Meijers Committee
standing committee of experts on international
immigration, refugee and criminal law

CM1603

Note on a Proposal for a Directive on combating terrorism

16 March 2016

The Meijers Committee would like to comment on the European Commission's proposal for a Directive on combating terrorism,[1] partly in light of the proposals made in the Council's General Approach of 3rd of March 2016 and the European Parliament's LIBE Committee's draft report of 10th of March 2016. The Meijers Committee holds that the proposal is insufficiently substantiated, that it extends the scope of criminal law too far and compromises fundamental rights.

1. The Meijers Committee wishes to express its support for the idea of reviewing existing EU criminal law instruments in the field of counter-terrorism. A review of the 2002 Framework Decision (as revised in 2008) offers an excellent opportunity to take a critical look at its provisions in light of the ambitions of the European institutions regarding a coherent criminal policy. In this regard, the Meijers Committee recalls that in recent years the European Commission, the Council and the Parliament have clearly expressed themselves in favour of developing EU-level criteria for the criminalisation of behaviour.[2] The underlying idea is to create a coherent EU criminal law system that avoids unnecessary and unclear criminal law offences in EU instruments.

2. Moreover, the Meijers Committee wonders how the proposed directive relates to the European institutions' laudable initiatives on deradicalisation, disengagement and rehabilitation of (potential) 'foreign fighters' and returnees - e.g. the European Commission has stated in this regard that prosecution can have adverse side-effects: 'the threat of prosecution may discourage certain individuals from returning who would otherwise be valuable sources of intelligence or be persuaded to de-legitimise terrorist groups and actively support counter-narratives among their peers. Also, if aspiring foreign fighters are likely to be prosecuted, their relatives may be more reluctant to alert the authorities to signs of radicalisation and preparation.'[3] Moreover, prisons can become breeding grounds for further radicalisation and many EU prisons are currently overcrowded. In the view of the Meijers Committee, discussions about broadening the scope of the criminal law should be fully coordinated with these meaningful initiatives in order to achieve 'better regulation'.

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1 2 December 2015, COM(2015) 625 final.

2 Council Conclusions on model provisions, guiding the Council's criminal law deliberations, 2979th JHA Council meeting, 30 Nnovember 2009; European Parliament, Resolution 'An EU approach to criminal law', 22 May 2012 (2010/2310(INI)); European Commission Communication 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', 20 September 2011, (COM(2011)0573).

3 European Commission, Background document to the High-Level Ministerial Conference 'Criminal justice response to radicalisation', 19 October 2015, Brussels, p. 2.

3. Unfortunately, the opportunity to develop criminal law on terrorism in line with these considerations is not taken up in the current proposal. For instance, in its Conclusions on model provisions guiding the Council's criminal law deliberations, the Council held that 'criminalisation of a conduct at an unwarrantably early stage' should be avoided - yet this aspect is particularly problematic in the current proposal. It creates a far-reaching extension of the scope of Member States' criminal law obligations in the field of terrorism that takes these obligations even further into the preparatory phase of possible harmful conduct.

4. It is notable that the European Commission has chosen not to conduct an impact assessment of the proposed directive, 'given the urgent need to improve the EU framework to increase security in the light of recent terrorist attacks including by incorporating international obligations and standards'. The legislative process so far also gives the general impression that legislation is being rushed through, without looking at the serious societal impacts that it could have. The Meijers Committee is of the opinion that such a rushed procedure does not do justice to the importance of a balanced legal response to terrorism, especially since the proposal concerns far-reaching powers under criminal law that can be exercised at a very early stage and that can have a serious impact on people's lives. Legislation in the field of counter-terrorism (including EU legislation[4]) is all too often characterized by short-term thinking and a lack of legislative scrutiny, whereas the new, far-reaching powers are then retained for a considerable time, sometimes also being used outside the counter-terrorism context. According to the Meijers Committee, the European institutions should make a joint effort to avoid falling into such traps and to engage in a profound, careful consideration of these proposals and a serious investigation of the functioning of existing instruments (not being limited to operational aspects but also looking at the effects of measures on fundamental rights and possible adverse side-effects).
The fact that international obligations in this area have already been adopted does not discharge the EU legislature of the obligation to make its own critical assessment of these measures, especially since these existing international obligations have been adopted without much democratic oversight and scrutiny.

