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**Rights, Proportionality and Process in EU Counter-Terrorism Law-Making**

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Proportionality is a key principle of EU law. However, in spite of procedural requirements intended to ensure the full integration of proportionality as a design principle in EU law, the EU continues to pass disproportionate counter-terrorism laws. If proportionality is a fundamental constitutional principle of the European Union, and if law-making processes at EU level have been designed expressly with this in mind, then why do the EU's counter-terrorism laws consistently raise issues of disproportionate interference with rights? Taking as a case study the passage of the EU Directive on Combating Terrorism, this article argues that at least part of the answer lies in the curtailment and adjustment, in the counter-terrorism field, of law-making processes that are designed to be participatory, evidence-based, and informed by proportionality.

European Union law does not have an emergency mode. There is no derogation clause, like in the European Convention on Human Rights,[1] or no suspension of constitutional rights to address public emergencies like in some national constitutional systems. While the EU's legal order has long had at its disposal a number of exceptional devices to act in particular kinds of (primarily financial) crises,[2] "the Union legal order…implies the absence of an 'emergency constitution'".[3] Although many rights protected by the Charter of Fundamental Rights can be limited, those limitations "must be provided for

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[1] Article 15, EUROPEAN CONVENTION ON HUMAN RIGHTS.
[2] See for example the 1958 EEC Treaty Articles 92 and 115, although in the EU's response to the financial crises of the 2000s it pressed tightly against its constitutional limits at times: Alicia Hinarejos, The Euro Area Crisis and Constitutional Limits to Fiscal Integration 14 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 243 (2012); Article 122 TFEU.
[3] Antonis Antoniadis, Robert Schütze and Eleanor Spaventa, Introduction: The European Union and Global Emergencies, in ANTONIS ANTONIADIS, ROBERT SCHÜTZE AND ELEANOR SPAVENTA (EDS), THE EUROPEAN UNION AND GLOBAL EMERGENCIES (2011) 2.

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by law and respect the essence of those rights and freedoms".[4] As a result, "[s]ubject to the principle of proportionality, limitation may be made only if they are necessary and genuinely meet objective of general interest recognised by the Union or the need to protect the rights and freedoms of others".[5] In other words, even when engaging in counter-terrorism, the EU can only limit rights in a proportionate manner, and must preserve the essence of the rights and freedoms protected by the Charter.

As a result of this constitutional obligation, enforceable by the Court of Justice of the European Union (CJEU), proportionality is and must be a design principle of EU law. Indeed, it is by mainstreaming proportionality in what Steiner describes as the deliberation, evaluation, and justification phases of law-making[6] that the EU system purports to put rights protection at the heart of its law-making activities. To this end, the Union has instantiated a number of procedural commitments in the policy-formation and legislative process designed to ensure appropriate attention to proportionality.[7] Notwithstanding this, however, the EU continues to pass disproportionate counter-terrorism laws. If proportionality is a fundamental constitutional principle of the European Union, and if law-making processes at EU level have been designed expressly with this in mind, then why do the EU's counter-terrorism laws consistently raise issues of disproportionate interference with rights? At least part of the answer to this question, we argue, is found in the curtailment and adjustment, in the counter-terrorism field, of law-making processes that are designed to be participatory, evidence-based, and informed by proportionality.

This paper proceeds in four stages.

In Part I, we establish the constitutional significance and particular content of the principle of proportionality in EU law and its application in key counter-terrorism law

[4] Article 52(1), CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (CHARTER OF RIGHTS).
[5] Ibid.
[6] Talya Steiner, Forward: Engagement with Rights in the Making of Counter-Terrorism Legislation: Perspectives from Three Case Studies XX INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW XX (2021).
[7] REPORT OF THE WORKING GROUP ON BETTER REGULATION (GROUP 2C), (2001); EUROPEAN COMMISSION, IMPACT ASSESSMENT GUIDELINES SEC (2009) 92; EUROPEAN COMMISSION, STRATEGY FOR THE EFFECTIVE IMPLEMENTATION OF THE CHARTER OF FUNDAMENTAL RIGHTS BY THE EUROPEAN UNION COM (2010) 573 final; EUROPEAN COMMISSION, OPERATIONAL GUIDANCE ON TAKING ACCOUNT OF FUNDAMENTAL RIGHTS IN COMMISSION IMPACT ASSESSMENTS SEC (2011) 567 final.

cases taken in the Court of Justice of the European Union. While not intended to be a comprehensive account of proportionality [8] or of the EU's counter-terrorism jurisprudence,[9] this Part serves to illustrate how proportionality, taken seriously, might mitigate the rights-limiting implications of implementing international obligations through EU law.

Reflecting the normative significance thought to attach to pre-enactment rights review, [10] in Part II we argue that giving meaningful effect to the principle of proportionality requires its integration in a serious way in policy-making processes and, in turn, that such integration requires participatory and robust policy-making processes in which implications for rights are taken seriously. That argument is affirmed by the Commission's own commitments to both *Better Regulation*[11] and compliance with the Charter of Fundamental Rights in EU law-making,[12] the connection of which with proportionality we illustrate in Part II.

In spite of these commitments, however, and the constitutional importance of taking proportionality seriously in policy-making, in Part III we use the case of the EU's Directive on Countering Terrorism (DCT)[13] to illustrate how significant and wide-ranging EU counter-terrorism law can be designed, passed, and implemented without adherence to these mechanisms of ensuring proportionality. While we focus in this part

[8] For a comprehensive account see, for example, Wolf Sauter, Proportionality in EU Law: A Balancing Act 15 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 439 (2013).
[9] For a larger analysis see Cian C Murphy, Counter-Terrorism Law and Judicial Review: The Challenge or the Court of Justice of the European Union in FERGAL F DAVIS AND FIONA DE LONDRAS (EDS), *CRITICAL DEBATES ON COUNTER-TERRORISM JUDICIAL REVIEW* (2014).
[10] Steiner, above n. ~~6~~10.
[11] REPORT OF THE WORKING GROUP ON BETTER REGULATION (GROUP 2C), 2001.
[12] EUROPEAN COMMISSION, IMPACT ASSESSMENT GUIDELINES SEC (2009) 92; EUROPEAN COMMISSION, STRATEGY FOR THE EFFECTIVE IMPLEMENTATION OF THE CHARTER OF FUNDAMENTAL RIGHTS BY THE EUROPEAN UNION COM (2010) 573 final; EUROPEAN COMMISSION, OPERATIONAL GUIDANCE ON TAKING ACCOUNT OF FUNDAMENTAL RIGHTS IN COMMISSION IMPACT ASSESSMENTS SEC (2011) 567 final.
[13] 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, OJ L 88, 31.3.2017, p. 6–21 ('DIRECTIVE ON COMBATING TERRORISM').

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on the specific example of the DCT, both antecedent[14] and subsequent[15] processes of counter-terrorism law-making at EU level have similar characteristics. Our close analysis of the development and passage of the Directive on Countering Terrorism illustrates deficits in rights review at the deliberative, evaluative and justificatory stages within the EU system itself, but importantly also shows how this is partly a product of deficits in antecedent instruments at both European and UN levels. This affirms that deficits in rights protection that are introduced through inadequate pre-enactment rights review in one part of the transnational counter-terrorism order can become wired into the counter-terrorism instruments developed across international organisations, including the EU.[16] The implication of this—that pre-enactment rights review 'downstream' may not be capable effectively of addressing shortcomings in rights review in an instrument's provenance—has the effect both of expanding what we conceptualise as the 'deliberation' phase in an instrument's development to include the process of making antecedent instruments, and of affirming the significance of effective anticipatory engagement with rights at all levels of transnational law- and policy-making.

Finally, we outline the broader significance of failures to take proportionality seriously in EU counter-terrorism law- and policy-making. Quite beyond the immediate question of legality that may arise in respect of individual instruments, this policy-process failure has implications for future policy-processes at EU level because of what we call compaction, and for rights-protection in the Member States because of the opportunities for the migration of anti-constitutional ideas[17] that implementation of EU law gives rise to. In short, failures to take proportionality sufficiently seriously—and thus effectively to undertake pre-enactment rights review—in the policy-making process in the EU may

[14] For example the Data Protection Directive: DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 24 OCTOBER 1995 ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA AND ON THE FREE MOVEMENT OF SUCH DATA, OJ L 281, 23/11/1995 p. 31-50.

[15] For example the PNR Directive: DIRECTIVE (EU) 2016/681 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 27 APRIL 2016 ON THE USE OF PASSENGER NAME RECORD (PNR) DATA FOR THE PREVENTION, DETECTION, INVESTIGATION AND PROSECUTION OF TERRORIST OFFENCES AND SERIOUS CRIME OJ L 119, 4.5.2016, p. 132–149.

[16] See further Fiona de Londras, The Transnational Counter-Terrorism Order: A Problématique 72 CURRENT LEGAL PROBLEMS 203 (2019).

[17] This phrase is taken from Kim Lane Scheppele, The Migration of Anti-Constitutional Ideas: The Post 9/11 Globalization of Public Law and the International State of Emergency in SUJIT CHOUDHRY (ED), THE MIGRATION OF CONSTITUTIONAL IDEAS (2009).

result in radical problems of rights protection with potentially irredeemable implications quite beyond the instrument in question.

**Part I: Proportionality, the EU, and Counter-Terrorism**

The doctrine of proportionality is found in a wide variety of legal systems, used primarily as a judicially-developed approach to assessing the lawfulness of interferences with rights protections. Although there are variations in its precise formulation across different jurisdictions,[18] in more or less all cases its function is as a means of testing the legal acceptability of measures that limit legally protected rights in pursuit of a legitimate objective. Once a legitimate objective in pursuit of which rights limitation takes place has been established, the test will then ordinarily involve at least three elements: assessment of the connection of the measure with the claimed objective (rationality test), assessment of the necessity of the measure to achieve the claimed objective (necessity test), and then assessment of whether the benefits of policy achievement outweigh the cost to rights (balancing test). Within EU law the principle of proportionality follows this well-established form.

