COUNCIL OF THE EUROPEAN UNION

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CATS 24
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NOTE

from :	Presidency
to :	Council
No. prev. Doc.:	7785/2/08 REV 2 CATS 24 DROIPEN 30
Subject :	Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism

1. The European Commission adopted on 6 November a proposal amending Framework Decision 2002/475/JHA on combating terrorism (14960/07 CATS 122 DROIPEN 104 + ADD 1 + ADD 2). The objective of the proposal is to update the Framework Decision and align it with the Council of Europe Convention on Prevention of Terrorism, by including public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism while at the same time not disturbing the legislative framework of the European Union and particularly Framework Decision 2002/475/JHA.

2. The Commission argues that it is important to include these offences in the Framework Decision because it:

   - entails the advantages of the more integrated institutional framework of the EU;

- the legal regime of the Framework Decision in respect of the type and level of criminal penalties and compulsory rules on jurisdiction will be applicable to the offences;
- EU cooperation mechanisms (see for instance the Decision of 2005 on sending terrorist-related information to Europol and Eurojust) are triggered since they have as their scope of application the Framework Decision.

3. The Presidency considers that the proposal of the Commission is very important. It is however also very delicate, as admitted by the Commission, since it lies at the interface between fundamental rights and freedoms such as freedom of expression. It is therefore essential that the right balance is struck in the instrument.

4. A first discussion on the proposal took place during the Portuguese Presidency in CATS (21-22 November 2007), Coreper and Council (6-7 December 2007).

5. The CATS discussed the issue of safeguards during its meetings of 6 February 2008.The issue was also discussed at the JHA Council of 6 March 2008 where a large majority of the delegations were in favour of the proposals made by the Presidency (6761/08 CATS 13 DROIPEN 17) as regards safeguards.

6. Several meetings of the Friends of Presidency were dedicated to the discussion of the proposal (22 February 2008, 18 March 2008 and 31 March 2008). The last discussion took place in the Article 36 Committee on 2 April 2008. Several member states have laid down parliamentary scrutiny reservations.

7. At the meeting of Coreper on 9 April, a large majority of delegations could support the text of a package proposal (doc 7785/2/08) that the Presidency had submitted to delegations. **DELETED** indicated that it was still not able to accept the proposal as regards attempts, jurisdiction and the principle of proportionality. **DELETED** was still studying the issue of jurisdiction and **DELETED** was studying the proportionality question. The Council Legal Service **DELETED**. The Presidency was encouraged by a number of delegations, including the Commission, to maintain the package as it was, in so far as possible, and not make any further concessions.

8. Delegations will find in Annex :

   - the recitals of the amending Framework Decision (Annex A) ;
   - a consolidated version of Articles 3, 4 and 9 of the Framework Decision 2002/475/JHA as amended by the draft Framework Decision (Annex B) ;
   - the final provisions of the amending Framework Decision together with a new Article 1a (Annex C) ;

9. The Presidency intends to finalise the discussion at the Council on 18 April 2008. The text will thereafter be submitted to Jurist/Linguist scrutiny in the course of which the text will be transformed into its original, amending, form as proposed by the Commission.

10. In the following amended package, adjustments have been made in the preamble (recital 16 has been modified to include only implementation), the reference to the principle of proportionality, which was in the text of the operational has been inserted in Article 2 of the amending Framework Decision and made clearer and the attempts to commit recruitment and training have been made optional. The remaining parts of the package are untouched.

11. The Presidency therefore submits to the Council the following amended **package and requests the Council to analyse this package as a whole**:

A. THE PRINCIPLE OF PROPORTIONALITY

1. Recital 16 is modified so as to read (see Annex A):

(16) "The implementation of the criminalisation under the Framework Decision should be proportional to the nature and circumstances of the offence, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discrimination."

A large majority of the Ministers could already at the Council in February accept a text similar to this one. References to "establishment" and "application" have been removed.

2. A new sentence is inserted in Article 2, paragraph 1 of the amending Framework Decision (see Annex C) as follows:

"In the implementation of this Framework Decision, Member States shall ensure that the criminalisation shall be proportionate to the legitimate aims pursued and necessary in a democratic society and shall exclude any form of arbitrariness and discrimination."

The Presidency considers that this reference, which affects the amending Framework Decision, is a reasonable compromise between those delegations that did not want to have a reference at all in the Framework Decision and those that wanted to have a more elaborate reference to the principle of proportionality in the operative text of the Framework Decision.

3. The insertion of a new Article 1a in the amending Framework Decision (Annex C) containing a paragraph on freedom of expression,

This paragraph is based on Article 7(2) of the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law: this paragraph is limited to a reference to freedom of expression. This paragraph was accepted at the level of Coreper by all delegations.

The Presidency considers that an equitable solution requires a specific reference to freedom of expression in accordance with the example of the draft Framework Decision on racism and xenophobia.

