

COUNTER - TERRORISM LEGISLATION IN ITALY: THE KEY ROLE OF ADMINISTRATIVE MEASURES

ABSTRACT: *The aim of the paper is to describe counter-terrorism legislation in Italy. After a brief introduction highlighting the trend among EU Member States to enact or amend anti-terrorism legislation in order to counter the recent phenomenon of “foreign fighters,” the note focuses on the counter-terrorism policy adopted in Italy. In particular, after analysing the main regulatory provisions in this regard, the paper focuses on administrative measures to combat terrorism. The analysis particularly concerns the instrument of administrative expulsions, which may well be considered the most used in our country. The study also focuses on all other administrative tools envisaged by the legislator in order to prevent, combat and counter the phenomenon of international terrorism.*

CONTENT: 1. Introduction: counter-terrorism reforms in the European Union. - 2. Italian counter-terrorism legislation and the primary role of administrative instruments.

1. Introduction: counter-terrorism reforms in the European Union

As a result of a series of terrorist attacks in Europe in recent years, both the European Union and its Member States have enacted or revised legislation to respond to the terrorism threat. Such legislation aims, in particular, to deal with the phenomenon of “foreign fighters” and includes measures to enhance prosecutorial powers, expand the scope of measures for extradition and revocation of travel documents, increase intelligence powers for surveillance and criminalise travel to foreign conflict zones. These measures refer, to a large extent, to substantive and procedural criminal law, but they also include several administrative instruments. The competence for tackling terrorism is shared between Member States and the European Union. On the one hand, article

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3 (2) of the Treaty on European Union (TEU) establishes that the EU shall offer its citizens an area of freedom, security and justice by preventing and combating crime.¹ The TEU specifies that the EU has competence in the field of criminal law. On the other hand, article 4 (2) of the TEU stipulates that the EU shall respect the essential functions of its Member States, which includes safeguarding national security.² National security, in particular, remains the sole responsibility of each Member State. When framing terrorism as a matter of national security, therefore, Member States have – and use – the competence to act outside the scope of EU law. There is a changing pattern of terrorism in many European countries. In the 1970s and 1980s most Member State authorities were concerned about terrorism from left-wing, right-wing and separatist groups. In recent years, some of these forms of terrorism do still exist but Member States have become more concerned about the threat deriving from jihadist terrorism due to its international nature and the multiple attacks that have been carried out in Europe and throughout the world.

The use of administrative measures has become a significant counter-terrorism tool in some Member States in their efforts to maintain national security. Their increasing prevalence is probably due to the perception that imposition of such administrative measures is proactive and preventive, thus protecting the population from the threat of terrorism. These measures include, for example, travel bans, expulsion orders, entry bans, control orders, assigned residence orders, area restrictions, social benefits stripping and citizenship revocation. Italy, France, Belgium, United Kingdom, Germany and Netherlands have all introduced provisions in law for the use of administrative measures in terrorism-related cases to varying degrees.

It is important to stress that on March 15, 2017 the European Parliament and the Council adopted the new Directive 2017/541/EU “on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Decision 2005/671/JHA”. The deadline by which Member States must transpose into national law the changes introduced by Directive 2017/541/EU is 8 September 2018. This Directive is clearly part of wider European action to prevent and combat terrorism.

1 Article 3 (2) of the Treaty on European Union: “The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.

2 Article 4 (2) of the Treaty on European Union: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining Law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State”.

The reasons that led to issuance of the above-mentioned Directive are attributable to three orders of need. First, after the numerous terrorist attacks perpetrated in the last few years by the Islamic State, even the European institutions – such as the international bodies and EU Member States – have warned of the need to adapt and review existing legislation given the new face of the terrorist threat. The second factor that led to adoption of the new Directive was the need to introduce specific provisions for the protection of victims of terrorist offences. Finally, there was a need to implement international obligations in this area, in particular the provisions of Resolution no. 2178/2014 adopted by the United Nations Security Council “on threats to international peace and security caused by terrorist acts”. The cross-border nature of terrorism requires a strong coordinated response and cooperation within and among Member States, as well as with and among the competent EU agencies and bodies. At the same time, the global character of terrorism necessitates an international answer, requiring the European Union and its Member States to strengthen cooperation with relevant third countries. Acts of terrorism constitute one of the most serious violations of the universal values of human dignity, freedom, equality and solidarity, and enjoyment of human rights and fundamental freedoms on which Europe is founded. They also represent one of the most serious attacks on democracy and the rule of law, principles which are common to the Member States and on which the European Union is based.