Since *Internationale Handelgesellschaft*[19] it has been clear that proportionality is a general principle of EU law and, as a result, is ordinarily part of the CJEU's analysis whenever a question of rights compliance arises. Proportionality is critical to the legal integration of the EU,[20] and its constitutional importance has become even clearer with the Charter of Fundamental Rights of the European Union.[21] The EU's test for proportionality incorporates rationality, necessity, and balancing analysis, although there are significant variations in how the test is applied to EU instruments when compared to national implementing provisions,[22] and across different categories of EU

[18] For empirical analysis of these variations see Talya Steiner, Liat Netzer, Raanan Sulitzeanu-Kenan, NECESSITY OR BALANCING: THE PROTECTION OF RIGHTS UNDER DIFFERENT PROPORTIONALITY TESTS—EXPERIMENTAL EVIDENCE (unpublished, on file with author)
[19] Case 11/70, *Internationale Handelgesellschaft bH v Einfuhr- und vorratsstelle fürGetreide und Futtermittel* [1970] ECR 1125.
[20] As Stone Sweet and Matthews put it, "the emergence of proportionality balancing as a master technique of judicial governance is the most important institutional innovation in the history of European legal integration": ALEC STONE SWEET AND J MATTHEWS, PROPORTIONALITY BALANCING AND GLOBAL CONSTITUTIONALISM 47 *Columbia Journal of Transnational Law* 73, 140-141 (2009).
[21] [2010] OJ C83/389.
[22] For analysis see generally Sauter, above n 15.

actions.[23] Where the CJEU is considering an EU instrument in an area in which the EU has discretion,[24] its general approach is to elide a necessity analysis[25] and to apply what is generally considered to be a reasonably low standard of rights protection: manifest disproportionality.[26] This reflects the Court's tendency to afford a significant degree of discretion to the EU in these matters,[27] although the amount of deference exercised tends to vary depending on the importance or aim of the impugned measure, the degree of discretion enjoyed by the EU, and the nature of the interest or right affected.[28] As envisaged by some as an implication of pre-enactment rights review,[29] there is an emerging—controversial[30]—tendency to consider whether *in forming the impugned measure* rights were appropriately considered and to feed that 'process-oriented proportionality'[31] in to (or some might say even to allow it to act as) the proportionality analysis *per se*.[32]

This very short overview affirms that while proportionality is a general principle of EU law, it is at times applied to the EU institutions and to EU measures in a reasonably light touch manner, perhaps even to the extent that these measures might be said to enjoy a presumption of proportionality that is difficult for a litigant to displace. As

[23] Craig divides these into cases of discretionary policy choices, cases of infringement of a right recognised in EU law, and cases of disproportionate penalty or financial burden: PAUL CRAIG, EU ADMINISTRATIVE LAW (2012), 590.
[24] The EU must, however, establish that it was in fact exercising discretion "taking into consideration…all of the relevant factors and circumstances of the situation the act was intended to regulate": Case C-310/04 *Spain v Council (Cotton Support Scheme)* [2006] ECR I-7285, [122].
[25] Sauter, above n 15, 447.
[26] See especially Case C-331/*88 The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health ex parte Fedesa et al* [1990] ECR I-4023 [13]; Case C-310/04 *Spain v Council (Cotton Support Scheme)* [2006] ECR I-7285: "What must be ascertained is therefore not whether the measure adopted by the legislature was the only one or the best one possible but whether it was manifestly inappropriate" ([99]). See also the analysis in Sauter, above n ~~8~~17, p. 450 *et seq.*
[27] Gráinne de Búrca, The Principle of Proportionality and its Application in EC Law 13 YEARBOOK OF EUROPEAN LAW 105 (1993); TI Harbo, The Function of the Proportionality Principle in EU Law 16 EUROPEAN LAW JOURNAL 158 (2010).
[28] de Búrca, ibid.
[29] Ittai Nar-Siman-Tov, Semiprocedural Judicial Review 6 LEGISPRUDENCE 271 (2012).
[30] See further the discussion in Darren Harvey, Towards Process-Oriented Proportionality Review 23(1) EUROPEAN PUBLIC LAW 93 (2017).
[31] Koen Lenaerts, "The European Court of Justice and Process-Oriented Review" (2012) 31(1) *Yearbook of European Law* 3.
[32] Joined Cases C-154/04 and C-155/04 *The Queen on the application of Alliance for Natural Health & Ors v Secretary of State for Health and National Assembly for Wales (Food Supplements)* [2005] ECR I-6451. A similar trend has been identified in the jurisprudence of the European Court of Human Rights: *Von Hannover v Germany (No 2)* App nos 40660/08 and 60641/08 (7 February 2012), *Animal Defenders International v UK* App no 48876/08 (22 April 2013), Janneke Gerards, Procedural Review by the ECtHR – a Typology in JANNEKE GERARDS AND EVA BREMS (EDS), PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES (2017).

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Sauter puts it "limited judicial review prevails with regard to EU measures", suggesting "a strong position of the EU legislature and executive".[33] That has not, however, prevented the European courts from affirming the proportionality principle in the field of EU counter-terrorism law. Rather, in a number of cases, the Court of Justice has been willing to quash significant EU measures introduced for the purposes of countering terrorism where they were found not to comply with the proportionality principle. It is sufficient for our purposes to look briefly at just two of these decisions: *Kadi*[34] and *Digital Rights Ireland*,[35] both of which make clear the importance of ensuring proportionality in EU counter-terrorism measures, even where those measures are intended to implement international legal obligations (such as UN Security Council resolutions), and even where they are considered to be of critical importance of law enforcement agencies including at Member State level.

In *Kadi* the Court of Justice annulled a regulation through which the EU sought to implement UN Security Council resolutions requiring the imposition of sanctions on persons listed as being engaged in the financing of terrorism and terrorism-related activities.[36] Following the collapse of the formal Taliban regime, the UN Security Council had adopted new resolutions for the disruption of terrorist financing and, specifically, the freezing of funds, directed against Osama bin Laden, members of Al-Qaeda, and the Taliban.[37] To implement these the EU adopted two common positions[38] and two regulations.[39] In practice, there was no meaningful opportunity for someone either to prevent, contest, or have reviewed a decision to list them with attendant consequences for the individual's ability to access their assets and finances. Having been thus listed, the applicants in this case claimed that the regulations breached their fundamental rights to a fair hearing, respect for property, and effective judicial review

[33] Sauter, above n 15, p. 452.
[34] Joined cases C-402/05 P & C-415/05 P *Kadi & Al Barakaat International Foundation v Council and Commission*.
[35] *Digital Rights Ireland and Seitlinger and Others* (C-293/12 and C-594/12) [2014] ECR I- 238
[36] UN SECURITY COUNCIL RESOLUTION 1267 (1999); UN SECURITY COUNCIL RESOLUTION 1333 (2000); UN SECURITY COUNCIL RESOLUTION 1373 (2001); UN SECURITY COUNCIL RESOLUTION 1390 (2000); UN SECURITY COUNCIL RESOLUTION 1453 (2002).
[37] UN SECURITY COUNCIL RESOLUTION 1390 (2000); UN SECURITY COUNCIL RESOLUTION 1453 (2002).
[38] COMMON POSITION 2002402/CFSP OJ 2002, L 139/4; COMMON POSITION 2003/140/CFSP OJ 2003, L 53/62.
[39] COUNCIL REGULATION (EC) NO 881/2002, OJ 2002, L 139/9; COUNCIL REGULATION (EC) NO 561/2003, OJ 2003, L 82/1.

largely on the basis of the lack of process and inability, at EU level, to contest the listing. In this, they succeeded.

Seen objectively the case was a stark test of the applicability and usefulness of general principles of EU law in the face of three powerful arguments for a hands-off judicial approach: the status of UN Security Council resolutions in international law,[40] the discretion of the EU and the practice of deference in respect of same (discussed above), and the (at the very least, rhetorical) politico-legal demand for judicial modesty in the realm of counter-terrorism and security.[41] In spite of those challenges, however, the Court of Justice displayed what Tridimus calls "constitutional confidence and distrust towards any invasion on due process",[42] finding that while the circumstances and sensitivity of counter-terrorism financing decisions may justify withholding some information from persons contemplated for sanctions and disallow, as a matter of practicality, advance communication of a decision to list, this did not mean that it was permissible to put a sanctions regime of this kind in place without any potential for challenge or review.

Echoing classical proportionality balancing reasoning, the Court held that the role of the judiciary in such a case was to use "techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice".[43] As the Council had failed to put in place a mechanism by which a person could be heard, including by providing evidence on the basis of which assets were frozen contemporaneous with or shortly after the listing decision, the right to be heard and the right to review were "patently not respected".[44] In respect of the right to property, the Court held that asset freezing could lawfully interfere with property where that interference pursues a public interest objective and does not disproportionately undermine the substance of the right. Freezing assets in order to disrupt terrorist financing and activities could be a

[40] Articles 25 and 103, CHARTER OF THE UNITED NATIONS
[41] For an overview of these arguments, found across jurisdictions, see the contributions to FERGAL D DAVIS AND FIONA DE LONDRAS, above n. ~~9~~18.
[42] P. Takis Tridimas, Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order 34(1) EUROPEAN LAW REVIEW 103, 114 (2009)
[43] *Kadi*, above n ~~34~~45, [344].
[44] *Kadi* above n. ~~34~~45, [334].

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proportionate interference with the right to property, *however* due to the lack of procedural safeguards already discussed above the Court held that in this case the interference was unjustified and thus impermissible.[45]

*Kadi* has been widely commented on,[46] not least because of its implications for EU constitutionalism, but for our purposes its key significance is in clarifying that EU fundamental rights apply to the EU's counter-terrorism measures and, in respect of these, the principle of proportionality must be complied with.

