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Legal aspects of combating terrorism in the Polish legal system against the background of challenges shaped by European legislation

Abstract

The article deals with the legal aspects of the fight against terrorism in the national legal system in the context of the challenges shaped by European legislation. The analysed issue is interesting due to the lack of broader and current analyses conducted in the field of legal sciences, devoted to the presentation and explication of legislation covering the subject matter of the fight against terrorism. This study is an attempt to fill this research gap.

In order to provide a comprehensive overview of the topic and to achieve the objectives set out in the article, the study is divided into six main parts. In the introduction, the thesis and its objectives are outlined, then sequentially: an analysis of the formation of legal regulations of domestic law aimed at counter-terrorism is made; the importance of the Act on anti-terrorist activities in the normative system of counter-terrorism in Poland is discussed, taking into account the perspective and experience of five years of its implementation; the current legal status of the European Union in the area of terrorism is presented; the perspectives and regulatory challenges of Polish law in the background of legislative activities of EU bodies are described; the considerations carried out are summarized, outlining the perspectives and regulatory challenges facing the domestic legislator in the background of the directions of the projected legislative solutions in the European Union.

Keywords:

Polish anti-terrorist
legislation,
European
anti-terrorist
legislation,
Act on anti-
terrorist activities,
anti-terrorism,
fight against
terrorism

Introduction

In legal doctrine, as a result of the analysis of the types and scope of legal solutions adopted in selected countries and targeted at combating the phenomenon of terrorism, two main models are identified, i.e. the so-called formal anti-terrorist legislation and substantive anti-terrorist legislation. As P. Chomentowski points out, (...) *in the first case, we are talking about states that have one or more legislative acts in their legal system, which directly and exclusively concern the whole area of the fight against terrorism. The second case is that of a whole system of provisions on the procedures and means used in the fight against terrorism, scattered throughout various laws*¹.

Taking this dualistic division of counter-terrorism regulations as a starting point, it should be pointed out that the primary purpose of this article is to attempt a synthetic description of the scope of regulations that make up the Polish anti-terrorism system against the background of the changes that occurred in it due to the adoption of the Act of 10 June 2016 on anti-terrorist activities, which de jure replaced the material model with a formal model. However, the discussion of these regulations is not possible without reference to European Union legislation, which, as in the case of EU regulations, by the effect of direct applicability co-creates the national system or, as in the case of directives, sets the direction of national legislative actions. Finally, a reference to the legislative sources of the EU is necessary in order to grasp the ongoing or planned changes in these regulations, the scope of which increasingly touches upon the issue of threats to state security called “asymmetric” or “hybrid”. The discussion of these issues will be devoted to individual parts of this study.

Historical background

As emphasised by M. Gołaszewska, (...) *the term ‘terrorism’ has not been legally defined in the Polish legal system. (...) it is rather a term of a scientific*

¹ P. Chomentowski, *Polski system antyterrorystyczny. Prawno-organizacyjne kierunki ewolucji* (Eng. Polish anti-terrorist system. Legal and organisational directions of evolution), Warszawa 2014, p. 47.

*nature, depicting a state of social threat caused by an act of a terrorist nature*². In view of the above, it should be noted that the problem of terrorism in the domestic legal system was addressed by the legislator relatively late, as only by the Act of 27 September 2002³. It was not until the Act of 27 September 2002, which amended the *Act of 16 November 2000 on counteracting the bringing into financial circulation of property values originating from illegal or undisclosed sources*⁴ (as of 1 December 2002), that it was supplemented with the phrase “and on counteracting financing of terrorism”. As it was indicated in the justification to the draft amending act:

(...) the proposed change in the title of the Act is related to the fact that the subject project covers the issue of counteracting the financing of terrorism. The introduction of regulations relating to this issue is one of the elements aimed at implementing the provisions of UN Security Council Resolution 1373 (2001) on combating international terrorism and the recommendations of the Financial Action Task Force on Money Laundering operating under the auspices of the OECD (FATF). The proposed solutions only relate to the issue of the General Inspector passing on to the obliged institutions information on persons who are reasonably suspected of aiding or participating in the perpetration of terrorist acts and create the possibility of initiating a procedure to block funds held in an account⁵.

This Act thus introduced the first *quasi* definition of “terrorism” into the Polish legal system, recognising as “terrorist acts” offences against

² M. Gołaszewska, *Zadania ABW w zakresie zwalczania zagrożeń godzących w bezpieczeństwo wewnętrzne państwa i jego porządek konstytucyjny* (Eng. Tasks of the ABW in combating threats to the state’s internal security and constitutional order), in: *Prawne aspekty funkcjonowania służb specjalnych na przykładzie Agencji Bezpieczeństwa Wewnętrznego*, P. Burczaniuk (ed.), Warszawa 2021, pp. 46-47.

³ *Act of 27 September 2002 amending the Act on counteracting the introduction into financial circulation of property values originating from illegal or undisclosed sources* (Journal of Laws of 2002, no. 180 item 1500).

⁴ The original text was published in the Journal of Laws of 2000, No. 116, item 1216.

⁵ *Explanatory Memorandum to the Government’s Draft Act on amending the Act on counteracting the introduction into financial circulation of property values originating from illegal or undisclosed sources*, <http://orka.sejm.gov.pl/proc4.nsf/opisy/338.htm> [accessed: 22 XI 2021].

peace, humanity and war crimes, offences against public security and offences under Articles 134 and 136 of the *Act of 6 June 1997 - Penal Code*⁶, hereinafter referred to as the “Penal Code”. This definition was shaped objectively, referring to specific types of prohibited acts covered by the Penal Code, which, significantly, did not define the concept of a terrorist offence at that time.

In the substantive criminal law, changes in this respect were introduced by the legislator only in 2004, when by virtue of the Act of 16 April 2004⁷ the Penal Code was supplemented from 1 May 2004 with the definition of a terrorist offence, understood as a prohibited act punishable by imprisonment of at least 5 years, committed with the aim of: 1) seriously intimidating a number of persons, 2) forcing a public authority of the Republic of Poland or another state or an authority of an international organisation to undertake or abandon certain actions, 3) causing serious disturbances in the system or economy of the Republic of Poland, another state or an international organisation - as well as a threat to commit such an act. Furthermore, changes have been introduced to the wording of Article 258 of the said Code which penalizes participation in an organized criminal group, extending it to a group or association aiming at committing a terrorist offence, differentiating responsibility depending on the involvement, i.e. establishment, leadership or participation in such a group. As indicated in the explanatory memorandum to the amending act, it was aimed at:

(...) the adaptation of Polish law to the requirements of the legal instruments of the European Union, adopted in 2001-2002, under the so-called ‘new acquis’. The Framework Decision of 13 June 2002 on combating terrorism obliges Member States to adopt a uniform definition of terrorist offences. The aim here is not merely to achieve a theoretical and systemic effect. The fact that an offence is classified as a terrorist offence has the effect of increasing the penalty for that offence⁸.

⁶ Current wording of the Act published in Journal of Laws of 2020, item 1444.

⁷ *Act of 16 April 2004 amending the Act - Penal Code and certain other acts* (Journal of Laws of 2004, No. 93, item 889).

⁸ *Explanatory Memorandum to the Government Draft Act on amending the Act - Penal Code and some other acts*, <http://orka.sejm.gov.pl/proc4.nsf/opisy/2407.htm> [accessed: 22 XI 2021].

Due to the fact that Member States were obliged to implement the legal solutions provided for in the above-mentioned Framework Decision by the end of 2002, this translated into the necessity of their adoption by Poland upon accession to the Union.