5. The Meijers Committee is of the opinion that the Commission's proposal is only weakly substantiated. It is stated that 'More coherent, comprehensive and aligned national criminal law provisions are necessary across the EU to be able to effectively prevent and prosecute foreign terrorist fighters-related offences and to respond in an appropriate manner to the increased cross-border practical and legal challenges.' However, the Commission provides no sources nor does it explain why the current instruments are insufficient and ineffective; neither does it give examples of situations that cannot be tackled at the present time. The proposal mentions 'loopholes' and 'enforcement gaps', but does not specify them and does not delve into the causes. It is the view of the Meijers Committee that such far-reaching proposals require a firmer basis. The focus should be on the effective use of existing powers and ways by which Member States can collaborate, e.g. in the area of information exchange, rather than creating new rules – something that is also required by the proportionality

4 SECILE Consortium, led by Professor Fiona de Londras, *Securing Europe through Counter-Terrorism: Impact, Legitimacy and Effectiveness. Final report summary,* 2015, http://cordis.europa.eu/result/rcn/164039_en.html.

principle (art 5 TEU).

6. All EU Member States have bound themselves to the obligation to respect fundamental rights. That is also the case in regard to the implementation of obligations to criminalise behaviour. It is worrying that the text of the proposed directive makes no reference to fundamental rights whatsoever (except in the preamble), whereas the Framework Decisions do. The Meijers Committee holds that the directive itself should clearly outline the obligation to respect fundamental rights. In particular, there is a risk that implementation of the measures envisaged will in practice encroach upon the right to non-discrimination by disproportionately targeting Muslims. The offences may be neutrally formulated, but considering the reasons and objectives outlined in the explanatory memorandum, the instrument seems to be particularly geared towards jihadism. In the proposal, only recital 20 states rather weakly that implementation 'should exclude any form of arbitrariness or discrimination.' The Meijers Committee proposes that the text of the directive itself provide for clear and strong guarantees against discrimination.
6a. The Council's proposal to refer to media freedom in Article 21*bis* is an improvement of the Commission's proposal. The Meijers Committee proposes to add a reference in the text to freedom of expression in general as well as other fundamental rights that are at stake, including freedom of religion, non-discrimination and freedom of movement, and to specify requirements for the restriction of these rights in the context of specific offences. This also means that the elements of the separate offences included should be restricted in such a way as to ensure that implementation does not risk encroaching on these fundamental rights (as specified below).

7. The broad definition of terrorism is unaltered in the proposal. Amongst other things, attacks against the military and military infrastructure of dictatorial regimes are included in the definition. In its outcome document on the 2002 Framework Decision, the Council stated that the instrument 'covers acts which are considered by all Member States of the European Union as serious infringements of their criminal laws committed by individuals whose objectives constitute a threat to their democratic societies respecting the rule of law and the civilisation upon which these societies are founded. It has to be understood in this sense and cannot be construed so as to argue that the conduct of those who have acted in the interest of preserving or restoring these democratic values, as was notably the case in some Member States during the Second World War, could now be considered as "terrorist" acts. Nor can it be construed so as to incriminate on terrorist grounds persons exercising their fundamental right to manifest their opinions, even if in the course of the exercise of such right they commit offences.'[5] The Meijers Committee holds that this fundamental dilemma deserves renewed consideration by the European legislature and that the outcome of such considerations should be clearly laid down in the text of the directive.
7a. This definition can lead to unjust results, especially in combination with a broad array of preparatory offences. For instance, incitement to attacks against the military infrastructure of dictatorial regimes, and glorification of such attacks, would also be prohibited. The proposed

5 Outcome of the proceedings, 7 December 2001, 14845/1/01 Rev. 1, Draft Council Statement.

directive contains no guarantees to prevent such criminal offences from being used arbitrarily or inconsistently, whereas the risk is certainly present.