*Digital Rights Ireland*[47] concerned a challenge to the Data Retention Directive,[48] introduced in 2006, which required telecommunications companies to retain, in bulk, communications metadata and make them available to law enforcement agencies in accordance with the implementing law in the Member States.[49] The obligation was, thus, for bulk data collection, without discrimination, and provided few meaningful limits on what governments could access this data for or, indeed, what use it could be put to. In spite of the clear rights implications of data retention,[50] there was no procedural or substantive mechanism for the protection of the rights to privacy or data protection, both of which are protected in the EU's Charter of Fundamental Rights.[51] Furthermore, the right to privacy as protected by Article 8 of the ECHR has been

[45] *Kadi* above n. 3445, [370].
[46] See for example Deirdre Curtin and Christina Eckes, The *Kadi* Case: Mapping the Boundaries between the Executive and the Judiciary in Europe 5(2) INTERNATIONAL ORGANIZATIONS LAW REVIEW 365 (2008); Katja S Ziegler, Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights 9(2) HUMAN RIGHTS LAW REVIEW 288 (2009); Samantha Besson, European Legal Pluralism after *Kadi* 5(2) EUROPEAN CONSTITUTIONAL LAW REVIEW 237 (2009); Gráinne de Búrca, The European Court of Justice and the International Legal Order after *Kadi* 51(1) HARVARD INTERNATIONAL LAW JOURNAL 1 (2010); Erika de Wet, From *Kadi* to *Nada*: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions 12(4) CHINESE JOURNAL OF INTERNATIONAL LAW 787 (2013).
[47] *Digital Rights Ireland* above n. 3546.
[48] Data Retention Directive, above n. 1423.
[49] On the Directive in general see for example Francesca Bignami, Privacy and Law Enforcement in the European Union: The Data Retention Directive 8(1) CHICAGO JOURNAL OF INTERNATIONAL LAW 233 (2007); Lilian Mitrou, The impact of communications data retention on fundamental rights and democracy—the case of the EU Data Retention Directive in KEVIN HAGGERTY AND MINAS SAMATAS (EDS), SURVEILLANCE AND DEMOCRACY (2010); Mark Taylor, The EU Data Retention Directive 22(4) COMPUTER LAW & SECURITY REVIEW 309 (2006); Marie-Helen Maras, From targeted to mass surveillance: is the EU Data Retention Directive a Necessary Measure or and Unjustified Threat to Privacy? in BENJAMIN GOOLD AND DANIEL NEYLAND (EDS), NEW DIRECTIONS IN SURVEILLANCE AND PRIVACY (2013).
[50] On the rights implications of data retention see, e.g. Elsbeth Guild and Sergio Carrera, The Political and Judicial Life of Metadata: Digital Rights Ireland and the Trail of the Data Retention Directive, CEPS PAPER IN LIBERTY AND SECURITY IN EUROPE NO 65 (2014)
[51] Article 7 and 8, CHARTER OF FUNDAMENTAL RIGHTS.

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interpreted as including a right to data protection.[52] A question of compatibility with fundamental rights, thus, arose and was referred to the Court of Justice.

The Court accepted (although it had been contested) that the purpose of the Directive was to harmonise data retention regimes across the EU for the purposes of ensuring the availability of data "for the purpose of the prevention, investigation, detention and prosecution of serious crime"[53] including terrorism. This, it was held, was a legitimate purpose.[54] Notwithstanding that, however, the Court found that the Directive "directly and specifically" interfered with both the rights to privacy and the protection of personal data, both in terms of data retention *per se* and in terms of state agencies' access to such data. This was important as the Court asserted that bulk data collection was *in itself* an interference with rights requiring justification. The Court went on to find that the measure was disproportionate, asserting importantly that "[w]hen interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may provide to be limited, depending on a number of factors, including, in particular the are concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference".[55] In respect of the Directive, the importance of the rights at hand and the extent of the interference imposed by the Directive were such, the Court held, that the EU's discretion was limited. Although countering terrorism and serious crime was "of the utmost importance in order to try to ensure public security",[56] the blanket and indiscriminate approach adopted in the Directive, its implications for more or less the entire European populace, the lack of limits on state authorities' access to the retained data, the lack of prior review of proposed access to retained data, and the length of the retention period all meant that the Directive imposed disproportionate interferences with protected rights and was, accordingly, quashed by the Court.

This decision, again, attracted significant attention.[57] Not only was the Directive presented as a security measure introduced, largely, in response to the London and

[52] *S and Marper v United Kingdom* [2008] 48 EHRR 55; *MK v France* (2013) ECHR 341.
[53] *Digital Rights Ireland*, above n ~~3546~~, [28].
[54] Ibid, [41]-[44].
[55] Ibid, [47].
[56] Ibid, [51].
[57] See for example Marie-Pierre Granger and Kristina Irion, The Court of Justice and the Data Retention Directive in *Digital Rights Ireland*—Telling off the EU Legislator and Teaching a Lesson in

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Madrid bombings and strongly supported by many Member States, but retention of and access to communications metadata was also said by security services to be of critical importance for security purposes. The Court, however, was undeterred from finding that the principle of proportionality resulted in the invalidation of such a measure. Indeed, in this case the Court went so far as to reduce significantly the discretion of the Union and, thus, the deference owed to it by the Court and resultantly developed and applied a very strict proportionality approach. In this respect, *Digital Rights Ireland* went beyond *Kadi*; not only are rights important and subject to judicial protection in counter-terrorism measures, but counter-terrorism measures will not automatically receive such deference as to result in a dialed-down proportionality analysis. It was for the European legislator to ensure that the EU instrument was proportionate; the Court would no longer rely on Member States implementing the law proportionately to ensure rights compliance.[58] This reinforced the need to ensure that legislative processes account properly for Charter rights, something already purportedly mainstreamed in legislative drafting processes, to which we now turn.[59]

**Part II: Taking Proportionality Seriously in Policy Processes**

While proportionality is primarily conceptualised as a legal test and standard, its relevance—as with most threshold legal concepts (such as constitutionality, or rights-respectfulness)—goes beyond the final product of doctrinal law and its implementation. It ought, also, to reach 'back' into the policymaking process, to shape the exercise of moving political or administrative decisions and commitments into legal form and, through implementation, practical operation; in other words, proportionality is a judicially-developed test that ought to have substantial upstream implications for the

Privacy and Data Protection 39(4) EUROPEAN LAW REVIEW 835 (2014); Guild and Carrera, above n. 5061; Orla Lynskey, The Data Retention Directive is Incompatible with the Rights to Privacy and Data Protection and is Invalid in its Entirety: *Digital Rights Ireland* 51(6) COMMON MARKET LAW REVIEW 1789 (2014); Niklas Vainio and Samuli Miettinen, Telecommunications data retention after *Digital Rights Ireland*: Legislative and Judicial Reactions in the Member States 23(3) INTERNATIONAL JOURNAL OF LAW AND INFORMATION TECHNOLOGY 290 (2015); Maria Helen Murphy, Data Retention in the Aftermath of *Digital Rights Ireland* and *Seitlinger* 24(4) IRISH CRIMINAL LAW JOURNAL 105 (2015).

[58] For analysis see Granger and Irion, ibid.

[59] See also I. de Jesús Butler. Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission 37 EUROPEAN LAW REVIEW 397 (2012).

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formation of law and policy.[60] This is true in the EU as it is in other polities and institutions. In all polities policy- and law-making processes are important not only because the ability to make and implement policy is an indictor of able government, but because the process of translating policy commitments into action is one in which the boundaries imposed by law should interact with the desired policy objectives in ways that result in a (legally) robust outcome. When that outcome is a piece of law, the process should be such as to ensure (to the extent possible) its legal validity. As the cases considered in the preceding section suggest, the Court of Justice's approach to assessing proportionality of European instruments and actions is such that it defers, to a substantial extent, to the EU institutions' judgement on these policy outcomes, but as in any polity where such deference operates that is underpinned by an understanding that appropriate efforts to ensure legality (and, in this case, proportionality) have taken place in the formation of the policy outcome itself. In CJEU jurisprudence that understanding has now become something akin to a demand, with the Court considering the question of input as well as output when deciding on proportionality,[61] although as Harvey observes "the Court has to date indicated a willingness to uncritically accept the assertions and evidence adduced by the law-maker at face value, thus arguably setting the justificatory threshold at a very low level".[62]

However, policy-making within the EU, including processes of law-making, is especially complex. This is perhaps to be expected, given its nature as a hybrid of national policy-making methods and the operation in the EU of a *sui generis* supra-national bureaucratic logic, which, furthermore, tends to lead to "experimentalist governance" [63] that is difficult for 'outsiders' to access or even to track. That bureaucracy is strictly constrained by the complexity of the EU-enterprise: multiple European institutions intersect, overlap and potentially conflict with multiple national institutions from the Member States so that policy-making at times seems like an exercise in proceduralised compromise. This is not least because the author of the

[60] See e.g. ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN *Europe* (2000)
[61] See the analysis in Herwig CH Hoffman, General Principles of EU law and EU Administrative Law, in CATHERINE BARNARD AND STEVE PEERS (EDS), EUROPEAN UNION LAW, 2nd Edition (2017;).
[62] Harvey, above n. ~~3044~~, 95.
[63] On which see Charles Sabel and Jonathan Zeitlin, Learning from Difference: The New Architecture of Experimentalist Governance in the European Union 14(3) EUROPEAN LAW JOURNAL 271 (2008).

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process—primarily the Commission—does not bear the cost of the regulation, which is instead mostly borne at the Member State level.

The messiness of these multi-actor processes, as well as the uneven distribution of the costs of the product of policy-making across the EU institutions and the Member States, means that effective processes of policy-making are especially important in the EU even if they might at times be complex, obtuse, multi-level, time consuming, and technocratic.[64] It is law that provides the boundaries to EU policy-making. The constitutional principles of the EU and their potential enforcement by the (domestic[65] and European) courts suggest that fundamental principles of EU law—including the principle of proportionality—ought, at least in principle, to limit and regulate both the process and the content of policy making and the law that emerges from it. Given this, one would expect that processes of policy- and law-making in the EU would be shaped in order to ensure that proportionality is taken seriously.

From the perspective of taking rights and proportionality seriously, it is important to note that—as in many other polities—the agenda-setting phase is often politically determined, and when it comes to counter-terrorism that political determination is frequently done in Council meetings and driven by the Presidency.[66] One implication of this is that the process of policy-making that kicks in after the agenda setting has taken place may well be put in a position of trying to devise a way of forming policy that is a legally acceptable and constitutionally consistent translation of the antecedent political decision. Indeed, in many ways this is part of the classical design of EU policy-making, where the regulatory machinery was separated from the political machinery in order to try to deliver public goods.[67] In order to try to ensure that the policies and instruments formulated during this process are legally robust, the European

[64] On policy-making in the EU generally see for example JEREMY RICHARDSON AND SONIA MAZEY (EDS), EUROPEAN UNION: POWER AND POLICY-MAKING, 4th Edition (2015).
[65] In areas where a Member State has accepted the jurisdiction of the Court of Justice the domestic courts in that country have a duty to provide preliminary rulings on the interpretation of the Treaties of the European Union and on the validity and interpretation of acts of EU institutions, bodies, offices and agencies: Article 267 TFEU.
[66] On the power of the Presidency generally see for example Jonas Tallberg, The Power of the Presidency: Brokerage, Efficiency and Distribution in EU Negotiations 42(5) JOURNAL OF COMMON MARKET STUDIES 999 (2004).
[67] This is not, of course, to suggest that it always succeeded. For discussion see e.g. Joseph Weiler, Europe in Crisis: On 'Political Messianism', 'Legitimacy' and the 'Rule of Law' 12 SINGAPORE JOURNAL OF LEGAL STUDIES 248, 267 (2012).