As T. Batory points out, (...) *when decoding offences of a terrorist nature on the basis of the provisions of the Penal Code, taking into account the typification of offences in the special part of this Code, it should be indicated that the following offences are involved: Art. 118 (Extermination), Art. 118a (Assassination against the population), Art. 119 (Violence and unlawful threat), Art. 120 (Means of mass destruction), Arts. 127 and 128 (Coup d'état), Art. 134 (Attempt on the life of the President), Art. 140 (Terrorist attack), Art. 148 (Assassination), Art. 163 (Causing dangerous events), Art. 164 (Imminent danger), Art. 165 (Other dangers), Art. 165a (Financing a terrorist crime), Art. 166 (Piracy), Art. 167 (Dangerous devices or substances), Art. 170 (Maritime robbery), Art. 173 (Catastrophe), Art. 174 (Danger of catastrophe), Art. 252 (Taking hostage), Art. 255a (Dissemination of content which may facilitate the commission of a criminal offence), Art. 258 § 2 and § 4 (Organised group and criminal association), Art. 259a (Crossing the border of the Republic of Poland to commit a terrorist offence)*⁹.

On the basis of the analysis of the amendments to the two Acts mentioned above, a basic conclusion should be drawn, that the introduction of the problem of combating terrorism into the national legislation was not the result of internal analyses and legislative proposals, but a direct consequence of the need to adapt the Polish legal system to the requirements arising from membership in the United Nations and the ongoing process of integration with the European Union.

In this context, a similar character is acquired by a major reform¹⁰ of the system of counteracting the use of the financial system for

⁹ T. Batory, *Zadania ABW w zakresie rozpoznawania, zapobiegania i wykrywania przestępstw* (Eng. Tasks of the ABW in the area of identification, prevention and detection of offences), in: *Prawne aspekty funkcjonowania służb specjalnych na przykładzie Agencji Bezpieczeństwa Wewnętrznego*, P. Burczaniuk (ed.), Warszawa 2021, pp. 73-74.

¹⁰ Amended by the Act of 25 June 2009 amending the Act on counteracting the introduction into financial circulation of property values originating from illegal or undisclosed sources and counteracting the financing of terrorism, and amending certain other acts (Journal of Laws of 2009, No. 166, item 1317).

the purpose of money laundering and terrorist financing, carried out in 2009, taking into account in the national legal regulations the requirements introduced by Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005¹¹ and Commission Directive 2006/70/EC of 1 August 2006 establishing implementing measures for Directive 2005/60/EC¹². Pursuant to this reform, in the first of the analysed Acts, the definition of the term “terrorist act” was repealed and the term “financing of terrorism” was introduced as a prohibited act - introduced as a new one - in Article 165a of the Penal Code. As indicated in the explanatory memorandum to the reform law, (...) *the requirement to criminalize the financing of terrorism is provided for in the International Convention for the Suppression of the Financing of Terrorism, which has been ratified by Poland (...). The issue of terrorist financing is also addressed by Directive 2005/60/EC. In this respect, the above regulation is not only aimed at full implementation of the Directive, but also at unifying the application of international standards*¹³. Analysing the changes in the branch of criminal law aimed at counteracting terrorism, it should be noted that by virtue of the amendment¹⁴ which entered into force on 14 November 2011, the legislator added to the Penal Code, in Article 255a, a new type of offence aimed at disseminating content which may facilitate the commission of an offence of a terrorist nature. The introduction of these changes, as before, resulted from the need to implement EU regulations, in this case Council Framework Decision 2008/919/JHA of 21 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, extending the catalogue of “offences connected with terrorist activity” to include the offences of incitement to commit a terrorist offence, recruitment for terrorism and training for terrorism.

¹¹ OJ EU L 309/13 of 24 XI 2005.

¹² OJ EU L 214/29 of 4 VIII 2006.

¹³ *Explanatory Memorandum to the Government's Draft Act on amending the Act on counteracting the introduction into financial circulation of property values originating from illegal or undisclosed sources and on counteracting the financing of terrorism and amending some other laws*, <http://orka.sejm.gov.pl/proc6.nsf/opisy/1660.htm> [accessed: 22 XI 2021].

¹⁴ *Act of 29 July 2011 amending the Act - Penal Code, the Act - Penal Procedure Code and the Act on Liability of Collective Entities for Acts Prohibited under Penalty* (Journal of Laws of 2011, No. 191, item 113).

In addition to the two legislative acts analysed above, an important place in the national legal regulations on the phenomenon of terrorism was taken by the Act on crisis management, adopted on 26 April 2007, which defined the authorities competent in matters of crisis management and their tasks, including in the prevention, prevention and elimination of consequences of terrorist events. Importantly, by virtue of the amendment¹⁵ of this Act, which entered into force on 19 September 2009, the scope of its legal definitions was extended to include the notion of an ‘event of a terrorist nature’, under which a situation arising as a result of an act specified in Article 115 § 20 of the Penal Code or a threat of such an act, which could lead to a crisis situation, was understood. In addition, Article 12a was added to the Act, which regulated cooperation in preventing, preventing and removing the effects of terrorist incidents between public administration bodies and owners and subsidiaries of critical infrastructure facilities, installations or equipment. Under this provision, the role of government administration bodies competent in recognising, preventing and combating threats was emphasised, including the special role of the Head of the Internal Security Agency, who was given statutory authority to give recommendations on the protection of critical infrastructure to bodies and entities threatened by acts of a terrorist nature, as well as to transfer to those entities the necessary information to counteract such threats, also obtained in the course of operational activities¹⁶.

It should be added that the issue of terrorist threats was also noticeably taken up by the legislator in the regulations on states of emergency. The *Act on the state of emergency of 21 June 2002*¹⁷ in its original wording, in art. 2 indicated that the justification for the request to the President of the Republic of Poland to impose a state of emergency was the occurrence of a situation of a particular threat to the constitutional system of the state, security of citizens or public order, including those caused by terrorist actions, which

¹⁵ Amended by the *Act of 17 July 2009 amending the Act on crisis management* (Journal of Laws of 2009, No. 131, item 1076).

¹⁶ Cf. *Explanatory Memorandum to the Government's Draft Act on Amendments to the Crisis Management Act*, <http://orka.sejm.gov.pl/proc6.nsf/opisy/1699.htm> [accessed: 22 XI 2021].

¹⁷ Original text published in Journal of Laws of 2002, No. 113, item 985.

could not be removed by the use of ordinary constitutional means. Similarly, the *Act of 29 August 2002 on martial law and on the competences of the Commander-in-Chief of the Armed Forces and the principles of his subordination to the constitutional bodies of the Republic of Poland*¹⁸ in Article 2 of its original version provided the basis for the President of the Republic of Poland to introduce, at the request of the Council of Ministers, martial law in a part or in the entire territory of the state in the event of an external threat to the state, including one caused by terrorist actions, an armed attack on the territory of the Republic of Poland or when an international agreement imposes an obligation of joint defence against aggression.

The subject matter of terrorist threats is also important in the constitutional legislation of the legal protection authorities, in particular in the *Act on the Police of 6 April 1990*, the *Act on the Border Guard of 12 October 1990*, the *Act on the Internal Security Agency and the Foreign Intelligence Agency of 24 May 2002*, hereinafter referred to as the “Act on the ABW and the AW”, as well as in other acts of law covering selected aspects concerning a given type of threats¹⁹, approaching the problem of counter-terrorist activities from the perspective of the scope of tasks entrusted to a given service and the powers granted to it, as well as the principles of cooperation and exchange of information.

