we have analysed other documents than purely EU legislation such as “additional measures” or “other measures”, as well as a number of agents whose experience and knowledge in the field must be taken into account to establish an updated state of art of the effort against radicalization. Concerning terrorist crimes and prevention of radicalisation, we shall highlight other documents such as The European Union Global Strategy on Foreign and Security Policy, as well as the work of the Radicalisation Awareness Network (RAN). Additionally, both Member States and the EU have included additional complementary approaches such as education, active participation of the youth and the promotion of social integration. Regarding hate and discrimination crimes, we have considered several resolutions from the European Parliament on this matter, as well as the work of the European Union Agency for Fundamental Rights (FRA) and the Office for Democratic Institutions and Human Rights (ODIHR).
2 COUNTER-RADICALISATION AND TERRORISM

2.1 THE EUROPEAN UNION’S RESPONSE TO THE PHENOMENON

2.1.1 Background

The fight against terrorism has been a constant among the Member States of the European Union for years\(^3\). However, the attacks on 9/11 marked a turning point on a global scale and gave rise to the strong and consistent commitment of the European Union to step up the fight against terrorism (European Parliament, 2001). This has materialised into an increasing multiplicity of legal instruments that track additional attacks against European countries. The truth is that we are not facing any new threats, but a new face of an already existing issue (Díaz & Rodríguez, 2015)\(^4\). The complexity of the phenomenon of jihadist

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\(^3\) However, its transnational pursuit has presented, and still presents, major difficulties to materialize itself effectively, because the definition itself of terrorism is a very discussed issue in terms of what should be considered as terrorism, taking into consideration the existence of numerous secessionist and war conflicts. Despite it, there exists a battery of international instruments since early 60s created to tackle terrorism. For the sick of mentioning some of them: the Tokyo Convention of the United Nations on Offences and Certain Other Acts Committed on Board Aircraft, 1963; the UN Hague Hijacking Convention (Convention for the Suppression of Unlawful Seizure of Aircraft), 1970; the UN Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; the UN International Convention against the taking of hostages, 1979; the UN Convention on the Physical Protection of Nuclear Material, 1980; the UN Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, 1988; the UN Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; the UN Protocol to the above-mentioned Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 1988; the UN Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991; the UN International Convention for the Suppression of Terrorist Bombings, 1997; the UN International Convention for the Suppression of the Financing of Terrorism, 1999; among others.

\(^4\) Thus it’s recognised by the COM (2016) 379 final document from the Commission:: “Violent radicalisation is not a new phenomenon; however, its most recent manifestations, its scale, as well as the use of new communication tools present new challenges that call for an approach addressing both the immediate security
terrorism has shaped its study, analysis and prevention. Ultimately, the prevention of terrorism has become a fundamental objective and a priority for the EU, which can be evidenced by the amount of legislative and non-legislative measures, working groups, and reinforcement of the investigation processes among others. In this context, the prevention of terrorism has been identified as the necessity of preventing the radicalisation of individuals since it has been proven that the attacks, in majority of the cases, have been perpetrated by national-born and national-educated subjects in the Member States of the EU, who become radicalized and commit the acts at home (Carbonell, 2015).^5^ 

The intense need of facing the phenomenon of terrorism and radicalisation of individuals has, however, led to a progressive criminalisation of a variety of specific conducts that are preparatory acts themselves. This trend manifests an anticipation and creation of criminal offences without precedents, and involves a challenging equilibrium towards fundamental rights such as freedom of expression. Likewise, the enormous amount of transnational police and legal cooperation and the number of instruments have raised questions about the balance between the search of public safety inside the European Space of Freedom, Safety and Justice, and the fundamental rights of EU citizens.

In this matter, as will be explained along the following parts, the criminal law instruments have sensitively evolved towards an enhanced criminalisation of conducts that denote that an individual is radicalised, or that can radicalise others, through a series of specific behaviours that can be summarised into apology, recruitment, training, indoctrinating and travel for terrorist purposes.

Nevertheless, the Council Common Positions 2001/930/CFSP and 2001/931/CFSP, after the Extraordinary European Council of 21 September 2001 supposed the first precedent of the judicial arsenal implications of radicalisation as well as the root causes, bringing together all relevant actors across society" (p. 3). 

^5^ In this matter, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions supporting the prevention of radicalisation leading to violent extremism states that "the recent terrorist attacks in Europe once again underlined the urgent need to tackle the radicalisation leading to violent extremism and terrorism. Most of the terrorist suspects implicated in those attacks were European citizens, born and raised in Member States, who were radicalised and turned against their fellow citizens to commit atrocities".
against terrorism and radicalisation after 9/11 (European Parliament, 2001), leading to the abandonment of the previous mere pragmatics declarations in pursuit of the adoption of the first measures to tackle the phenomenon of terrorism.

The *European Position 2001/930/CFSP* (Council of European Union, 2001) defends the necessity of fighting against terrorism financing and, in this order, typifies financing itself as an offence as well as the respective measures to adopt, materialising the Resolution 1373 (2001) of the United Nations. In none of the sections does the Resolution refer to the prevention of radicalisation. However, section 2 (a) provides that the States have to adopt measures with the objective of refraining “from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists”.

The above-mentioned section 2 could be established as the first precept that introduces the need of adopting measures into national law to prevent recruitment for terrorism, as well as those intended to prevent any kind of support, active or passive, which to some extent would be the seed of what would be typified a posteriori as public incitement to commit acts of terrorism. However, such measures were not foreseen in the following *Council Framework Decision 2002/475/JHA*, but in the *Council Framework Decision 2008/919/JHA*, which will be analysed in the following sections.

For its part, the *Position 2001/931/CFSP* (Council of the European Union, 2001) supposed the immediate precedent of the Framework Decision 2002/475/JHA in defining individuals, groups or entities that participate in acts of terrorism (article 1); similarly, what needs to be understood as acts of terrorism (article 1.3); and it incorporates a list of individuals, groups and entities considered by the European Union linked to the commission of acts of terrorism.
2.1.2 Council Framework Decision 2002/475/JHA, 13 June 2002, on combating terrorism as the first European legal framework, and its impact on the transnational cooperation

2.1.2.1 The first European legal framework in the field of terrorism

The Council Framework Decision of 13 June 2002 on combating terrorism supposed a turning point in the field of terrorism at European Union level (Council of the European Union, 2002), which has been understood as the cornerstone in which the rest of legal instruments related to the fight against terrorism will pivot. Its transcendence arises from being the first legal set of instruments binding the Member States in which the terrorist offences (Álvarez Conde & González, 2006) are defined for the first time and in a systematic manner (article 1), terrorist organization and the offences of terrorist affiliation and collaboration with them (article 2), the offences related to terrorist activities (article 3), penalties for attempt, instigation and abetting (article 4), minimum sanctions to impose on such cases (section 5), mitigating circumstances (article 6), liabilities for legal persons (article 7) and their sanctions (article 8), competency and legal actions (article 9), and protection and assistance to the victims of terrorism (article 10). We are therefore referring to the first European legal framework on terrorism that has the objective of harmonizing terrorist offences in all the Member States of the European Union based on the description of objectives elements (concrete conducts) and subjective elements (the purpose of terrorism in which these offences have to be committed with in order to be considered as acts of terrorism). Thus, they established as terrorist offences the following: 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 weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical 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) threatening to commit any of the acts listed in (a) to (h), provided that they are committed with one of the three aims defined by the Decision: 1) seriously intimidating a population; 2) unduly compelling a Government or international organisation to perform or abstain from performing any act, or 3) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.

In the same way, it defines a terrorist group as a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences, which, in this sense, establishes an obligation for the Member States of transposing into national legislation both directing a terrorist group and 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. Similarly, there are provisions for offences linked to terrorist activities such as aggravated theft with a view of committing acts of terrorism, and extortion or drawing up false administrative documents with the same purposes. Furthermore, there is another provision for the Member States to transpose the instigation and complicity on these cases, as well as the attempt of committing acts of terrorism in cases of threats of committing terrorist offences and in cases of manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons.

The Decision Framework of 2002 provides that the legal obligations that need to comply with the assigned sanctions to these conducts are basically deterrence. For this reason, the Decision understands that terrorist offences as well as their incitement, abetting and attempts must

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6 As provided by article 5.1 of the Decision, “Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 1 to 4 are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition”.

be punished with imprisonment for a period of more than the Member States's national legislation foresee for criminal offences without terrorist purposes, except for those offences already foreseen that supposed the maximum term possible consistent with the national law. Likewise, for those cases of directing terrorist groups and participating in activities of a terrorist group the penalty cannot be less than 15 years of imprisonment in the first case and 8 years for the latter. For threatening to commit any of the acts (a) to (h) above-mentioned in the article 1, the maximum sentence shall not be less than eight years. Nevertheless, some mitigating circumstances are provided by the Decision given specific cases: the abandonment of the terrorist activity and providing the authorities with information that helps them to prevent or mitigate the effects of the acts, to identify or to prosecute the perpetrators, to find evidences, and to prevent the commission of other acts of terrorism.

Finally, the Decision provides the penal liability of legal persons for terrorist offences, the applicable sentences and the legal jurisdiction for the prosecution of the perpetrators of such offences.

It is necessary to highlight that, however, the transposal of the offences mentioned above was clearly weak according to both reports in 2004 and 2007 issued by the Commission (Commission of the European Communities, 2004; 2007).

2.1.2.2 The implementation of police and legal cooperation measures for the efficiency of the Framework Decision 2002/475/JHA, and common response strategies

The Framework Decision 2002/475/JHA has been recognised as the first common European legal framework for all Member States in the field of terrorism legislation. To tackle the phenomenon of terrorism, however, there have been two approaches: on one hand, the amortisation of terrorist activities and the necessity of preventing them through national penal legislations from each Member States, and on the other hand, given the transnationality nature of terrorism, the police and legal cooperation. According to Tinoco Pastrana (2016), “the purpose of preventive measures is fighting against radicalisation and recruitment of terrorists, identifying the means of radicalisation, propaganda methods
and tools used by the terrorists. This depends mainly on the States, with the essential contribution of the EU in coordinating national policies, best practices and the information exchange” (p. 447). Yet, this was already provided by the article 4 of the Council Common Position 2001/931/CFSP, according to which “Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union, afford each other the widest possible assistance in preventing and combating terrorist acts”.

Accordingly, in virtue of the article 67 of the Treaty on the Functioning of the European Union, the Union shall constitute an area of freedom, security and justice, and in pursuing such space, it must therefore strive “to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws”. Paragraph 4 of the article thereupon provides the guarantee for the principle of mutual recognition, with a primarily legal foundation on the high degree of confidence among the Member States, and on which all cooperation instruments in the field of terrorism will get impregnated of.

In light of the above, together with the Council Framework Decision 2002/475/JHA, the same day they were adopted two Framework Decisions of special significance in matter of police and legal cooperation, still in force. These are the Council Framework Decision 2002/465/JHA on joint investigation teams and the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States.

With regards to the Council Framework Decision 2002/465/JHA, it recognizes that in order to be able to ensure a high level of public safety inside the European area of freedom, security and justice to the European citizens, a “closer cooperation between police forces, customs authorities and other competent authorities in the Member States, while respecting the principles of human rights and fundamental freedoms and the rule of law on which the Union is founded and which are common to
the Member States”, and to those effects a legal regulation on joint investigation teams is created. Such regulation materializes the mandate contained in the article 13 of the Convention celebrated by the Council establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Council of European Union, 2000), which already provides the creation and functioning of such investigation teams, especially for offences related to drug trafficking, human trafficking and terrorism.

Thus, the competent authorities of two or more Member States can, in agreement with article 1, create a joint investigation team for a certain purpose and for a limited period renewable upon agreement of the parties. In general, the teams could be created to carry out criminal investigations in one or more Member States of the team, but they are specially intended for the following assumptions:

1. When criminal investigations in a Member State demand especially complex procedures and the mobilization of a significant amount of resources which also affect another Member State.

2. When some Member State faces criminal investigations that require a coordinated response by two or more Member States.

According to the Decision, the investigation team can only operate in these territories of the Member States participating. Similarly, the operation will be led by a representing member of the competent authority participating in the criminal investigation from the Member State in which the team is based, and it will act under its national law. Furthermore, they can decide whether specialists outside the national competent authorities can participate in the teams or not. Among them, representatives from Europol, OLAF or third States, mainly from the USA, can be taken into consideration.

The Council Framework Decision 2002/584/JHA provides the European arrest warrant and surrender procedures among Member States (henceforth EAW), which were established with the purpose of speeding up extradition procedures that used to slow down and hinder the prosecution of individuals already sentenced in any of the Member
States, or sought by authorities because of reasonable suspicion of having committed an offence. Accordingly, the EAW embodies the first European legal binding instrument that specifies the principle of mutual recognition as a guiding and informant principle in the field of legal cooperation. Thus, the EAW implies a legal resolution emanated by a Member State requesting another State arrest and deliver an individual wanted by the national authorities. The Member State receiving the request must execute the resolution on the basis of the principle of mutual recognition, being provided the motives in article 3 in which the State will not be obliged, mainly related to respecting human rights and the receiving State self-sovereignty. On the other hand, the Decision (article 2) foresees the scope for the issuing of an EAW “for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months”. The offences are also defined on article 2, including terrorist offences, racism and xenophobia among others, given that they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State.

The following legal instruments of the European Union are provided based on respecting the necessity of cooperation among the competent authorities, particularly in relation to information exchange. However, there exists a difference between the previous legal instruments and forthcoming ones, in terms of the purpose of their incorporation to the European legal regulation. The Directive relating to the joint investigation teams and the one regulating the EAW were adopted together with the Council Framework Decision 2002/475/JHA in direct response to the attacks on 9/11. Following the World Trade Centre attacks, the attacks of March 11th and July 7th took place in London. Consequently, the Council of Europe drafted the Convention for the prevention of terrorism. This incorporated the commitments emanating from Resolution 1264 (2005) from the Security Council of the United Nations, which further recognised the progress made by terrorist threats and the complexity introduced by the internet. This process led to adopt the European Union
Counter-Terrorism Strategy (Council of the European Union, 2005). The strategy relies on four fundamental strands of work: prevent, protect, pursue and respond. The adoption of new instruments legally binding to the Member States is precisely provided by the third strand, pursue. Pursue was defined as “to pursue and investigate terrorists across our borders and globally; to impede planning, travel, and communications; to disrupt support networks; to cut off funding and access to attack materials and bring terrorists to justice”.

In this regard, the Council drafted the Decision 2005/671/JHA on September 20th, on the exchange of information and cooperation concerning terrorist offences (Council of the European Union, 2005). Through this instrument the efforts of the European Union on the fight of terrorism were once more made explicit, taking into consideration that it passes through a further “cooperation between the operational services responsible for combating terrorism: Europol, Eurojust, the intelligence services, police forces and judicial authorities”. After noting the use of the internet by terrorists to spread radical ideology and recruit new members to the cause, the Decision confirms on its recital 3rd that “it is essential in the fight against terrorism for the relevant services to have the fullest and most up-to-date information possible in their respective fields” Given “the persistence of the terrorist threat and the complexity of the phenomenon”, there exists therefore a “need for ever greater exchanges of information” (recital 4th).

Accordingly, article 2 of the Framework Decision sets out the obligation of facilitating information about terrorist offences to Eurojust, Europol and the Member States. The instrument is reinforced by the Prüm Treaty (Spanish Government, 2005), signed Belgium, Germany, Spain, France, Luxemburg, The Netherlands and Austria. In accordance with article 16 of that Treaty, the States can provide other States with information and personal data about certain individuals without previous request if this is necessary to prevent terrorist attacks.