Commission generally follows three stages: (i) assessing rights impact as part of the *ex ante* impact assessment of a proposed measure,[68] (ii) consulting on fundamental rights by, for example, identifying rights questions in preparatory documents and proposals or engaging directly with civil society such as NGOs or expert rights bodies,[69] and (iii) including assessment of compliance with the Charter of Fundamental Rights in the explanatory memorandum accompanying a proposed new legal measure.[70] These stages integrate the commitment to comply with the Charter with the EU's *Better Regulation* agenda, introduced in order to "enhance the rationality of the EU emerging regulatory state while at the same time democratising its decision-making process".[71] Let us consider each of these three approaches in turn.

*Rights in the Impact Assessment*

Core to the *Better Regulation* agenda is a commitment to undertaking *ex ante* impact assessments for proposed new measures. This process encompasses tasks with clear connections to proportionality analysis; it should verify the existence of a problem or challenge, explore potential solutions to it, and present an evidence-based option to the political institutions of the EU, which then decide what—if any—option to pursue in order to address the identified challenge.[72] The Commission places a very heavy premium on these assessments, describing the *ex ante* process as "an essential tool for producing high quality and credible policy proposals…increas[ing] the legitimacy of EU action from the point of view of stakeholders and citizens".[73]

In making these assessments the Commission considers, among other things, the social/societal impacts of the proposed measures, including their impact on

[68] EUROPEAN COMMISSION, OPERATIONAL GUIDANCE ON TAKING ACCOUNT OF FUNDAMENTAL RIGHTS IN COMMISSION IMPACT ASSESSMENTS SEC (2011) 567 final; EUROPEAN COMMISSION, IMPACT ASSESSMENT GUIDELINES SEC (2009) 92.
[69] EUROPEAN COMMISSION, STRATEGY FOR THE EFFECTIVE IMPLEMENTATION OF THE CHARTER OF FUNDAMENTAL RIGHTS BY THE EUROPEAN UNION COM (2010) 573 final, 6; EUROPEAN COMMISSION, OPERATIONAL GUIDANCE ON TAKING ACCOUNT OF FUNDAMENTAL RIGHTS IN COMMISSION IMPACT ASSESSMENTS SEC (2011) 567 final, 11 and 13.
[70] EUROPEAN COMMISSION, STRATEGY FOR THE EFFECTIVE IMPLEMENTATION OF THE CHARTER OF FUNDAMENTAL RIGHTS BY THE EUROPEAN UNION COM (2010) 573 final, 7-8; EUROPEAN COMMISSION, OPERATIONAL GUIDANCE ON TAKING ACCOUNT OF FUNDAMENTAL RIGHTS IN COMMISSION IMPACT ASSESSMENTS SEC (2011) 567 final, 6 and 23.
[71] Alberto Alemanno, A Meeting of Minds on Impact Assessment: When Ex Ante Evaluation Meets Ex Post Judicial Control 17(3) EUROPEAN PUBLIC LAW 5 (2011). See generally REPORT OF THE WORKING GROUP ON BETTER REGULATION (Group 2c), May 2001.
[72] EUROPEAN COMMISSION, BETTER REGULATION GUIDELINES SWD (2017) 350 (2017).
[73] EUROPEAN COMMISSION, IMPACT ASSESSMENT GUIDELINES SEC (2009) 92, p. 18.

fundamental rights. In truth, Commission officials sometimes find it difficult to assess rights impact in a manner analogous to, for example, economic or environmental impact.[74] This reflects the concern that fundamental rights cannot easily be fitted into the economic-environmental-social structure of classical impact assessment, and there is a perception, at least in some of the scholarship, that rights are not given sufficient weight in the process, either because of an unwillingness to redesign impact assessment in order to account for rights,[75] or because of the difficulty as a general matter of applying (largely quantitative) impact forecasting methods to (largely qualitative) values such as rights enjoyment.[76] To assist in this, Commission officials are expressly prompted to consider the following questions in respect of rights:

Would any limitation of fundamental rights:

- be necessary to achieve an objective of general interest or to protect the rights and freedoms of others (which)?
- be proportionate to the desired aim?
- preserve the essence of the fundamental right concerned?[77]

The assessment of rights in the *ex ante* impact assessment is, then, clearly and manifestly influenced by the proportionality standard as articulated in judicial *dicta* at European level. Whether the *ex ante* impact assessments undertaken shape, in a meaningful way, the policy outcome is a matter of some dispute.[78] While the Commission is clearly committed to them as core to better regulation, it is also of course possible that they might be shaped in a way to reinforce rather than challenge the starting assumptions that underpinned the initial policy formation. As Wegrich puts it, "If we assume that politicians and bureaucrats are smart, then we should also assume

[74] See generally FIONA DE LONDRAS AND JOSEPHINE DOODY, POLICY-MAKER PERSPECTIVES ON IMPACT, LEGITIMACY AND EFFECTIVENESS IN EU COUNTER-TERRORISM (2014). Importantly, fundamental rights expertise may not be in present in all DGs, and the Commission itself advises civil servants to engage with DG Justice "for guidance on how to assess in concrete cases the impacts which a proposed initiative may have on fundamental rights", EUROPEAN COMMISSION, OPERATIONAL GUIDANCE ON TAKING ACCOUNT OF FUNDAMENTAL RIGHTS IN COMMISSION IMPACT ASSESSMENTS SEC (2011) 567 final, 3.

[75] de Jésus Butler, above n 5970, p. 405.

[76] For a longer discussion see Fiona de Londras, Accounting for Rights in EU Counter-Terrorism: Towards Effective Review 22(2) COLUMBIA JOURNAL OF EUROPEAN LAW 237 (2016)

[77] EUROPEAN COMMISSION, OPERATIONAL GUIDANCE ON TAKING ACCOUNT OF FUNDAMENTAL RIGHTS IN COMMISSION IMPACT ASSESSMENTS SEC (2011) 567 final, 7.

[78] See the discussion in de Jésus Butler, above n. 5970.

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that such gaming of better regulation procedures is happening".[79]

*Consultation and Participation*

As already noted, the Commission also emphasises the use of participatory and consultative approaches to law-making, partly reflecting the Treaty approach to proportionality and subsidiarity.[80] Participatory commitments in policy-making are usually intended not only to bring technical and industry expertise to relevant policy making processes, but also to bring to the table a range of experience and epistemological communities that could identify, perhaps in ways that are nationally or contextually contingent, potential difficulties either in the reception, acceptance, implementation, or lawfulness of the proposed mechanism for giving effect to the policy decision, thus raising—at a sufficiently early stage—any necessary red flags indicting that the policy formation process is edging too close to the boundaries imposed by legal principles such as proportionality.[81] The importance of pluralising the community of people engaged in the policy-making and policy formation processes is heightened by the fact that the EU tends to rely on a network of professionals with particular expertise, competence and knowledge on the particular policy issue,[82] largely because of the 'unclear technology'[83] of EU policy making, i.e. because of the difficulty of penetrating the obtuse and often opaque processes of policy making within the Commission and institutions and the implication of this for access, by outsiders, to its mechanisms. Different Directorates General have what de Jésus Butler calls "consultation habits",[84] and these habits do not always involve consultation with rights-related expertise. This difficulty is exacerbated by the tendency to move between different modes of governance in policy-making, particularly where questions of EU competency or deadlocks arise.[85] Even when consultation is undertaken it is, as in all

[79] Kai Wegrich, Which results? Better regulation and institutional politics 6(3) EUROPEAN JOURNAL OF REGULATION AND RISK 369, 370, fn 5 (2015).
[80] Article 5, TREATY ON THE EUROPEAN UNION; TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, Protocol 2.
[81] On the (theoretical) benefits of participation and consultation see, classically, Sherry Amstein, A Ladder of Citizen Participation 35(4) JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 216 (1969).
[82] See e.g. Julie Girling, The Role of Science in 21st Century EU Policy Making 5(3) EUROPEAN JOURNAL OF RISK REGULATION 300 (2014).
[83] Jeremy Richardson, The EU as a policy-making state: A policy system like any other? in RICHARDSON AND MAZEY, above n 6475, 17.
[84] de Jésus Butler, above n 5970, 400.
[85] Ingeborg Tömmel and Amy Verdun, Innovative Governance in the European Union: What Makes it Different? in INGEBORG TÖMMEL AND AMY VERDUN, (EDS), INNOVATIVE GOVERNANCE IN THE EUROPEAN UNION: THE POLITICS OF MULTILEVEL POLICYMAKING (2009).

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contexts, subject to the limitations imposed by gatekeeping, and there is no clarity (and no commitment) as to what will be done with the outcome of a consultation, i.e. as to whether the consultation will or will ordinarily determine the shape, acceptability, and form of the policy outcome. Indeed, in some cases the Commission has appeared to be plainly unwilling to act on the views expressed to it in the course of the consultations undertaken.[86] While this mode-switching may be successful in enabling the EU to achieve its desired policy outcome, it raises significant difficulties in terms of ensuring that processes designed to secure meaningful engagement with legal standards such as proportionality are engaged in consistently, rigorously, and pluralistically. Thus, the commitment to participation and consultation may, in reality, suffer from both inadequacy (in the range of consulted persons) and limitations (in the application of the outcomes).

*Rights in the Explanatory Memorandum*

Where there has been an impact assessment and consultative process, the executive memorandum is primarily an account of how and why the proposed legislative measures are proposed and formulated in the manner presented; the explanatory memorandum should "contain a summary explaining how fundamental rights obligations have been met".[87] Although opinions provided by Legal Services are not ordinarily published, it is usually the case that some Legal Services input will have been provided to Commission officials preparing the explanatory memorandum.[88] The extent to which this input shapes or is reflected in the memorandum itself is, however, for the DG to decide and extremely difficult to detect.[89] This is even more so the case where there is no impact assessment, green paper or other consultation document against which to consider the proposals as formulated in the explanatory memorandum for it is the case that all three stages of proportionality analysis in the policy-making process leading to legislative outputs within the EU do not, necessarily, take place.