Detailed operating procedures, in turn, were included in internally binding legal acts and more informal documents created both at the level of the Council of Ministers or individual ministries and services and institutions, as well as in agreements of an administrative nature between them. Significant tasks related, inter alia, to the development of draft standards and procedures in the field of combating terrorism and applying to relevant ministers in order to take legislative action to improve the methods and forms of combating terrorism have been performed by the existing since 25 October 2006 Interministerial Team for Terrorist Threats²⁰, acting as an auxiliary body of the Council of Ministers.

¹⁸ Original text published in Journal of Laws of 2002, No. 156, item 1301.

¹⁹ A detailed list of basic laws regulating the scope of tasks performed with regard to particular types of terrorist threats by relevant entities was attached as Annex No. 1 to the *National Anti-Terrorist Programme for 2015-2019* (MP of 2014, item 1218).

²⁰ Appointed by *Order No. 162 of the Prime Minister of 25 October 2006 on the creation of the Interministerial Team for Terrorist Threats*.

An analysis of the historical development of national legislation aimed at countering terrorist threats, as outlined above, allows the conclusion that it has followed a substantive model, creating a system of provisions scattered across various laws and other normative and non-normative acts.

It should be pointed out that the described development of legal regulations of the anti-terrorist system was accompanied by a long-standing debate, (...) *whether counter-terrorism can constitute a statutory subject matter, and if so, whether counteracting this threat to security can be included in one comprehensive law*²¹. Among the attempts to develop such a law, attention should be drawn to the work of the Task Force for Systematising National Regulations and Legal Solutions Relating to Counter-Terrorism²², which has developed a preliminary draft of assumptions for a draft law on the collection and processing of information for the purpose of identifying threats of a terrorist nature. Taking into account the recommendations of this Team, a Task Force was appointed to develop detailed assumptions for the draft act on identifying, preventing and combating terrorism²³. *Within this body, however, it was not possible to develop the envisaged objectives, and at the political level it was decided to terminate work in this area*²⁴.

Due to the failure of legislative activities of the above-mentioned Groups, work began on a strategic document of a non-normative nature, relating to the prevention of and response to terrorist threats, which resulted in the adoption of the *National Anti-Terrorism*

²¹ K. Indeck, P. Potejko, *Wstęp* (Eng. Introduction), in: *Terroryzm. Materia ustawowa?*, K. Indeck, P. Potejko (ed.), Warszawa 2009, p. 4.

²² Appointed by *Decision No. 5 of the Chairman of the Interministerial Team for Terrorist Threats of 10 June 2008*.

²³ Appointed by *Decision No. 6 of the Chairman of the Interministerial Team for Terrorist Threats of 12 January 2009*.

²⁴ M. Cichomski, M. Horoszko, I. Idzikowska, *Przygotowanie do przejmowania kontroli nad zdarzeniami o charakterze terrorystycznym oraz reagowanie w przypadku wystąpienia takich zdarzeń w świetle rozwiązania ustawy o działaniach antyterrorystycznych – w kontekście zadań resortu spraw wewnętrznych* (Eng. Preparing to take control over terrorist events and reacting in case of such events in the light of the solution of the act on anti-terrorist activities - in the context of the tasks of the ministry of internal affairs), in: *Polska ustawa antyterrorystyczna – odpowiedź na zagrożenia współczesnym terroryzmem*, W. Zubrzycki, K. Jałoszyński, A. Babiński (ed.), Szczytno 2016, p. 280.

*Programme for 2015-2019*²⁵, which presents in particular the diagnosis of the phenomenon of terrorism and the anti-terrorist system of the Republic of Poland, the main objective and specific objectives of the programme and the mechanisms for its implementation.

Another decision to undertake work on a law comprehensively regulating the issues of conducting anti-terrorist activities and cooperation between authorities competent to conduct such activities was taken on 2 December 2015 at a meeting of the Interministerial Team for Terrorist Threats, while the draft developed by the Ministry of Interior and Administration in cooperation with the Internal Security Agency began government legislative work in April 2016. The draft law, which was finally adopted on 10 June 2016, changing the model of anti-terrorist legislation from a material model to a formal model, took into account the experience gathered by the teams working in 2008-2009 and created in connection with the functioning of the National Anti-Terrorist Programme.

The special significance of the Act on anti-terrorist activities in the normative system of counter-terrorism in Poland

The Act on anti-terrorist activities²⁶ entered into force on 2 July 2016, just before the summit of the North Atlantic Alliance member states taking place on 8-9 July 2016 in Warsaw and the World Youth Day scheduled for 26-31 July 2016. World Youth Day in Krakow, which events - as was often pointed out during legislative work - influenced the acceleration of work on the Act.

As is indicated in the doctrine:

(...) after many years of a kind of 'legal chaos' in anti-terrorist activities - also in Poland - the need to strengthen the tools for counteracting and combating terrorist threats, as well as for responding to these threats, was perceived. (...) For many years, experts dealing with public security have pointed out that the Polish services in the event of an attack do not act as quickly

²⁵ Resolution 252 of 9 December 2014 on the "National Anti-Terrorism Programme for 2015-2019" (MP of 2014, item 1218).

²⁶ Original text was published in Journal of Laws 2016, item 904.

and efficiently as their counterparts in London, Paris or Brussels. The reason for this was the lack of clear rules and procedures for responsibility for a given area of activity and the resulting chaos and dilution of responsibility²⁷.

In order to counteract this, the Polish legislator passed a law whose primary objective became:

(...) to increase the effectiveness of the Polish anti-terrorist system, and thus increase the security of all citizens of the Republic of Poland, by:

- 1) strengthening the mechanisms for coordination of activities;
- 2) clarifying the tasks of individual services and bodies and the principles of cooperation between them;
- 3) ensuring the possibility of effective action in the event of a suspicion of a crime of a terrorist nature, including in the area of preparatory proceedings
- 4) providing response mechanisms adequate to the type of threats occurring;
- 5) adapting criminal provisions to the new types of terrorist threats²⁸.

As was clearly emphasised in the justification to the draft law:

(...) the regulation has the character of integrating the activities of the entities of the Polish anti-terrorist system with a clear indication of responsibility in individual areas. Application of the systemic approach to the problem of terrorist threats in the Act will allow for using the potential of all services, bodies and institutions with statutory authority to carry out anti-terrorist actions. The regulation will also have a direct impact on the speed

²⁷ A. Tyburska, B. Jewartowski, *Ustawa antyterrorystyczna wobec zjawiska współczesnego terroryzmu* (Eng. The Act on anti-terrorist activities and the phenomenon of contemporary terrorism), in: *Polska ustawa antyterrorystyczna – odpowiedź na zagrożenia współczesnym terroryzmem*, W. Zubrzycki, K. Jałoszyński, A. Babiński (ed.), Szczytno 2016, p. 263.

²⁸ *Explanatory Memorandum to the Government's Draft Act on Anti-Terrorist Actions and Amendments to Certain Other Laws*, <https://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=516> [accessed: 24 XI 2021].

and correctness of the decision-making process at the strategic level²⁹.

Structurally, the Act has been divided into 7 chapters. Chapter 1 contains the most important legal definitions of such notions for the functioning of the Act as:

- “counter-terrorist activities”, understood as activities of public administration bodies consisting in prevention of terrorist events, preparation for taking control over them by means of planned undertakings, response in case of occurrence of such events and removal of their consequences, including restoration of resources intended for response to them (Article 2, item 1 of the Act);
- “counter-terrorist actions”, understood as actions against perpetrators, persons preparing or assisting in the perpetration of a terrorist offence referred to in Article 115 § 20 of the Penal Code, conducted in order to eliminate the direct threat to life, health or freedom of persons or property with the use of specialised forces and resources and specialised tactics of action (Article 2, item 2 of the Act);
- “place of a terrorist event”, understood as the open or enclosed space in which a terrorist event has occurred or in which its effect has occurred or is expected to occur, and the space in which threats related to a terrorist event exist (Article 2, item 6 of the Act)
- “terrorist event”, understood as a situation that is suspected to have arisen as a result of a terrorist offence as referred to in Article 115(20) of the Penal Code, or a threat of such an offence.