8. As indicated above, the Council (in light of the debate about criteria for criminalisation) has stated that 'criminalisation of a conduct at an unwarrantably early stage' should be avoided; 'conduct which only implies an abstract danger to the protected right or interest should be criminalised only if appropriate considering the particular importance of the right or interest which is the object of protection.'[6] The definition of criminal offences should be clearly delineated, as required by the legality principle (article 49 EU Charter of Fundamental Rights). It is the view of the Meijers Committee that this also implies that the definition should be so strict that the behaviour to be criminalised is not too far removed from the potential harm (from the potential terrorist attacks themselves), and such harm should actually be intended.
In this regard, several proposed offences are problematic (as indicated below). For now, it is important to note that the proposal offers unprecedented opportunities to cumulate offences - e.g. inciting the distribution of a message to the public with the intent to incite the commission of a terrorist offence (art. 16(2) / art. 5), and inciting the financing of training for terrorism (art. 16(2) / art. 11 / art. 8). Moreover, the proposal would oblige Member States to criminalise 'aiding and abetting the soliciting of another person to participate in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way' (art. 16 lid 3 / art. 6 / art. 4 sub b). This enlarges the scope of the criminal law even further and can lead to absurd situations.
8a. It is important to keep in mind that, in common with substantive criminal law, criminal procedural law in the field of counter-terrorism often also extends further into the preparative phase than 'normal' criminal procedural law. In the Netherlands, for instance, 'indications' of an offence (rather than a reasonable suspicion) are sufficient to deploy certain procedural powers. Thanks to the combination of broader substantive and procedural law provisions, the government can act at an extremely early stage. Many of the offences in the proposed directive do indeed target acts that would otherwise be considered 'normal' innocent behaviour, such as taking a chemistry course or buying fertilizer. Thus, because the *actus reus* cannot make the difference, a person's alleged intention (*mens rea*) plays an even greater role, and in the field of terrorism there is a greater risk that the authorities may derive such an intention (in part) from ideologies and/or religious beliefs. In the current societal context, that means that there is a genuine risk that Muslims will be disproportionately targeted in practice.

9. With regard to Article 2(d), the Meijers Committee wonders what is meant by a 'structured group' that 'does not need to have (...) a developed structure.'

10. The proposed article 15 states that for an offence referred to in Article 4 and Title III to be punishable, it shall not be necessary that a terrorist offence be actually committed, nor shall it be necessary to establish a link to a specific terrorist offence (or, regarding articles 9 to 11, to specific offences related to terrorist activities). In the explanatory memorandum this is explained as follows: 'For instance, for the criminalisation of the recruitment to terrorism it is

6 Council Conclusions on model provisions, guiding the Council's criminal law deliberations, 2979th JHA Council meeting, 30 November 2009, par. 5.

not necessary that the person is solicited to commit a specific terrorist offence or that the person providing training for terrorism instructs a person in the commission of a specific terrorist offence. In the same spirit, for the criminalisation of the financing of terrorism, it is sufficient that there is knowledge about the use of the funds for purposes furthering the terrorist activities in general without there being a need to be linked to for instance a specific already envisaged travel abroad.'
The Meijers Committee is of the opinion that this addition to article 15 (which is not included in the Framework Decision) stretches the relationship between behaviour and potential harmful consequences too far; no such relationship is required at all. In fact, the Meijers Committee holds that the requirement that the behaviour in question poses a real danger of possible terrorist offences is important for preparatory offences in general. If the conduct described is capable of creating harm in exceptional situations, the prohibition should be limited to those exceptional situations. With regard to article 8 (receiving training) such a requirement is referred to in the explanatory memorandum; in article 5, a requirement to this end is laid down in the text itself. The Meijers Committee recommends, having regard to article 8 and the other offences in the directive, that the relationship between behaviour and possible harm should be more clearly expressed in the text.