B. ATTEMPTS

4. on "attempt" to commit one of the three new offences (Article 4(2) in Annex B):

The original Framework Decision contains in Article 4, paragraph 2 an obligation to criminalise attempts, with the exception of attempts to possess weapons or explosives and attempts to threat to commit terrorist offences; all other attempts are criminalised. The Council of Europe Convention criminalises attempts to commit recruitment and attempts to commit training with a reference to national law.

Those delegations that have wanted to exclude attempts from the scope of application of the Framework Decision have argued that it would go too far to include attempts to what is in fact preparatory acts to commit terrorist offences. The delegations taking the opposite view have argued that the Council of Europe Convention does not exclude attempts to recruitment or to training and that the attempts to recruitment and the setting up of a training camp without actually having provided training are offences which should become criminalised because of the future risk of commission of terrorist offences.

The Presidency considers that an equitable compromise consists in making a reference to the two types of offences but making it optional to criminalise them. In such a manner attempts to training and to recruitment are covered by the Framework Decision but the discretion of national parliaments in the implementation of the Framework Decision is maintained in this regard.

C. JURISDICTION

5. on "jurisdiction" (Article 9): mandatory grounds for jurisdiction will be maintained (including points (d) and (e)), for the new offences, as they currently stand in the existing Framework Decision. (Annex A)

Some delegations have argued that taking extra-territorial jurisdiction for these offences would go too far and would not be necessary. However, other delegations, including the Commission, have argued strongly that it would give an unfortunate political signal to the rest of the world if the EU were not prepared to take jurisdiction over these offences, which actually for the most part are committed outside the territory of the Union. It should also be noted that, as this is a Framework Decision, the actual exercise of that jurisdiction may be subject to further procedural requirements under national law. Moreover, no argument has been presented to explain why these three offences should be treated differently than those in the original Framework Decision.

The Presidency considers that an equitable compromise needs to be found in this respect as well, and considers that the arguments put forward by the delegations that want to align themselves with the EU legal framework rather than with the Council of Europe Convention are convincing.

D. SUGGESTED COUNCIL CONCLUSION

Delegations are invited to accept this as a final compromise package, subject to further parliamentary scrutiny in some Member States and to the opinion of the European Parliament which will be examined as soon as possible.

ANNEX A

Recitals of

the proposal for a Council Framework Decision

amending Framework Decision 2002/475/JHA on combating terrorism

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29, Article 31(1)(e) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission[1],

Having regard to the opinion of the European Parliament[2],

Whereas:

(1) Terrorism constitutes one of the most serious violations of the universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms on which the European Union is founded. It also represents one of the most serious attacks on the principle of democracy and the principle of the rule of law, principles which are common to the Member States and on which the European Union is based.

(2) The Council Framework Decision 2002/475/JHA on combating terrorism represents the basis of the counter-terrorist policy of the European Union. The achievement of a legal framework common to all Member States, and in particular, of a harmonised definition of terrorist offences, has allowed the counter-terrorism policy of the European Union to develop and expand, subject to the respect of fundamental rights and the rule of law.

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1 [...]
2 [...]

(3) The terrorist threat has grown and rapidly evolved in recent years, with changes in the modus operandi of terrorist activists and supporters including the replacement of structured and hierarchical groups by semi-autonomous cells loosely tied to each other. Such cells inter-link international networks and increasingly rely on the use of new technologies, in particular the Internet.

(4) The Internet is used to inspire and mobilise local terrorist networks and individuals in Europe and also serves as a source of information on terrorist means and methods, thus functioning as a 'virtual training camp'. Activities of public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism have multiplied at very low cost and risk.

(5) The Hague Programme underlines that effective prevention and combating of terrorism in full compliance with fundamental rights requires Member States not to confine their activities to maintaining their own security, but to focus also on the security of the Union as a whole.

(6) The action plan on the implementation of the The Hague Programme recalls that a global response is required to address terrorism and that the expectations that citizens have of the Union cannot be ignored, nor can the Union fail to respond to them. In addition, it states that attention must focus on different aspects of prevention, preparedness and response to further enhance, and where necessary complement, Member States' capabilities to fight terrorism, concentrating particularly on recruitment, financing, risk analysis, protection of critical infrastructures and consequence management.

(7) The current proposal foresees the criminalisation of terrorist linked offences in order to contribute to the more general policy objective of prevention of terrorism through reducing the dissemination of those materials which might incite persons to commit terrorist attacks.

(8) The United Nations Security Council Resolution 1624 (2005) calls upon States to take measures that are necessary and appropriate, and in accordance with their obligations under international law, to prohibit by law incitement to commit terrorist act or acts and to prevent such a conduct. The report of the Secretary-General of the United Nations "Uniting against terrorism: recommendations for a global counter-terrorism strategy" of 27 April 2006, interprets the abovementioned resolution as providing for a basis for the criminalization of incitement to terrorist acts and recruitment, including through the Internet. The United Nations Global Counter-Terrorism Strategy (8 September 2006) mentions that the Member States of the UN resolve to explore ways and means to coordinate efforts at the international and regional level to counter terrorism in all its forms and manifestations on the Internet.