The need for information exchange as a way of preventing acts of terrorism has further legal repercussion with the Decision 2006/690/JHA, of 18 November, on the simplification of the information exchange and intelligence among information services (Council of the European Union,
2006). Here, state agencies focused on crime investigations, such as police institutions, are required to closely collaborate with intelligence services in terms of information exchange, given that provisions from the 4th recital: “criminal activities are committed in a clandestine way, and it’s necessary to control them and to crucially rapidly exchange the information available on this regard”. Thus, the separation between intelligence and criminal investigation is diluted. The Decision allows the use of information provided as a means of evidence under consent of the State that initiated the process of legal cooperation. Such consent will not be necessary if the Member States already agreed to the use of the information as legal evidence in the moment it was transferred. Furthermore, in the cases of terrorism-related offences as well as racism and xenophobia, it will not be necessary issuing any request as it will be considered as a spontaneous exchange strictly limited to the necessary information and intelligence to discover evidences, prevent or investigate such offences. Under the provisions of this Framework Decision it was developed the SIENA (Secure Information Exchange Network Application) network, precisely to simplify such exchange of information and intelligence7.

The Decision from 2006 on information exchange was consistent with the Council’s Convention on the article 34 of the European Union’s Foundational Treaty on judicial assistance in the field of criminal law among the Member States of the EU (The Spanish Government, 2003), which would suppose the main instrument leading all criminal investigations in this matter, and which precedents are the Convention of 1959 of the Council of Europe on mutual legal assistance and the Protocol of 1978. Here, there were established fundamental measure to take into consideration in transnational investigations. Thus, the Convention of 2000 is the first one regulating the abovementioned joint investigation teams. But it also provides the procedures for requesting mutual assistance, the documents needed, and the interception of telecommunications. In line with the Convention, the requests can be issued under a Member State request, being legally possible whether

7 See for more information https://www.europol.europa.eu/activities-services/services-support/information-exchange/secure-information-exchange-network-application-siena
the interception and direct transmission of the information and evidences to the demanding State, whether being registered and transmitted after. The interception can also take place in a continental shelf satellite communications station of the Member States, in which case, in conformity with article 19, they will be intercepted through a service provider. Accordingly, the service providers must deal with several requirements related to the investigation of the criminal offences addressed by the present document. These measures will be added to the 2014/41/EU Directive on the European investigation order. Due to the fact that the Internet plays a fundamental role in today’s society, the legal instruments must count with the collaboration of the telecommunication industry and service providers. Hence, the Directive 2000/31/EC of 8 June 2000 on legal considerations of the information society services, in particular, the online commerce in the EU market arena (European Parliament and the Council, 2000) provides the legal framework for the intervention of service providers in terms of terrorist, racism and xenophobia offences. Consistent with article 3, the Member States cannot restrain the free market component of providing information society services with the exception of: a) the measures shall be necessary for (i) "public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons, the protection of public health, public security, including the safeguarding of national security and defence, the protection of consumers, including investors". Additionally, when such measures take place "against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives".

On the other hand, where an information society service is provided, article 12 regulates the concrete responsibility of the intermediate service providers. The Member States shall ensure that a service provider is not liable for the information transmitted through a telecommunication network. The conditions are that the provider: “(a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained
in the transmission”. This will not, however, be an obstacle for a tribunal or administrative authority to request the service provider to stop any infractions or to impede them. Additionally, article 13 provides the exemption of responsibility of the service provider in the case of automatic, provisional and temporary information storage when the purpose is “making more efficient the information’s onward transmission to other recipients of the service”. The condition is that: “a) the provider does not modify the information; b) the provider complies with conditions on access to the information; c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry; d) the provider does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information; and e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement”. In this sense, this must be understood without prejudice of a tribunal or administrative authority requires the service provider to stop or prevent an infraction from being committed. Lastly, even though they must collaborate with the authorities if requested, the service providers do not have any general obligations to actively execute information searches related to facts or circumstances that indicate illegal activities in conformity with article 15 of the Directive. Notwithstanding, if they have any knowledge or concern that such illicit activities are taking place by any recipient of their service, they are obliged to promptly inform the competent public authorities. The information provided to the authorities must enable the identification of recipients of their service.

On 12 June 2007, the Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System (SIS II) (Council of the European Union, 2007) came into force, setting up an additional tool for operational cooperation between police and judicial authorities in criminal matters. This, *grosso modo*, comprises a massive database containing alerts on missing persons to ensure their protection or to prevent threats, and that allows the authorities to identify
an individual or suspicious objects that could endanger the public safety. The data includes names, physical descriptions, place of birth, whether if the individual is dangerous or not, and they can be used just for the purposes of the alerts they were introduced for (Bachmaier Winter, 2014). Consistently, the Prüm Treaty was extended by the Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (Council of the European Union, 2008). In this regard, consistent with the 10th recital of the Decision, it “therefore contains provisions which are based on the main provisions of the Prüm Treaty and are designed to improve the exchange of information, whereby Member States grant one another access rights to their automated DNA analysis files, automated dactyloscopy identification system and vehicle registration data”. Chapter IV of the Decision provides measures to prevent terrorist offences, among which precisely can be found the transmission of information, or joint operations (joint patrols and other operations in which public agents participate in other States’ operations) with the objective of preventing the offences foreseen in the Framework Decision 2002/475/JHA. Finally, the Decision Frameworks 2008/315/JHA and 2009/316/JHA of the Council, the first one on organization and information exchange content of criminal record registries, and the last one on the creation of the European Criminal Records Information System (ECRIS) were also promulgated.
2.1.3 The Framework Decision 2008/919/JHA of November 28th. New terrorist conducts and reinforcement in international cooperation measures

2.1.3.1 Internet as a determining component in the evolution of the European legislation against terrorism and radicalisation

Six years after the Framework Decision of 2002 came into force, with a few blurred aspects when adopting it, the first reform was approved under 2008/919/JHA by the Council (Council of the European Union, 2008), which was adopted with the purpose of fighting radicalisation and terrorist recruitment threats, and typified offences such as public incitement of terrorist acts, recruitment and training for terrorism, all of them conducts executed via Internet\(^8\), recognising on its 4\(^{th}\) recital that “Internet is used to inspire and mobilized local terrorist networks and individuals all across Europe, as well as source of information on terrorist means and methods, working henceforth as a ‘virtual training camp’. Thus, activities like abetting the commission of terrorist offences, and recruitment and training for terrorism have increased with really low costs and risks for the perpetrators”. In the last instance, as stated by the Report from the Commission to the European Parliament and the Council on the application of the Framework Decision 2008/919/JHA from the Council (European Commission, 2014), whose main objective was “reduce the dissemination of messages and material that may incite people to commit terrorist attacks and to adapt current legislation to changes in the modus operandi of terrorist activists and supporters” (p.3). This was a consequence of having considered the Framework Decision 2002 insufficient “in that conduct such as disseminating messages of public provocation which did not actually incite a particular person to commit a terrorist offence, disseminating messages encouraging people to become terrorists without reference to a specific

\(^8\) As stated by the 3\(^{rd}\) recital of the Framework Decision of 2008: “the terrorist threat has grown and developed rapidly in the past few years”, in which organized terrorist groups make use more and more often of new technologies available, especially Internet.
terrorist offence, or disseminating on the internet terrorist expertise not aimed at supporting the activities of a specific terrorist group, were not necessarily criminalised” (p. 4). Hence, the Framework Decision 2008 is configured as a legal framework that supposes a freedom limitation on the internet, supported by the supranational institutions, and which has an effect on the report from the General Assembly of the United Nations so-called *United against terrorism: recommendations for a global strategy in the fight against terrorism* (UN Secretary-General, 2006). Section C, paragraphs 58 and 59, states that “Terrorist networks rely on communication to build support and recruit members. We must deny them this access, particularly by countering their use of the Internet — a rapidly growing vehicle for terrorist recruitment and dissemination of information and propaganda” (p.12), taking into account that a report from 1998 counted less than 20 terrorist websites, while there existed thousands of them in 2005.

Based on such concerns, the Framework Decision from 2008 introduces significant modifications to the previous one in terms of radicalisation. Its immediate precedent is the *Council of Europe Convention on the Prevention of Terrorism* (Convention No. 196 of the Council of Europe), Warsaw, 16 May 2005, which already requested the participating States to adopt the offences related to incitement and glorification of terrorism on Internet, and recruitment and training for terrorism.

Also, in the *Resolution 1264 (2005) passed by the Security Council on its session 5261, celebrated on 14 September 2005*, where participating States were encouraged to take measures on this direction, as well as the Global Strategy to Tackle Terrorism adopted on 2006.

In accordance with the above, the Framework Decision 2008 provides the commitment by the States to adapt the following provisions to the national legislation:

1. **Public provocation to commit a terrorist offence**, meaning the public “distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of [terrorist] the offences”, when regardless of whether or not it advocates “terrorist
offences, causes a danger that one or more such offences may be committed”.

The criminalisation of the conduct of public provocation to commit a terrorist offence has raised some concerns in some democracies of the European Union (European Commission, 2014), given the difficulty of decoupling these types of expressions from the fundamental right relating to freedom of speech, recognised not only in the multiplicity of international instruments but by the Decision itself on its article 2\(^9\). Mostly when the precept itself establishes two circumstances contrary to the fundamental principle of *nullus crimen sine iniuria* from the criminal law. These two circumstances are: on one hand the criminalisation of indirect incitement when the law establishes offences for such conducts “regardless of whether or not there has been direct incitement to commit terrorist crimes”. This means that the conduct of disseminating a message which indirectly incites to commit acts of terrorism becomes a crime, fact that implies an extension of the punitive framework. Consequently, we are currently dealing with the criminalisation of preparatory acts by themselves. On the other hand, it implies the possibility of limiting freedom of expression in terms of affecting messages in social networks that sympathises with a concrete ideology (whether or not it is violent), and from which it cannot be established a causal relation between the publication of the message and the effective commission of a terrorist act as a consequence of reading it.

In addition, this involves an excess of penal and punitive regulation of such conducts in the national legislations. As an example, these excesses can be seen in two Member States:

\(^9\) Article 2, Framework Decision 2008/919/JHA: “This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability”.
Belgium

The Belgian Penal Code provided in 2013 the offence of public incitement to terrorism on its article 140bis, with a sanction of five to ten years of imprisonment and a fee of hundred to five thousand euro to the offense of disseminating or make available to the public a communication that directly or indirectly incites the commission of a terrorist offence. The article sets on its last provision that such conduct must involve a risk of committing the offences mentioned. Thus, it was repealed on 2016.

The problem with the regulation is the effective criminalisation of manifestations that do not involve a commission of an act of terrorism, but manifestations that remain secured by the principle of freedom of expression even if they could be classified as antidemocratic. Consequently, mere expressions are criminalised not being required any objective requirement such as the creation of an effective risk for any lives, physical integrity, freedom, etc.

Spain

Spain counts with a long trajectory in terms of antiterrorist legislation, for which the prohibition of the incitement was regulated since 2000. However, on 2015 the Penal Code was reform to increase the punitive margin, strongly discussed and criticized given the remarkable number of sanctions to users of Twitter for publishing offensive messages, such as black humour jokes, which in no case imply any risks for any legal assets (see Miró Llinares, 2017).

2. Recruitment for terrorism: shall mean soliciting another person to commit one of the [terrorist] offences”.

Regarding recruitment for terrorism, the mere request to an individual to join a proscribed organisation is punished as an offence, and therefore it is not necessary that any concrete or abstract effective terrorist risks are manifested. Furthermore, the attempt of committing the recruitment for terrorism is also typified even if the request to an individual never reaches the recipient. This implies an important issue given a penal
system based on the effective protection of the legal assets instead of conducts, that even though they are morally reprehensible, they do not have the power of jeopardise any legal assets. In this sense, the French legislation has the following provisions:

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<td>France introduced on its Penal Code through the Law 2012-1432, 21 December, on public safety and fight against terrorism, the offence of recruitment on its article 421-2-4, in which the offence of incitement to commit acts of terrorism through promises, gifts or any kinds of benefits, threats or urging an individual to participate or support a terrorist organization is punished with ten years of imprisonment and a fee of 150.000 €.</td>
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Thus, France opens the way to punish with a term of imprisonment of ten years an individual whose conduct is a mere promise of something, even if it didn’t have any effect on the other person.

3. Training for terrorism: understood as “providing instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of committing one of the [terrorist] offences […] knowing that the skills provided are intended to be used for this purpose”.

2.1.3.2 The intensification of legal instruments for police and judicial cooperation

Right after the Council Framework Decision 2008/919/JHA of November 28th, the Council issued the Framework Decision 2008/978/JHA, on 18 December 2008, on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matter (Council of the European Union, 2008), as an instrument of mutual recognition. The precedent to this European Evidence Warrant was the Framework Decision 2003/577/JAH from the Council on the execution in the European Union of orders freezing property or evidence
(Council of European Union, 2003), instruments that overlapped and that were scarcely applied since they did not speed up the procedures related to the obtaining and securing of evidences with serious limitations in meeting their objectives. This is also acknowledged, accordingly, by the ulterior European legal instrument that replaced it, the Directive 2014/41/EU of the European Parliament and the Council, from April 3rd, 2014, regarding the European Investigation Order in criminal matters (EIO) (The European Parliament and the Council, 2014). On its recital (3rd) the Directive establishes that the Council Framework Decision 2003/577/JAH was limited to the freezing phase, and that “a freezing order needs to be accompanied by a separate request for the transfer of the evidence to the State issuing the order”, consequently “this results in a two-step procedure detrimental to its efficiency. Moreover, this regime coexists with the traditional instruments of cooperation and is therefore seldom used in practice by the competent authorities”. For its part, the 4th recital states that the European Evidence Warrant (EEW) “is only applicable to evidence which already exists and covers therefore a limited spectrum of judicial cooperation in criminal matters with respect to evidence”. Thus, the EEW works as a replacement for every prior instrument classified as fragmentary\(^\text{10}\) on its purpose to achieve a general system to obtain evidences in transnational cases. In the last instance, it establishes a unique regime to obtain evidences. According to article 1 of the Directive, “a European Investigation Order (EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State (‘OGthe issuing State’) to have one or several specific investigative measure(s) carried out in another Member State (‘the executing State’) to obtain evidence”.

\(^{10}\text{In particular, according to article 34 of the Directive, it replaces the following instruments: (a) European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959, as well as its two additional protocols, and the bilateral agreements concluded pursuant to Article 26 thereof; (b) Convention implementing the Schengen Agreement; (c) Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol. 2. Framework Decision 2008/978/JHA is hereby replaced for the Member States bound by this Directive. Provisions of Framework Decision 2003/577/JHA are replaced for Member States bound by this Directive as regards freezing of evidence. For the Member States bound by this Directive, references to Framework Decision 2008/978/JHA and, as regards freezing of evidence, to Framework Decision 2003/577/JHA, shall be construed as references to this Directive}.”
The Directive is divided in seven chapters that regulate all the necessary procedures and provisions to obtain evidence and to practice diligences investigations in another Member State. Henceforth we are referring to the main legal instrument for investigating purposes, as article 4 states that an OEI may be issued:

(a) with respect to criminal proceedings that are brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;

(b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters;

(c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters; and

(d) in connection with proceedings referred to in points (a), (b), and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.

Similarly, article 9 provides the recognition and execution obligations for the EIO on the basis of the mutual recognition principle, in which

the executing authority shall recognize an EIO, transmitted in accordance with this Directive, without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement provided for in this Directive

In the same way, the Directive provides the transfer of evidences procedures (article 13), legal remedies (article 14), temporary transfer to the issuing State of persons held in custody for the purpose of carrying out an investigative measure (article 22), as well as the temporary transfer to the executing State of persons held in custody for the
purpose of carrying out an investigative measure (article 23), hearing by videoconference or other audiovisual transmission (article 24) or hearing by telephone conference (article 25), information on bank and other financial accounts (article 26), information on banking and other financial operations (article 27), investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time (article 28), covert investigations (article 29), interception of telecommunications with technical assistance of another Member State (article 30), and provisional measures (article 32), among other measures and procedures.