The main substantive content of the Act is contained in Chapters 2 and 4, which are structurally based on the separation of two main stages of undertaking counter-terrorist activities. The first of them, regulated in chapter 2, is the stage of prevention of terrorist events, in which responsibility and a coordinating role is assigned to the Head of the Internal Security Agency. As essential elements of the activities of this stage, the legislator considered firstly, imposing an obligation on public administration bodies, owners

²⁹ Ibid.

and possessors of facilities, installations, devices of the infrastructure of public administration or critical infrastructure - to cooperate with bodies, services and institutions competent in matters of security and crisis management in the performance of anti-terrorist activities, and in particular to immediately provide the Head of the Internal Security Agency with information concerning threats of a terrorist nature to the infrastructure of public administration or critical infrastructure in their possession, including threats to the functioning of energy, water and sewage systems and networks, as well as heating systems and data communications systems important from the point of view of national security. At the same time, the Head of the ABW received a number of new powers, including in particular:

- issuing orders to authorities and entities which are endangered by these events, aiming at counteracting the threats, their removal or minimisation, as well as providing them with information necessary for achieving this goal (Art. 4 of the Act);
- coordination of analytical and information activities undertaken by special services and coordination of the exchange of information (its collection, processing and analysis) provided by the Police, Border Guard, the Marshal's Guard, the State Protection Service, the State Fire Department, the General Inspector of Financial Information, the National Revenue Administration, the Military Police and the Government Centre for Security, concerning events of a terrorist nature and data on persons connected with terrorist activities, which are classified in accordance with the so-called catalogue of incidents of a terrorist nature, specified in the *Regulation of the Minister of Internal Affairs and Administration of 22 July 2016 on the catalogue of incidents of a terrorist nature*³⁰ (Art. 5 of the Act);
- coordination of operational and exploratory activities concerning incidents of a terrorist nature, undertaken by special services and the Police, Border Guard, National Revenue Administration and Military Police, as well as issuing recommendations to these services aimed at removing or minimising the terrorist threat that has occurred (Art. 8 of the Act);

³⁰ Journal of Laws 2017, item 1517, as amended.

- maintaining a list of persons connected with terrorist activities and providing information from that list, also in the form of current analyses of the state of the threat of a terrorist event (Art. 6 of the Act)
- managing covert operations with regard to foreigners in the scope of obtaining and recording the contents of conversations conducted with the use of technical means, images or sounds of persons from premises, means of transport or places other than public places, the contents of correspondence and data contained on computer data carriers, telecommunication terminal equipment, information and data communications systems (Art. 9 of the Act)
- free access to data and information collected in public registers and records, as well as to images of events recorded by image-recording devices placed in public premises, along public roads and other public places (Art. 11 of the Act)
- empowering officers of the Internal Security Agency, the Police and the Border Guard to take fingerprints, record facial images and collect DNA material (Art. 10 of the Act).

Moreover, the Act introduces solutions facilitating secondment of employees or officers of other special services, as well as the Police, the Border Guard, the Marshal's Guard, the State Protection Service, the State Fire Service, the General Inspector of Financial Information, the National Revenue Administration, the Military Police and the Government Centre for Security to the ABW, which is of utmost importance from the perspective of organisation and operation of the Counter-Terrorism Centre of the ABW³¹, i.e. the statutory organisational unit of the ABW, responsible for recognising terrorist threats and performing its tasks in close cooperation with other state services and institutions and international organisations³².

It should be added that the Act introduced, in Chapter 3, the possibility for the Prime Minister to introduce one of the four alert levels and CRP alert levels, which are characterised by the value of universally applicable information directed, in addition to bodies,

³¹ Order No. 163 of the Prime Minister of 26 September 2018 on granting the statute of the Internal Security Agency (MP of 2018, item 927).

³² Cf. *Zwalczanie terroryzmu* (Eng. Combating Terrorism), <https://www.abw.gov.pl/pl/zadania/zwalczanie-terroryzmu/5,Zwalczanie-terroryzmu.html> [accessed 24 XI 2021].

services and institutions, also to other organisational units and society. This system has been largely transposed from the previously applicable Annex No. 1 to the *Order No. 18 of the Prime Minister of 2 March 2016 on the list of undertakings and procedures of the crisis management system*³³. *The use of a catalogue of alert degrees results from Poland's obligations as a member of the North Atlantic Treaty Organisation (NATO)*³⁴.

The second stage of undertaking counter-terrorist activities, regulated in Chapter 4 of the Act, was considered to be the stage involving preparation for taking control of terrorist events by means of planned undertakings, response in the event of the occurrence of such events and restoration of resources intended for responding to such events, in which responsibility and coordination role was assigned to the minister in charge of internal affairs. The legislator defined the notion of a person in charge of counter-terrorist activities undertaken by competent services or bodies within the framework of their statutory competence on the place of an event of a terrorist nature, who becomes a representative of the Police Commander-in-Chief (or a representative of the Minister of National Defence - in the case of an event on the territory of military areas). The leader of anti-terrorist activities so appointed has gained the right, when justified by the situation on the site of an event of a terrorist nature, to, inter alia ordering the evacuation of persons or property from the place of a terrorist event and its surroundings to a designated place, facility or area, and stopping or limiting vehicle traffic or rail traffic in the place of a terrorist event and its surroundings, or demanding free use of real estate or free takeover for use of movable property, including objects and equipment, or demanding assistance from institutions, organisations, entrepreneurs and natural persons or giving instructions to them. Furthermore, within this stage, the Act has established the possibility of prohibiting gatherings or mass events in the area or facility covered by the alert level, on the principles laid down in Article 21. The legislator has also provided for the possibility of using the Armed Forces of the Republic of Poland to assist police units in the event of the introduction of the third or fourth alert level, on the principles laid down in Article 22. Special use of firearms means the possibility to use firearms against a person

³³ MP of 2016, item 233.

³⁴ *Explanatory Memorandum to the Government's Draft Act on Anti-Terrorist Actions and Amendments to Certain Other Laws*, <https://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=516> [accessed: 24 XI 2021].

carrying out an attack or taking or holding a hostage, which may result in death or a direct threat to life or health of this person if it is necessary to counteract a direct, unlawful and violent attack on human life or health or to release a hostage and the use of firearms in a way causing the least possible harm is insufficient and counteracting such an attack or releasing a hostage in another way is impossible.

In Chapter 5 of the Act, the legislator introduced special provisions concerning the pre-trial stage of criminal proceedings, concerning the special mode of performing procedural actions, searching premises or detaining a person suspected of terrorist offences, as well as drafting a decision on presenting charges and ordering pre-trial detention.

