



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 1 April 2008

**Interinstitutional File:
2007/0236 (CNS)**

**7785/1/08
REV 1**

LIMITE

**CATS 24
DROIPEN 30**

NOTE

from :	Presidency
to :	Article 36 Committee
No. prev. Doc.:	7785/08 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 the 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 perturb the legislative framework of the European union and particularly Framework Decision 2002/475/JHA.
2. The Commission advocates 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 is situated on the borderline of fundamental rights and freedoms such as freedom of expression, assembly or of association. It is therefore essential that the right balance is struck in the instrument.
 4. A first discussion on the proposal has taken 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).
 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).
 7. 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 (Annex C) ;
 - a suggested Council statement (Annex D).
 8. The Presidency intends to finalise the discussion at the Council on 18 April 2008. The following issues are submitted to delegations.

1. Safeguards

Following the discussion which took place during the meeting of the Council on 28 February 2008, the revised text includes:

- a) recital 16 on proportionality to be inserted in the amending Framework Decision (see Annex A), based on Article 12.2. of the Convention and amended compared to the previous version ;
- b) a new Council statement (see Annex D) which aims at making it clear that faithful implementation of the Convention of the Council of Europe, and in particular as regards its provisions on proportionality, would be sufficient to ensure compatibility between the Framework Decision and the Convention of the Council of Europe for the parts which were integrated into EU legislation ;
- c) a new provision is added based on Article 7(2) of the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. In order not to disturb the coherence and consistency within the legal acts of the EU, the Presidency proposes this text to be included in unchanged form. The Presidency suggests to insert this new provision as a new article 1a in the amending Framework Decision (see Annex C).

Delegations are invited to agree on these proposals.

2. Attempt to commit "recruitment", "public provocation" and "training" (Article 4(2))

"Ancillary offences" described in Article 4 of the Framework Decision were discussed during the meeting of the Friends of Presidency on 18 March 2008. All delegations agreed on the first part of Article 4 (inciting, aiding or abetting): the result is set out in the Annex.

With regard to "attempting" (Article 4(2) of the Framework Decision) : the Convention provides for the criminalisation of the attempt to commit "recruitment to terrorism" and "training to terrorism" (but not the attempt to commit "public provocation to commit a terrorist offence"). The proposal of the Commission explicitly excludes any obligation for such criminalisation.

Most delegations agreed on the need to align the Framework Decision on the Convention of the Council of Europe on this issue: the result of this modification is reflected in the amended Article 4(2) in Annex B. By including the attempt to commit “recruitment to terrorism” or to commit “training to terrorism”, the Framework Decision would ensure, for example:

- the criminalisation of the setting up of a training camp even if no trainees have attended yet the training sessions ;
- the printing of leaflets advocating terrorism even if the leaflets are not disseminated yet.

Some delegations, however, supported the limitation proposed by the Commission. Some invoked the explanatory report to the convention which, in their opinion, “softens” the requirement, found in the convention, to criminalise the attempt.

In the light of additional safeguards included in the Framework Decision and in line with the general orientation to ensure parallelism with the Convention, the Presidency suggests to maintain the criminalisation of the attempt with regard to “recruitment” and “training”.

Delegations are invited to agree on Article 4(2) as it is contained in Annex B.

3. Jurisdiction (Article 9)

Regarding "jurisdiction" (Article 9 of the Framework Decision), the remaining issue is related to Article 9(1)(d) and (e). During previous discussions, delegations were divided on the need to apply letters (d) and (e) to the three new offences.

Some delegations were opposed to the inclusion of letters (d) and (e) for the new offences because these mandatory grounds for jurisdiction are not provided in the Convention. Other delegations emphasised that there is no substantial reason to exclude letters (d) and (e).

To facilitate the discussions, the Presidency has inserted a new paragraph 1a in the revised version of Article 9 so as to illustrate what Article 9 would look like if letters (d) and (e) were maintained but only as optional grounds for jurisdiction for the three new offences. This proposal is based on similar wording found for example in Article 10(5) of Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems.