A new step in the reinforcement of police and judicial cooperation in the fight against transnational crime and terrorism is constituted by Directive 2016/680 of the European Parliament and the Council from. This 27 April 2016 Directive is on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, repealing Council Framework Decision 2008/977/JHA (The European Parliament and the Council, 2016). This Directive reiterates and enhances the balance between data protection of the people and the necessity of using such data in order to prevent and investigate. In this regard, the 3rd recital states that “the scale of the collection and sharing of personal data has increased significantly. Technology allows personal data to be processed on an unprecedented scale in order to pursue activities such as the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties”, which gives the Directive a basis to further establish the common legal framework on data protection focused on prevention and investigation. Likewise, the Directive provides a necessary and more efficient new step in the field of information exchange. The information gathered by the security authorities must comply strictly with a series of characteristics: the information must be “processed lawfully and fairly; collected for specified, explicit and legitimate purposes and processed only in line with these purposes; adequate, relevant and not excessive in relation to the purpose in which they are processed; accurate and updated where necessary; kept in a form which allows identification of
the individual for no longer than is necessary for the purpose of the processing; appropriately secured, including protection against unauthorised or unlawful processing”. Accordingly, it establishes periods of time to suppress and review the information and the rights necessary to make it available to interested parties. It also provides increased levels of security for accessing the information, especially when it is automatized.

On the same 27 April 2016, the Directive 2016/681 of the European Parliament and the Council on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime was approved (The European Parliament and the Council, 2016). The main purpose is to regulate the transfer of registry data of the passengers of air companies’ international flights inside the EU. According to article 1, the main purpose of the Directive is to regulate the transfer of the registry of passengers’ personal data from EU external flights of air companies (PNR), as well as the treatment of such data. In addition, it will be applied to EU internal flights under certain requirements. Among them, if a MS wants to apply the Directive to EU internal flights, it must be previously notified to the European Commission. Likewise, in accordance with article 2.3 of the Directive, “a Member State may decide to apply this Directive only to selected intra-EU flights. In making such a decision, the Member State shall select the flights it considers necessary in order to pursue the objectives of this Directive”.

Both Directives, 2016/680 and 2016/681, were formulated in a context of clear concern about so-called foreign fighters and their mobilisation across the Member States. Henceforth, Directive 2017/541 – which will be further analysed in the next section – sets provisions to punish travel for terrorist purposes from a penal perspective.

Also, it is covered by the Additional Protocol of the Convention of the Council of Europe on preventing terrorism and the latest Resolutions from the Security Council of the United Nations, among which Resolution 2178 (2014) demands special attention. In accordance to the (7th) recital, the “assessment of PNR data allows identification of persons who were unsuspected of involvement in terrorist offences or serious
crime prior to such an assessment and who should be subject to further examination by the competent authorities. By using PNR data it is possible to address the threat of terrorist offences and serious crime from a different perspective than through the processing of other categories of personal data”. With the aim of preventing, detecting, investigating and prosecuting terrorist offences, the Directive explains the importance for air companies of providing PNR data. It provides that all passengers’ information must be transferred as a single pack of information, called PIU, to allow an easy exchange of data between governments and companies. The content of the PNR includes basic information of the flights, the passengers, date of the flight, itinerary, and the boarding pass information, such as contact data, payment method and information about the baggage. Similarly, the Directive sets the minimum norms to treat the information, how to transfer, exchange and store it.

The terrorist attacks in the European Union reached a critical point between years 2013 and 2015, 2015 being the darkest year of jihadist terrorism in the history of the European Union. This led to an inevitable strengthening of the international response. Here, the starting point was Resolution 2178 (2014), approved by the Security Council of the United Nations, which raised concerns about the increasing frequency of terrorist attacks and the imperative to act to tackle conditions leading to the propagation of terrorist acts. The Resolution makes clear the concern with the problem of foreign fighters, which it defines 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”. For its part, the Additional Protocol of the Convention of the Council of Europe for the prevention of terrorism (CETS 196) (Council of Europe, 2015), which criminalises the following conducts and calls for the signing members of the Convention to transpose them into national law. In accordance with domestic and international law, the fact of receiving training for terrorism (article 3), the offence of travelling abroad for the purpose of terrorism (article 4), funding travelling abroad for the purpose of terrorism (article 5), and organising or otherwise facilitating travelling abroad for the purpose of terrorism (article 6). The European Union agreed to sign and to be part of the Additional Protocol through the European Decision 2015/1914 of the Council on 18 September 2015\(^{11}\), after considering that a greater “understanding of foreign terrorist-fighter-related offences and criminal offences of a preparatory nature with the potential to lead to the commission of terrorist acts, would contribute to further enhancing the

effectiveness of the criminal justice instruments and cooperation at Union and international level”.

As a consequence of the international commitments assumed, on December 2015 the European Parliament and the Council published a proposal (European Commission, 2015) covering the need to move forward on the fight against terrorism and radicalisation in the criminal law, through the adaptation of existing rules, given that “they need to be aligned taking into account the changing terrorist threat Europe is facing”. The core of the proposal is the interest in facing the phenomenon of “the foreign fighters and the risks related to travelling to third countries for terrorism”. On the other hand, the proposal makes evident that “the internet has become the primary channel used by terrorist to disseminate propaganda, issue public threats, glorify horrendous terrorist acts such as beheadings, and claim responsibility for attacks”. On the basis of these two axes and the realization of the current dynamics of the terrorist phenomenon through the internet, the proposal explains that it is necessary to adapt legislation to the existing reality.

In this sense, since early 2017 it was introduced to the European legislation the Directive (UE) 2017/541 of the European Parliament and the Council from the 15th of March of 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JAH and amending Council Decision 2005/671/JAH (The European Parliament and the Council, 2017). The Directive replaces the previous common legal framework with the creation of a new one, renewed and with an exhaustive purpose of further enhance the penal response to every aspect of the phenomenon. Similarly, it provides an integral framework covering not only the definition of terrorist offences, but also includes provision for investigative tools and confiscation, and measures against open source online provocative content in terms of hatred, incitement and glorification of terrorism. The document also incorporates new offences that punish acts other that purely terrorist. This is preparatory acts for terrorist offences, which given the “risks” they involve, merit special consideration and treatment in accordance with the Directive itself and other international instruments.
In this matter, regarding the recent Directive, apart from the classic terrorist offences, the Member States must transpose into their national legislation the following:

1. Cyberterrorism

In accordance with article 3, the offence of cyberterrorism is added to the traditional terrorist offences, understood as the illegal interference with information system and data\(^\text{12}\). With cyberterrorism we are referring to its wider concept. As expressed by Miró Linares (2012), the concept of cyberterrorism “is used, in a broad sense, as a way of referring to the effects of social risks which involve the union between global terrorism and new information and communication technologies, that is, to encompass a whole group of behaviours carried out by terrorist organizations, characterised all of them by the use of the Internet whether to disseminate and to communicate contents related to an armed group or to execute direct computer attacks, as several criminological studies have already shown” (pp. 128-129).

\(\text{Table 1. Source: Miró Linares (2012, p. 129)}\)

<table>
<thead>
<tr>
<th>USE OF ICT FOR DISSEMINATION INFORMATION</th>
<th>DIRECT CYBERATTACKS</th>
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<tr>
<td>Incitement and terrorist propaganda</td>
<td>Activities of information support</td>
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<tr>
<td>Incitement websites</td>
<td>Request for funding</td>
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<tr>
<td>Propaganda websites</td>
<td>Orders to cells/groups</td>
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<tr>
<td>Incitement websites</td>
<td>Training in manufacturing of explosives, etc.</td>
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<tr>
<td>Propaganda websites</td>
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is sense, article 3 of the Directive regulates cyberterrorism as direct terrorist cyberattack in accordance with the term of cyberterrorism used on this section.

Notwithstanding, it doesn’t suppose a brand new provision since it was already foreseen in the *Directive 2013/40/EU of the European*

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\(^{12}\) Article 3. 1 (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;
Parliament and the Council of 12 August 2013 on attacks against information system and replacing the Council Framework Decision 2005/222/JAH (The European Parliament and the Council, 2013), and which takes into consideration the Council of Europe Convention of 2001 on cybercrime (Budapest Convention). The Directive 2013/40/EU gives a legal definition to the unlawful interception of the information systems establishing a typified behaviour for "seriously hindering or interrupting the functioning of an information system by inputting computer data, by transmitting, damaging, deleting, deteriorating, altering or suppressing such data, or by rendering such data inaccessible, intentionally and without right". Similarly, article 5 addresses the illegal data interference as "deleting, damaging, deteriorating, altering or suppressing computer data on an information system, or rendering such data inaccessible" though computer programs designed or adapted primarily for that purpose, or through "a computer password, access code or similar data by which the whole or any part of an information system is capable of being accessed" (article 7). Article 9 provides the penalties assigned to such conducts punishable by a minimum term of imprisonment of at least 5 years when they are committed in the context of a criminal organization.

2. Reception and training for terrorism

The previous Decision criminalised the act of instructing and providing training for terrorist purposes, while in this new Directive those individuals providing such training are also punishable. To this effect, the Directive urges the Member States to typify as an offence "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" with terrorist purposes. The Directives clarifies that this offence refers to both receiving and providing training by an individual as well as self-learning or self-radicalisation. Accordingly, the (11th) recital states that "self-study, including through the internet or consulting other teaching material, should 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”, excluding in any case consultation for legitimate purposes, such as academic or research purposes.

3. Travelling for the purpose of terrorism

Travelling for the purpose of terrorism defines and addresses the general alarm regarding foreign terrorist fighters, by aiming to stem the flow of individuals travelling for the purpose of terrorism. For this, the (12th) recital states that “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”. Although the offence is not of mandatory transposition, allowing the Member States to decide whether this conduct must be included on their national penal codes or not, article 9 of the Decision provides a further offence of “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”. When the offence is committed intentionally, the article encourages Member States to adopt necessary measures to ensure that the conduct is punishable: “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”.

4. Organising or otherwise facilitating travelling for the purpose of terrorism

In an effort to cover all the intervening aspects and related phases, which remain distant from effectively committing the terrorist offence, the fact of intentionally organising or facilitating travels with the purpose of terrorism is also defined, that is assisting any person in travelling for that purpose, knowing that the assistance thus rendered is for that purpose.

5. Terrorist financing

Article 11 of the Directive 2017/541 obliges Member States to make punishable as a criminal offence “providing or collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the knowledge that they are to be used, in full or in part, to commit, or to contribute to the commission of, any of the offences”, while it shall not be necessary that the funds effectively contribute to the commission of such offences. Terrorist financing has been an important issue on the counter-terrorism agenda since 9/11. In concrete, the notorious Resolution 1373 of 2001 from the Security Council of the United Nations emphasised precisely the need to tackle terrorist financing. In this area, at European level the pivotal legislation remains the Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. The Directive was drafted following the recommendations from the Financial Action Task Force (FATF) of 2003 (FAFT, 2003). Its purpose was to prevent terrorist groups from financing of terrorism through financial systems. Thus, the Directive provided measures to verify the identity of clients and to report suspicious operations, as well as established the installation of preventive systems in the organisations that could be used for money laundering. Accordingly, it reinforce the due diligence measures regarding clients (article 11, 12, 13). The Directive not only addressed
the control of the financial system but also the control of non-financial sectors and guilds such as notaries, independent legal professionals, auditors, external accountants, real estate agents and tax advisors, betting services providers, services providers to companies and trusts, and any goods provider when paying in cash more than 15,000 euro. The Directive established monitoring obligations and requirements for those cases implying a high risk of money laundering and terrorism financing, even introducing the concept of “enhanced customer due diligence” (The European Parliament and the Council, 2005). Subsequently, the Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of ‘politically exposed person’ and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis (The Commission of the European Communities, 2006) was adopted. Accordingly, in this matter it stands out the recent Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council (The European Parliament and the Council, 2015), which repeals the Directives 2005/60/EC and the Commission Directive 2006/70/EC; This Directive composes the current common legal framework in terms of terrorism financing, complemented by the Directive 2014/42/UE of the European Parliament and the Council of 3 May 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (The European Parliament and the Council, 2014), which remains applicable to the offences provided precisely by the Council Framework Decision 2002/475/JAH (updated by Directive 2017/541), that is, for terrorist offences.

The Directive 2015/849 harmonises all related legislation, giving force to the recommendations from the FATF, including the scope of application as: “(1) credit institutions; (2) financial institutions; (3) the following natural or legal persons acting in the exercise of their professional activities: (a) auditors, external accountants and tax advisors; (b) notaries and other independent legal professionals, where they
participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or carrying out of transactions for their client concerning the: (i) buying and selling of real property or business entities; (ii) managing of client money, securities or other assets; (iii) opening or management of bank, savings or securities accounts; (iv) organisation of contributions necessary for the creation, operation or management of companies; (v) creation, operation or management of trusts, companies, foundations, or similar structures; (c) trust or company service providers not already covered under point (a) or (b); (d) estate agents; (e) other persons trading in goods to the extent that payments are made or received in cash in an amount of EUR 10 000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked; (f) providers of gambling services”. Among the obligations for these subjects are the identification and verification of their clients and real ID holders of the services; the notification of suspicious transactions; the adoption of complementary measures such as establishing policies and preventing procedures; and the use of additional measures related to the corresponding due diligence.

Additionally, to verify the ownership of the information from the companies, a central registry accessible by the financial intelligence agencies is provided.

6. Investigative instruments and seizure

The (21st) recital of the Directive states that in order to succeed in the investigation and prosecution of the terrorist offences, relevant institutions must have at their disposal “efficient investigation instruments similar to those used for fighting organised crime and other serious offences”. Thus, it explains that among these instruments there shall be “a registry of personal effects, communications interception, undercover surveillance, including electronic surveillance, recording and storing communications in vehicles and public or private spaces and images of individuals inside vehicles in public spaces, and financial investigations”. For this, article 20 provides for Member States to adopt
measures to ensure that the people in charge of the investigation and prosecution of such offences are equipped with such legal instruments, and, on the other hand, that they can resort to seizure and confiscation of goods and gains product of terrorist activities in compliance with Directive 2014/42/EU. This latter document provides the minimum regulations for compliance the Member States in terms of seizure and confiscation.

7. Provisions in terms of illegal online content and information exchange

Directive 2017/541 takes advantage of the existing online reality to fight against terrorism through the Internet. Article 21 complements the obligations of the online service providers previously analysed by Directive 2000/31/EC on electronic commerce, by establishing a battery of measures to tackle online content which constitutes a public incitement to commit acts of terrorism without prejudice to the measures provided to these effects by the Member States. Accordingly, the Directive states that Member States must ensure the prompt removal of the illegal content hosted on their own territories and that constitutes a public provocation to commit a terrorist offence, and should urge the removal of content hosted outside of their territories. Thus, they shall make use of the legal instruments of transnational cooperation. When in some cases removal is not possible, measures of removal and blocking must be set in accordance to article 21.

Finally, in terms of police and judicial cooperation, the Directive amends the Framework Decision 2005/671/JAH on information exchange, providing it with further flexibility. Hence, article 2, paragraph 6, of the 2005 Decision is amended by article 22 of the 2017 Directive, stating that "each Member State shall take the necessary measures to ensure that relevant information gathered by its competent authorities in the framework of criminal proceedings in connection with terrorist offences is made accessible as soon as possible to the competent authorities of another Member State where the information could be used in the prevention, detection, investigation or prosecution of terrorist offences as
referred to in Directive (EU) 2017/541, in that Member State, either upon request or spontaneously, and in accordance with national law and relevant international legal instruments”.

2.1.5 Additional measures against radicalisation

Beyond confronting the phenomenon of radicalisation by means of prohibition of conducts and behaviours through the Penal Code, the European Union is aware that prevention depends on more than the defining of new offences in response to the changes of the modus operandi and the increasing of followers. Hence, policies to fight radicalisation have also been focused on prevention, elucidating the possible causes and implementing action plans accordingly. Here, the COM (2016) 379 final (The European Commission, 2016) states:

The drivers conducive to radicalisation may include a strong sense of personal or cultural alienation, perceived injustice or humiliation reinforced by social marginalisation, xenophobia and discrimination, limited education or employment possibilities, criminality, political factors as well as an ideological and religious dimension, unstructured family ties, personal trauma and other psychological problems (p. 3).