The Act also introduced numerous changes in the competences and pragmatic provisions of legal protection bodies, which are mainly a consequence of the directional solutions introduced in the Act based on the separation of two main stages of undertaking anti-terrorist activities. In particular, it should be noted that as part of these changes, a new type of offence was added to the Penal Code, by means of Article 259a, in the form of an offence of crossing the border of the Republic of Poland in order to commit a terrorist offence and, by means of Article 259b, the institution of extraordinary mitigation of punishment or conditional suspension of the execution of punishment in relation to the perpetrator of the above offence who voluntarily abandoned the commission of, inter alia, a terrorist offence³⁵. Furthermore, by virtue of amendment provisions included in the Act, the Act on the ABW and the AW has been substantially amended, i.a:

- by extending the ABW competence by identification, prevention and detection of threats to the security of information and communication systems vital for the continuity of the functioning of the state, as specified in Art. 5 sec. 1 item 2a of the ABW and the AW Act;
- by introducing the ABW's authorisation to conduct the so-called secret cooperation with a perpetrator of an espionage offence or a suspect of a terrorist offence;

³⁵ The wording of Article 259a and Article 259b was amended as of 22 June 2021 by virtue of Article 1, point 2 of the *Act of 20 April 2021 amending the Act - Penal Code and some other acts* (Journal of Laws of 2021, item 1023). They removed the phrase “on the territory of another state” and changed the penalty for the offence under Article 259a to imprisonment from 3 months to 5 years.

- by giving the ABW the power to access bank secrecy (Art. 34a of the Act on the ABW and the AW);
- by adding a series of ABW powers in the area of information and communication security, i.e:
 - a) assessing the security of ICT systems (Article 32a of the ABW and the AW Act);
 - b) providing, at the request of the Head of the ABW, information on the construction, functioning and principles of operating ICT systems by the entities referred to in art. 5 sec. 1 item 2a of the ABW and AW Act (art. 32b of the ABW and the AW Act);
 - c) blocking the availability of specified IT data or IT services in the ICT system, connected with an event of a terrorist nature (Article 32c of the ABW and the AW Act);
 - d) keeping of a register of events violating the security of IT systems (Article 32d of the ABW and the AW Act);
 - e) issuing recommendations by the Head of the ABW with a view to improving the security level of IT systems (art. 32e of the ABW and the AW Act).

It should be pointed out that since the date of enactment of the Act on anti-terrorist activities, it has been amended six times, and the amendments were aimed primarily at adjusting it to reorganisation and changes in individual services.

The Act on anti-terrorist activities shaped in this way has received a positive reception and international evaluation, including, among others, being presented in 2018 by Jukka Savolainen, Director of Resilience at the European Centre of Excellence against Hybrid Threats in Helsinki (Hybrid CoE), as an exemplary case in terms of legislative solutions that can serve as a model solution and make an important contribution to the development of national legislation of EU and NATO countries in the context of “legal resilience” to hybrid threats. *Undoubtedly, positive evaluations of the Act on anti-terrorist activities on international forums and its impact on the shaping of European legislation is an undoubted success and a reason for satisfaction for the authors of the Act*³⁶.

Summing up the description of legal solutions introduced by the Act on anti-terrorist activities, it should be emphasised once

³⁶ S. Żaryn, *Polska antyterrorystycznym wzorem* (Eng. Poland as an anti-terrorist model), Portalwgospodarce.pl, <https://wgospodarce.pl/opinie/58189-polska-antyterrorystycznym-wzorem> [accessed: 25 XI 2021].

again that it changed the national model of anti-terrorist legislation from a dispersed substantive model to a concentrated formal model. In such a way, this law has become, together with the new Law on Anti-Money Laundering and Financing of Terrorism passed on 1 March 2018³⁷, the source of Polish regulations that directly shape the legal core of the counter-terrorism area.

European law and terrorism - state of play

Counter-terrorism is an important issue covered by European Union legislation. However, specifying and analysing the scope of the impact of this legislation is not easy, in particular due to the nature of the sources of European Union law.

It should be recalled that the sources of EU law include, in the first place, the so-called primary law, consisting of the treaties concluded by the Member States, among them both the founding treaties of the European Communities and the European Union (i.e. the Treaty of Paris of 1951, the Treaties of Rome of 1957 and the Maastricht Treaty of 1992) and the so-called revision treaties, i.e. the agreements concluded between Member States amending and supplementing the founding treaties, as well as the accession treaties (on the accession of individual states to the EU). It should be added that primary law also includes the annexes (in the form of protocols) attached to these agreements, general principles of law and the Charter of Fundamental Rights of the European Union. Secondary law, created by the Union's institutions on the basis of primary law, includes, in line with Article 288 of the Treaty on the Functioning of the European Union³⁸, regulations, directives, decisions, recommendations and opinions. These legal acts differ, in particular, in their force and scope: a regulation is of general

³⁷ Original text announced in the Journal of Laws of 2018, item 723. The primary purpose of the Act was to align Polish legislation with the provisions of *Directive (EU) 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 purpose of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC*, and the revised recommendations of the Financial Action Task Force (FATF).

³⁸ Journal of Laws 2004, No. 90 item 864/2.

application and binding in its entirety and directly applicable in all Member States. A Directive, on the other hand, is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. A decision is binding in its entirety but is individual and specific, which means that each of them is addressed to a precise group of addressees and deals with precise matters or situations, whereas recommendations (suggesting certain actions) and opinions (containing certain assessments) have no binding force.

In light of the above, it should be noted that the European Union's counter-terrorism legislation is, firstly, differentiated by the nature of the source of law in which it is regulated, which directly translates into the extent of its impact. Secondly, there is a thematic dualism in the way in which terrorism is regulated in the European Union, with individual issues either being dealt with in a separate, thematically distinct piece of legislation, or issues being dealt with in conjunction with other security legislation.

When analysing primary legislation, it must be pointed out that the Treaty on European Union³⁹ refers directly to the problem of terrorism in only one place, indicating in Article 42, in conjunction with Article 41 (systematically located in section 2 on Common Security and Defence Policy), that the EU may undertake, in accordance with the principles of the United Nations Charter, missions outside its territory to preserve peace, prevent conflicts and strengthen international security. Such missions, in which it may use civilian and military means, include joint disarmament operations, humanitarian and rescue missions, military advice and assistance missions, conflict prevention and peace-keeping missions, military crisis management missions, including peacemaking and post-conflict stabilisation operations. Importantly, under the Treaty, all these missions may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.

The Treaty on the Functioning of the European Union, on the other hand, deals with terrorism in much greater detail, both in Part Three, which is devoted to the Union's internal policies and actions, and in Part Five, which sets out the legal basis for the Union's external action.

³⁹ Journal of Laws 2004, No. 90 item 864/30.

In this respect, under Title V of Part Three of the Treaty on an Area of Freedom, Security and Justice, it is provided in Article 75 that, where necessary to achieve the objectives referred to in Article 67 (the so-called 'EU obligations') in preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-state entities. The Council, on a proposal from the Commission, shall adopt measures to implement this framework. These acts must contain the necessary provisions on legal safeguards. Significantly, on the basis of this delegation, Union bodies have issued 75 secondary acts of regulation introducing restrictive measures against selected countries, including Iran, Iraq, Congo, Belarus, Liberia, Somalia, Lebanon, Uzbekistan, among others.

Within the same Title V of Part Three of the Treaty, Article 83 indicates that the European Parliament and the Council, acting by means of directives in accordance with the ordinary legislative procedure, may establish minimum rules with regard to the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them jointly. The Treaty has included terrorism among these crimes, along with trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of the delegation in question, the Union bodies issued, inter alia, *Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*⁴⁰, which is one of the most important pieces of EU secondary legislation in the field of terrorism.

This delegation also gave rise to *Council Decision (EU) 2018/889 of 4 June 2018 on the conclusion, on behalf of the European Union,*

⁴⁰ OJ EU L 88/6 of 31 III 2017.

*Council of Europe Convention on the Prevention of Terrorism*⁴¹, which approved, on behalf of the Union, the Council of Europe Convention on the Prevention of Terrorism of 16 May 2005⁴², for matters falling within the competence of the Union and *Council Decision (EU) 2018/890 of 4 June 2018 on the conclusion, on behalf of the European Union, of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*⁴³.