However, the Presidency invites delegations to reflect further upon the need for such paragraph. Although it is clear that the proposal of the Commission goes further than the Convention on this point, it is difficult to see why this should preclude the inclusion of letters (d) and (e) as these grounds already form part of the legislative framework. Delegations who insist on making these grounds optional could not submit any other argument than the fact that it is not required by the convention.

The Presidency therefore suggests to include letters (d) and (e) as mandatory grounds for jurisdiction for the three new offences and therefore to maintain Article 9 as it stands in the text adopted in 2002.

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 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.

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 establishment and 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 discriminatory or racist treatment.

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 ¹ 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) ², 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) ³, knowing that the skills provided are intended to be used for this purpose.

¹ Scrutiny reservation for ES and IT.

² Scrutiny reservation for ES.

³ Scrutiny reservation for ES.

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. (...) ¹

¹ This provision is moved to a new Article 1a in the amending Framework Decision (see Annex C).

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 ¹.
- 1a. ² 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, 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) (...) ³, is made punishable.

¹ PT entered a scrutiny reservation on the fact that "organising or directing others to commit [provocation, recruitment or training]" and of "contributing to the commission of [provocation, recruitment or training] by a group of persons acting with a common purpose", which are mentioned in the Convention, are not covered in the Framework Decision.

² Reservation for ES on the fact that "inciting" is not applicable to the new offences.

³ Some delegations insisted on the need to maintain the current wording (NL, IT, ES) under which only attempt to commit "provocation" is excluded. Other delegations would favour the current wording but were flexible (EE, IE, CY and SK). Some delegations (DE, SE, FR, EL, CZ), however, supported the exclusion of the criminalisation of "attempt" with regard to the three new offences (including therefore "recruitment" and "training").

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.

¹[1a. A Member State may decide not to apply, or to apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(d) and 1(e) for offences referred to in Article 3(2)(a) to (c) and to offences referred to in Article 4 in so far as they are linked to offences referred to in Article 3(2)(a) to (c).]

2. to 5. *Unchanged*

¹ See the cover note (point 3) for further explanation on this point. DE, BG, UK, CZ, SE, PL, HU are in favour of keeping paragraph 1a. COM, BE, FR, ES oppose this paragraph.

**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^{1 2}

This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to [freedom of association]³, 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 ...^{*}.⁴
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.

¹ This provision was previously found in the new paragraph 4 inserted in Article 3 of the existing Framework Decision. The Presidency suggests to move this clause in the amending Framework Decision instead of having it as a modification to the existing Framework Decision. This follows a request by SE to make it clear that this provision applies not only to the definition of new offences inserted in Article 3 but also to references to Article 3 made in other parts of the Framework Decision.

² Reservation of ES on this provision. FR suggests to limit this provision to the offence of “public provocation”. HU and SE could not accept such limitation.

³ Deletion of “freedom of association” was supported by FR and AT. SE and FI opposed it.

⁴ DE suggests to insert here a clause based on the proposed statement contained in Annex D.

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.*

Proposal for a Council Statement

The Council declares that faithful implementation of the Convention of the Council of Europe, and in particular as regards its provisions on proportionality, would be sufficient to ensure compatibility between the Framework Decision and the Convention of the Council of Europe for the parts which were integrated into EU legislation ¹.

¹ DE suggests to insert this wording as a new provision in the operative text of the amending Framework Decision. The new provision would read as follows “(...) *Implementation of the Convention of the Council of Europe, and in particular as regards its provisions on proportionality, (...) ensures compatibility between the Framework Decision and the Convention of the Council of Europe for the parts which were integrated into EU legislation*”. This proposal was supported by PL and HU. Other delegations entered a reservation (CY, COM, ES, AT, FR, PT, EL). COM noted that transferring this clause in the operative text would be at odd with the disconnection clause found in the convention.