In this matter, the European Union has been developing policies and road maps for the Member States to pursue the prevention of radicalisation, since, as mentioned earlier in this report, such topic depends mostly on the Member States. Nevertheless, the following documents must be highlighted to the extent that they provide other measures to combat radicalisation in the European Union.
2.1.5.1 The European Union Counter-Terrorism Strategy and the European Union Strategy on Combating Radicalisation and Terrorist Recruitment of 2005

The Strategy was adopted on 30 November 2005 with the main objective of fighting terrorism globally and making Europe safer (Council of the European Union, 2005). It was divided in four strands of work: prevent, protect, pursue and respond. The initiative was a reaction to two events in European territory: the murder of the Theo van Gogh and the London terror attacks, and the observation that in both cases the perpetrators were European citizens. This being so, it became necessary to refocus the prevention of terrorism into the avoidance of European citizens of becoming terrorist perpetrators (Carbonell, 2015). The prevention strand was committed to addressing the drivers of radicalisation and terrorist recruitment: “in order to prevent people from turning to terrorism and to stop the next generation of terrorists from emerging, the EU has agreed a comprehensive strategy and action plan for combating radicalisation and recruitment into terrorism. This strategy focuses on countering radicalisation and recruitment to terrorist groups such as Al Qaeda and the groups it inspires”. Likewise, it recognises that there exist a range of conditions in society which:

…may create an environment in which individuals can become more easily radicalised. These conditions include poor or autocratic governance; rapid but unmanaged modernisation; lack of political or economic prospects and of educational opportunities. Within the Union these factors are not generally present but in individual segments of the population they may be. To counter this, outside the Union we must promote even more vigorously good governance, human rights, democracy as well as education and economic prosperity, and engage in conflict resolution. We must also target inequalities and discrimination where they exist and promote inter-cultural dialogue and long-term integration where appropriate.

One of the European Union’s key priorities for ‘prevent’ is, in accordance with the Strategy, to “promote a good governance, democracy, education and economic prosperity through Community and Member
States assistance programmes; to develop an inter-cultural dialogue within and outside the Union”, as well as to “continue research, share analysis and experiences in order to further our understanding of the issues and develop policy responses”. Here, the European Union Strategy to Fight Radicalisation and Terrorist Recruitment\textsuperscript{13} was also adopted. Its main purpose is:

1. To promote security, justice and equal opportunities for all;

2. To ensure that the appropriate voices and arguments prevail over extremist speech;

3. To enhance governmental dialogue and communication;

4. To support messages that condemn terrorism;

5. To fight against online radicalisation and recruitment for terrorism;

6. To enable develop capabilities and involve front line professionals from every relevant sector;

7. To support citizens and civil society to build resilience;

8. To support decoupling initiatives;

9. To support more research on the tendencies and challenges of radicalisation and terrorist recruitment;

10. To align, internally and externally, the research effort in the field of anti-radicalisation.

2.1.5.2 The Radicalisation Awareness Network (RAN)\textsuperscript{14}

According to the Communication from the Commission to the European Parliament and the Council concerning terrorist recruitment: addressing the factors contributing to violent radicalisation COM (2005) 313 final, the elaboration of programmes for the youth, which are the most vulnerable citizens to terrorist recruitment, are crucial to prevent the so-called homegrown terrorists. Thus, the document explains that “the promotion of cultural diversity and tolerance can help to stem the development of violent radical mind-sets”, stating a variety of programmes aimed to achieve such objectives: the “Youth” Programme, the “Culture” Programme or the “Socrates” Programme. On the other hand, the report from 3 November 2015 on preventing radicalisation and recruitment of European citizens by terrorist organisations (The European Parliament, 2015), stressed education and social inclusion as the main strand for the prevention pillar. Accordingly, the Commission urges the Member States to “encourage educational centres to provide academic courses and programmes to enhance comprehension and tolerance, in particular regarding different religions cohabitation, history of religions, thoughts and ideologies”. Likewise, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions from 2013 recognises that the youth is the most vulnerable part of the society but also the one that has mastery of ICT, facilitating access to radical content. As expressed by the document, the Internet is also a suitable vehicle for counter-radicalisation speech. Thus, it suggests measures such as the creation of programmes that teach and promote critical thinking, employment programmes like Erasmus +, the EU financing programme for cooperation in the fields of education, professional training, youth and sport; and encouraging groups and associations to work together with former extremists and victims to provide the youth with both perspectives.

\textsuperscript{14} See https://ec.europa.eu/home-affairs/what-we-do/networks.radicalisation_awareness_network_en
2.1.5.3. The education and active participation of the youth as a measure for preventing radicalisation

According to the *Communication from the Commission to the European Parliament and the Council concerning terrorist recruitment: addressing the factors contributing to violent radicalisation* COM (2005) 313 final, the elaboration of programmes for the youth, which are the most vulnerable citizens to terrorist recruitment, are crucial to prevent the so-called *homegrown terrorists*. Thus, the document explains that “the promotion of cultural diversity and tolerance can help to stem the development of violent radical mind-sets”, stating a variety of programmes aimed to achieve such objectives: the “Youth” Programme, the “Culture” Programme or the “Socrates” Programme. On the other hand, the report from 3 November 2015 on preventing radicalisation and recruitment of European citizens by terrorist organisations (The European Parliament, 2015), stressed education and social inclusion as the main strand for the prevention pillar. Accordingly, the Commission urges the Member States to “encourage educational centres to provide academic courses and programmes to enhance comprehension and tolerance, in particular regarding different religions cohabitation, history of religions, thoughts and ideologies”. Likewise, the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* from 2013 recognises that the youth is the most vulnerable part of the society but also the one that has mastery on the ICT, facilitating the access to radical content. As expressed by the document, Internet is also a suitable vehicle to counter-radicalisation speech. Thus, it suggests measures such as the creation of programmes that teach and promote critical thinking, employment programmes like Erasmus +, the EU financing programme for cooperation in the fields of education, professional training, youth and sport; and encouraging groups and
associations to work together with former extremists and victims to provide the youth with both perspectives.

2.1.5.4 Promoting social integration and intercultural dialogue

The European Union emphasizes the fundamental role of social integration and intercultural dialogue to prevent radicalisation, as those individuals who feel uprooted are more vulnerable to identification with jihadist ideology. Intercultural and inter-religious dialogue is not the main role of the European Union, yet it remains fundamental for the stability and harmony of the European Neighbourhood Policy. Additionally, the traditional dialogue among the European Commission, the different churches and the religious communities should be mentioned.

2.1.5.5 Promoting research

The research in this field remains crucial to addressing radicalisation holistically. Communication COM (2013) 941 provides three streams of financial support for research and innovation:

- Horizon 2020 programme to fund research into Secure societies, a collaborative effort which includes research into radicalisation and recruitment;
- Use the Disaster Resilience and Fight against Crime and Terrorism funding streams to fund further research into ways to address radicalisation;
- Work with national policy makers, the RAN, and researchers, to ensure that research remains targeted.

In accordance with the Communication COM (2016) 379 supporting the prevention of radicalisation leading to violent extremism, “EU research has provided useful comparative results on radicalisation and de-radicalisation processes among young people and on the evolving and complex social context of religions, multiculturalism and political extremism in many Member States” (p. 4). The VII Framework Programme on Research and Technological Innovation funded research
projects in this field, such as the Safire Project and number of programmes and projects on radicalisation were included in H2020. The present project Pericles is likewise funded under the umbrella of H2020, aiming to reduce distance between the academy and security professionals.

2.1.5.6 The European Union Global Strategy on Foreign and Security Policy

The precedent to this Strategy is the European Security Strategy of 2003 established as a main line of action for the Foreign and Security Common Policy and the Security and Defence Common Policy. However, given the development of international and regional conflicts and issues, the Strategy was not sufficiently responsive to reality. The new Global Strategy aims to provide a renovated and enhanced response to the current security issues of the European Union. One of its strands is the fight against terrorism, asking from Member States more solidarity and investment in this matter. Additionally, it focuses on the fight against radicalisation through the empowerment of civil associations, social agents and victims of terrorism, intercultural and interreligious dialogue.
2.2 The Council of Europe

The Council of Europe (CoE) is an international organisation based in Strasbourg whose main objectives are the defence and promotion of democracy, protection of human rights and the rule of law in Europe. The CoE is the oldest institution in Europe and it comprises 47 European Member States. The role of the Council has had special transcendence in addressing terrorism and radicalisation. The following sections will further develop the most relevant international conventions in the field adopted by the Council and that are, therefore, binding to all its MemS, including the EU.

2.2.1 The Council of Europe Convention on the prevention of terrorism on 2005

The referral framework in the field of radicalisation is given by the Council of Europe Convention on the prevention of terrorism (Convention N° 196 of the Council of Europe) signed in Warsaw on 16 May 2005 (Council of Europe, 2005). Similarly, it will provide a legal instrument from which the European Union will take inspiration for the adoption of the Council Framework Decision of 2008, as well as the Member States and the United Kingdom to typify terrorist offences after the attacks in London. In comparison with other similar conventions, like the Convention on the suppression of Terrorism of 1977, amended by the 2003 protocol after 9/11, and the Convention on money laundering and terrorism financing signed in Warsaw in 2005, the relevance of the Convention of 2005 lies in its status as the first traditional instrument that address the prevention of acts of terrorism through the provision of previous offences, defining them as offences that imply abstract danger instead of direct physical danger. Likewise, the Convention established Resolution 1264 (2005) of the United Nations.
In accordance with article 2, the objective was to further enhance the prevention of terrorism through measures such as the provision of the offences of public incitement to the commission of acts of terrorist, recruitment for terrorist purposes and training for terrorism. Once again, the prevention relates to conduct that leads to radicalisation of individuals and prompts them to commit acts of terrorism. Articles 5, 6 and 7 oblige signing States to transpose into national legislation crimes against public incitement to commit acts of terrorism, and recruitment and training for terrorist purposes. With the aim of facilitating the adoption of these offences, the articles provide a definition of these types of conducts. Thus, for the purposes of the 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”. “Recruitment for terrorism” is defined as “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”. Finally, the Convention understands the concept of “training for terrorism” as providing “instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used to this purpose”. Nevertheless, article 8 states that for an act to constitute an offence from those set in articles 5 to 7, “it shall not be necessary that a terrorist offence be actually committed”, making even punishable the attempt by article 9.

The Convention places special emphasis on the need for appropriate measures to tackle radicalisation, stating that Member States “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” (article 3). Additionally, it urges each Party to adopt measures to improve international cooperation, related in
particular to: “a) exchanging information; b) improving the physical protection of persons and facilities; c) enhancing training and coordination plans for civil emergencies”. Likewise, it sets the need for promoting tolerance by encouraging intercultural and interreligious dialogue involving more active participation of non-governmental organisations and other civil society actors. Finally, it urges the “endeavour to promote public awareness regarding the existence, causes and gravity of and the threat posed by terrorist offences”. To these effects, article 4 specifically obliges Member States to provide themselves with assistance and mutual support in order to enhance “their capacity to prevent the commission of terrorist offences, including through exchange of information and best practices” and any other joint efforts of a preventive character.

The Convention establishes a wide range of legal provisions to ensure the international cooperation in the fight against terrorism including the duty to investigate (article 15), international cooperation in criminal matters (article 17), extradite or prosecute (article 18), or spontaneous information (article 22). Regarding the latter, the Member States may “without prior request, forward to the competent authorities of another Party information obtained within the framework of their own investigations, when they consider that the disclosure of such information might assist the Party receiving the information in initiating or carrying out investigations or proceedings”.

Finally, given that the protection of human rights is one of the CoE’s main objectives, articles 5 to 7 and 9 set provisions for the establishment, execution and application for criminal offences with the obligation to respect freedom of expression, freedom of association and freedom of religion and freedom from discrimination. Criminalisation shall be strictly subordinated to the principle of proportionality, seeking a balance between the transposition of the CoE legislation and the desired objectives and the need for a democratic society.

As already analysed, the Convention implies a reflection point in terms of terrorism, because it is not solely focused on reactive measures but also on preventive measures. There is currently a high level of commitment shown by the Member States of the EU, taking into
consideration that just four are of the Member States of the EU have not yet ratified the instrument\textsuperscript{16}.

\textit{2.2.2 Additional Protocol to the Convention for the Prevention of Terrorism of the Council of Europe}

Since the \textit{Council of Europe Convention for the Prevention of Terrorism} took place, a multiplicity of jihadist terrorist attacks took place in different Member States, which led to the elaboration of an ulterior \textit{Additional Protocol amended the Convention, 22 October 2015} (Council of Europe, 2015), with the two main purposes of: materialising and adopting the \textit{Resolution 2178 (2014) of the Security Council of the United Nations}, and enhancing the preventive response of the Convention through the incorporation of the offence of receiving training for terrorism.

The Protocol offers the following definitions of relevant conduct:

“"Receiving training for terrorism" means to receive instruction, including obtaining knowledge or practical skills, from another person in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence."

“"Travelling abroad for the purpose of terrorism" means travelling to a State, which is not that of the traveller’s nationality or residence, for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism."

“"Funding travelling abroad for the purpose of terrorism" means providing or collecting, by any means, directly or indirectly, funds fully or partially enabling any person to travel abroad for the purpose of terrorism, as defined in Article 4, paragraph 1, of this Protocol, knowing that the funds are fully or partially intended to be used for this purpose.”

\textsuperscript{16} At the time of this document, all Member States of the EU have signed the Council of Europe Convention for the Prevention of Terrorism, and 24 have ratified it, with the exception of Belgium, Greece, Ireland and United Kingdom (included in the European bloc for the analysis of the legislation in this document).
Finally, "‘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, as defined in Article 4, paragraph 1, of this Protocol, knowing that the assistance thus rendered is for the purpose of terrorism."

With the objective of further enhancing the investigation of such offences, article 7 sets that each Member State shall take the necessary measures "in order to strengthen the timely exchange between Parties of any available relevant information concerning persons travelling abroad for the purpose of terrorism". For that purpose, there must be a 24-hours, seven-days-a-week, available contact point designated by each Party, whose functions will be carrying out communications which the other point of contacts on an expedited basis.

Though more than two years have elapsed since its adoption, currently just five Member States of the Union have ratified the Convention with the Additional Protocol\textsuperscript{17}.

\textsuperscript{17} At the time of this document, 25 Member States of the EU have signed the Additional Protocol, with the exception of Austria, Hungary and Ireland; and just five, Denmark, France, Italy, Latvia and Czechia, have ratified it.
2.3 United Nations

Chapter V of the United Nations Charter (UN, 1945), regulating the Security Council of the United Nations, sets its key function as “the maintenance of international peace and security” (article 23). Under the auspices of article 23, a series of Resolutions are provided in virtue of the Charter VII, binding all Member States. The following sections will present the most important Resolutions in the field of terrorism and radicalisation.

2.3.1 Resolution 1264 (2005), signed by the Security Council on its 5261º session, held on 14 September 2005, and the prohibition of the incitement to commit acts of terrorism

Following the condemnation of the attacks in London (Security Council, 2005) as well as in Iraq (Security Council, 2005), the Council of the United Nations adopted a profound Resolution in relation to the prohibition of the incitement to commit acts of terrorism (Security Council, 2005). The Resolution strongly condemns acts of terrorism, as well as glorification of terrorism that can lead to new acts of terrorism. It states that “incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights”. Accordingly, it recognizes that freedom of speech does not apply to such acts, and calls on States to prevent terrorists from taking advantage of communications technology to encourage the support of criminal offences. More specifically, it calls upon all States to “a) prohibit by law incitement to commit a terrorist act or acts; b) prevent such conduct; c) deny safe haven to any person with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct”.