The same part of the Treaty became the setting for the rules of police cooperation in the EU, of which the establishment of Europol (European Union Agency for Law Enforcement Cooperation) is an element. Its task, under Article 88 of the Treaty, is to support and strengthen action by Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.

Finally, in Part Five of the Treaty on the external action of the Union, there is Article 222 which establishes a so-called solidarity clause whereby the Union and its Member States act jointly in a spirit of solidarity if any Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. In this regard, the Union shall mobilise all the instruments at its disposal, including the military resources made available to it by the Member States, in order, firstly, to prevent terrorist threats on the territory of the Member States; secondly, to protect democratic institutions and the civilian population from any terrorist attack; thirdly, to assist a Member State on its territory, at the request of its political authorities, in the event of a terrorist attack. Moreover, as added in paragraph 2, if a Member State has been the target of a terrorist attack or the victim of a natural or man-made disaster, other Member States shall assist it at the request of its political authorities. To this end, the Member States shall coordinate their action within the Council. At the same time, paragraph 3 specified that, acting on a joint proposal from the Commission and the High Representative of the Union for Foreign Affairs and Security Policy, the Council shall

⁴¹ OJ EU L 159/1 of 22 VI 2018.

⁴² OJ EU L 159/3 of 22 VI 2018.

⁴³ OJ EU L 159/15 of 22 VI 2018.

adopt a decision laying down the conditions for the Union to apply this solidarity clause. Such a decision was issued on 24 June 2014⁴⁴.

Turning the present considerations towards EU derived law, it should be pointed out that one of the most important - if not the most important - EU normative act touching on the issue of terrorist threats is, indicated above, *Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*. The Directive entered into force on 20 April 2017, replacing, as its title indicates, *Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism*, which was considered to be the basis for Member States' actions to combat terrorism in the field of criminal justice. The new Directive, as indicated in its Article 1, established minimum rules concerning the definition of criminal offences and sanctions in the field of terrorist offences, offences relating to a terrorist group and offences linked to terrorist activities, as well as measures to protect, assist and support victims of terrorism. As indicated in recitals 6 to 8 of the new Directive:

(...) Taking account of the evolution of terrorist threats to and legal obligations on the Union and Member States under international law, the definition of terrorist offences, of offences related to a terrorist group and of offences related to terrorist activities should be further approximated in all Member States, so that it covers conduct related to, in particular, foreign terrorist fighters and terrorist financing more comprehensively. These forms of conduct should also be punishable if committed through the internet, including social media. Furthermore, the cross-border nature of terrorism requires a strong coordinated response and cooperation within and between the Member States, as well as with and among the competent Union agencies and bodies to counter terrorism, including Eurojust and Europol. To that end, efficient use of the available tools and resources for cooperation should be made, such as joint investigation teams and coordination meetings facilitated by Eurojust. The global character of terrorism necessitates an international answer, requiring the Union and its Member States to strengthen cooperation with relevant third countries. A strong coordinated response and cooperation is also necessary

⁴⁴ OJ EU L 192/53 of 1 VII 2014.

with a view to securing and obtaining electronic evidence. This Directive exhaustively lists a number of serious crimes, such as attacks against a person's life, as intentional acts that can qualify as terrorist offences when and insofar as committed with a specific terrorist aim, namely to seriously intimidate a population, to unduly compel a government or an international organisation to perform or abstain from performing any act, or to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation. The threat to commit such intentional acts should also be considered to be a terrorist offence when it is established, on the basis of objective circumstances, that such threat was made with any such terrorist aim. By contrast, acts aiming, for example, to compel a government to perform or abstain from performing any act, without however being included in the exhaustive list of serious crimes, are not considered to be terrorist offences in accordance with this Directive.

Pursuant to Article 28 of the Directive, its provisions should be implemented at the level of the relevant laws, regulations and administrative provisions of the Member States by 8 September 2018. In Poland, this Directive was implemented by the *Act of 20 April 2021 amending the Act - Penal Code and certain other acts*⁴⁵. As indicated in the justification to the bill in question:

(...) in view of the fact that Poland had previously implemented, inter alia, Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ EU L 164 of 22 June 2002, p. 3), concerning the same area, the vast majority of the provisions of Directive 2017/541 should be regarded as implemented. For example, in Article 115 § 20 of the Penal Code there is already a definition of a terrorist offence, in Article 165a the financing of a terrorist offence is criminalised, and in Article 258 § 2 and 4 activities within a terrorist criminal group are criminalised. As an aside, it should be mentioned that Directive 2017/541 is cross-cutting in nature and touches not only on the area of criminal law, but also on related topics such as the protection of the rights of victims of terrorism. Here too, however, the vast majority of the implementation work has already been done on the occasion

⁴⁵ Journal of Laws 2021, item 1023.

of the implementation of earlier EU instruments, such as Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA (Official Journal of the EU L 315 of 14 November 2012, p. 57). Moreover, some of the postulates contained in the Directive do not require legislative measures, but only organisational ones⁴⁶.

The common legal framework set out by the discussed Directive 2017/541 provides a reference for the exchange of information and cooperation between national competent authorities of Member States carried out in the EU on the basis of:

- *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*⁴⁷;
- *Council Framework Decision 2002/465/JHA of 13 June 2002 on Joint Investigation Teams*⁴⁸;
- *Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences*⁴⁹;
- *Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union*⁵⁰, which lays down the rules under which Member States' law enforcement authorities may exchange existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations or intelligence operations concerning serious crime, including organised crime and terrorism;
- *Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism*

⁴⁶ *Explanatory Memorandum to the Government Draft Act on Amendments to the Act - Penal Code and certain other acts*, <https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=867> [accessed: 2 XII 2021].

⁴⁷ OJ EU L 190/1 of 18 VII 2002.

⁴⁸ OJ EU L 162/1 of 20 VI 2002.

⁴⁹ OJ EU L 253/22 of 29 IX 2005.

⁵⁰ OJ EU L 386/89 of 29 XII 2006.

*and cross-border crime*⁵¹, which contains provisions in Chapter 4 on the conditions for the supply of information for the prevention of terrorist offences;

- *Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013*⁵².

At the same time, at the level of the Union, the need for an effective exchange between the competent authorities of the Member States and Union agencies of information that the competent authorities consider relevant for the prevention, detection, investigation or prosecution of terrorist offences has been highlighted in recent years. These exchanges should be carried out in accordance with national law and the applicable legal framework of the Union, such as:

- *Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences*,
- *Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)*⁵³,
- *Directive (EU) 2016/681 of the European Parliament and of the Council on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*⁵⁴.

EU legislation makes sure that the information exchange described above complies with EU data protection rules, as defined by *Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection and prosecution of criminal offences and the execution of criminal penalties, on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA*⁵⁵, and is without prejudice to EU rules on cooperation between national competent authorities

⁵¹ OJ EU L 210/1 of 6 VIII 2008.

⁵² OJ EU L 180/1 of 29 VI 2013.

⁵³ OJ EU L 205/63 of 7 VIII 2007.

⁵⁴ OJ EU L 119/132 of 4 V 2016.

⁵⁵ OJ EU L 119/89 of 4 V 2016.

in criminal proceedings contained in acts such as, inter alia, *Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters*⁵⁶.

Furthermore, Member States must adopt measures to protect, support and assist in response to the specific needs of victims of terrorism, in accordance with *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA*⁵⁷. At the same time, assistance to victims in pursuing their claims for compensation is to be without prejudice to, and complementary to, the assistance that victims of terrorism receive from supportive bodies in accordance with *Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims*⁵⁸. It should be added that the legal order of the European Union has regulated in a subject-matter manner, through Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015⁵⁹, common provisions on the prevention of the use of the Union's financial system for money laundering or terrorist financing.