2. Italian counter-terrorism legislation and the primary role of administrative instruments

The Italian legal system has been fighting terrorism since the end of the 1960s. Although Italy has continued to fight extremists’ political terrorism and Mafia organised crime, in the last few years the jihadist terrorism phenomenon has developed at an international level and has also started to be of concern in Italy. Many new counter-terrorism measures have been developed in Italy due to the rapid evolution of this international issue. Since the September 11, 2001 terrorist attack in New York, Italian legislation has followed two main pathways. First, a number of reforms have criminalised preliminary actions and expanded the scope of punishable criminal offences. In addition, new administrative and financial measures have been added to the strategy. Italian legislation to counter international terrorism provided for by the Criminal Code,

the Criminal Procedure Code and some Special Laws is not the result of a reasoned assessment of the need to introduce counter-terrorism legislation into our legal system. Instead, starting from 2001, it arose under the form of Law Decrees as an immediate response to serious terrorist attacks committed in the world.

In particular, the main pieces of Italian anti-terrorism legislation are:

- Law Decree no. 374 of 18 October 2001, subsequently passed as Law no. 438 of 15 December 2001 (“urgent measures against international terrorism”), which was issued following the New York attacks of September 2001;
- Law Decree no. 144 of 27 July 2005, subsequently passed as Law no. 155 of 31 July 2005 (“urgent measures regarding expulsion and deportation”), which was issued following the London attacks of July 2005 against the public transport network;
- Law Decree no. 7 of 18 February 2015, subsequently passed as Law no. 43 of 17 April 2015 (“urgent measures against international terrorism and extension of the powers of the Direzione Nazionale Antimafia to terrorism-related crimes”), which was issued following the Paris attacks of January 2015 against the satirical weekly magazine Charlie Hebdo. In addition to these Law Decrees, it is also important to mention the recent Law no. 152 of 28 July 2016, which introduced new provisions against terrorism and ratified some international Conventions on the prevention of terrorist attacks, such as the Council of Europe Convention on the Prevention of Terrorism (Warsaw, 2005) and the related Additional Protocol (Riga, 2015), the UN Convention for the Suppression of Nuclear Terrorism (New York, 2005), the Protocol amending the European Convention on the Suppression of Terrorism (Strasbourg, 2003) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Warsaw, 2005). At the root of legislative interventions to counter terrorism is the awareness that the fight against terrorism cannot be combated only with the “classical” tools of criminal law, but also with the use of administrative instruments. After the September 2001 terrorist attack, administrative measures have become an increasingly widespread and important component of counter-terrorism policies.

The term “administrative measures” is quite vague: they can be defined as restrictive measures aimed at preventing terrorism within the territory of a State, decided upon and ordered by the executive (or with its close involvement) and subject to limited judicial review. Administrative measures seem to fit somewhere between prevention

and repression. On the one hand, they are preventive because they are applied before the commission of a terrorist act, in order to reduce in advance the threat within a country, in defence of the public. On the other hand, they are becoming an increasingly repressive and punitive instrument to the extent that they impose more or less severe restrictions on those to whom they are applied; furthermore, they can be used as actual sanctions in some cases (for example, revocation of social benefits or, more seriously, deprivation of citizenship). Currently, administrative expulsions have become a key element of Italy's counter-terrorism policy and represent a discretionary power of the executive. The expulsion order is not subject to prior judicial validation on the merits and is immediately enforceable. The decision can be appealed before the administrative court, but its execution cannot be suspended. The expulsion implies a re-entry ban for a period of time determined on a case-by-case basis. In essence, the Italian legal system has three types of administrative expulsion (*espulsione amministrativa*) of non-EU citizens, as opposed to judicial expulsion (*espulsione giudiziaria*) ordered by a criminal judge. First, legal provisions on immigration, including expulsions of foreign citizens, are in the *Testo unico sull'immigrazione* (Legislative Decree no. 286 of 25 July 1998). This important piece of legislation provides that the Minister of the Interior can order the expulsion of a foreign citizen "for reasons of public order or State security". The expulsion order has to present appropriate reasons in fact and in law.

