

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) 625 final).

Final document approved by the Committee

The Committee on Justice,

Having examined, pursuant to article 127 of the Rules of procedure, 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) 625),

Whereas:

- This proposal, whose intentions the Committee wholeheartedly endorses, derives from the need to strengthen the legal and operational instruments available to the EU and its Member States to prevent, pre-empt and combat the terrorist threat which has become particularly menacing in the aftermath of repeated appalling terror attacks, mostly in close succession, in several European and neighbouring countries;
- The increasingly evident transnational character of the terror organisations bent on radicalising and recruiting affiliates in different countries, also through the routine use of the Internet, is severely testing the capacity of individual European States to tackle the problem by themselves alone, making it necessary to improve the quality and the volume of information exchanged and forms of cooperation between them, in addition to gradually aligning their legal systems and operational instruments for preventing and combating terrorism;

Considering that:

- The framework decision 2002/475/JHA - to be replaced by this proposal for a directive - which was previously amended by the Council framework decision 2008/919/JHA, has already criminalised the commission of terrorist attacks, participation in the activities of a terrorist group, including the provision of financial support for terrorist activities, as well as public incitement, recruitment and training for terrorism purposes, and has introduced provisions governing aiding and abetting, incitement and attempting to commit terrorist crimes. It did not, however, explicitly criminalise travelling to third countries for the purposes of terrorism, nor did it explicitly criminalise receiving training for terrorist purposes, as established by the UNSCR recommendation 2178(2014) and as requested by the Additional Protocol. Moreover, the 2002/475/JHA framework decision already criminalises financing terrorism, to the extent that the funds are provided to a terrorist organisation, but not the financing of terrorist crimes or crimes connected with terrorist

activities, such as recruitment, giving and receiving training, travelling abroad to take part in terrorism, and organising or facilitating it;

- With this legislative initiative presented by the European Commission on 2 December 2015, the Commission deemed it necessary to update the existing provisions and make them more effective to deal with foreign terrorist fighters and with the risks posed not only by individuals travelling abroad to engage in terrorism, but also the increasing threats from homegrown terrorism, by isolated and radicalised perpetrators and terrorists who have been thwarted in their attempts to travel abroad (by having had their passports impounded, for example). The proposed legislation is to implement the new international rules and obligations entered into by the EU and to more effectively manage the evolving terrorist threat, by enhancing the safety and security of the Union and the people. This being so, the draft directive proposes to expand criminalisation in various spheres already provided by United Nations and Council of Europe instruments, and in particular to criminalise travelling to any country for the purpose of terrorism, including within the EU, and also the country of which the perpetrator of the crime is a national or a resident, and inciting and attempting to commit many of the crimes introduced by the proposal for a directive;
- Another purpose of the proposed legislation is to protect, support and assist victims of terrorism according to their particular needs, and in particular to guarantee them immediate access to professional and specialised support services according to their particular needs, and in particular medical and psychosocial treatment. Directive 2012/29/EU already lays down a number of mandatory rights for all victims of crime, including the right to protection, support and assistance, depending on their individual conditions, but provides no specific measures. It is therefore crucial for the competent national authorities to work together to provide all victims of terrorism with adequate information and with the assistance they require, regardless of wherever they live in the European Union;

Considering furthermore that:

- The negotiations that took place at the European Union Council in the course of six meetings of the DROIPEN Group between 7 January and 26 February, 2016 unfortunately led to the substantial emptying of the contents of the text proposed by the Commission, and to a minor addition to the text of a measure suggested by the national delegations. In particular, as far as the criminalisation of travelling abroad for the terrorism purposes (article 9 of the proposal for a directive), the original text proposed by the Commission criminalised travelling from the EU to third countries, within the EU, or from one Member State to another Member State, and travel by "returnees" who have fought or received training in zones controlled by terror groups and have returned to Europe to commit acts of terrorism. This proposal was nevertheless seriously challenged by some delegations. Accordingly, the Netherlands Presidency submitted a compromise text to the JHA Council on 11 March, 2016, which had been convened to adopt a general orientation, but merely criminalised