Concluding the concise - due to the requirements of this study - considerations discussing the current state of European law of an anti-terrorist nature, it should be added that it remains in line with other normative actions of the international community created in particular within the framework of the United Nations and the Council of Europe, and is in a way inspired by them. Of these various measures, the first is undoubtedly the Council of Europe Convention on the Prevention of Terrorism⁶⁰, drawn up in Warsaw on 16 May 2005, which, pursuant to Article 2 thereof, aims to strengthen the efforts of the Parties to prevent terrorism and the negative impact of terrorism on the full enjoyment of human rights, in particular the right to life, both through measures taken at national level and through international cooperation, with due regard for existing multilateral or bilateral treaties or agreements

⁵⁶ OJ EU L 130/1 of 1 V 2014.

⁵⁷ OJ EU L 315/57 of 14 XI 2012.

⁵⁸ OJ EU L 261/2 of 6 VIII 2004.

⁵⁹ OJ EU L 141/73 of 5 VI 2015.

⁶⁰ Journal of Laws of 2008, No. 161, item 998.

between the Parties. As indicated in the explanatory memorandum to the request for ratification of this Convention, it is (...) *the first instrument of international law intended to regulate comprehensively inter-State cooperation - not in the field of combating and punishing terrorist offences already committed - but in the field of preventing terrorism. Its aim is to criminalise acts which precede and prepare the commission of a terrorist act*⁶¹.

Perspectives and regulatory challenges of Polish law against the background of legislative activities of EU bodies

Speaking about the perspectives and regulatory challenges of the Polish law against the background of the legislative activities of the EU bodies, one should start with a kind of summary of the implementation process of the provisions of the *Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism*, which should be completed by 8 September 2018. It should be noted that pursuant to Article 29 of that Directive, by 8 March 2020, the Commission was to submit a report to the European Parliament and the Council assessing the extent to which the Member States had adopted the measures necessary to implement this Directive, and a report to the European Parliament and the Council by 8 September 2021 assessing the added value of this Directive on combating terrorism. The European Commission, in an evaluation report prepared for the European Parliament on the degree of implementation and application at the national level of the so-called Anti-Terrorism Directive (dated 24 November 2021)⁶², pointed to the need to establish single points of contact for victims of terrorism, which, according to the report, are still lacking in Poland, which may, in the coming future, adversely affect the process of obtaining assistance or efficient recovery of claims

⁶¹ *Explanatory memorandum to the request for ratification of the Council of Europe Convention on the Prevention of Terrorism*, <https://archiwum.bip.kprm.gov.pl/ftp/kprm/dokumenty/070423u2uz.pdf> [accessed: 3 XII 2021].

⁶² *Report no. 13478/21 from the Commission to the European Parliament and the Council based on Article 29(2) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*.

related to a terrorist act under the influence of which Polish citizens have suffered. The report stresses, *inter alia*, that the planned actions of the Commission will focus on increasing the level of protection and adopting effective measures to improve the situation of victims of terrorism.

Importantly, the document indicates that further work of the Commission will be aimed at reviewing actions to counter violent extremism in EU Member States. As part of this effort, plans are emerging for a specific discussion among Member States on the application of the implemented provisions of the Directive to violent ultra-right terrorist acts.

In outlining the prospects for the direction of EU legislative action setting trends for changes in national law, attention should be drawn to the Communication on the EU Strategy for a Security Union published by the European Commission on 24 July 2020⁶³. As A. Koziół points out, this strategy (...) *aims to support Member States in the fight against changing threats and to build resilience in the long term by combating classic and hybrid threats in the physical and digital environment*⁶⁴.

Analysing the specific considerations of the Strategy, she observes that in its point 2, entitled ‘The rapidly changing threat landscape’, she states. “A rapidly changing European security threat landscape” it is pointed out that:

(...) The COVID-19 crisis has also underlined how social divisions and uncertainties create a security vulnerability. This increases the potential for more sophisticated and hybrid attacks by state and non-state actors, with vulnerabilities exploited through a mix of cyber-attacks, damage to critical infrastructure, disinformation campaigns, and radicalisation of the political narrative. At the same time, more long-established threats continue to evolve. There was a downward trend in terrorist attacks in the EU in 2019. However, the threat to EU citizens of jihadist attacks from or inspired by Da’esh and al-Qaeda and their affiliates remains high. In parallel, the threat of violent right wing extremism is also growing. Attacks

⁶³ <https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:52020DC0605&from=EN> [accessed: 15 II 2022].

⁶⁴ A. Koziół, *Nowy plan zwalczania terroryzmu w UE* (Eng. New plan to combat terrorism in the EU), „Biuletyn Polskiego Instytutu Spraw Międzynarodowych”, 19 II 2021 r., no. 33 (2231).

inspired by racism must be a cause for serious concern: the deadly anti-Semitic terror attacks in Halle were a reminder of the need to step up the response in line with the 2018 Council Declaration. One in five people in the EU are very worried about a terrorist attack in the next 12 months. The vast majority of recent terrorist attacks were “low tech” attacks, lone actors targeting individuals in public spaces, while terrorist propaganda online took on a new significance with the live streaming of the Christchurch attacks. The threat posed by radicalised individuals remains high – potentially bolstered by returning foreign terrorist fighters and by extremists released from prison⁶⁵.

This section also points out that (...) *criminals and terrorists find it easier to access firearms, from the online market and through new technologies such as 3-D printing*⁶⁶.

In turn, point 3 of the strategy, ‘A coordinated EU response serving the whole of society’, emphasises the need for all actors in the public and private sectors to work together, as it is noted that in both sectors their main players are reluctant to share security information, either for fear of compromising national security or for competitive reasons.

However, the most effective action is through cooperation. In the first instance, this means increased cooperation between Member States, including law enforcement, judicial and other public authorities, as well as working with the Union’s institutions and agencies to build the understanding and communication necessary for common solutions. Cooperation with the private sector is also crucial as industry owns much of the digital and non-digital infrastructure that is necessary to effectively fight crime and terrorism⁶⁷.

The strategy clearly identifies four strategic priorities for the security union: first, a security environment that stands the test of time; second, addressing evolving threats; third, protecting Europeans from terrorism and organised crime; fourth, a strong European security ecosystem.

Under the first priority, the focus is on the protection and resilience of critical infrastructure, cyber security and the protection of public

⁶⁵ *Communication from the Commission on the EU Security Union Strategy, Brussels, 24.07.2020 COM(2020) 605 final*, <https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:52020DC0605&from=EN> [accessed: 3 XII 2021].

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

spaces. Action to improve cyber-security points out that it must go hand in hand with the fight against terrorism, extremism, radicalism and hybrid threats, and that the solution lies in better forms of cooperation between intelligence services, the EU INTCEN and other security organisations. Speaking about the protection of public spaces, it was stressed that:

(...) Recent terrorist attacks have focused on public spaces, including places of worship and transport hubs, exploiting their open and accessible nature. The rise of terrorism triggered by political or ideologically motivated extremism has made this threat even more acute. This calls for both stronger physical protection of such places and adequate detection systems, without undermining citizens' freedoms. The Commission will enhance public-private cooperation for the protection of public spaces, with funding, the exchange of experience and good practices, specific guidance and recommendations. Awareness raising, performance requirements and testing of detection equipment and enhancing background checks to address insider threats will also be part of the approach⁶⁸.