The Commission may determine that the impact assessment should be skipped,

[86] See in particular the criticism of the Commission's handling of consultation in respect of Passenger Name Data regulation in de Jésus Butler, above n 5970.
[87] EUROPEAN COMMISSION, STRATEGY FOR THE EFFECTIVE IMPLEMENTATION OF THE CHARTER OF FUNDAMENTAL RIGHTS BY THE EUROPEAN UNION COM (2010) 573 final, 8.
[88] de Jésus Butler, above n 5970.
[89] Ibid, p. 410 *et seq*.

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including for reasons of urgency.[90] In the EU, as in other polities, urgency is at times cited in aid of attempts to accelerate law-making processes in the field of counter-terrorism,[91] meaning that this critical stage of *ex ante* impact assessment may be abridged or excluded entirely. Similarly the consultative and participatory processes can be omitted from a process, not least where there is no green paper or other consultative document underpinning or initiating the process but where, instead, the policy initiative has political origins. Again, this is detectable in the counter-terrorism realm, where high-level political decisions to take action are made, often in the Council, and the Commission's role becomes *de facto* to give effect to this policy commitment.[92] Where impact assessment and consultation or participation have been condensed or excluded, the explanatory memorandum becomes the critical document for analysis of the extent to which rights and proportionality were designed into the process resulting in the legal instrument in question. When that is the case, the evidence of proportionality analysis in evidence in the explanatory memorandum can, and sometimes does, raise questions about the extent to which proportionality really has had the upstream effects that its purpose and the deference afforded to the EU by the Court of Justice suggest ought to be the case. We turn now to one recent example—the Directive on Combating Terrorism—to consider precisely those questions.

## Part III: Taking Proportionality Seriously? The EU Directive on Combating Terrorism

In autumn 2001 the EU did not yet have a body of EU counter-terrorism law *per se*. That changed swiftly after the attacks of September 11th, and at the time of writing this paper (in late 2019) the EU is widely recognised as a significant counter-terrorism

[90] "Particularly urgent proposals, in response to cases of emergency or force majeure, may be exempted from the normal impact assessment procedures. Exemption will be the exception to the rule and will be assessed on a case by case basis between the lead DG, the other services concerned and the SG and, if necessary, between the relevant cabinets", EUROPEAN COMMISSION, INTERNAL GUIDELINES ON THE NEW IMPACT ASSESSMENT PROCEDURE DEVELOPED FOR THE COMMISSION SERVICES 8

[91] This was the case in respect of both the DIRECTIVE ON COMBATTING TERRORISM below and the FRAMEWORK DECISION OF 2002 already discussed above.

[92] See the discussion, based on empirical research with persons working in the EU, in de Londras, Accounting for Rights, above n. 7688.

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actor,[93] participates in substantial ways in the "transnational counter-terrorism order",[94] and has developed its own significant corpus of counter-terrorism law and policies using a variety of policies, action plans, directives, and other instruments. However, it was not until 2017 that the EU passed a comprehensive Directive on Countering Terrorism (DCT).

The DCT is a wide-ranging law, replacing an earlier instrument: the 2002 Framework Decision on Combating Terrorism, as amended.[95] While the Directive's content is ranging, it broadly contains three categories of provision: (a) provisions incorporating (sometimes in amended forms) measures already existing in EU law, (b) provisions giving effect to international obligations of the EU and/or the Member States, and (c) 'new' provisions proposed and promoted by the Commission or the Member States. Although the Directive's have provisions raised real concerns about human rights protection;[96] the substantive text as originally proposed did not include an express protection of rights.[97] Given this, and bearing in mind the role of proportionality in EU law considered in Part II above, one might reasonably expect robust and rigorous pre-enactment rights analysis to have taken place. As we will see, that was far from the case.

[93] For an analysis see Jörg Monar, The EU as an International Counter-Terrorism Actor: Progress and Constraints 30(2-3) INTELLIGENCE AND NATIONAL SECURITY 333 (2015); Erik Brattberg and Mark Rhinard, The EU as a Global Counter-Terrorism Actor in the Making 21(4) EUROPEAN SECURITY 557 (2012).

[94] Above n. 1624

[95] FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM; FRAMEWORK DECISION 2008/919/JHA AMENDING FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM

[96] See for example the interventions of a civil society coalition identifying human rights concerns: Joint Civil Society Statement, "Counter-Terrorism: The EU and its Member States must respect and protect human rights and the rule of law", 1 March 2016. Available at: http://www.enar-eu.org/IMG/pdf/2016_joint_statement_ct_and_hr_final.pdf See also the critiques in Fionnuala ní Aoláin, European Counter-Terrorism Approaches: A Slow and Insidious Erosion of Fundamental Rights, JUST SECURITY, 17 October 2018. Available at https://www.justsecurity.org/61086/european-counter-terrorism-approaches-slow-insidious-erosion-fundamental-rights/. ELSPETH GUILD AND DIDIER BIGO, ANTI- AND COUNTER-TERRORISM AND HUMAN RIGHTS IN EUROPE: 5 SNAPSHOTS OF CURRENT CONTROVERSIES (2018); European Digital Rights, "Recommendations for the European Parliament's Draft Report on the Directive on Combating Terrorism". Available at https://edri.org/files/counterterrorism/CounterTerror_LIBEDraftReport_EDRi_position.pdf. Human Rights Watch, "EU Counterterrorism Directive Seriously Flawed", 20 November 2016. Available at https://www.hrw.org/news/2016/11/30/eu-counterterrorism-directive-seriously-flawed.

[97] See the proposed Directive appended to EUROPEAN COMMISSION, PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON COMBATING TERRORISM AND REPLACING COUNCIL FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM, COM/2015/0625 final - 2015/0281 (COD).

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*(a) The Content of the Directive on Combating Terrorism*

The primary focus of the DCT is the extension and further harmonisation of criminal laws of terrorism across the Member States, largely in response to the 'foreign terrorist fighter' phenomenon, which had recently attracted significant European and international attention, including a UN Security Council Resolution.[98] The Directive followed the controversial[99] 2002 Framework Decision on Combating Terrorism (amended in 2008), which defined terrorist acts in extremely broad terms and placed very significant obligations on Member States—most of whom had very limited counter-terrorism law at the time of its introduction—to introduce domestic criminal law to criminalise wide ranging and often ill-defined 'terrorist acts'.[100] These ranged from "attacks upon the physical integrity of a person"[101] to "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"[102] done "with the aim of seriously intimidating a population, or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization".[103] The Framework Decision also required criminalization of directing or participating in a terrorist group,[104] aggravated theft, extortion and drawing up false administrative documents with a view to committing terrorist acts,[105] inciting, aiding, abetting or attempting terrorist acts or the direction of or participation in a terrorist

[98] UN SECURITY COUNCIL RESOLUTION 2178 (2014).
[99] For analyses see, for example, Steve Peers, EU Responses to Terrorism 52(1) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 227 (2003); Eugenia Dumitriu, The EU's Definition of Terrorism: The Council Framework Decision on Combating Terrorism 5(5) GERMAN LAW JOURNAL 585 (2004); Matthias Borgers, Framework Decision on Combating Terrorism: Two Questions on the Definition of Terrorist Offences 3(1) NEW JOURNAL OF EUROPEAN CRIMINAL LAW 68 (2012).
[100] Article 1, FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM
[101] Article 1(1)(b), FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM
[102] Article 1(1)(f), FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM
[103] Article 1(1), FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM
[104] Article 2, FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM
[105] Article 3(2), FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM *as amended by* Article 1, FRAMEWORK DECISION 2008/919/JHA AMENDING FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM.

group, [106] public provocation to commit a terrorist offence, [107] recruitment for terrorism,[108] and training for terrorism.[109]

The DCT incorporates but goes further than these offences and their definitions from these earlier Framework Decisions,[110] while maintaining a very broad definition of terrorism.[111] While public provocation to commit a terrorist offence was an offence under the Framework Decision,[112] the DCT widened the office in very significant ways, so that Member States were obliged to "take the necessary measures to ensure that the distribution, or otherwise making available *by any means, whether online or offline*, of a message to the public, with the intent to incite the commission of one of [terrorist acts] where such conduct, *directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed*, is punishable as a criminal offence when committed intentionally" (emphasis added).

Simply placing existing obligations on a new legal footing was not sufficient to fulfill the policy objective of the Directive; instead, the Commission argued that the existing Decisions needed to be reviewed "to tackle the evolving threat in a more effective way",[113] with particular emphasis on FTFs. In this respect, the Directive gives effect to related international obligations placed on Member States by the United Nations Security Council Resolution 2178 (2014), and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (which itself is designed to give

[106] Article 4, FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM
[107] Article 3(1)(a), FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM *as amended by* Article 1, FRAMEWORK DECISION 2008/919/JHA AMENDING FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM.
[108] Article 3(2), FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM *as amended by* Article 1, FRAMEWORK DECISION 2008/919/JHA AMENDING FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM.
[109] Article 3(2), FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM *as amended by* Article 1, FRAMEWORK DECISION 2008/919/JHA AMENDING FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM.
[110] DIRECTIVE ON COMBATING TERRORISM, above n. **Error! Bookmark not defined.**22, Articles 3-14.
[111] DIRECTIVE ON COMBATING TERRORISM, above n. **Error! Bookmark not defined.**22, Article 3.
[112] Article 3(1)(a), FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM *as amended by* Article 1, FRAMEWORK DECISION 2008/919/JHA AMENDING FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM.
[113] Explanatory Memorandum to the proposed Directive appended to European Commission, Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM/2015/0625 final - 2015/0281 (COD) ('Explanatory Memorandum'), 4.