11. Although it is positive that article 5 contains a 'danger' criterion, the Meijers Committee considers that an even stricter criterion is needed to limit the scope of the provocation offence, since the right to freedom of expression is so clearly at stake here. In its current form, the offence potentially criminalises sympathisers with the ideology underlying terrorist groups, but who do not necessarily accept the violence as such; it could thus make non-violent resistance suspect and thereby be counterproductive. Moreover, because the definition of terrorism in the proposed directive is so broad, discussions of possible justifications for violent resistance in exceptional circumstances are also criminalised: in a free society, such debates should not be settled by criminal law. With all of the opportunities offered for the cumulation of offences, the risk of creating a 'chilling effect' on freedom of speech is even greater, e.g. criminalising the financing of the propagation of such ideologies.
The offence should be further restricted, e.g. by requiring a 'serious and actual danger' and/or as the LIBE draft report states a 'clear and substantial danger', or by reviving the Parliament's proposal with regard to the 2008 revision of the Framework Decision to limit the article to 'conduct that clearly and intentionally advocates the commission of a terrorist offence where such conduct manifestly causes a danger that such offences are committed'.
11a. The proposal is also problematic in that it explicitly criminalises indirect provocation. Especially in combination with the preamble, which states that 'The offenses related to public provocation to commit a terrorist offence act comprise, inter alia, the glorification and justification of terrorism or the dissemination of messages or images including those related to the victims of terrorism as a way to gain publicity for the terrorists cause or seriously intimidating the population', this recital leads to a disproportional infringement of freedom of expression including the freedom of the press and should be renounced. The explanatory memorandum states that 'Such messages and images may also include those denigrating victims of terrorism, including their families', which makes the offence even less clear: some Member States may interpret this as meaning that, even if there is no real danger of future offences, offence to victims and their families is sufficient reason to criminalise expressions.

The text proposed in the Council, which specifically mentions glorification of terrorism in the text of the directive, is even more problematic - as is the LIBE draft report's addition of the words 'or glorify': the Meijers Committee strongly believes that these proposals should be renounced. Instead, the directive should explicitly exclude glorification or justification of terrorism from its reach, because it is particularly with these types of prohibitions that the risk of encroaching upon freedom of expression is very high. Moreover, the proposal to change the text to 'advocates the commission of terrorist offences thereby causing a danger' is a significant step back in terms of freedom of expression: it could be interpreted so as to mean that advocating the commission of terrorist offences (whether directly or indirectly, including by glorification) *automatically* causes a danger. This would make the 'danger' requirement ineffective and superfluous.
The safeguard that the Council proposes in recital 20A ('Nothing in this Directive should 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, falls outside the scope of this Directive and, in particular, of the definition of public provocation to commit terrorist offences') should, in the view of the Meijers Committee, be included in the text of the directive itself.
11b. The Meijers Committee further believes that the Council's addition to recital 7 - 'it seems appropriate for Member States to take measures to remove or to block access to webpages publicly inciting to commit terrorist offences. Where such measures are taken, they must be set by transparent procedures and provide adequate safeguards, in particular to ensure that restrictions are limited to what is necessary and proportionate' - falls outside the scope of this instrument and creates a particularly pressing risk for freedom of expression and freedom of the internet, especially since the proposal does not oblige involvement of the judiciary in such blocking measures.

12. The proposed articles 7 and 8 refer to providing and receiving training 'for the purpose of committing of or contributing to [in article 8: the commission of]' one of the terrorist offences mentioned. The Meijers Committee recommends specifying what is meant by 'contributing to [the commission of]' these offences and why this addition is necessary. Moreover, it is advised that the text of article 8 makes it clear that active participation in the training is required and that 'the mere fact of visiting websites containing information or receiving communications, which could be used for training for terrorism, is not enough' as the explanatory memorandum states.