18 Given the most relevant Resolutions chosen for the present report, for a further revision see: http://www.un.org/es/sc/ctc/resources/res-sc.html
2.3.2 Resolution approved by the General Assembly of 8 September 2006. The Global Counter-Terrorism Strategy

By this Resolution the Global Counter-Terrorism Strategy of the United Nations was approved (UN General Assembly, 2006), implying the first common strategic and operative focus to all Member States of the United Nations, and materialising practical measures to that effect. Furthermore, its value lies not only in its place as the first strategic approach to the phenomenon, but in the fact that it supposes the first international consensus in this matter. It is composed of four main pillars:

1) Measures to address the conditions conducive to the spread of terrorism;

2) Measures to prevent and combat terrorism;

3) Measures to build States’ capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard

4) Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism

With the purpose of ensuring the monitoring of these measures, the Strategy has been reviewed every two years. Four evaluation resolutions have been elaborated, which have complemented the Strategy and served as guidance for its application. The last Resolution: Report Activities of the United Nations system in implementing the United Nations Global Counter-Terrorism Strategy (UN Secretary-General, 2016) merits further attention because it provides an overview of how the Strategy has been applied over a decade. The following observations are worth quoting in full:

1) “Since its adoption in 2006, the United Nations Global Counter-Terrorism Strategy has seen important progress in its implementation, but has also encountered unforeseen challenges, especially with the rise of new types of terrorism-related threats to international peace and security. The most significant challenge is the spread of violent extremist ideologies and the emergence of terrorist groups fuelled by them” (section 4).
2) “The capacity of Member States to prevent and counter terrorism has grown, as has the supporting role of the United Nations in providing capacity-building assistance. Nevertheless, despite a great deal of activity, not enough has been achieved to address the conditions conducive to the spread of terrorism, nor in ensuring respect for human rights and the rule of law while countering terrorism” (section 16).

3) “The time has come to harness collective efforts to more systematically implement an “All-of-United Nations” approach. There is a need to better integrate efforts towards a common purpose, devising multifaceted responses” (section 24).

4) “The continuing relevance of the United Nations Global Counter-Terrorism Strategy depends on strong cooperation between Member States at the global, regional and national levels” (section 44).

2.3.3 Resolution 2178 (2014), approved by the Security Council on its 7272º session, held on 24 September 2014, and the prohibition of the travels with terrorist purposes

After all the events to date, the central focus of the Security Council of the United Nations is on the phenomenon of foreign fighters, which are defined 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” (Security Council, 2014).

Foreign fighters not only hinder the possibility of mitigating radicalisation and jihadism, but represent a serious threat to their origin States, the States they transit through and the destination States. A new comprehensive approach is indispensable to address underlying factors such as radicalisation. Thus the resolution calls on all States to adopt the following measures.

1. All States shall prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers
and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.

2. Urges Member States to intensify and accelerate the Exchange of operational information regarding actions or movements of terrorists or terrorist networks through bilateral or multilateral mechanisms.

3. Calls upon to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by preventing the radicalisation to terrorism and recruitment of foreign terrorist fighters.

4. The States shall, consistent with international refugee law and international humanitarian law, to enhance the prevention and suppression of the recruiting for terrorism.

5. In concrete, it obliges Member States to ensure that their domestic laws and regulations establish a serious criminal offense for the following conducts:

   a) Their nationals who travel or attempt to travel to a State other than their States of residence of nationality for the purpose of perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;

   b) The wilful provision, by any means, of funds for terrorism, including the travel of individuals who travel to a State other with terrorist purposes.

   c) The facilitation by any means of the travel of individuals for the purpose of terrorism.
2.3.4 The Resolution approved by the General Assembly of 12 February 2016. Secretary-General’s Plan of Action to Prevent Violent Extremism

Through this Resolution the General Assembly of the United Nations gives its agreement to the Plan of Action to Prevent Violent Extremism (UN General Assembly, 2016), and it expresses its commitment to give it further consideration within the framework of the United Nations Global Counter-Terrorism Strategy. The Plan of Action (UN Secretary-General, 2015) contains important measures to combat and prevent extremism that deserve special mention. The document recognises that “there is a need to take a more comprehensive approach which encompasses not only on-going, essential security-based counter-terrorism measures, but also systematic preventive measures which directly address the drivers of violent extremism that have given rise to the emergence of these new and more virulent groups’. The Plan analyses the devastating effects of violent extremism, as well as its drivers based on “available qualitative evidences”. It establishes as drivers of extremism and radicalisation: the lack of socio-economic opportunities; the marginalisation and discrimination; the bad governance, human rights violations and the estate of Law; unresolved and prolonged conflicts; and radicalisation in prisons. On the basis of all this knowledge and accumulated experience, it presents a plan of action, that is, a series of recommendations to prevent violent extremism. Accordingly, the plan includes and recommends as a prevention measure the need for a global framework to prevent violent extremism and the need to carry out national and regional plans of action. Additionally, it provides the need to mobilise resources with the objective of creating synergies, and to invest in prevention. Furthermore, within the global framework it encourages the dialogue and prevention of conflicts; the strengthening of the good governance, human rights and the rule of law; collaboration with communities; youth empowering; women empowering and gender equality; promotion of education, development of attitudes and the facilitation of employment; and the need for elaborating national
communication and collaboration strategies and with public and private sector social media.

Finally, the Plan of Action calls for concerted action as having the potential “to enhance efforts to counter this kind of violent extremism”. It concludes by stating that “at a time of growing polarization on a number of national, regional and global issues, preventing violent extremism offers a real opportunity for the members of the international community to unite, harmonize their actions and pursue inclusive approaches in the face of division, intolerance and hatred”.
As stated at the beginning of this report, the phenomenon of violent radicalisation is a process through which an individual or a group of individuals take their ideology to the ultimate extremes driving them to the commission of acts of terrorism or violent actions mainly motivated by hatred. Breivik’s terrorist attack as well as the recent driving into pedestrians in Charlottesville are cases that illustrate hatred in its cruelest and most extreme manifestation. Hatred itself has been defined as “antipathy and aversion towards something or somebody to which some harm is desired” (Fuentes Osorio, 2017, p. 133). In other words, we are referring to the feeling or the subjective state of mind that leads an individual to commit a legal offence (Aguilar García, Gómez Martín, Marquina Bertrán, De Rosa Palacio, Tamarit, 2015). Likewise, hate crimes shall be understood as “any offence motivated by intolerance, that is, any offence against people, social groups or goods, when the victim, facilities or objective of the action have been chosen with prejudices or social animadversion, for reasons of condition, linkage, affiliation or relation to a social group” (Ibarra, 2016, p. 9). According to Croall & Wall (2002), “the perpetrators of hate crimes have in common a hatred of the ‘other’ whose ‘difference’ becomes their target. At their most extreme, hate crimes involve genocide, ethnic cleansing and serial killing. In their lesser yet nevertheless insidious forms they can include assaults, rape and/or the many ‘lower level’ incidents of name-calling, harassment or vandalism which threaten and degrade the quality of life of victims” (p. 3). These also reflect extreme discrimination (International Association of Prosecutors, 2014). Under the national law of most countries, there are prohibitions on intolerance and discrimination, including group discrimination. The criminal law protects such groups.

In particular, the European Court of Human Rights in the Case of Vejdeland and others v. Sweden. The Judgment of 9 February 2012 highlighted that “when a particular group is singled out for victimisation and discrimination, hate-speech laws should protect
because they have, “over the course of history, suffered numerous acts of effective discrimination and the lack of enjoying the benefits of similar rights as others” (Miró Llinares, 2017, p. 47). At a minimum, there exist provisions for crimes based on racial, national or religious prejudices, as well as those related to discrimination on grounds of sex, disabilities, sexual orientation and gender identity (The Spanish Government, 2016). In the case of hate crimes, they are usually criminalised in two different ways: on one hand, via the establishment of a general aggravating circumstance applicable to the offences; on the other hand, via the concrete and substantive criminalisation of hate crimes among which can be found hate speech or discrimination offences. The study, analysis and prevention of these types of conducts becomes fundamental not only because it concerns one of the main objectives of the international institutions, but also because dealing with such behaviours help to prevent radicalisation. As identified by European and national authorities, certain groups and individuals are likely to suffer discrimination and marginalisation, which may constitute serious drivers of radicalisation. As mentioned in chapter I, as a consequence of the successive jihadist attacks, there has been an increase of hate conducts and social rejection towards Arab and Muslim people living in Europe, fed by the current European social and security reality; thus, “the argument of terrorist attacks that makes possible, in an atmosphere of horror, the growth of a discourse that legitimates intolerance, reactions and manipulations oriented to the expansion of hatred and the appearance of an anti-Muslim sentiment” (Raxen, 2016). The following sections will address the most significant responses to such conducts performed by the European Union, the Council of Europe and the United Nations.

those characteristics that are essential to a person’s identity and that are used as evidence of belonging to a particular group. Restrictions on freedom of expression must therefore be permissible in instances where the aim of the speech is to degrade, insult or incite hatred against persons or a class of person”. “Moreover, the Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner”.

20 Such situation was revealed by the “Fundamental Rights Report 2017. FRA Opinions” from the European Union Agency for Fundamental Rights (FRA), outlining that “racist and xenophobic reactions towards refugees, asylum seekers and migrants persisted across the European Union in 2016. Muslims experienced growing hostility and intolerance”. 
3.1 The European Union’s Response

3.1.1 Background

In the same way as the extensive experience that the European Union has in the area of terrorism, it counts with a long trajectory in terms of fight against discrimination and hatred to certain groups of people. The principle of no discrimination is, in fact, set as a fundamental value for the European Union by virtue of article 2 of the Treaty on the European Union. Likewise, the Treaty on the Functioning of the European Union itself provides different articles which prohibit, precisely, discrimination and hatred. Thus, article 10 sets as one of the main objectives of the Union combatting discrimination “based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. Likewise, Article 18 prohibits any discrimination on grounds of nationality within the scope of application of the Treaties. Article 19 provides that the Council “may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”, similarly applicable to the workplace as set by article 157. Consequently, the prohibition of discrimination supposes a guiding principle of the European Union itself, which indeed must ensure its effective compliance. In this matter, a battery of instruments focused on the provision of legal restrictions of discriminations can be found in two different forms: from a positive approach, through instruments that recognise the equality of all citizens as a fundamental right, and from a negative approach through the specific prohibition of discriminatory or hate conducts towards certain groups.
3.1.2 **Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia**

The Joint Action against racism and xenophobia (The Council of the European Union, 1996) supposes the starting point of the anti-racism legislation of the European Union\(^{21}\). It is established to contribute to the fight against these types of conducts after the realisation by the Council of the differences between national legal frameworks on this field, which are considered by the document as an obstacle for the appropriate international judicial cooperation. This instrument establishes that the Member State must commit to ensure an effective judicial cooperation in relation to the following conducts:

1. Public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin;

2. Public condoning, for a racist or xenophobic purpose, of crimes against humanity and human rights violations;

3. Public denial of crimes to a group of persons defined by reference to colour, race, religion or national or ethnic group;

4. Public dissemination or distribution or tracts, pictures or other material containing expressions of racism and xenophobia;

5. Participation in the activities of groups, organizations or associations, which involve discrimination, violence, or racial, ethnic or religious hatred.

\(^{21}\) Prior to the adoption of the Common Action, a series of Resolutions were drafted by the European Union in matter of combating racism and xenophobia, and discrimination. Among them there can be found the Resolution of 5 October 1995 on the fight against racism and xenophobia in the fields of employment and social affairs; the Resolution of the Council of 23 October 1995 on the response of educational systems to the problems of racism and xenophobia; the European Parliament Resolution of 27 April 1995 on racism, xenophobia and anti-Semitism; and the European Parliament Resolution of 26 October 1995 on racism, xenophobia and anti-Semitism.
Likewise, the Action sets that, in the cases of investigations or proceedings related to behaviours previously described, all Member States must increase judicial cooperation and adopt adequate and sufficient measures to ensure the seizure of racist and xenophobic materials; the recognition that such conducts cannot be considered as political offence; to provide information to other Member States to allow it to initiate legal proceedings or proceedings for confiscation when such States knows that such material is going to be disseminated or distributed in another Member State.

3.1.3 Directives 2000/43/EC and 2000/78/EC as European guarantees of the non-discrimination principle

Based on article 6\textsuperscript{22} of the Treaty of the European Union, two fundamental Directives were adopted in the field of non-discrimination. While it is true that there exist various instruments that guarantee the principle of non-discrimination, such as the Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (The Council of the European Communities, 1976); this, in addition to the existing common and international legislation such as the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women or the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, which materialise and embody the principle of non-discrimination at European level.

\textsuperscript{22} Article 6 TUE: “1. 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. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. 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 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (The Council of the European Union, 2000) was adopted with the objective of establishing minimum requirements to apply the principle of equal treatment in the European Union when considering, on one hand, the international commitments assumed in terms of equality and prohibition of discrimination\(^{23}\), and on the other hand by virtue of the “discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice” (9\(^{th}\) recital). According to the Report from the Commission to the Council and the European Parliament on the application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Commission of the European Communities, 2006), it was the first legal instrument of the Council adopted unanimously in line with article 13 of the Treaty of Amsterdam, 1 May 1999. In this sense, the Directive 2000/43/EC provides not only a legal framework for minimum non-discrimination standards, but also important definitions thereon. Thus, for example, the Directive defines direct and indirect discrimination. Regarding article 2.2, the direct discrimination will occur “where one person is treated less favourably than another is, has been or would be treated in a comparable situation”. By indirect discrimination the document understands “where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”. Accordingly, all practices that take place with the objective of discriminating against persons based on racial or ethnic origins shall be

considered discriminatory practices, including harassment. Article 2 sets that the field of application of the prohibition of discrimination must be understood with regard to the full scope of the phenomenon, such as: “(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay; (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; (e) social protection, including social security and healthcare; (f) social advantages; (g) education; (h) access to and supply of goods and services which are available to the public, including housing”. Likewise, the Directive provides exceptions to the application of the principle of non-discrimination in article 4, according to which certain discriminations can be authorised provided that the racial or ethnic origin constitutes an essential professional requirement and that the national legislations are able to establish positive provisions to prevent or compensate potential disadvantages. In addition, the document provides remedies and enforcement in chapter two. This chapter also stipulates that individuals, legal persons, as well as other interested associations who suffered discrimination under the provisions of the Directive can initiate legal actions. As set out in article 8, the burden of proof is placed on the defendant. For the effective consolidation of the non-prohibition, the Directive envisages social and civil dialogue according to which all Member States must adopt measures to foster such dialogue among social partners and non-governmental organisations to promote and contribute to equal treatment (articles 11 and 12). In line with the first report of the application of this Directive, it “represents a major step forward in the fight against racial discrimination across the EU. Although all Member States already had some sort of legal requirement in respect of equality and non-discrimination, for most of them the transposition of Directive 2000/43/EC required fairly extensive changes to existing
legislation, or whole new Acts" (Commission of the European Communities, 2006).

The Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (The Council of the European Union, 2000) was subsequently adopted, complementing the previous one, which covered not only racial or ethnic origin, but also extended to discrimination on the grounds of religion or belief, disability, age or social orientation in terms of employment and occupation. This was provided by its 9th recital stating that “employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential”. Similarly, the Directive’s scope of application is not as broad as the previous one, but, as stated by article 3, it shall apply to all persons in relation to conditions for access to employment, access to all types and to all levels of vocational guidance, vocational training; employment and working conditions; and membership of, and involvement in, an organisation of workers or employers. However, the Directive does not aim to sacrifice, on the bases of the principle of non-discrimination, the special conditions of every job in favour of the non-discriminatory treatment when the personal characteristics of the individuals are essential to the performance of the professional activity, for example, in the field of armed forces regarding age and disabilities requirements (articles 3.4 and 4). Nevertheless, it does impose the obligation of ensuring access to employment for disabled people through the implementation of “reasonable adjustments”. With regards to discriminations on the grounds of age, article 6 sets provisions for a series of situations that would not suppose discriminatory treatment: “(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in
question or the need for a reasonable period of employment before retirement”. The document also provides actions and positive specific measures, as well as remedies and enforcement for the principle of non-discrimination. Furthermore, it includes provisions related to social and institutional dialogue on the same terms than the previous Directive.

Accordingly, the Member States published the report regarding the application of both Directives in 2014. In its conclusions that report stated that “by today, all the Member States have taken the necessary measures to transpose the two Directives into their respective domestic legal orders and to set up the procedures and bodies that are indispensable for the implementation of these Directives” (European Commission, 2014).

