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Proposal for a

COUNCIL FRAMEWORK DECISION

amending Framework Decision 2002/475/JHA on combating terrorism

(presented by the Commission)

{SEC(2007) 1424}

{SEC(2007) 1425}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Grounds for and objectives of the proposal

Terrorism constitutes one of the most serious threats to democracy, to the free exercise of human rights and to economic and social development.

The European Union has set itself an objective in the Treaty on European Union to provide citizens with a high level of safety within an Area of Freedom, Security and Justice. It is vitally important that Member States of the European Union have effective criminal laws in place to achieve this objective in the context of the fight against terrorism. It is also crucial that measures are taken to enhance international co-operation in this field.

Modern information and communication technologies play an important role in the propagation of the terrorist threat. The Internet, in particular, is cheap, fast, easily accessible and has a practically global reach. All these advantages, highly appreciated by law-abiding citizens that benefit from the Internet in their daily lives, are also unfortunately exploited by terrorists. They use the Internet as a means of dissemination of propaganda aiming at mobilisation and recruitment as well as instructions and online manuals intended for training or planning of attacks. Both are addressed at current and potential supporters.

The Internet serves in this manner as one of the principal boosters of the processes of radicalisation and recruitment and also serves as a source of information on terrorist means and methods, thus functioning as a 'virtual training camp'. The dissemination of terrorist propaganda and terrorist expertise through the Internet complements and enhances off-line indoctrination and training and contributes to the development of a stronger and wider platform of terrorist activists and supporters.

Preventing such a growing threat constitutes a political urgency. Modern terrorism and its new modus operandi must be fought by the EU with the same determination and strength demonstrated in fighting traditional terrorism. This proposal up-dates the Framework Decision on combating terrorism [OJ L 164, 22.6.2002, p. 3–7] and aligns it with the Council of Europe Convention on the prevention of terrorism, through including public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism in its concept of terrorism.

It is important to include these offences also in the Framework Decision on combating terrorism, mainly for the following reasons:

- it entails the advantages of the more integrated institutional framework of the European Union (in particular : no lengthy procedures of signature and ratification like for the Council of Europe Conventions, application of proper follow up mechanisms, common interpretation by the Court of Justice);
- the Framework Decision provides for a specific legal regime, in particular in respect of the type and level of criminal penalties and compulsory rules on jurisdiction, which will also be applicable to the newly integrated offences;
- the Framework Decision is a key instrument in the EU policy against terrorism : the explicit inclusion of these specific preparatory acts therefore triggers the European Union cooperation mechanisms referring to the Framework Decision.

The added value of including public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism in the EU concept of terrorism is further detailed in the Impact Assessment.

The Framework Decision on combating terrorism also applies to conduct which can contribute to acts of terrorism in third countries. This reflects the Commission's commitment to tackle terrorism at a global as well as a European Union level. This proposal maintains this approach and stresses the importance of international co-operation within the framework of existing organisations and co-operation mechanisms.

The European Union and its Member States are founded on respect for human rights, fundamental freedoms, the guarantee of the dignity of the human being, and the protection of these rights, both as regards individuals and institutions.

- **General context**

European Union

The Framework Decision on combating terrorism approximates the definition of terrorist offences in all Member States and ensures that penalties and sanctions are provided for natural and legal persons having committed or being liable for such offences which reflect their seriousness. It determines the cases in which Member States are obliged to assume jurisdiction over terrorist offences so that they can be efficiently prosecuted and includes specific measures with regard to protection of and assistance to victims of terrorist offences because of their vulnerability.

The first evaluation report from the Commission on the implementation of the Framework Decision on combating terrorism [COM(2004) 409, 8.6.2004, and Commission staff working paper SEC(2004) 688, 8.6.2004] took stock of national implementation at the time. A second evaluation report from the Commission adopted at the same time as this proposal, up-dates the assessment as regards Member States already evaluated under the previous report and includes a full and original evaluation of the implementation of Member States evaluated for the first time. Both reports reflect the level of harmonisation achieved in the Union further to the adoption of the Framework Decision on combating terrorism and provide for useful interpretative guidelines as well as a valuable overview of counter-terrorism legislation in the Member States.

Under the The Hague programme, the European Council 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.

Under the EU Strategy and Action Plan on Radicalisation and Recruitment which was adopted by the JAI December 2005 Council, the EU calls for measures to combat the terrorist use of the Internet. It also emphasises that the activities of the Member States have to be accompanied by action at EU level.