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effect to UN Security Council Resolution 2178 (2014)), as well as to Financial Action Task Force (FATF) Recommendation No. 5.[114] Thus, the Directive added further new offences to the existing *acquis*, specifically travelling abroad for terrorism,[115] organising or otherwise facilitating travelling abroad for terrorism,[116] an expanded offence of financing terrorism,[117] and—in widely criticised addition to existing inchoate offences ported from the Framework Decisions[118]—aiding or abetting, inciting and attempting any of these newly criminalised activities.[119] The offences of directing and participating in the activities of a terrorist group[120] can be committed even if no further terrorist activity takes place (i.e. 'mere' direction or participation is sufficient),[121] and the offences of provocation, recruitment, providing training, receiving training, travelling for the purposes of terrorism, organising or facilitating travelling for the purpose of terrorism, and aggravated theft, extortion or drawing up of false documents with a view to committing a terrorist act can all be committed even if no other terrorist offence takes place as a result or in connection thereto.[122]

As this overview of the content of the Directive suggests, there are serious concerns as to its human rights implications. In large part, these concerns mirror those that are often expressed in respect of domestic counter-terrorism. First, there are criticisms of the over-extension of the criminal law, for example through the inclusion of glorification—a term not defined in the Directive—within the scope of the offence of provocation of terrorism.[123]

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[114] Although not legally binding as a matter of international law, FATF recommendations are often treated as if they were binding, and as the best practice approach to ensuring compliance with international legal obligations in respect of terrorist financing. For further analysis see, for example, BEN HAYES, COUNTER-TERRORISM, 'POLICY LAUNDERING' AND THE FATF: LEGALISING SURVEILLANCE, REGULATING CIVIL SOCIETY (2012).

[115] DIRECTIVE ON COMBATING TERRORISM, above n. **Error! Bookmark not defined.**~~22~~, Article 9.

[116] Ibid, Article 10.

[117] Ibid, Article 11. In large part, this brought this Directive in line with DIRECTIVE (EU) 2018/843 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 30 MAY 2018 AMENDING DIRECTIVE (EU) 2015/849 ON THE PREVENTION OF THE USE OF THE FINANCIAL SYSTEM FOR THE PURPOSES OF MONEY LAUNDERING OR TERRORIST FINANCING, AND AMENDING DIRECTIVES 2009/138/EC and 2013/36/EU, *OJ L 156, 19.6.2018, p. 43–74.*

[118] See for example the criticism from the civil society coalition, above n. ~~96~~107.

[119] DIRECTIVE ON COMBATING TERRORISM, above n. **Error! Bookmark not defined.**~~22~~, Article 16.

[120] Ibid, Article 3.

[121] Ibid, Article 13.

[122] Ibid.

[123] For critiques of criminalising 'glorification' see, for example, S Chenani Edkaratne, Redundant Restriction: The UK's Offense of Glorifying Terrorism 23(1) HARVARD HUMAN RIGHTS JOURNAL 205 (2010); Eric Barendt, Incitement to, and Glorification of, Terrorism in IVAN HARE AND JAMES WEINSTEIN (EDS), EXTREME SPEECH AND DEMOCRACY (2009).

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Second, there are concerns that the Directive criminalises excessively remote activities. This is well illustrated by the offence of receiving training for terrorism (Article 8). Article 8 requires member states to "take the necessary measures to ensure that receiving instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1) is punishable as a criminal offence when committed intentionally". During the passage of the Directive, NGOs in particular expressed concern about the significant broadening of criminal liability through this provision especially as it does not expressly require active participation ("receiving instruction on") for criminal liability to attach.[124] However these concerns resulted in only very minor textual changes from the originally proposed text, specifically a change from "to receive instruction" to "receiving instruction" in the opening phrase.[125]

Third, the reach of the inchoate offences is a matter of concern. Article 16 of the Directive is extensive in its scope and, when seen in concert with the very broad phrasing and reach of the primary offences to which it relates, its reach becomes clear. Article 16(1) requires member states to criminalise aiding or abetting the offences prescribed in Articles 3 to 8, 11 and 12. That is, terrorist offences *per se* (Article 3), offences relating to directing or participating in a terrorist group (Article 4), public provocation to commit a terrorist offence (Article 5), recruitment (Article 6), providing training (Article 7) or receiving training (Article 8) for terrorism, terrorist financing (Article 11), and 'other' terrorist offences of aggravated robbery, extortion and drawing up false administrative documents with a view to committing terrorist acts (Article 12). Incitement is even more broadly applied in Article 16(2); not only does it also apply to Articles 3 to 8, 11 and 12, but also to Articles 9 (travelling for the purpose of terrorism), and 10 (organising or otherwise facilitating travel for terrorism). Finally, Article 16(3) requires member states to criminalise attempts to commit most of the terrorist offences in Article 3, recruitment or the provision of training for terrorism (Articles 6 and 7), and most elements of travelling for the purpose of terrorism (namely Article 9(1) and

[124] See the critiques from the civil society coalition, above n. 96~~107~~.
[125] See Article 8 as originally proposed by the Commission, above n. 97~~108~~.

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Article 9(2)(a)). It is well noted that expanding the reach of the criminal law further and further away from a primary offence through the instigation of multiple and remote inchoate offences is a key technique of the contemporary approach to counter-terrorism,[126] as much in evidence here in the Directive as it is in many states' domestic criminal counter-terrorist law.

The same rights-related concerns can be applied, thus, to the Directive as have been levied at inchoate offences in domestic law,[127] particularly as the Directive does not include explicit protections of procedural rights (or explicitly require their protection in national implementing legislation) so that the mixture of extensive inchoate offences, a lack of explicit procedural protection, and the very broad and vague definitions of terrorist activity on which much of the Directive hangs combine to raise significant questions of rights protection and, thus, proportionality. Our purpose here is not to argue conclusively that the Directive is or is not proportionate, but rather to illustrate how clearly and how sharply questions of proportionality and rights arose in respect of the Directive so that—given what we have seen about the role of proportionality above—we might have expected that robust proportionality analysis would have been undertaken as part of the pre-enactment rights review.

As discussed in Part II, a Commission proposal is ordinarily the culmination of comprehensive consultation and administrative processes, incorporating impact assessments**,** reports by experts, international organisations and NGO, inter-service scrutiny, and the explanatory memorandum. Under the Ordinary Legislative Procedure, the proposal is then submitted to Parliament, Council and all Member State parliaments where it is assessed on the basis of the principles of subsidiarity and proportionality.[128] The aspiration is that this process will ensure effective adherence to the principles of subsidiarity, legality and proportionality across the law-making process. However, since 2001 EU counter-terrorism law has rarely been made in rigorous adherence to

[126] See generally JOANNA SIMON, PREVENTIVE TERRORISM OFFENCES: THE EXTENSION OF THE AMBIT OF INCHOATE LIABILITY IN CRIMINAL LAW AS A RESPONSE TO THE THREAT TO TERRORISM, DPhil thesis, University of Oxford, 2015.
[127] Ibid; see also ANDREW ASHWORTH AND LUCIA ZEDNER, *PREVENTIVE JUSTICE* (2014), esp. Chapter 8; Caroline Pelser, Preparations to Commit a Crime: The Dutch Approach to Inchoate Offences 4 UTRECHT LAW REVIEW 57 (2008); Francesca Galli, Freedom of thought or 'thought-crimes'? Counter-terrorism and freedom of expression, in ANICETO MASFERRER AND CLIVE WALKER (EDS), COUNTER-TERRORISM, HUMAN RIGHTS AND THE RULE OF LAW (2013).
[128] TEU Protocol No. 2

this ordinary procedure. Instead, and in common with other national and international institutions,[129] the EU has tended to follow an abridged and accelerated process for the introduction of counter-terrorism law, often without any *ex ante* impact assessment and with limited parliamentary resistance, and almost never with provision for evaluative independent *ex post facto* review.[130] The same pattern is in evidence as regards the DCT. As we will see, there is no evidence of robust engagement with proportionality analysis across these domains where the Directive is concerned. This is not least because, for purported reasons of urgency,[131] no impact assessment took place in respect of the proposed Directive. Furthermore, there was no formal process of consultation and participation, at least not with civil society and human rights bodies,[132] so that the number of actors involved in the evaluative phase was greatly reduced.

In terms of preparatory documents and processes, then, our only source for effective analysis of the extent to which proportionality reasoning impacted on the policy- and law-making process is the explanatory memorandum that was attached to the proposed Directive.[133] However, when we analyse the engagement therein with the elements of proportionality analysis—identifying infringements of rights, identifying a worthy goal, establishing the necessity of the intervention, and establishing that the intervention represents a proportionate balance between the worthy goal and the rights infringement—it becomes very clear that, inasmuch as it is in evidence, engagement with proportionality reasoning was superficial and performative at this stage of the process.

According to the memorandum what we might term the 'worthy goal' is ensuring that the EU has "adequate tools in place to protect EU citizens and all living in the EU", that these tools "counter such violations in an effective and proportionate manner", are "adequate to meet […] the threats the EU is confronted with" and "preserv[e] a society

[129] On the tendency towards abridged and fast-tracked processes in the field of counter-terrorism at UN level, for example, see FIONNUALA NÍ AOLÁIN, REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM (2018) UN Doc A/73/361.
[130] For analysis see, for example, de Londras, Accounting for Rights, above n. **Error! Bookmark not defined.**~~14~~.
[131] Explanatory Memorandum, above n. 113~~125~~, 12.
[132] Ibid. See also EDRi, above n. 96~~107~~: "Civil society has not been awarded the opportunity to provide input, evidence or expertise prior to the proposal of the Directive", 1.
[133] Explanatory Memorandum, above n. 113~~125~~.

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in which pluralism, non-discrimination, tolerance, justice, solidarity and equality prevail".[134] To do this, the Commission argued, required them to "upgrad[e]" and "scale up" EU counter-terrorism law to meet the challenge of foreign terrorist fighters,[135] requiring a "[m]ore coherent, comprehensive and aligned" counter-terrorism law at national level across the member states,[136] taking into account "new international standards and obligations",[137] specifically UN Security Council Resolution 2178 (2014), UN Security Council Resolution 2249 (2015), the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (2015), and Recommendation 5 of the Financial Action Task Force as revised following the introduction of UNSC Resolution 2178 (2014). In other words, the approach proposed was 'necessary' as against the worthy goal to be pursued. The measures proposed, the Commission argued, would ensure EU compliance with its international obligations (especially as the EU is a signatory to the Additional Protocol) and "avoid any legal gaps that may result from a fragmented approach and would be of clear added value for enhancing the security of the EU an the safety of EU citizens and people living in the EU", providing a common benchmark for cross-border cooperation and information exchange, and facilitate cooperation with non-EU countries.[138] These are effectively rationality claims aligning the proposed changes to the goal to be pursued and making clear predictions of effectiveness for the proposed Directive.