Over time, the grounds for expulsion of non-Italian nationals have been expanded. In particular, the above-mentioned counter-terrorism Law Decree of 2005 grants the Minister of the Interior – or, on delegation, the Prefect – the power to order the expulsion of a foreign citizen against whom there are "well-founded reasons to believe that his/her stay in the territory of the State may in any way facilitate terrorist organisations or activities, at the national or international level". In any case, the expulsion order can be suspended or even revoked if the individual concerned agrees to collaborate with the competent authorities. Finally, the recent counter-terrorism Law Decree adopted in 2015 expanded the hypotheses for the administrative expulsion of a foreign citizen, by order of the Prefect, for reasons of "social dangerousness" (*pericolosità sociale*). This Law also expressly refers to the category of – non-Italian – aspiring foreign fighters. The provision fits with the discipline of personal preventive measures that are already applied to Mafia suspects. It is important to stress that the removal (*allontana-*

mento) of EU citizens for reasons of security, by order of the Ministry of the Interior, is regulated by different rules – Legislative Decree no. 30 of 6 February 2007 and subsequent modifications – which are more favourable for the individual concerned and subject to judicial validation. From a counter-terrorism perspective, use of the above-mentioned administrative expulsions can help prevent the creation and stabilisation of extremist networks on national territory. It is quite clear that, in practice, administrative expulsions are often ordered when there is evidence that an individual is a threat to national security, but the evidence is considered insufficient for prosecution. In fact, the forms of behaviour that lead to an expulsion order do not need to be connected to the use of terrorist violence: many non-EU citizens were expelled from Italy because, for example, they had displayed extremist attitudes or paid tribute to jihadist organisations.

Obviously, the measure of administrative expulsion is not exempt from risks. It is possible to distinguish two main types of problem. The first is of a legal nature and is related to the question of human rights protection. The second is more pragmatic and concerns possible counterproductive consequences, from a counter-terrorism perspective.

With regard to the first issue, the administrative measure of expulsion is imposed on a suspect without the procedural guarantees associated with criminal prosecution, such as prior judicial review, appropriate standard of proof and assessment of evidence and full compliance with the principle of the presumption of innocence. In addition, the expulsion can result in violation of human rights in the country of destination. The European Court of Human Rights has upheld the prohibition on sending individuals to States in which they face a real risk of torture, inhuman or degrading treatment.

With regard to the second issue, the expulsion order may have the undesirable effect of intensifying the feelings of frustration and anger – and even sense of revenge – at the individual level. At the organisational level, it can reinforce the narrative of victimhood and persecution so recurrent in the propaganda of jihadist groups and could even facilitate the terrorist recruitment of others. Overall, Italy's extensive use of administrative expulsions of foreign citizens, associated with restrictive naturalisation laws, has so far proved to be effective from a counter-terrorism perspective. However,

other instruments are necessary, especially in the long term. It is worth mentioning that, unlike many other European countries, Italy has not yet developed fully fledged counter-radicalisation and de-radicalisation programmes. Italy's Lower House passed a bill in the summer of 2017, introducing "new measures for the prevention of jihadist radicalisation and extremism", but the procedure was not completed before the end of the legislature.

The recent reform of 2015 introduces significant changes also in terms of substantive and procedural criminal law and in terms of prevention and investigative coordination. The first articles of Law Decree no. 7 of 2015 amend various provisions of the Criminal Code for violations related to terrorism activities, such as recruitment of terrorists and endorsing or inciting to terrorism, if committed by means of computer or telematics instruments. In particular, the definition of new offences is aimed at punishing so-called "foreign fighters", defined as individuals who travel to a State other than their State of residence or nationality for the purpose of the perpetration, planning or preparation of terrorist acts, or their participation in such events, as well as providing or receiving terrorist training and, more in general, anyone organizing trips abroad aimed at terrorism. The Law Decree also pays particular attention to those activities carried out through the Internet. Paragraphs 2, 3 and 4 of article 2 provide measures for blocking and taking down of terrorism-related websites. A unit of the Ministry of Interior is empowered to generate and update a list of websites used for subversive and terrorist activities. In addition, internet service providers can be requested to filter or take down the websites in the list if asked by a public authority.