In its conclusions of 15 and 16 June 2006, the European Council expressly asks the Council and the Commission to develop measures to prevent the misuse of the Internet for terrorist purposes while at the same time observing fundamental rights and principles.

International

The Council of Europe Convention on the prevention of terrorism (Warsaw, 16 May 2005) requires State Parties to ensure that public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism are punishable.

Furthermore, the United Nations Security Council Resolution 1624 (14 September 2005) and the United Nations Global Counter-Terrorism Strategy (8 September 2006) are especially relevant. The G8 Summit (St. Petersburg, Russian Federation, 16 July 2006), and the Decision No. 7/06 "Countering the use of the Internet for Terrorist Purposes" of the Ministerial Council of the OSCE (5 December 2006), should also be considered.

- **Existing provisions in the area of the proposal**

Article 4 of the Framework Decision on combating terrorism states that inciting, aiding or abetting terrorist offences should be made punishable by the Member States. Article 2 of the same instrument requires Member States to hold those directing a terrorist group or participating in its activities criminally liable. However, these provisions do not explicitly cover the dissemination of terrorist propaganda and terrorist expertise, in particular through the Internet.

Articles 5 to 7 of the Council of Europe Convention for the prevention of terrorism require State Parties to ensure that public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism, when committed illegally and intentionally, are punishable. Furthermore, Article 9 requires States Parties to set out ancillary offences to those referred to in Articles 5 to 7.

- **Consistency with the other policies and objectives of the Union**

The proposal is in line with the EU Strategy and Action Plan on Radicalisation and Recruitment, up-dates and complements the EU counter-terrorism legal framework and complies with the Charter of Fundamental Rights of the European Union [OJ C 364, 18.12.2000, p. 1].

Counter-terrorist measures must go alongside the protection of human rights and fundamental freedoms. This proposal deals with issues which are on the borderline between the legitimate exercise of freedoms, such as freedom of expression, association or religion, and criminal behaviour. Therefore, it was elaborated under careful consideration of such human rights and fundamental freedoms. Particularly, the restrictions imposed to the freedom of expression by the new offence of public provocation to commit a terrorist offence are in line with Article 10 of the ECHR.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Consultation methods, main sectors targeted and general profile of respondents

The Commission issued three different questionnaires in 2006: a questionnaire to Member States on 26 June 2006; a questionnaire to the media, relevant industry and civil society, national, European and international NGOs dealing with human rights issues, bar and lawyers' associations, publishers, broadcasters and journalists' associations, internet service providers, telecommunication companies, and other relevant industry on 20 November 2006, and finally, a questionnaire to Europol, Ceuol and Eurojust on 11 December 2006. In addition, conversations and meetings were held with representatives of European media and internet service providers. Finally, a conference was held on 20 March 2007 in order to bring together representatives of the Member States, Europol and, Eurojust and Ceuol, present the results of the questionnaires and discuss possible solutions to fight the use of the internet for terrorist purposes.

Summary of responses and how they have been taken into account

The responses to the three questionnaires are summarised in Annexes I, II and III to the impact assessment annexed to this proposal.

The conference held on 20 March 2007 confirmed that there is sufficient support for the amendment of the Framework Decision on combating terrorism in order to include the new offences of public provocation to commit a terrorist offence, recruiting for terrorism and training for terrorism, including when committed via the Internet, insofar as the criminalisation does not go further than the balance achieved in the Council of Europe Convention on the prevention of terrorism.

The current proposal constitutes a balanced approach which has taken into consideration the replies to the three questionnaires and views expressed throughout the consultation process and rests on the annexed impact assessment. In particular, the proposal includes parallel offences to those introduced in the Council of Europe Convention on the prevention of terrorism. In this manner, it provides for adequate legal measures to tackle public provocation to commit a terrorist offence, recruiting for terrorism and training for terrorism, including when such offences are committed via the Internet. It is fully compliant with human rights and does not alter the liability regime for service providers established under the Directive on electronic commerce.

• **Collection and use of expertise**

There was no need for external expertise.

• **Impact assessment**

1. No policy change (which is a debatable status quo because of the existence of the Council of Europe Convention on the prevention of terrorism).
2. Forbidding internet service providers to give access to material aiming at public provocation to commit terrorist offences, recruitment or training for terrorism.
3. Enhancing law enforcement authorities' capacities and expertise to counter the use of the Internet for terrorist purposes (through adequate training, the support of experts and efficient equipment, possibly financed by the Commission).
4. Urging Member States to sign and/or ratify the Council of Europe Convention on the prevention of terrorism (through a political statement).
5. Revising the Framework Decision on combating terrorism in order to introduce parallel offences to those foreseen under the Council of Europe Convention on the prevention of terrorism and make public provocation to commit terrorist offences, recruitment and training for terrorism, also via the Internet, punishable.