However, when it comes to the balancing test the Explanatory Memorandum is decidedly light. The Commission does aver to the principle of proportionality on a number of occasions,[139] and the Memorandum states unequivocally that "all measures intended to enhance security measures must comply with the principles of necessity, proportionality and legality, with appropriate safeguards to ensure accountability and

[134] Ibid, 1.
[135] Ibid.
[136] Ibid, 2.
[137] Ibid, 4.
[138] Ibid, 10.
[139] Ibid, 2 ("It is important to have adequate tools in place to protect EU citizens and all people living in the EU and counter such violations in an effective and proportionate manner…"); Ibid, 13 ("All measures intended to enhance security measures must comply with the principles of necessity, proportionality and legality, with appropriate safeguards to ensure accountability and judicial redress", and "Any limitation on the exercise of fundamental rights and freedoms is subject to the conditions set out in Article 52(1) of the Charter of Fundamental Rights, namely be subject to the principle of proportionality…").

judicial redress".[140] However, the Memorandum generally contains no explanation or analysis of how fundamental rights are to be protected or the principle of proportionality fulfilled by the Directive as proposed. Instead, in 12 lines of text (out of the 23 pages of the Memorandum) under the heading 'proportionality', the Commission claims that "the proposed new Directive is limited to what is necessary and proportionate on the one hand to implement international obligations and standards…and on the other hand to adapt existing terrorist offences to the new terrorist threats….The proposal defines the scope of the criminal offences with a view to covering all relevant conduct while limiting it to what is necessary and proportionate".[141] In this entire 12-line paragraph no explicit mention is made of fundamental rights at all.

In almost two pages of text headed 'fundamental rights' the Commission emphasises the importance of the principle of proportionality and acknowledges that "any legislation in the field of criminal law, necessarily has an impact on the exercise of fundamental rights".[142] It goes on to list a range of rights that are "particularly relevant in relation to the proposed measures"[143] without analysing how the provisions of the proposed Directive would impact on them, and reiterated again the obligation to ensure all EU measures are proportionate. Without engaging in the content of the proposed measures it then goes onto assert proportionality on the basis that the proposed offense are "limited…to what is necessary to allow for the effective prosecution of acts",[144] but only the offence of travelling abroad for terrorism attracts an engaged analysis. This offence implicates the right to freedom of movement within the EU; one of the totemic four freedoms protected in EU law. Here the Commission makes reference to another instance of interference with that right,[145] which seems to be offered as a quasi-precedent for its limitation on the grounds of policy and public security, including the prevention of crime.

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[140] Ibid, 13.
[141] Ibid, 11.
[142] Ibid, 13.
[143] Ibid, 14.
[144] Ibid.
[145] DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 29 APRIL 2004 ON THE RIGHT OF CITIZENS OF THE UNION AND THEIR FAMILY MEMBERS TO MOVE AND RESIDE FREELY WITHIN THE TERRITORY OF THE MEMBER STATES AMENDING REGULATION (EEC) NO 1612/68 AND REPEALING DIRECTIVES 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance). OJ L 158, 30.4.2004, p. 77–123.

However, apart from that, the Memorandum seems to treat the provenance of these provisions (in international standards and/or prior EU instruments) as effectively determinative of the question of proportionality and fails to subject them to any standalone scrutiny. For example, under the heading of 'Stakeholder consultations', the Memorandum notes that draft texts of the Additional Protocol were made available for comments while it was being prepared, and that various NGOs did indeed submit comments to that—Council of Europe—process. The Memorandum acknowledges that civil society had "stressed the need for adequate human rights safeguards, sufficient legal clarity…and clarification of obligations in international humanitarian law"[146] but claims that these were "incorporated" into the Additional Protocol through generic human rights clauses. Although it does not say so explicitly, the Memorandum clearly treats this as sufficient to deal with any questions of proportionality and rights compliance arising in respect of provisions intended to incorporate the Additional Protocol and, by implication, UN Security Council resolutions. This is notwithstanding the fact that civil society continued to express concerns about the content and implications of the Additional Protocol. Furthermore, no analogous claims about, for example, the implementation of FATF Recommendations are even made in the memorandum, notwithstanding the lack of rights-related scrutiny in that organisation, [147] and there is no sustained engagement with the questions of proportionality relating to the Framework Decisions which are treated instead as presumptively proportionate seemingly because of their provenance in EU law.

The Explanatory Memorandum accompanying the proposed Directive, then, did not especially articulate a proportionality analysis, although it contained multiple reminders that EU laws must be proportionate, from which one would be expected to infer proportionality of the attached proposed Directive notwithstanding the lack of substantiation. This is even more striking when one considers that, as originally proposed, the Directive did not even include a standard, generic provision requiring Member States to ensure compliance with fundamental rights in its implementation. Given the importance of the Explanatory Memorandum to the overall process of

[146] Explanatory Memorandum, above n. 113~~125~~, 12.
[147] See generally Hayes, above n. 114~~126~~ and de Londras, "The Transnational Counter-Terrorism Order", above n. **Error! Bookmark not defined.**~~26~~.

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ensuring compliance with the Charter, including proportionality, this raises clear questions. The legislative process undertaken in respect of the Directive, which was the Ordinary Legislative Procedure but with significant adjustments and without meaningful civil society engagement, does not answer those questions. Indeed, in March 2016, the European Network Against Racism led a joint civil society statement outlining the threat posed by the Directive to the preservation of human rights an expressing concerns about the "fast-tracked procedures used by EU institutions and EU Member States authorities to adopt counter-terrorism measures".[148] To no avail, however, and the Directive proceeded through the LIBE Committee (i.e. the civil liberties committee of the European Parliament) and seven trilogues before being passed into law.

This is not to suggest that there were no changes to the Directive during the legislative process. Both the Council (through DROIPEN) and Parliament (through LIBE) made extensive amendments to the proposed Directive's with reference to rights and proportionality during the policy-making process, most notably to Recitals 19 and 20. The LIBE Committee proposed extensive amendments to the draft proposal including reference to freedoms of speech, and freedom of information, and proposed insertion of a rights-based provision that would state that "this Directive should not have the effect of requiring Member States to take measures which would result in any form of discrimination".[149] Moreover, both co-legislators wanted to add a provision, proposed by DROIPEN[150] as Article 21bis, that would have provided that 'fundamental principles relating to freedom of the press and other media'. This Article 21bis was present in the consolidated compromise text agreed following the seventh and final trilogue held on 10 November 2010, and received broad support from civil society organisations although in some cases they also advocated expanding the explicit rights protection[151] and the conversion of rights-related recitals into a standalone provision.

[148] Civil society coalition, above n. 96~~107~~.
[149] COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS, REPORT ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON COMBATING TERRORISM AND REPLACING COUNCIL FRAMEWORK DECISION 2002/475/JHA ON COMBATING TERRORISM COM(2015) 0625—C8-0386/2015—2015/0281 (COD)).
[150] See the note to from the Presidency to the Council on the first reading of the proposal 2015/0281 (COD), 3 March 2016.
[151] Meijers Committee, "Note on a Proposal for a Directive on Combating Terrorism", 16 March 2016. Available at https://www.commissie-meijers.nl/sites/all/files/cm1603_note_on_a_proposal_for_a_directive_on_combating_terrorism_.pdf

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A number of civil society organisations referenced Recitals 19 and 20 and broadly supported the amendments as improvement on the Commission's proposal. The NGO, European Digital Rights (EDRi) recommended the elaboration of content and the conversion of the recitals into a stand alone Article 23.[152]. Reflecting these proposed changes, the final version of the Directive includes Article 23, which provides:

> 1. This Directive shall not have the effect of modifying the obligations to respect fundamental rights and fundamental legal principles, as enshrined in Article 6 TEU.
>
> 2. Member States may establish conditions required by, and in accordance with, fundamental principles relating to freedom of the press and other media, governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where such conditions relate to the determination or limitation of liability.

Fundamentally, this generic provision is inserted as a general statement of commitment to rights protection that, we can reasonably assume, is intended to ensure proportionality, and it does appear to be the case that the rights-orientation of actors engaged formally (DROIPEN and co-legislators) and informally (civil society organisations) was relevant to having this provision inserted. However, such a generic statement of the continued application of fundamental rights to the Directive gives little if any guidance as to how this commitment is to be fulfilled by the implementing parties. As noted by the UN Special Rapporteur on Protecting Fundamental Rights while Countering Terrorism, such generic human rights clauses[153] have a limited mitigated impact on the likely negative effect of the legal instrument on fundamental rights protection,[154] calling into question whether such a clause can be considered sufficient to secure the Directive's claim to proportionality.

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[152] EDRi, "Recommendations for the European Parliament's Draft Report on the Directive on Combating Terrorism". Available at https://edri.org/files/counterterrorism/CounterTerror_LIBEDraftReport_EDRi_position.pdf

[153] Such clauses are found in UN Security Council resolutions as well. See for example UNSC RESOLUTION 2178 (2014), Operative Paragraph 5; UNSC RESOLUTION 2396 (2017), Operative Paragraphs 4, 7, 11, 12, 13, 15 and 40; and UNSC RESOLUTION 2462 (2019), Operative Paragraphs 5, 6, 19, 20 and 23.

[154] NÍ AOLÁIN, above n. 129~~150~~.

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This analysis of the passage of the DCT shows that techniques of law- and policy-making that are often adopted in making counter-terrorism law undermine what seem to be established and proceduralised commitments to pre-enactment rights review in EU law-making. The development of the Directive was characterised by shortened and adjusted processes, exclusion of critical actors (especially civil society), claims of urgency, and superficial engagement with proportionality at deliberative and evaluative stages of the process. The inclusion, in the end, of an imprecise and generic statement of rights compliance can hardly be considered sufficient when seen against the wide-ranging and rights-limiting obligations that the Directive places on the Member States. While the curtailment of the process (including cutting down dramatically on participation and consultation) might be seen as erecting an even greater obligation to justify the Directive's content by reference to constitutional principle, the entirely unsatisfactory engagement right rights and proportionality in the Explanatory Memorandum suggests that a culture of justification[155] enriched by and reflected in rigorous pre-enactment rights review has yet to take root in EU counter-terrorism.