travel to third (non-EU) states for terrorist purposes, also when the journey includes one or more stop-overs within the EU. The scope of the crime definitions originally proposed by the Commission was thereby substantially restricted, and also created a substantial misalignment between the proposal for a directive and Art. 4 of the Council of Europe Additional Protocol as well as United Nations Resolution 2178: for according to these international instruments, travelling for the purposes of terrorism at least within the EU, or from one Member State to another, should be criminalised. As for criminalising the financing of terrorism (articles 11 and 15 of the proposal for a directive), the text proposed by the Commission and supported by Italy, was designed to transpose into EU legislation the criminalisation criteria provided by recommendation no. 5 of the FAFT. This proposal had been severely challenged by certain delegations who had insisted on the most restrictive possible interpretation of these criteria. The compromise text presented by the Netherlands Presidency to the JHA Council on 11 March, 2016 does not appear to have taken those criteria fully on board, because it limits the scope of article 11(2) only to the crimes provided by articles 3, 4 and 9. In particular, the Committee recalls that according to the FAFT standards, the financing of terrorist organisations and of individual terrorists must be prosecuted regardless of whether or not the funds have been shown to have been for the commission of any specific terrorist act (“financing for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act”). Criminalisation must also cover financing recruiting, training and travelling for terrorism purposes even in the absence of the link to any specific terrorist act;

- The Italian delegation opposed the Netherlands Presidency’s weaker compromise position, in that it not only failed to take account of the international standards laid down in United Nations Resolutions, the Council of Europe Protocol and FAFT, but neither did it seem to offer any new instruments for addressing the increasingly complex threats facing Europe’s citizens: in particular, in the course of the negotiations, it disregarded the numerous Italian initiatives to strengthen measures to combat terrorism. Italy had suggested adding to the proposal for a directive a measure requiring the Member States to adopt the necessary measures to ensure that, within the Union, all the intelligence gathered by the competent national authorities in prison environments relating to the radicalisation of detainees or individuals at risk of radicalisation, should be forwarded, where relevant, to the authorities responsible for preventing, investigating and combating terrorist crimes. If these measures were to be implemented, the Member States would be able to exchange any internationally relevant information promptly, directly and also bilaterally, between the central national authorities appointed as Eurojust correspondents, whenever the judicial authorities of a Member State were in possession of intelligence of importance for the purposes of judicial proceedings to combat terrorism being conducted in another Member State. Even though this proposal was deemed interesting and worthy of consideration not only by reference to terrorism but also to organised crime in general, it was not taken up in the text of the directive, but it was suggested that it could be dealt with at another Council working group;

- Italy, acting jointly with France, also proposed a measure designed to criminalise the illegal trafficking of cultural property from countries in which terrorist organisations were operating, but neither was that proposal taken up in the operational part of the directive (that is to say, in the part binding on the Member States), only being mentioned in the 11th Recital;
- The Italian delegation also backed initiatives to introduce the criminalisation of “apology of terrorism”, the adoption of measures to black out Internet sites and remove contents inciting terrorism, and to adopt joint investigative procedures by all the Member States in proceedings relating to terrorist crimes. With reference to the measures regarding Internet sites, it should be noted that these were not mentioned in the operational part of the directive, but only referred to in the seventh Recital. However, the adoption of joint investigative measures has only included as a generic obligation to use those for dealing with organised crime, but no agreement was reached on which specific investigative measures should be enacted into in national legislation for antiterrorism investigations. The Spanish proposal to include all attacks on information systems provided by articles 3 to 7 of directive 2013/40/EU on the list of terrorist acts was only taken up by reference to 2 types of cyber attacks – illegal interference with systems and with data;
- At the European Union JHA Council meeting on 11 March, 2016 the Netherlands Presidency submitted a compromise text to the Justice Ministers to be used as the basis for the adoption of the general orientation;
- The European Commission noted the importance of the agreement, but reiterated the need to complete the work by referring to the criminalisation of travelling for terrorist purposes, considering the compromise version proposed by the Netherlands Presidency too restrictive, and inconsistent with the international instruments of the United Nations and the Council of Europe. Many delegations who had welcomed the general approach nevertheless expressed their support for the compromise text in order to have it rapidly adopted, while expressing misgivings on certain aspects, and particularly the provisions regarding the criminalisation of travelling for the purposes of terrorism and the financing of terrorism;
- The Italian Minister of Justice stressed the limitations of the compromise text, particularly with regard to the criminalisation of travel for the purposes of terrorism and financing terrorism, and stressed the need to maintain a coherent systematic approach: in this connection, it should be remembered that the directive on the European PNR has been adopted, whereby the Member States shall establish a system for policing data on passengers, also when flying within the EU; therefore, stating that - within the scope of the directive to combat terrorism - these flights are irrelevant when they refer to individuals with links to terror groups or undergoing training, would send out a confused and contradictory message to the public. The Minister therefore rejected the adoption of the general orientation and said that at a time of maximum European ambition to combat terrorism, the compromise