### 3.1.4 The Charter of Fundamental Rights of the European Union of 2007 and further recognition of equal treatment

The Charter of Fundamental Rights of the European Union envisages and reaffirms a battery of personal, civil, political, economic and social rights of all citizens and residents in the EU, providing a judicial response to all international obligations assumed by the EU itself in this field. These are instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms or the jurisprudence itself of the Court of Justice of the European Union and the European Court of Human Rights. To that effect, similar basic rights are homogeneously set out at international level, which provides a high degree of juridical security. In addition, the Charter became legally binding after the entry into force of the Lisbon Treaty and, consequently, it has the same validity as any Treaty of the European Union. The rights provided are the materialisation of the spirit of the European Union itself, given that it is based on the “indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law”, as stated on its preamble (The European Parliament, the Council and the Commission, 2016).
The protection of equality and therefore the prohibition of discrimination is included on Title III of the Charter, where article 20 recognises that “everyone is equal before the law”; article 21 sets the prohibition of "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation". It prohibits equally any discrimination on grounds of nationality within the scope of application of the Treaties. Likewise, article 23 provides that “equality between women and men must be ensured in all areas, including employment, work and pay”.

According to the Report from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Application of the EU Charter of Fundamental Rights (European Commission, 2015), the Charter of Fundamental Rights of the European Union has set a reference point to European courts, demonstrating its efficiency. For example, the Case Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding against G4S Secure Solutions. G4S Secure Solutions is a company that was sued by Samira Achbita after she was discriminated by an internal company rule which prohibited the use of an Islamic headscarf. In such case, the European Union Tribunal of Justice made use of the EU Charter of Fundamental Rights, which protects the freedom of conscience and religion, provided by article 10.1: “everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance”. Along with this legal framework and the Directive 2000/78, the Tribunal stated that “such internal rule of a private organisation can constitute an indirect discrimination in the sense of article 2.1(b) of the Directive 2000/78 if it is confirmed that it has an apparently neutral obligation, it cause in fact a particular disadvantage to those that practise a religion or have certain beliefs, excepting that it can be objectively justified with a legitim purpose, such as the compliance by the business owners of a regime of political, philosophical and religious neutrality in the relation with their
clients, and that the means to achieve such purpose are adequate and necessary”.

However, although fundamental rights from the Charter are fully recognised, it does not imply that we shouldn’t continue protecting them effective and efficiently. This means, as recognised by the 2015 report abovementioned, it is necessary to ensure that all legislations comply with and respect fundamental rights, as well as to work more actively with these institutions protecting them, such as the Fundamental Rights Agency.

3.1.5 **Council Framework Decision 2008/913/JHA of November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law**

This Framework Decision is simultaneously adopted with the Framework Decision 2008/913/JHA (The Council of the European Union, 2008), being introduced to the legal system in response to the persistence of the legal differences among the Member States of the UE in the field of hatred, which considerably jeopardises an effective fight against such types of behaviour. In addition, the Decision can be considered as an important achievement in the fight against hatred, since the document is the fruit of seven years of negotiations until it was unanimously adopted on 28 November 2008. The document constitutes a continuation of the Common Action previously analysed. Accordingly, the 13th recital sets its fundamental objective as “ensuring that racist and xenophobic offences are sanctioned in all Member States by at least a minimum level of effective, proportionate and dissuasive criminal penalties”. For that matter, article 1 sets hate and discrimination conducts that must be sanctioned by every Member States’s national legislation

(a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;
(b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;

c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

On the other hand, article 4 establishes that in cases other than those previously described, legislation must criminalise the rest of conducts that are carried out with racist or xenophobic motivations whether as aggravating circumstances, where if the aggravating circumstance is not specifically foreseen, the court must take into account such motivations in order to determine the applicable sanctions to the case. Regarding this last one, as provided by the *Practical Guide on Prosecuting Hate Crimes* (2014) “while specific hate crime laws serve to enshrine society’s rejection of hate crimes and facilitate effective data collection, hate crime prosecutions can still be pursued in the absence of specific provisions” (p. 25). However, the reality is that the majority of Member States do set legal specific provisions related to hatred against certain individuals or groups. There are two ways of regulating such motivations: by establishment of defined and autonomous hate offences, and by setting out of a generic aggravating circumstance based on the motivation of the perpetrator. Hence, the following sample shows provisions regulating hatred in some countries of the European Union:
§ 130. Incitement to hatred

(1) Whosoever, in a manner capable of disturbing the public peace

1. Incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or

2. Assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population, shall be liable to imprisonment from three months to five years.

(2) It shall be liable to imprisonment up to three years or fine whosoever

1. Disseminates or makes available to the public a copy (§ 11 (3)) or offer, provide or make available to a minor material under article 11 (3) which

(a) Incites hatred against an aforementioned group, segments of the population or individuals ((1) 1) because of their belonging to one of the aforementioned groups or segments of the population ((1) 1);

(b) Calls for violent or arbitrary measures against individuals or segments of the population referred to in subparagraph (a); or

(c) The human dignity of individuals or segments of the population referred to in subparagraph (a) is assaulted by being abused, maliciously scorned or slandered;

2. Disseminates or makes available a content referred to in paragraphs 1 (a) to (c) by radio, media services or telecommunication services to a minor or to the public, or;

3. Produces, acquires, supplies, makes available, provides, promotes or undertakes documents referred to in article 11 (3) regarding content affecting paragraph 1 (a) to (c); uses number 1 or 2 or allows another person to use it.

(3) It shall be liable to imprisonment up to five years or a fine whosoever publicly commits an act committed under the rule of National Socialism of the kind specified in article 6 (1) of the International Criminal Code in a manner likely to disturb public peace or endorse, deny, or downplay in a group.

(4) It shall be liable to imprisonment up to three years or a fine
whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying or justifying National Socialist rule of arbitrary force.

(5) Paragraphs 2 (1) and (3) shall also apply to written materials (11 (3)) of a content such as indicated in (3) and (4) above by means of radio or tele media to a minor or to the public.

(6) In cases under paragraph (2), numbers 1 to 3, also in conjunction with paragraph (5) above, the attempt is punishable.

(7) In cases under paragraph (2), also in conjunction with paragraph (5) above, and in cases of paragraph (3) and (4) above, article 86 (3) shall apply mutatis mutandis.

Austria

§ 283. Incitement

(1) Who publicly in a way that it becomes accessible to the public,
1. Promotes violence against a church or religious society or another according to the existing or missing criteria of race, language, religion or belief, nationality, descent or national or ethnic origin, gender, physical or mental disability, age group or sexual orientation, or expressly incite or incite hatred towards a member of such a group for belonging to that group;
2. Intending to violate the human dignity of others, insults one of the groups referred to in subparagraph 1 in a manner likely to scorn or disparage that group in public opinion, or
3. Crimes within the meaning of Sections 321 to 321f and Sections 321k, which have been legally established by a domestic or international court, approve, deny, grossly downplay or justify, the act being against one of the groups referred to in item 1 or against a member of a is specifically addressed to such a group for belonging to that group and committed in a manner likely to incite to violence or hatred of such a group or against a member of such a group, shall be punished with imprisonment of up to two years.

(2) Anyone who commits the act under paragraph 1 in a printed matter, on the radio or otherwise in a manner which makes the acts referred to in paragraph 1 accessible to a broad public shall be punished with imprisonment of up to three years.

(3) Anyone who acts by virtue of paragraphs 1 or 2 to cause other persons to commit violence against a group referred to in subsection (1) point 1 or against a member of such a group for belonging to that group shall be imprisoned for six months up to five years.

(4) Who, if he is not threatened with a more severe punishment than in

Available on:
https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296
an act under paragraphs 1 to 3, (§ 12), written material, pictures or other representations of ideas or theories, hatred or violence against one in para To endorse, promote or incite a member of such a group or a member of such a group by virtue of its affiliation with that group, in a printing, broadcasting or otherwise making it accessible to the general public, in a favourable or justifying manner Distributed or otherwise made publicly available shall be punished with imprisonment of up to one year or a fine of up to 720 daily rates.

Article 35 A (Aggravating circumstances)

In the exercise of its powers in the determination and punishment, the Court may take into account as an aggravating factor the motive of prejudice against a group of persons determined by race, colour, national or ethnic origin, religious or other beliefs, pedigree, sexual orientation or gender identity.

Article 47. Actions against the sovereignty of the Republic

(1) Any person who takes any action in public,

(a) bring about a change in the sovereignty of the Republic, or

(b) promote hostility between communities, religious groups, by reason of race, religion, colour or gender,

is guilty of an offense and, if convicted, is liable to imprisonment of up to five years.

### Denmark

<table>
<thead>
<tr>
<th>§ 266 b.</th>
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<tr>
<td>Whosoever publicly or deliberately disseminates an opinion or other communication by which a group of persons is threatened, detained or degraded because of his race, colour, national or ethnic origin, belief or sexual orientation, punishable by fine or imprisonment for up to 2 years.</td>
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<th>§ 157 a 3) (aggravating circumstance to torture)</th>
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<tr>
<td>3) because of his or her political conviction, gender, race, colour, national or ethnic origin, belief or sexual orientation.</td>
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All Member States’ criminal legislation have currently adopted provisions for hate crimes, some of them through generic aggravating circumstances, others through the prohibition of hate speech and other conducts of distinguishable discriminatory nature, or both types of legal provisions in the cases of lack of any specific discriminatory conduct or with unlawful motivation. As mentioned before, article 4 of the Directive establishes that in the absence of express legal classification, the court shall take into account such motivation when setting a punishment. Conversely, according to the scope of application, it is foreseen for all Member States of the EU, including those committed through an information system as referred to in article 9.2 of the Decision. In the

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27 Available on [this link](https://www.retsinformation.dk/Forms/r0710.aspx?id=181992#idc7e92ae3-9e9f-4f37-aeca-7b6659e85e49)

28 In spite of that the conclusions from the Report to the Commission and the European Parliament and the Council on the application of the Framework Decision 2008/913/JHA of the Council on combating certain forms and expressions of racism and xenophobia by means of criminal law (available on [this link](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:en:PDF)) mention that “it appears that a number of Member States have not transposed fully and/or correctly all the provisions of the Framework Decision, namely in relation to the offences of denying, condoning and grossly trivialising certain crimes”.

29 Article 9: 1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the conduct referred to in Articles 1 and 2 where the conduct has been committed: (a) in whole or in part within its territory; (b) by one of its nationals; or (c) for the benefit of a legal person that has its head office in the territory of that Member State.
light of the above, the European legal framework already counts, in this sense and since that date, with legal instruments to carry out investigations of such offences committed through computer systems, as provided by Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), already analysed in a previous section above, regarding the responsibility and obligations of service providers. Additionally, the Council of Europe adopted the Convention on Cybercrime or Budapest Convention, which will be addressed below. Likewise, the Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audio-visual Media Services Directive) must be taken into consideration (The European Parliament and the Council, 2010). Its main objective is to establish a legal framework for the provision of services in the field of transnational audio-visual cooperation, to strengthen the internal market of production and distribution of programmes, and to ensure fair competition. According to the Directive, the Member State must ensure the freedom of reception as well as the obligation of not hampering any broadcasts from other Member State on their territory (article 1.1). Nevertheless, the Member States can take exceptional measures to such freedom of broadcast when, in cases of hate crimes, the measures are aimed to ensure the public order, "in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons". These measures must also comply with the requirement that they are “taken against an on-demand audio-visual media service which prejudices the objectives referred to in

2. When establishing jurisdiction in accordance with paragraph 1(a), each Member State shall take the necessary measures to ensure that its jurisdiction extends to cases where the conduct is committed through an information system and:
   (a) the offender commits the conduct when physically present in its territory, whether or not the conduct involves material hosted on an information system in its territory;
   (b) the conduct involves material hosted on an information system in its territory, whether or not the offender commits the conduct when physically present in its territory.
3. A Member State may decide not to apply, or to apply only in specific cases or circumstances, the jurisdiction rule set out in paragraphs 1(b) and (c)".
point (i) or which presents a serious and grave risk of prejudice to those objectives", always bearing in mind the principle of proportionality.

However, article 1.4 (b) sets the exceptional adoption of measures when the Member State where the service provider is registered has not taken any measures after the interested Member State requested so, or if the implemented measures are not sufficient, having previously notified the Commission and the Member State the intention to initiate such measures.

For its part, article 6 of the Directive provides that “Member States shall ensure by appropriate means that audio-visual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality”. Regarding the prohibition of broadcasting that incites or encourage discrimination, article 9 establishes that “Member States shall ensure that audio-visual commercial communications provided by media service providers under their jurisdiction comply with the following requirements: [...] (c) audio-visual commercial communications shall not: [...] (ii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation”. Finally, even though the Directive 2010/13/EU is the current legal framework for audio-visual broadcasting, as analysed above, there has been drafted the COM (2016) 287 final (European Commission, 2016) proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services in view of changing market realities, setting new provisions to fight against audio-visual hate content. The objective of the proposal is to modernise the previous Directive, because “the audio-visual media landscape is changing at a rapid pace due to ever-increasing convergence between television and services distributed via the internet”. Accordingly, the proposal replaces article 6 with “Member States shall ensure by appropriate means that audio-visual media services provided by media service providers under their jurisdiction do not contain any incitement to violence or hatred directed against a group of persons or a member of such a group
defined by reference to sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. In addition, it establishes an additional chapter with provisions applicable to video-sharing platform services, among which can be found that Member States shall establish the necessary mechanisms to assess the appropriateness of the measures and to ensure the protection of citizens from online contents that incite to violence and hatred against a segment of the population or a group on grounds of sex, racial, national or ethnic origin, colour and religion (article 28b).

3.1.6 Other measures

3.1.6.1 European Parliament Resolutions


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30 The documents raises concerns about the existing situation, “has been triggered by the proliferation of hate speech and other series of worrying events, such as the prohibition by local authorities of holding equality and gay pride marches, the use by leading politicians and religious leaders of inflammatory or threatening language or hate speech, and the failure by the police to provide adequate protection against violent demonstrations by homophobic groups, even while breaking up peaceful demonstrations”; this together with the facts highlighted by the Resolution such the suicide of a 16-years-old Italian in Turin who left a message explaining that he took such decision based on the continuous harassment he was suffering because of his sexual orientation.
States, to coordinate their measures to combat anti-Semitism and attacks against minority groups, including the Roma, traditional national minorities and third-country nationals in Member States, so as to enforce the principles of tolerance and non-discrimination and to foster social, economic and political integration”, but additionally “urges the Member States to resolutely prosecute any hate speech in racist media programmes and articles spreading intolerant views, in the form of hate crimes against the Roma, immigrants, foreign nationals, traditional national minorities and other minority groups, or by bands and at neo-Nazi concerts, which can often take place in public without any repercussions; also urges political parties and movements who exercise a strong influence over the mass media to abstain from hate speech and from the use of defamation against minority groups within the Union”.

Parliament Resolution P7_TA (2013) 0090 of 14 March 2013 on strengthening the fight against racism, xenophobia and hate crime (The European Parliament, 2013), responds to disturbing reports from the European Union Agency for Fundamental Rights (FRA) showing that one person out of four within a minority group was victim of a hate crime but that 90% of these were immigrants or ethnic minority groups that preferred not to report it to the authorities. The Resolution urges all Member States to continue strengthening the fight against hate crimes as well as against discriminatory conducts, and it extols the importance of supporting, promoting and monitoring national integration strategies as well as the need for all citizens to know their rights in terms of protection hate crimes.

More recently, we have seen Parliament Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (The European Parliament, 2014). The document establishes a roadmap to fight against discrimination on grounds of sexual orientation, and to protect the fundamental rights of the LGTBI community. Additionally, it sets horizontal actions to implement the roadmap; general provisions in terms of non-discrimination for employment, education, health care, access to goods and services and specific actions for trans and intersexual actions. In this respect, the Parliament Resolution urges Member States
to apply the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (The European Parliament and the Council, 2012). The Directive 2012/29/EU, or Directive on victims, sets minimum standards for Member States in terms of rights, support and protection of the victims in the whole Union. Thus, according to article 1, the purpose of the Directive is “to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings”. Among the rights of the victims some must be emphasized, such as the right to understand and to be understood in the context of criminal proceedings which means that communication with victims, must be in a clear and accessible language to the victims, that necessary information must be provided, and that the possibility must be provided for the victim to be accompanied by a friend or a family member (article 3). Likewise, the right to receive information from the first contact with a competent authority (article 4); the right of victims when making a complaint (article 5); the right to receive information about their case (article 6); the right to interpretation and translation (article 7); the right to access victim support services (article 8 and 9); and others within criminal proceedings such as the right to safeguards in the context of restorative justice services, the right to reimbursement of expenses, the right to legal aid, and the right to the return of seized property are enshrined.