It was also pointed out that the drone market is constantly evolving and generates additional risks, as these devices can be used by criminals and terrorists for illegal purposes. In particular, public spaces, critical infrastructure, law enforcement agencies, national borders and even individual individuals who may be attacked using them are at risk. The European Commission notes that the measures taken by the European Union Aviation Safety Agency regarding, among others, the registration of drone operators and the mandatory remote identification of drone operators are a first step. However, further actions are necessary and should include the exchange of information, development of guidelines and good practices for common use, including by law enforcement authorities, as well as wider testing of drone protection measures.

The second priority identified actions that should be taken in the face of evolving threats. These included cybercrime, combating illegal online content and hybrid threats. Speaking about the fight

⁶⁸ Ibid.

against illegal online content, the strategy points out that many serious threats to citizens, such as terrorism among others, are mainly spreading in the digital environment, and fighting them requires concrete actions and a framework ensuring the respect of fundamental rights.

An essential first step is swiftly concluding the negotiations on the proposed legislation on terrorist content online and ensuring its implementation. Strengthening voluntary cooperation between law enforcement and the private sector in the EU Internet Forum is also key to fight the misuse of the internet by terrorists, violent extremists and criminals⁶⁹.

For Union bodies, the EU's Suspicious Content Reporting Unit at Europol is of key importance and will continue to play a key role in monitoring the online activities of terrorist groups and the response of online platforms to such activities.

A key element of the strategy in the context of terrorism is Priority 3, and in particular its first part 'Terrorism and radicalisation'. 'A key element of the Strategy in the context of terrorism is Priority Three, and in particular its first part, 'Terrorism and radicalisation', which emphasises that the threat of terrorism in the EU remains high and that the main responsibility for fighting terrorism and radicalisation remains with the Member States. *However, the ever-increasing cross-border/cross sectorial dimension of the threat calls for further steps in EU cooperation and coordination. Effective implementation of EU counter-terrorism legislation, including restrictive measures, is a priority. It remains an objective to extend the mandate of the European Public Prosecutor's Office to cross-border terrorist crimes⁷⁰.*

According to the document, Union action in this field will focus on:

- countering radicalisation combined with the promotion of social cohesion at local, national and European level;
- limiting the availability of chemical, biological, radiological and nuclear (CBRN) materials and explosive precursors which could be converted into weapons for use in attacks;
- effective prosecution of perpetrators of terrorist crimes, including foreign terrorist fighters. Important in this context are the ongoing efforts to fully implement border security legi-

⁶⁹ Ibid.

⁷⁰ Ibid.

- slation and to make maximum use of all relevant EU databases to exchange information on known suspects;
- developing counter-terrorism partnerships and cooperation with countries in the EU neighbourhood and beyond, drawing on the expertise developed within the EU network of security and counter-terrorism experts.

Under the fourth priority of building a strong European security ecosystem, it is emphasised that this must be based on four elements, namely cooperation and information sharing, the importance of strong external borders, enhancing security research and innovation, and skills and awareness-raising.

There is no doubt that the plan submitted by the Commission offers many new solutions that are intended to increase the effectiveness of cooperation between EU bodies and Member States. However, these measures will require multi-level regulatory action by the European Union and their subsequent implementation in the Member States, in which achieving consensus may be problematic.

Undoubtedly, proper implementation of the provisions of the *Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on countering the dissemination of terrorist content on the Internet*⁷¹, which will enter into force on 7 June 2022, will be among such challenges. The basic assumption of this normative act is to establish a harmonised legal framework for preventing the use of the Internet to disseminate content that promotes terrorism by introducing a mechanism for issuing and verifying orders to remove content of a terrorist nature or to prevent access to it.

Significantly, in Poland the Internal Security Agency is currently, pursuant to Article 32c of the ABW and the AW Act (added by the Act on anti-terrorist activities), able to apply the so-called availability blockade, i.e. in order to prevent, counteract and detect terrorist offences and to prosecute their perpetrators, the court, on a written application of the Head of the ABW submitted after obtaining a written consent of the Public Prosecutor General, by way of a decision may order the service provider providing electronic services to block access in the ICT system to specific IT data connected to a terrorist event

⁷¹ OJ EU L 172/79 of 17 V 2021.

or specific ICT services used or intended to be used to cause a terrorist event.

However, when analysing the regulation in question, the powers of the competent authority in this respect should be much broader and include the possibility of using both operational and legal-administrative measures within the framework of the established mechanism for safeguarding the digital market against terrorist threats. Consequently, it will be necessary to make changes to national law, including:

- the designation of the competent authority to carry out the new tasks under the Regulation, including the issuing of removal orders (Article 3 of the Regulation), the review of removal orders (Article 4 of the Regulation), the extension of the period of retention of terrorist content that has been removed or to which access has been disabled as a result of a removal order (Article 6(2) of the Regulation), the issuing of decisions on hosting providers exposed to terrorist content and supervising their implementation of specific measures (Article 5 of the Regulation), the imposing of administrative fines (Article 18 of the Regulation), the publishing of a report (Article 8 of the Regulation), the transmission of annual information to the European Commission pursuant to Article 21 of the Regulation;
- the designation by the competent authority of a contact point to carry out the tasks laid down in the Regulation;
- the establishment of a complaint mechanism for the issuance of removal orders and other decisions issued by the Competent Authority in relation to the performance of the tasks set out in the Regulation;
- the introduction of provisions for the imposition of administrative fines by the competent authority for infringements as defined in the Regulation;
- the establishment of a mechanism to monitor the application of the Regulation and the transmission of annual information in this regard to the European Commission.

To sum up the considerations of this part, it should be indicated that the main axis of legislative work of the European Union in the area of counter-terrorism in the coming period will focus

on the implementation of the discussed EU strategy in the field of security union and proper implementation in the Member States of individual regulations resulting from it.

Conclusion

Summarising the considerations undertaken in this article, it should be pointed out firstly that at the national level, the Act on anti-terrorist activities introduced in 2016 changed the model of anti-terrorist legislation from a diffuse material model to a concentrated formal model. Thus, this law, together with the new Law on Anti-Money Laundering and Financing of Terrorism enacted on 1 March 2018, became the pillar of national legislation that directly shapes the core of the counter-terrorism area.

Secondly, the European counter-terrorism legislation is highly differentiated, both by the nature of the source of law - which directly translates into the scope of the power of its impact, and by the dualistic methodology of the subject way of regulating terrorism, so that individual issues are either included in a separate scope subject normative act or are included together with other regulations of the security area. They are therefore closer to the material model.

Thirdly, moving on to the level of forecasts, on the basis of the analysis of actions summarising the process of implementation of the so-called Anti-Terrorist Directive and provisions of the adopted EU strategy in the field of security union, it should be indicated that the EU legislative actions will proceed in the direction of further approximation of the legislation of particular Member States, in particular with regard to the uniform definition of such concepts as 'terrorist offence', 'offence relating to a terrorist group' and 'offence linked to terrorist activity', so that these definitions cover more comprehensively acts relating in particular to the activity of foreign terrorist fighters and issues of financing terrorism. It is also important in this regard to cover activities via the Internet, including social media. Furthermore, the cross-border nature of terrorism calls for strong, coordinated action and cooperation both within and between Member States and with and between the relevant Union agencies and bodies involved in the fight against terrorism, including Eurojust

and Europol. In addition, the global nature of terrorism requires action to be taken at international level, which means that the Union and its Member States must and will work towards closer cooperation with relevant third countries. 3. also notes that the Commission's further work is to be directed towards reviewing countering violent extremism in EU Member States, which will undoubtedly remain part of the political and legal debate, particularly given the apparent attempt to leave left-wing extremism out of the public debate.

It is important to underline that the fight against terrorism can never be considered as a closed and concluded topic; on the contrary, changes in the nature of terrorist threats force continuous efforts to identify them and, consequently, to change the legal status, both at national and international level.

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