13. The need for and proportionality of the proposed new criminal offences of travelling abroad for terrorism and organising or otherwise facilitating such travel (articles 9 and 10) are not sufficiently demonstrated, also in light of existing criminal offences in the Member States and other legal options, such as taking passports. Moreover, the Meijers Committee considers that these articles are too loosely defined for such far-reaching restrictions of the right to liberty of movement, which entails the right to leave any country including one's own (Article 2, Fourth Protocol to the ECHR).
Article 9 refers to travelling abroad 'for the purpose of the commission of or contribution to a terrorist offence referred to in Article 3 (...)'. The wording 'or contribution to' makes the

offence excessively broad and unclear: there is no explanation of what this could entail. Moreover, the Meijers Committee considers the criminalisation of travelling abroad to participate in the activities of a terrorist group particularly far-reaching, as the offence of article 4 in itself is already quite broad. Article 10 includes the term 'otherwise facilitating'; according to the Commission this 'is used to cover any other conduct than those falling under "organisation" which assists the traveller in reaching his or her destination. As an example, the act of assisting the traveller in unlawfully crossing a border could be mentioned.' This makes the provision very broad and unclear. Although the organisation or facilitation needs to be committed intentionally and 'knowing that the assistance thus rendered is for that purpose', apparently there is no requirement that the organiser or facilitator has the purpose of contributing to the commission of terrorist offences.
All these elements together lead to a greatly expanded scope of criminal liability for an otherwise ordinary activity - travelling abroad. Almost everything will thus come down to the alleged purposes of the traveller, an assessment that is left to domestic law. Some Member States will be able to interpret this very broadly, e.g. judging that travelling to a certain 'suspect' region will in principle be sufficient to prove a terrorist purpose. Thus, there is a risk of reversing the burden of proof, which will prove especially problematic for humanitarian organisations and journalists.
Should the offences be adopted, the Meijers Committee holds that it is at least absolutely necessary that they are limited to travelling outside the EU. Moreover, The Meijers Committee concurs with the LIBE committee's draft report that 'the act of travelling should be criminalised under very specific conditions and only when the intention of doing so for a terrorist purpose is proven by inferring, as much as possible, from objective, factual circumstances'; such specific guarantees should be included in the text itself.

14. The Meijers Committee is not convinced of the need to establish jurisdiction for non-EU nationals who provide training for terrorism to nationals or residents abroad, as proposed in Article 21 (1)(d). There should be particularly compelling reasons for establishing such a far-reaching ground for jurisdiction, especially where offences in the preparatory stage are concerned. The Commission, in the view of the Meijers Committee, has failed to demonstrate such compelling reasons. It is also highly questionable whether this form of jurisdiction will actually be used in practice.

15. The Council proposes to include a specific provision on investigative tools. According to the Meijers Committee, this falls outside the scope of the directive. The same is true of the LIBE draft report's proposal on 'asset freezing' in Article 11a. That said, the breadth of criminal procedural powers in the field of terrorism is certainly something that the European legislature should be concerned about, but not just from a law enforcement perspective; rather, the balance between effective investigations and fundamental rights requires more careful consideration. This is particularly pressing with regard to offences, such as those contained in the proposed directive, where evidence gathering may be difficult because they are committed in third countries with worrying human rights records. Moreover, the relationship between criminal (substantive and procedural) counter-terrorism law and other fields of counter-terrorism law should be borne in mind when drafting this directive. For example, some states have adopted or proposed far-reaching administrative law measures,

such as removing a person's nationality after that person has been convicted of terrorist offences (or even in the absence of a criminal conviction). According to the Meijers Committee, the European legislature should consider how the current proposal relates to such initiatives.

About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

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