Relations between the Internet and terrorist organisations are particularly relevant, because telematics instruments are those most used for proselytism and ideological propaganda, and for transmitting instructions and messages. In this regard, the reform has opportunely introduced an aggravating circumstance when certain terrorist facts are made using the Internet. In the Italian legal system, monitoring of the Internet with purpose of preventing terrorist threats is entrusted to the Comitato di Analisi Strategica Antiterrorismo established at the Ministry of the Interior and chaired by the Direttore centrale della Polizia di Prevenzione. Another instrument provided by the reform of 2015 is the special police supervision measure (*sorveglianza speciale di pubblica sicurezza*), which includes several restrictions of individual fundamental rights and

freedom. In particular, the judicial authority can order dangerous people, who have not complied with an “oral notice”, to maintain a lawful conduct; not to give cause of suspicion; not to associate with persons convicted for criminal offences or subjected to preventive or security measures; to return to their residence by a certain time in the evening or not to leave their residence before a certain time in the morning, except in case of necessity and after having given notice in due time to the authorities; not to own or carry fire arms; not to enter bars or night-clubs; and not to take part in public meetings. If need be, this may be combined either with a prohibition on residence in one or more given municipalities or provinces or, in the case of particularly dangerous persons, with an order for compulsory residence in a specified municipality. In any case, the special police supervision measure requires issuance by a criminal judge, under an application, which could be filed by the Questore, the head of Direzione Investigativa Antimafia and the Procuratore Nazionale Antimafia e Antiterrorismo. The special measure can only be issued after the suspect has been granted the opportunity to be heard. The decision could be subject to appeal before the Court of Appeal and the Court of Cassation. The reform of 2015 also intervenes on the coordination of investigative activities, providing for the attribution of anti-terrorism functions to the national Procuratore Nazionale Antimafia. In addition, the most recent legislation has increased the emergency power of the Questore allowing specific measures against those subjected to special police supervision, including seizure of passport and of any other travel documents.

Other instruments to combat terrorism are the financial prevention measures that are aimed at freezing, seizing and confiscating assets, in order to obstruct the access of terrorist organisations to their financial resources. In particular, Legislative Decree no. 109 of 22 June 2007 defines the freezing of funds as “the prohibition [...] of handling, transfer, modification, use or management of the funds or access to them, so as to modify the volume, amount, placement, property, possession, nature, destination or any other change that allows the use of funds, including portfolio management”.

For the purposes of ascertaining terrorist offences, the Law Decree of 2015 has dictated – derogating from the provisions of the Privacy Code – a temporary discipline regarding the conservation of telephone and telematics traffic data by telecommunications service operators. Subsequently Law no. 167 of 20 November 2017 – in imple-

mentation of article 20 of Directive 2017/541/EU on the fight against terrorism – has established that the deadline for the retention of telephone and telematics traffic data, as well as data on unanswered calls, is established in 72 months, notwithstanding the provisions of the Privacy Code.

Finally, it is important to stress that on 19 November 2017, Law no. 161 to combat criminal activities of the Mafia (“amending the Code of Anti-Mafia Legislation and protection measures under Legislative Decree no. 159 of 6 September 2011, the Criminal Code, the implementing, coordinating, and transitional rules of the Criminal Procedure Code, and other provisions, and delegating power to the Government for the protection of labour in companies which were sequestered and confiscated from organised crime”) entered into force in Italy. The main purposes of the new Law are to speed up the application of asset protection measures, make the appointment of judicial administrators more transparent, create a government unit for the administration of seized and confiscated assets, and include corruption, stalking, and terrorism within the scope of anti-Mafia legislation. The new Law expands the application of Legislative Decree no. 159 of 2011 to those who, in groups or in isolation, carry out “preparatory, objectively relevant, or executive acts” aimed at subverting the order of the state through the commission of a crime having a terrorist purpose with international ramifications or participating in a foreign conflict in support of an organization that pursues terrorist aims. Under the new Law, a request for the application of protection measures against a person of interest must be filed with the chancellery of the sections or the tribunal of the district capital in the territory in which the person resides. Protection measures include special surveillance and the prohibition of staying in one or more municipalities, other than the habitual residence, or in one or more regions. If the suspect must be detained, he/she is to be held in detention or imprisonment at a facility located outside the jurisdictional district of the judge directing the procedures.