**Part IV: Shortfalls in Proportionality Analysis: Beyond the Directive on Combating Terrorism**

The problems with pre-enactment rights review that we have identified in respect of the DCT are not unique to this instrument. Indeed, they have been widely observed in respect of both earlier and subsequent instruments and are arguably characteristic of the approach to making EU counter-terrorism law. If, as this suggests, there is a systemic difficulty with taking proportionality seriously in the formation of EU counter-terrorism, this has significant consequences both within EU counter-terrorism and in the laws of the Member States. Unless a Member State opted out (as Denmark, Ireland and the United Kingdom did in respect of this Directive[156]), it was required to transpose the Directive into domestic law by 8 September 2018. As of the end of August 2020, all 25 Member States that had not opted-out had transposed aspects of the Directive,

[155] David Dyzenhaus, What Is a 'Democratic Culture of Justification'? in: REDRESSING THE DEMOCRATIC DEFICIT (2017) 425

[156] DIRECTIVE ON COMBATING TERRORISM, above n. **Error! Bookmark not defined.**~~22~~, Recitals 41 and 42.

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albeit to significantly varying degrees.[157] Transposition brings the faults of the Directive directly into the domestic law of the Member States, and ultimately where the EU instrument is deficient in terms of proportionality this may lead to conflicts between domestic courts (that strike down the transposing measures) and the EU institutions (that attempt to enforce the Directive), just as happened in respect of the Data Retention Directive.[158] Deficiencies in proportionality analysis at EU level thus have direct implications not only for rights-protection but also for the harmonisation and effectiveness of law across the EU—that is, for one of the primary purported purposes of the Directive itself. In the meantime, the DCT continues to have effects within the EU itself, operating as the foundation for the Union's continuing action in areas directly implicated by the Directive. Activity since the passage of the DCT has been fairly relentless. While, in some cases, new instruments have been preceded by *ex ante* impact assessments,[159] this is by no means always the case, and as we saw with the role played by the Framework Decisions in the drafting of the Directive, existing EU counter-terrorism instruments can and do operate as a starting point for future instruments,

[157] See the data on national transposition, updated weekly, on https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32017L0541

[158] Before the Court of Justice struck it down, transposing measures for the Data Retention Directive had been impugned and in some cases found lacking in the Supreme Courts of Bulgaria (Bulgarian Supreme Administrative Court No 13627, 11 December 2008) and Cyprus (Supreme Court of Cyprus, Decision on Civil Applications 65/2009, 78/2009, 82/2009 and 15/2010-22/2010, 1 February 2011), and the Constitutional Courts of Germany (German Constitutional Court, No 11/2010, 2 March 2010), Romania (Constitutional Court of Romania No 1258, 8 October 2009) and the Czech Republic (Czech Constitutional Court PI US 24/10, 22 March 2011).

[159] For example, REGULATION (EU) 2018/1672 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 23 OCTOBER 2018 ON CONTROLS ON CASH ENTERING OR LEAVING THE UNION AND REPEALING REGULATION (EC) No 1889/2005 passed through the policy-making process as per the ordinary legislative procedure. It appears the existing regulation was subject to an ex-post evaluation and that the updated regulation was informed by both stakeholder consultation and an impact assessment (EUROPEAN COMMISSION, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CONTROLS ON CASH ENTERING OR LEAVING THE UNION AND REPEALING REGULATION (EC) NO 1889/2005, COM(2016) 825 FINAL). Furthermore, the EU established a new 'interoperability framework' between EU information systems on borders and visas, and on police and judicial cooperation, asylum and migration in 2018. The two Regulations – in the field of borders and visas (2019/817) and in the field of police and judicial cooperation (2019/818) -- were adopted in June 2019 providing border officials and law enforcement authorities with the capacity for better detection of security threats by means of a biometric matching service to facilitate identification. The relevant regulation proposals were informed by impact assessments and civil society actors, including the European Data Protection Supervisor (EDPS), the European Agency for Fundamental Rights (FRA), and the Meijers Committee, all had opportunities to inform the process. European Data Protection Supervisor, *Opinion 4/2018 on the Proposal for two Regulations establishing a framework for interoperability between EU large-scale information systems*, 16 April 2018; Fundamental Rights Agency, "Interoperability and fundamental rights obligations" 2017/0351 (COD) 2017/0352 (COD); Meijers Committee, *CM1802 Comments on the Proposal for a Regulation of the European Parliament and of the Council on Establishing a Framework for Interoperability between EU Information Systems (Police and Judicial Cooperation, asylum and migration), 12 December 2017, COM (2017) 794*, 19 February 2018 .

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sometimes even being treated as presumptively proportionate simply because of their status as EU law.

Even the attempts at EU level to stock-take its counter-terrorism law and its impact on rights since the passage of the Directive seem not to have adequately addressed the shortcomings in proportionality analysis that are observable in the process that led to the DCT. The Special Committee on Terrorism (TERR)[160] that was established to assess the impact of counter-terrorism measures, seems also to have under-weighed rights and proportionality in its analysis. Co-led by Monika Hohlmeier, who happened to be the LIBE Committee's Rapporteur on the DCT during its passage through the policy-making process in 2016, the TERR's function was to evaluate the effectiveness of the EU's counter-terrorism framework, including by considering the impact of counter terrorism measures on fundamental rights.[161] The Explanatory Statement to the TERR's comprehensive report[162] on the current EU counter-terrorism landscape mirrors, in part, the tone and focus that we observed in respect of the Explanatory Memorandum to the DCT as proposed.[163] In particular, it emphasises the need to facilitate an effective response to the growing and evolving terrorist threat and firmly placing rights analysis within that security-driven framework, relegating explicit references to rights and allusions to proportionality to a short paragraph at the end.[164]

Echoing some of the opacity observed in the development and passage of the DCT, and much to the objection of civil society organisations, much of the Committee's work was undertaken in camera and, thus, with minimal engagement with civil society.[165] In

[160] Special Committee on Terrorism (2018/2044(INI)) established by the European Parliament under Rule 197 of its Rules of Procedure: European Parliament decision of 6 July 2017 on setting up a special committee on terrorism, its responsibilities, numerical strength and term of office (2017/2758(RSO)) *OJ C 334, 19.9.2018, p. 189–192.*

[161] Ibid, D(1)(e).

[162] Explanatory Statement to European Parliament, Findings and Recommendations of the Special Committee on Terrorism (2018).

[163] Explanatory Memorandum, above n. 113~~125~~.

[164] Explanatory Statement to European Parliament, Findings and Recommendations of the Special Committee on Terrorism (2018).

[165] A number of civil society organizations voiced concern regarding the lack of transparency with only a few meetings held in public. However, it is noted that, according to EDRi, TERR committee members did meet with a group of civil society organisations including Amnesty International; the European Network Against Racism (ENAR) and the International Committee of Jurists (ICJ), see: Ana Ollo, "European Parliament—fighting terrorism with closed-door secrecy,", 7 February 2018. Available at https://edri.org/european-parliament-fighting-terrorism-with-closed-door-secrecy/.

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the end, rights and proportionality are given very modest billing in the report that was adopted by the Parliament.[166] Although the Preamble to the report itself begins with generic reference to fundamental rights, only 21 of the 228 recommendations contained therein make explicit reference to rights. Reference to proportionality is primarily implicit, with the Report claiming that Member States and EU institutions must "find the right balance between the different fundamental rights involved and security needs…[and that]…the first priority should lie in protecting people's fundamental right to life and right to security".[167] The two explicit references to proportionality appear in relation to cooperation and information exchange, and to proportionate penalties when dealing with terrorist financing. This, predictably, prompted widespread criticism from civil society, [168] not least because, as the EDRi put it, even the amendments that were accepted to the Report "merely establish a shopping list of individual rights and that none of the fundamental rights provisions are substantiated with concrete proposals to end violations of fundamental rights or how to better enforce and respect these rights".[169]

**Conclusions**

The CJEU shows significant deference to the Union in respect of its claims of the proportionality of its legal instruments. In more recent case law, it has also tended to work into that analysis a consideration of the process by which instruments and decisions were formed, albeit in a way that appears to accept at face value the claims of proportionality analysis by the Commission and other EU institutions. That approach is based, to at least some extent, on the assumption that in developing, proposing, and then finalising legal instruments, the EU will be appropriately attentive to the demands of proportionality and, as a result, that proportionality will be an affective value in the policy- and law-formation processes. However, at least in the counter-terrorism context, there is good reason to suggest that this is not the case. Furthermore, when it

[166] EUROPEAN PARLIAMENT, FINDINGS AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON TERRORISM (2018).
[167] Ibid, para. 222.
[168] See for example Maryant Fernández Pérez, "EU Parliament's Anti-Terrorism Draft Report Raises Major Concerns", 10 October 2018. Available at https://edri.org/eu-parliaments-anti-terrorism-draft-report-raises-major-concerns/
[169] Chloé Berhélémy, "The TERR Committee votes on its irreparable draft Report", 21 November 2018. Available at https://edri.org/the-terr-committee-votes-on-its-irreparable-draft-report/

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comes to *ex post facto* review of EU counter-terrorism proportionality and effective rights-protection seem not to be the priority, so that policy-making and parliamentary processes of EU counter-terrorism-making seem, in at least some cases, to leave much to be desired from a rights-related perspective.

Even in the wake of judicial censure for disproportionate counter-terrorist action, our analysis of proportionality in the process of forming the DCT suggests that procedural fidelity to proportionality and the rigorous analysis that would to accompany it cannot be assumed. Instead, well-worn patterns—visible across the transnational counter-terrorism order as well as in many national jurisdictions—of claims or urgency, necessity and the need for extensive criminalisation seem to drive this process, often to the extent that ordinary procedural safeguards—including impact assessments and stakeholder participation in the EU context—are bypassed.

In the field of EU counter-terrorism deference cannot rest on an assumption of procedural rigour oriented towards ensuring proportionality. At least in the case of the DCT it is very clear that such procedural rigour is not in evidence, and that inasmuch as it occurs pre-enactment rights review is limited and performative. While it is clear that EU courts continue to be willing to strike down even strategically important instruments, including those implementing international obligations such as UN Security Council Resolutions, in order to ensure that proportionality and meaningful rights protection operate in the field of EU counter-terrorism, there is a better alternative. This is for pre-enactment rights review to be undertaken in a meaningful, robust, and participatory way in EU counter-terrorism so that proportionality and rights can be elevated from mere 'legal tests' to be passed when the law is impugned before the national or EU courts, to affective principles hardwired into EU counter-terrorism at every stage, including its development.