(9) The Council of Europe Convention on the Prevention of Terrorism establishes the obligations of States parties to this Convention to criminalise public provocation to commit a terrorist offence and recruitment and training for terrorism, when committed illegally and intentionally.

(10) The definition of terrorist offences, including offences linked to terrorist activities, should be further approximated in all Member States, so that it will cover public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism, when committed intentionally.

(11) Penalties and sanctions should be provided for natural and legal persons having committed or being liable for public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism, when committed intentionally. These forms of behaviour should be equally punishable in all Member States irrespective of whether they are committed through the Internet or not.

(12) Additional jurisdictional rules should be established to ensure that public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism may be effectively prosecuted when they are directed towards or resulted in the commission of a terrorist offence which is subject to the jurisdiction of a Member State.

(13) Given that the objectives of the proposed action cannot be sufficiently achieved by the Member States unilaterally, and can therefore, because of the need for European-wide harmonised rules, be better achieved at level of the Union, the Union may adopt measures, in accordance to the principle of subsidiarity. In accordance with the principle of proportionality, this Framework Decision does not go beyond what is necessary in order to achieve the objectives.

(14) The Union observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, notably Chapters II and VI thereof. Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as freedom of expression, assembly, or of association, the right to respect for private and family life, including the right to respect of the confidentiality of correspondence.

(15) Public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism are intentional crimes. Therefore, nothing in this Framework Decision may be interpreted as being intended to reduce or restrict the dissemination of information for scientific, academic or reporting purposes. The expression of radical, polemic or controversial views in the public debate on sensitive political questions, including terrorism, falls outside the scope of this Framework Decision and, in particular, of the definition of public provocation to commit terrorist offences,

(16) The (...) implementation (…) of the criminalisation under the Framework Decision should be proportional to the nature and circumstances of the offence, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discrimination.

ANNEX B

Consolidated text of

Framework Decision 2002/475/JHA on combating terrorism as amended by the Framework Decision currently negotiated

Article 3

Offences linked to terrorist activities

1. For the purposes of this Framework Decision:

(a) "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed;

(b) "recruitment for terrorism" means to solicit another person to commit one of the offences listed in Article 1(1) (a) to (h), or in Article 2(2);

(c) "training for terrorism" means to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of committing one of the offences listed in Article 1(1) (a) to (h), knowing that the skills provided are intended to be used for this purpose.

2. Each Member State shall take the necessary measures to ensure that terrorist-linked offences include the following intentional acts:

(a) public provocation to commit a terrorist offence;

(b) recruitment for terrorism;

(c) training for terrorism;

(d) aggravated theft with a view to committing one of the offences listed in Article 1(1);

(e) extortion with a view to the perpetration of one of the offences listed in Article 1(1);

(f) drawing up false administrative documents with a view to committing one of the offences listed in Article 1(1)(a) to (h) and Article 2(2)(b).

3. For an act to be punishable as set forth in paragraph 2, it shall not be necessary that a terrorist offence be actually committed.

4. (...)

Article 4

Inciting, aiding or abetting, and attempting

1. Each Member State shall take the necessary measures to ensure that (…) aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable.

1a. Each Member State shall take the necessary measures to ensure that inciting an offence referred to in Article 1(1), Article 2 or Article 3(2) (d) to (f) is made punishable.

2. Each Member State shall take the necessary measures to ensure that attempting to commit an offence referred to in Article 1(1) and Article 3 **(d) to (f)**, with the exception of possession as provided for in Article 1(1)(f) and the offence referred to in Article 1(1)(i), is made punishable.

3. Each Member State may decide to take the necessary measures to ensure that attempting to commit an offence referred to in Article 3 (b) and (c) is made punishable.

Article 9

Jurisdiction and prosecution

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 1 to 4 where:

   (a) the offence is committed in whole or in part in its territory. Each Member State may extend its jurisdiction if the offence is committed in the territory of a Member State;

   (b) the offence is committed on board a vessel flying its flag or an aircraft registered there;

   (c) the offender is one of its nationals or residents;

   (d) the offence is committed for the benefit of a legal person established in its territory;

   (e) the offence is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that Member State.

2. to 5. *Unchanged*

ANNEX C

Autonomous provisions (which do not modify the existing Framework Decision) of the proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism

Article 1a

This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to (...) freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

Article 2

1. Member States shall take the necessary measures to comply with this Framework Decision by … *. **In the implementation of this Framework Decision, Member States shall ensure that the criminalisation shall be proportionate to the legitimate aims pursued and necessary in a democratic society and shall exclude any form of arbitrariness and discrimination.**

2. By … *, Member States shall forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report drawn up from that information and a report from the Commission, the Council shall assess, by …**, whether Member States have taken the necessary measures to comply with this Framework Decision.

Article 3

This Framework Decision shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Done at Brussels,

For the Council
The President

* *Two years after the entry into force of the Framework Decision*

** *Three years after the entry into force of the Framework Decision.*