The Directive sets provision to ensure that victims, particularly hate crimes victims, benefit from the same rights than other citizens regardless their nationality or resident status.

Lastly, in relation to hate speech on the Internet, the Motion for a European Parliament resolution on establishing a common legal definition of hate speech in the EU (The European Parliament, 2017) has been recently published. It proposes the creation of a legal common definition of incitement to hatred considering that the new measures against such conducts through the Internet that encompass an incitement to hatred are not the same in all Member States, and thus do not coincide. The measures affect large digital platforms such as Facebook, Microsoft, Twitter and YouTube, and which have committed
themselves to monitor within 24 hours the notifications of illegal content removal.

In concrete, the Motion declares that the legal definition of hate speech currently differs from State to State, with “a relatively broad definition in Germany and a narrower one in the Czech Republic”.

3.1.6.2 The European Union Agency for Fundamental Rights (FRA)

The European Union Agency for Fundamental Rights is a decentralised EU agency with the objective to provide expert advice in policy- and decision-making to EU institutions and national governments of EU Member States to ensure that fundamental rights are protected within the Union. Among other focal points, the FRA works on discrimination, racism and xenophobia, carrying out its activities by collecting data and information, sharing evidence-based insights and advice with policy- and decision-makers, raising rights awareness and promotes fundamental rights through cutting-edge communications, and engaging with a wide array of diverse stakeholders from the local to international level.

Recently, the FRA published a good practices and measures compendium performed by some Member States to share expertise across the Union. Most of the measures concern principally security forces, criminal justice and civil society organisations since they are considered critical to combat hate crimes.

More recently, the FRA published in 2017 a state of play report of the fundamental rights in Europe. Regarding non-discrimination, it states that Member States remain without unanimously agreeing on the Directive on equal treatment due to reservations from Member States. The report highlights that over the course of 2016 some States raised their concerns regarding the prohibition by some EU States of wearing certain clothes, affecting mostly Muslim women. With respect to this latter issue, the report recalls that the EU and its Treaties and legal

Instruments protect freedom of conscience, thought and religion, as well as freedom of worship to express their beliefs.

The report condemns the fact that racism, xenophobia and intolerance towards refugees, asylum seekers and migrants have increased. Furthermore, it states that Muslims have become recurrent victims of hate crimes after the successive terrorist attacks in European countries. It disapproves that only a few Member States executed national action plans focused on the fight against racial discrimination, racism or xenophobia in 2016, and that those organisations in charge of protecting and encouraging equal treatment suffered in 2016 several budget cuts and staff reduction, and legal modifications which hindered their activities. The fact that migrant communities continued experiencing ethnic discriminatory profiling by security forces after escalations of tension after each terrorist attack deserves special mention.

3.1.6.3 OSCE Office for Democratic Institutions and Human Rights (ODIHR)

The Organization for Security and Co-operation in Europe (OSCE) is composed of 57 participating Member States strongly committed to the fight against discrimination and hatred, promoting security, human rights, national minorities and democratisation among its objectives. The internal OSCE Office for Democratic Institutions and Human Rights (ODIHR), cooperates, inter alia, with other international bodies such as the United Nations Convention on the Elimination of All Forms of Racial Discrimination (UNCERD), the European Commission against Racism and Intolerance (ECRI), the abovementioned European Union Agency for Fundamental Rights (FRA), and the European Monitoring Centre on Racism and Xenophobia. The OSCE Eleventh Meeting of the Ministerial Council of 1 and 2 December 2003, from the OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century, states that “while fully respecting freedom of expression, the OSCE will strive to combat hate crime which can be fuelled by racist, xenophobic and anti-Semitic propaganda on the Internet”, and, accordingly, “encourages all participating States to collect and keep records on reliable information and statistics on hate crimes, including on forms of violent manifestations of racism, xenophobia, discrimination, and anti-Semitism”.

3.2 THE COUNCIL OF EUROPE

3.2.1 Convention for the Protection of Human Rights and Fundamental Freedoms

The Council of Europe was created in 1949 with the purpose of defending human rights and providing common solutions to likewise common society problems such as discrimination of minorities and xenophobia (Aguilar García, et. Al.). In this matter, the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome in 1950 establishes on its article 14 the prohibition of any discrimination. Thus, “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

Subsequently, Protocol No. 12 to the Convention of 4 November 2000 (Council of Europe, 2000) establishes the general prohibition of discrimination. Article 14 of the Convention provides the equality for all people, as it was similarly provided by other international instruments such as the Universal Declaration of Human Rights from the United Nations or the International Covenant on Civil and Political Rights. However, although the right of equality recognised that all people have equal dignity, it does not explicitly provide the prohibition of discrimination, that is, an independent prohibition that criminalises such behaviour is not foreseen. Additionally, the ECRI established that “the protection offered by the CEDH against discrimination must be reinforced with an additional protocol containing a general protection clause against any discrimination on grounds of race, colour, mother tongue, religion or ethnic or national origin”. Accordingly, the ECRI assumed that the recognition of the right of equality neither facilitates nor makes more efficient the removal of racism from society, and to these
effects the recognition of the right to protection against racial discrimination as a fundamental right was essential. Therefore, the 12 Protocol sets the right to protection against discrimination with the following provision:

### General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

### 3.2.2 Convention on Cybercrime, Budapest, 23 November 2001 and Additional Protocol

The Convention (Council of Europe, 2001) was a consequence of the inexorable advance of the digitalisation era. According to its preamble, it was drafted in response to “the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against cybercrime, inter alia, by adopting appropriate legislation and fostering international co-operation”. Thus, it becomes the first international legal framework in the field of offences committed by means of ICT, with the objective to further adopt it to national legislation in a harmonised manner. Furthermore, it establishes important investigative and police and legal cooperation measures. The instrument has three distinct parts: first, cybercrimes (Chapter I); second, measures to be taken at national level (Chapter II); and third, international cooperation (Chapter III). Regarding cybercrime, the Convention sets that Member States shall adopt such legislative and other measures to establish criminal offences under their domestic law the access to the whole or any part of a computer system without right; the interception without right, made by technical means, of non-public transmissions of computer data to, from or within a computer system; the damaging, deletion, deterioration,
alteration or suppression of computer data without right; the serious hindering without right of the functioning of a computer system by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data; the computer-related forgery, and fraud; offences related to child pornography; and offences related to infringements of copyright and related rights. Subsequently, with the generalisation of unlawful use of the ICTs, as already addressed in the analysis of radicalisation through Internet, the Council of Europe adopted in 2003 the Additional Protocol to the Budapest Convention (Council of Europe, 2003) with the objective of criminalising the incitement to hatred on Internet. Thus, the preamble states “the need to harmonise substantive law provisions concerning the fight against racist and xenophobic propaganda”, being “aware that computer systems offer an unprecedented means of facilitating freedom of expression and communication around the globe”, and “concerned, however, by the risk of misuse or abuse of such computer systems to disseminate racist and xenophobic propaganda”, setting provisions for the criminalisation of the following conducts:

1. Dissemination of racist and xenophobic material through computer systems

2. Racist and xenophobic motivated threat

3. Racist and xenophobic motivated insult

4. Denial, gross minimisation, approval or justification of genocide or crimes against humanity

The investigative measures are set on the second part of the Convention:

1. Expedited preservation of stored computer data (article 16). “Each Party shall adopt such legislative and other measures as may be necessary to enable its competent authorities to order or similarly obtain the expeditious preservation of specified computer data, including traffic

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32 Under article 2 of the Protocol, “racist and xenophobic material” means “any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors”.
data, that has been stored by means of a computer system, in particular where there are grounds to believe that the computer data is particularly vulnerable to loss or modification”.

2. Expedited preservation and partial disclosure of traffic data (article 17). “Each Party shall adopt, in respect of traffic data that is to be preserved under Article 16, such legislative and other measures as may be necessary to: a) ensure that such expeditious preservation of traffic data is available regardless of whether one or more service providers were involved in the transmission of that communication; and b) ensure the expeditious disclosure to the Party’s competent authority, or a person designated by that authority, of a sufficient amount of traffic data to enable the Party to identify the service providers and the path through which the communication was transmitted”.

3. Production order (article 18). “Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to order: a) person in its territory to submit specified computer data in that person’s possession or control, which is stored in a computer system or a computer-data storage medium; and b) a service provider offering its services in the territory of the Party to submit subscriber information relating to such services in that service provider’s possession or control”.

4. Search and seizure of stored computer data (article 19). According to this provision, “each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to search or similarly access” a computer system and computer data stored therein, and “a computer-data storage medium in which computer data may be stored”.

5. Real-time collection of traffic data (article 20). The objective of this provision is the collection or record through the application of technical means and compel a service provider to collect or record through the application of technical means and to cooperate with the authorities in the collection or recording of “traffic data, in real-time, associated with specified communications in its territory transmitted by means of a computer system”.
6. Interception of content data (article 21). Likewise, the Parties shall adopt necessary measures to empower its competent authorities to collect or record content data, in real-time, of specified communications in its territory transmitted by means of a computer system.

Lastly, Chapter III sets international cooperation provisions such as extradition; mutual assistance including spontaneous information; procedures pertaining to mutual assistance requests in the absence of applicable international agreements; mutual assistance regarding provisional measures such as expedited preservation of stored computer data, expedited disclosure of preserved traffic data; mutual assistance regarding investigative powers such as accessing of stored computer data, trans-border access to stored computer data with consent or where publicly available; mutual assistance regarding the real-time collection of traffic data; or the mutual assistance regarding the interception of content data.

### 3.2.3 The European Commission against Racism and Intolerance (ECRI)

The European Commission against Racism and Intolerance is an independent human rights body of the Council of Europe focused on the fight against racism, xenophobia, anti-Semitism and intolerance in Europe. Thus, the ECRI elaborates reports and emits recommendations to CoE Member States in this matter. It was founded in 1993 after the first Head of the States and Government Summit of the Council of Europe to fight against the social growing issues of racism and anti-Semitism\(^33\). Since then, the Commission analyses and evaluates the efficiency of every action implemented by all Member States and urges their implementation at local, national and European level, both from a policy-making and a legal perspective. In this regard, the most important work made by ECRI to date is precisely the monitoring of the States, according to which the body monitors every country’s situation in relation to racism and intolerance. Once the situation is analysed, the ECRI

\(^{33}\) See more on: [https://www.coe.int/t/dghl/monitoring/ecri/About/ENG%20Leaflet%20ECRI.pdf](https://www.coe.int/t/dghl/monitoring/ecri/About/ENG%20Leaflet%20ECRI.pdf)
drafts recommendations on how each State can deal with the identified problems, issuing national reports. Such reports are product of specific visits to the countries and a dialogue between its national authorities and the ECRI. The monitoring takes place every five years. Accordingly, the recommendations and annual reports have strong relevance since they are being considered by the European Court for Human Rights itself as legal bases for its decisions. That is the case, for example, of the well-known sentence of the Féret v. Belgium of 16 June 2009, which the Court made use in the legal bases III of the second report on Belgium, 21 March 2000, the third report of 27 January 2004, and the fourth report of 26 May 2009. Particularly important recommendations have emanated from ECRI such as the Recommendation R (97) 20 of CoE’s Committee of the Ministers of 30 October on “hate speech” where it was addressed as “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”. More recently, the General Recommendation No. 15 on combating hate speech adopted on 8 December 2015 which reiterates the concept of hate speech. Accordingly, it is addressed as:

The use of one or more particular forms of expression – namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes “race”, colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation.

Additionally, express reference deserves the ECRI General Policy Recommendation No. 1 of 4 October 1996 on combating racism, xenophobia, antisemitism and intolerance; the ECRI General Policy Recommendation No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level of 13 June 1997; the ECRI General Policy Recommendation No. 3 on combating racism and intolerance against Roma/gypsies of 6 March 1998; the
ECRI General Policy Recommendation No. 4 on national surveys on the experience and perception of discrimination and racism from the point of view of potential victims of 6 March 1998; the ECRI General Policy Recommendation No. 5 on combating intolerance and discrimination against Muslims of 16 March 2000; the ECRI General Policy Recommendation No. 6 on combating the dissemination of racist, xenophobic and anti-Semitic material via the internet of 15 December 2000; the ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination of 13 December 2002; the ECRI General Policy Recommendation No. 8 on combating racism while fighting terrorism of 17 March 2004; the ECRI General Policy Recommendation No. 9 on the fight against anti-Semitism of 25 June 2004; the ECRI General Policy Recommendation No. 10 on combating racism and racial discrimination in and through school education of 15 December 2006; the ECRI General Policy Recommendation No. 11 on combating racism and racial discrimination on policy of 29 June 2007; the ECRI General Policy Recommendation No. 12 on combating racism and racial discrimination in the field of sport of 19 December 2008; the ECRI General Policy Recommendation No. 13 on combating anti-Gypsiesm and discrimination against Roma of 24 June 2011; and the ECRI General Policy Recommendation on combating racism and racial discrimination in employment of 22 June 2012.
3.3 The United Nations

3.3.1 The United Nations Universal Declaration of Human Rights, 10 December 1948

The Universal Declaration of Human Rights was approved on 10 December 1948 by the General Assembly of the United Nations in Paris by Resolution 217 A (III) (UN General Assembly, 1948), constituted as a historic milestone and universal reference in the field of human rights. The Declaration is, in reality, the enshrining of certain human rights that must be ensured and protected around the globe as stated on its preamble. The principle of equality is set as fundamental right of the individual which shall receive coverture and protection by all institutions. Such principle is protected by the following articles:

**Article 1.** All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

**Article 2.** Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

**Article 7.** All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
3.3.2 The United Nations International Convention on the elimination of all forms of racial discrimination of 1965 and the Committee on the elimination of racial discrimination

The Convention supposes the most important international document in terms of racial and ethnic discrimination, based on the principle of equality and dignity from the Universal Declaration of Human Rights and the urgent need to eliminate everywhere on the globe racial discrimination and to protect human dignity. Thus, the document considers that “any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere” (UN General Assembly, 1965). The Convention sets especially important definitions such as racial discrimination itself, provided by article 1 as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. Additionally, article 4 establishes a series of conducts that shall be punishable by each State Party. Accordingly:

a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The absolute prohibition of discrimination is established by article 5 of the Convention, according to which, “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the
right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment* of the rights.

The Declaration is, likewise, a legal instrument which constitutes the foundations as a legal person of the Committee for the elimination of racial discrimination. According to article 8 of the Convention, the Committee shall be composed by eighteen experts with great moral prestige and of recognised solid impartiality, which will be appointed in their personal capacity by States Parties. The Committee’s main function is to monitor the application of the Convention by the States Parties. The States undertake to submit every two years for consideration by the Committee a report on the legislative, judicial, administrative or other measures which they have adopted. Subsequently, the Committee shall report annually “to the General Assembly and may recommendations based on the examination of the reports and information received from the States Parties”.

In accordance with the above, the Committee has issued several recommendations of especial importance over the years, among which the following must be highlighted:

❖ General Recommendation No. 15 on organized violence based on ethnic origin, article 4. It states that, given the concerns about evidences of violence based on ethnic origins, States parties shall penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts

❖ General Recommendation No. 26 related to article 6 of the Convention, which establishes the possibility for hate crime victims to receive an adequate reparation or satisfaction for any damage suffered as a result of such discrimination. The Recommendation states that the extent to which the acts of discriminations and insults
on grounds of racial or ethnic origin affects the perception of the offended individuals and their reputation is often underestimated.