text was wholly inadequate for introducing minimum criminal law harmonisation instruments;

- The Netherlands Presidency concluded that the text submitted to the Council had attracted sufficient support, and stated its intention to begin a trilogue with the Parliament as soon as possible (as shown in the general orientation adopted by the JHA Council on 11 March, 2016);
- Following the adoption of the general orientation by the EU Council, the European Parliament's LIBE Committee began examining the proposal for a directive and the German rapporteur, Monika Hohlmeier (European People's Party Group), formulated certain amendments which seem to move in the direction advocated by the Italian government. Once the LIBE Committee has voted on the measure, trilogues will begin with the EU Council and the European Commission;

noting the need for this final document to be promptly forwarded to the European Commission as part of the political dialogue, and to the European Parliament and the Council;

stressing the need to confirm support for the European Commission's proposal on criminalising travel for the purposes of terrorism (article 9), which appears to be consistent with article 4 of the Additional Protocol of the Council of Europe and with the United Nations Resolution 2178 by also criminalising travelling for terrorist purposes within the EU, or between one Member State and another;

expresses a favourable opinion of the proposal for a directive presented by the European Commission (COM(2015)625), with the following qualifications:

- a) Confirm support for the European Commission proposal to criminalise travel for terrorist purposes (article 9), which appears to be consistent with the provisions of article 4 of the Council of Europe Additional Protocol and with United Nations Resolution 2178 in that it criminalises travel for terrorism purposes within the EU, or between one Member State and another;
- b) Make provision for enhanced cooperation and coordination mechanisms with the related exchanges of information and intelligence between all the judicial authorities of the Member States, to detect terrorist crimes whenever the investigation involves judicial authorities belonging to different Member States of the European Union;
- c) Enact specific legislation to expand the powers of the European Prosecutor's Office to include terrorist crimes, resorting, where the conditions provided by the Treaties are met, to the instrument of enhanced cooperation, with the participation of at least nine Member States, pursuant to the provisions of the Lisbon Treaty; and at all events to propose the

creation within Europe of a structure to coordinate investigations and to gather information for the purpose of more effectively combating terrorist crimes. In the meantime, more strategic use may be made of the Schengen Information System (SIS);

- d) Harmonise the provisions at the European level for prosecuting the crimes of illegal trafficking of cultural property from countries in which terrorist organisations are operating, since this is one of the main sources of finance for terrorism, as Italy has frequently pointed out both nationally and internationally and, in particular, as a member of the United Nations;
- e) Ensure the possibility of using all the investigative instruments to collect evidence of crimes, in order to make it possible to rapidly perform investigations and prosecute terrorist crimes;
- f) Adopt Europe-level measures to close down websites and remove contents supporting and propagating terrorism;
- g) Specify – in article 21 of the proposal for a directive dealing with jurisdiction and criminal prosecution on the basis of the territoriality principle – the procedures whereby any conflict of jurisdiction between individual Member States can be resolved, in the event that a crime falls within the jurisdiction of more than one Member State, by explicitly referring to the framework decision 2009/948/JHA on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.