After careful examination of the impacts on security, economy and human rights of each of the options as well as weighing their advantages and drawbacks, the combination of options 5 and 3 appears to be the most effective policy to counter terrorist use of the Internet while fully respecting human rights.

The Commission carried out an impact assessment listed in the Work Programme, accessible on www.europa.eu.int.

3. LEGAL ELEMENTS OF THE PROPOSAL

• **Summary of the proposed action**

The proposed amendment of the Council Framework Decision of 13 June 2002 on combating terrorism is intended to harmonise national provisions on public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism, so that these forms of behaviour are punishable, also when committed through the Internet, throughout the EU, and ensure that existing provisions on penalties, liability of legal persons, jurisdiction and prosecution applicable to terrorist offences, apply also to such forms of behaviour.

• **Legal basis**

Articles 29, 31(1)(e) and 34(2)(b) TUE.

• **Subsidiarity principle**

The subsidiarity principle applies to action by the Union.

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reason(s).

Modern terrorism is eminently global. The dissemination of propaganda aiming at mobilisation and recruitment as well as instructions and online manuals intended for training or planning of attacks via the Internet have an intrinsic international and cross-border character. The threat is international, and so must be at least part of the answer.

Both EU counter-terrorist and cyber-crime policies require coordinated efforts of Member States as well as co-operation at an international level in order to achieve their aims. Differences in legal treatment in the different Member States hinder the coordinated efforts required at EU level and difficult co-operation at international level.

Union action will better achieve the objectives of the proposal for the following reason(s).

There is a clear need to extend the current complementary efforts at national and EU level in the fight against terrorism to the new *modus operandi* of terrorists. The extension of the current common definition of terrorism will prevent terrorists from benefiting from loopholes and divergences of national legislation. Operational law enforcement work against cross-border criminal activities will be considerably facilitated. A common ground shared by all Member States will also facilitate co-operation at an international level, strengthening the position of the EU in international fora.

Increased law enforcement co-operation at EU and international level will result in more efficient investigations and prosecutions, leading to increased security.

The proposal therefore complies with the subsidiarity principle.

• **Proportionality principle**

The proposal complies with the proportionality principle for the following reason(s).

This proposal does not go beyond what is required and what is adding value at the EU-level. As a Framework Decision, it is binding upon Member States as to the results to be achieved but leaves to the national authorities the choice of form and methods of implementation.

The provisions of the Directive on electronic commerce and the Directive on data retention remain unchanged so that no new obligations are imposed on telecommunication service providers or operators. The proposal does not impose on industry the burden of setting up new mechanisms of co-operation. It simply leads to an increased use of existing mechanisms under

the Directive on electronic commerce and the Directive on data retention. Indirect costs resulting from this proposal are limited to the additional work-load resulting from investigations related to the new offences. Considering the number of terrorist prosecutions per year in the EU, it appears that such costs are not significant.

- **Choice of instruments**

Proposed instruments: Framework Decision based on Article 34(2)(b) of the TUE. As the aim is approximating Member States' legislation, other instruments are not appropriate.

4. BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

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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 Commission¹,

Having regard to the opinion of the European Parliament²,

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.
- (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.

¹ [...]
² [...]

- (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,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

The Framework Decision of 13 June 2002 on combating terrorism is amended as follows:

- (1) Article 3 is replaced by the following:

*"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 acts 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 acts listed in Article 1(1), 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 acts listed in Article 1(1), 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 acts listed in Article 1(1);
 - (e) extortion with a view to the perpetration of one of the acts listed in Article 1(1);

- (f) drawing up false administrative documents with a view to committing one of the acts 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."
- (2) In Article 4, paragraph 2 is replaced as follows:

"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, with the exception of possession as provided for in Article 1(1)(f) and the offences referred to in Article 1(1)(i) and Article 3(2)(a) to (c), is made punishable."
- (3) In Article 9 the following paragraph 1(a) is added:

"1a. Each Member State shall also establish its jurisdiction over the offences referred to in Article 3(2)(a) to (c) where the offence was directed towards or resulted in the carrying out of an offence referred to in Article 1 and such offence is subject to the jurisdiction of the Member State under any of the criteria set out in paragraph 1(a) to (e) of this Article."

Article 2

- 1. Member States shall take the necessary measures to comply with this Framework Decision by [31 December 2008].
- 2. By [31 December 2008], 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 [31 December 2009], 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*