❖ General Recommendation No. 20 of 2005 on discrimination against non-citizens. It raises concerns about unauthorised aliens and those that cannot demonstrate their nationality in the Member State where they live. The Recommendation clarifies that certain civil, political, economic, social and cultural rights “such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons”. Any difference of treatment in terms of citizenship or immigration status constitutes discrimination, establishing thus on the Recommendation itself general measures and protection measures against verbal incitement to racial and violent hatred.

❖ General Recommendation No. 31 of 2005 on the prevention of racial discrimination in the administration and functioning of the criminal justice system. Based on article 6 of the Convention which establishes that States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights, the Recommendation provides a series of general measures and strategies to implement in order to prevent racial discrimination in public administration and in the functioning of penal justice, as well as measures that must be undertaken to prevent discrimination of defendants on grounds of racial or ethnic origins.

❖ General Recommendation No. 34 on racial discrimination against people of African descent. The document expressly recognises the rights of the African descent community and it’s aware “that millions of people of African descent are living in societies in which racial discrimination places them in the lowest positions in social hierarchies”. Hence, the Committee observes that in order to effectively put an end to the structural discrimination suffered by this group of people, especial measures shall be adopted.
3.3.3 The International Covenant on Civil and Political Rights, 16 December 1996

The International Covenant on Civil and Political Rights was adopted by the UN in 1966 and came into force on 1976, when it got a sufficient number of ratifications (Joseph & Castan, 2013). The document contains a long list of civil and political rights derived from the inherent human dignity, and to which all citizens are entitled. Accordingly, a catalogue is established on the basis of that “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights”, as defined in the preamble.

Under such international legal instrument, the prohibition of discrimination and hate crimes is set in several provisions.
Article 4. 1.

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 20.

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 24.1.

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Article 26.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3.3.4  The Convention on the elimination of all forms of discrimination against women, 1979, and the Committee for the elimination of discrimination against women

The Convention (UN General Assembly, 1979) was adopted as an instrument to bring to light all the areas in which women are denied equality with men, acknowledging that “extensive discrimination against women continues to exist”, violating the principles of equality of rights
and respect for human dignity proclaimed by a number of international instruments and documents. In view of this situation, the General Assembly of the United Nations adopted the Convention, together with the term “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field” (article 1). The structure of the Convention revolves around the United Nations requirements to all States Parties to adopt, by all appropriate means and without delay, appropriate measures to ensure the full development and advancement of women (article 3), through legislative and other measures, including sanctions where appropriate under the principle of non-discrimination (article 2). Concretely, the measures must impact on and ensure the participation of women in political and public life of their countries (article 7 and 8); to ensure that the nationality of women depends neither on a marriage to an alien nor to changes made by the husband during marriage (article 9); education (article 10); employment (article 11); access to health care (article 12); economic and social life (article 13); discrimination in rural areas (article 14); and in all matters relating to marriage and family relations (article 16).

Furthermore, as a monitoring Committee on the correct application of the Convention against racial discrimination, the Convention on the elimination of all forms of discrimination against women established the Committee on the elimination of discrimination against women. Accordingly, article 17 provides the legal regime of the Committee, according to which, it shall consist of twenty-three experts of high moral standing and competence in the field covered by the Convention.
3.3.5 The Yogyakarta Principles, 2006

The Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity are the outcome of the meeting that took place in the Indonesian University of Gadjah Mada between 6 and 9 November 2006. A number of experts in human rights from the globe gathered and unanimously adopted them with the purpose of elaborating a battery of legal international principles on sexual orientation, gender identity and international rights. The principles are built up as an ensemble of minimum requirements that all States must comply with in relation to the sexual orientation in response to and because of recurring abuses and violent actions against people on grounds of sexual orientation and gender identity,

which, in line with the preamble, suffer “violence, harassment, discrimination, exclusion, stigmatisation and prejudice” because of their gender identity. Twenty-nine principles are proclaimed: the right to the universal enjoyment of human rights (principle 1); the rights to equality and non-discrimination (principle 2); the right to recognition before the law (principle 3); the right to life (principle 4); the right to security of the person (principle 5); the right to privacy (principle 6); the right to freedom from arbitrary deprivation of liberty (principle 7); the right to a fair trial (principle 8); the right to treatment with humanity while in detention (principle 9); the right to freedom from torture and cruel, inhuman or degrading treatment or punishment (principle 10); the right to protection from all forms of exploitation, sale and trafficking of human beings (principle 11); the right to work (principle 12); the right to social security and to other social protection measures (principle 13); the right to an adequate standard of living (principle 14); the right to adequate housing (principle 15); the right to education (principle 16); the right to the highest attainable standard of health (principle 17); protection from medical abuses (principle 18); the right to freedom of opinion and expression (principle 19); the right to

freedom of peaceful assembly and association (principle 20); the right to freedom of thought, conscience and religion (principle 21); the right to freedom of movement (principle 22); the right to seek asylum (principle 23); the right to found a family (principle 24); the right to participate in public life (principle 25); the right to participate in cultural life (principle 26); the right to promote human rights (principle 27); the right to effective remedies and redress (principle 28); and accountability (principle 29).
4. CONCLUSIONS

Throughout the present report we have been evincing the judicial arsenal currently available internationally in relation to terrorism and hatred, although provisions on terrorism are more developed. Since the 9/11 attacks in the USA international institutions like the European Union, the Council of Europe and the United Nations have set a clear legislative trend, the ultimate goal of which is the efficient fight against terrorism. This focus has been intensified as successive attacks have occurred in different Member States of the European Union. Precisely this search for efficiency in the fight against terrorism has led international instruments to adapt relatively quickly to the evolution of the phenomenon of radicalisation itself. The following characteristic key points of the international legislation are worth highlighting.

1. RESISTANCE VERSUS ALIGNMENT IN TERRORISM LEGISLATION

The definition of terrorism itself has been, from the very beginning, an issue of some contentopn, given the lack of consensus about its conceptualisation and scope. It is true that international instruments have been available since the 60s, but with a broad legislation range. Before 9/11 there existed international legislation on terrorism. This, for example, we find in the framework of the United Nations the Convention of Tokyo from 1963 on Convention on Offences and Certain Other Acts Committed on Board Aircraft; the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970; the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971; the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973; the New York International Convention Against the Taking of Hostages of 1979; and the Vienna-New York Convention on the Physical Protection of Nuclear Material of 1980. However, States were reluctant
to follow international legislation tendencies and cede, in a certain sense, part of their sovereignty related to the fight against terrorism. This situation was also given because until 9/11 “the only terrorist threat known was coming from delimited groups which had specific scenarios, whose members were coming from concrete social circles, and which used to act according to determine pattern of conducts” (Carrasco Durán, 2010, p. 18). But the attacks on the World Trade Center propelled the international community in is entirely to adopt a common commitment, implying a tendency of setting common objectives to efficiently fight against terrorism, since the transnational aspect of the phenomenon does not allow States to achieve it by themselves. Nevertheless, such reactive attitude was adopted only reluctantly even after 9/11. In fact, as analysed in the first chapter, the first European framework on the fight against terrorism (Framework Decision 2002/475/JHA) was poorly transposed into national legislation as stated by the reports of the European Commission evaluating the adoption of legal binding instruments by Member States as provided by article 288 of the Treaty on the Functioning of the European Union. This situation has changed substantially to reflect the realisation that there threat of the phenomena of radicalisation and terrorism, and their materialisation is real, as illustrated by the repeated attacks in Europe over a little more than a decade. Accordingly, new provisions that criminalise more and more behaviours related to terrorism are currently being quickly adapted to national penal codes and as special laws from Member States, which are already aware of the fact that an efficient fight relies on a harmonised and joint response from all States committed to the fight against radicalisation and terrorism. This means that, ultimately, a global threat requires likewise a global response.

2. EXTENSION OF THE CONCEPT OF TERRORISM

One of the fundamental characteristics of the legal evolution is, without a doubt, the extension of the concept of terrorism. The first regulations typified classic crimes of terrorism and those identified with the effective damage of a good. For example, the Decision 2002/475 classified as offences those conducts that, together with a concrete motivation defined
by the Decision, attempt against life, against physical integrity, kidnaping or taking of hostages, massive distructions, unlawful seizure of aircrafts and ships, manufacturing nuclear weapons, explosives, etc., the release of dangerous substances, causing fires, floods or explosions, interfering with or disrupting the supply of water, power or any other fundamental natural resource, and the threatening to commit any of the acts listed. Currently, with the existing framework in the fight against terrorism (Directive 2017/541), not only is considered terrorist act to effectively attempt against people or things, but also the fact of publishing messages on the social networks with certain characteristics; organising or facilitating travel with terrorist purposes; or the fact of usually visit websites that could potentially radicalise the readers. This means the criminalisation of offences against life, against physical integrity, against property, etc., coupled with the terrorist motivation internationally established and defined. Notwithstanding, the state of the situation started to change when the international community realised that radicals and extremists carry out certain activities prior to effectively attempt against essential goods, representing at some point real danger. Thus, it was confirmed that terrorists use Internet as a strategic essential element for their cause, and therefore, to communicate and disseminate their speech, to recruit new supporters and even to train them without the need of being physically present. The international response has been the restriction of freedoms on internet and the attempt to limit to the maximum their activity on cyberspace. Nevertheless, this tendency has reached unsuspected limits, leading to exaggerate figures and the traditional institutions of penal law without precedent. In this way, for example, preparatory acts of preparatory acts, or even attempt of offences which by any means can have harmful effect to any good. In this way, for example, the attempt of recruitment is punished even without requiring any effective result of the conduct which implies an offence. Such criminalisation implies cases like the following: if an extremist tries to radicalise someone, that is, by contacting him (her) through a digital message with the aim of recruiting him (her), even though if the subject does not receive the message, the sender can be charged by the offence of attempt of recruiting. On the other hand, conducts like incitement or public provocation, direct or indirect, can lead to a severe restriction of fundamental liberties, such as
freedom of expression, as it is already happening in some national legislations. In this sense, conduct such hate speech are being classified in the legislations but they are not “incriminated themselves, because they don’t constitute any damage or danger for others’ freedom and can be limited to the exercise of a fundamental right” (Vives Antón, 2018, p. 30). All this constitutes an anomalous way of understanding the criminal law in democratic societies, because it establishes a democratic exceptionality and implies a real criminal law of the enemy (see Miró Llinares, 2005).

La teoría del derecho penal de enemigo fue enunciada en un primer momento por Günter Jakobs para ponerla en contraposición al derecho penal del ciudadano. En este sentido, Jakobs define enemigo como aquel que de forma persistente niega el Derecho y persiste en su comportamiento asocial, en contraposición al ciudadano que viola el Derecho de forma incidental o no reiterada (delito) (Jakobs, 2008). En este caso, la diferencia entre derecho penal del ciudadano y derecho penal del enemigo es que, mientras que el primero castiga al ciudadano por cometer un hecho que atenta contra los intereses jurídicos normativizados, en el derecho penal del enemigo el legislador actúa previniendo, atacando a un sujeto peligroso antes de que cometa el hecho (Jakobs, 2008).

3. CHANGE OF APPROACH (REACTIVE VERSUS PREVENTIVE)

Another tendency emanating from the legislative evolution is the change of approach of international institutions. The first legal instruments used to react to the attacks configuring instruments that punished the conducts directly related to the attacks. However, reacting to such events is necessary but not sufficient to achieve the essential goal of effectively avoiding them to happen. On this account, since the attacks in Madrid in 2004 and in London in 2005 a new set of instruments were elaborated by the European Union, the Council of Europe and the United Nations to provide a preventive response. Thus, institutions addressed how extremist radicalisation leading to serious attacks happens and how it materialises. The criminalisation of conducts that do not fall directly under the category of terrorism, but behaviours related to terrorism as stated by the legal terminology used by legal instruments, represents an attempt
to prevent attacks through the identification of those subjects whose conduct indicates radicalisation which can lead them to commit acts of terrorism. Hence, if a subject trying to radicalise and recruit an individual is intercepted, the specific driver of violent extremism – namely, the recruitment- is preventively eliminated. It happens likewise with the offence of active or passive training. If a person tries to get knowledge on how to commit an attack, and (s)he is intercepted, the person offering training information and material is intercepted as well, thus instantly removing the opportunity of getting trained. Therefore, the prevention passes through the criminalization of these conducts somehow related to radicalisation and terrorism instead of directly reacting against the subject that has already perpetrated the attack.

4. INTERVENTION ON INTERNET AND INVOLVEMENT OF INTERNET SERVICES PROVIDERS (ISP)

The majority of international instruments and documents covering radicalisation reveal that the Internet is a fundamental element used by radicals to get to their objectives at the lowest cost. Extremists use the Internet to communicate, to disseminate their speech, to recruit, to radicalise and to train, among others. The effective transnationality of the phenomenon makes the prosecution of terrorism especially difficult. International institutions, aware of this situation, try to bring the fight against terrorism to Internet. This implies the inclusion of Internet as a site and facilitator of crimes related to terrorist activities, and the creation of legal instruments that enable law enforcement and intelligence agencies to investigate suspected crimes via the Internet. It additionally implies the inclusion of digital services providers, such as Facebook, Twitter, and YouTube in the prosecution process, since they can identify easier criminal conducts happening on their platforms. Thus, they now incur legal obligations such as the blocking and deletion of online illegal content that they are aware of, and the responsibility to inform the competent authorities. There is now further international legislation obliging services providers to facilitate the required technical assistance to discover and investigate such offences, as well as to surrender the relevant information to national authorities.
5. **FUNDAMENTAL RIGHTS VERSUS SECURITY**

As mentioned in the previous section, with the objective of preventing the attacks, international legislation has provided investigatory bodies and intelligence services with stronger investigatory powers, potentially limiting fundamental rights. This is a result of efforts to reach radicalized subjects before they can grow and commit or facilitate the commission of a terrorist attack by others. This implies the interception, for example, of communications and the investigation, of Internet users. Therefore, there occurs a notable impact on fundamental rights such as the right to privacy recognized not only by the majority of democratic legislations but also by the Charter of Fundamental Rights of the European Union. As stated, certain liberties have been restricted leading the European Court of Human Rights to reject some documents in force, for example, the Directive 2006/24/EC of the European Parliament and the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, rejected on 2014. That Directive harmonised the provisions related to data storage generated or treated by services providers with the aim of making them available for the prevention, investigation, detection and prosecution of serious crimes. The Court rejected the Directive because the information that services providers were obliged to store restricted the fundamental right of private life and privacy of communications, without sufficient guarantees that the intrusion of the investigatory powers in people’s personal life would be limited to the strictly necessary. This is just an example, but indeed we are facing increasingly new regulations that intercept communications and that virtually undermine the right to intimacy and the right to privacy of communications (Argomaniz, 2015). That is the case of the Investigatory Powers Act 2016 of United Kingdom, where intelligence services and investigatory bodies are authorized to effectuate massive interceptions, receiving the document the name of Snooper’s Chart. Such tendency, classified
by International Amnesty as “vigilant States”\textsuperscript{37} has become more in the general principle or tendency instead of being an exception to the fundamental rights, fact that clearly remains questionable from a legal point of view. As stated by Brown & Korff (2009), the right to privacy and non-discrimination are being challenged by the enhancement of terrorist suspects surveillance. Concretely, they express that:

Even where ‘data mining’ and ‘profiling’ contributes to the apprehension of terrorists, there will always be a high proportion of ‘false negatives’ – real terrorists that are not identified as such. We are giving up freedom without gaining security. In the process, all of us are increasingly placed under general, precautionary mass surveillance, with comprehensive data being captured on our activities. The European surveillance society is developing in a profoundly undemocratic way. (p. 132)

REFERENCES


democráticos antes y después del 11 de septiembre de 2001. 
*Cuadernos de Política Criminal, 87.*


Spanish Goverment (2005). Treaty between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxemburg, the Kingdom of the Netherlands and the Republic of Austria concerning the deepening of cross-border cooperation, in particular in the fight against terrorism, cross-border crime and illegal migration. Available on: https://www.boe.es/buscar/doc.php?id=BOE-A-2006-22583


