Evaluation

of the

Framework Decision 2002/475/JHA on combatting terrorism, as amended by Framework Decision 2008/919 JHA

on the basis of the

Manifesto for a European Criminal Policy

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1. On the requirement of a fundamental legal interest worthy of protection

a) What interest does the legal instrument in question aspire to protect?

Terrorist acts infringe interests on two levels. First they affect the most fundamental interests of human beings such as subsistence and freedom from bodily injury etc. They do, however, also constitute an attack on, or an attempted attack on, the society. Thus, Recital 1 of the original Framework decision provides that the EU is based on the principles of democracy and rule of law and that these principles are common to the Member States. Recital 2 provides that terrorism is one of the most serious violations of those principles.

b) Is the protected interest fundamental for the EU in terms of its nature and is it anchored in the primary law of the EU?

The protected interest is fundamental for the EU and is anchored in the primary law of the EU.

Article 83 TFEU lists terrorism within the areas of particularly serious crimes with a cross-border dimension. In this area the EU retains competence to establish minimum rules concerning the definition of relevant criminal offences and sanctions for the purpose of the approximation of criminal laws in the Member States if this proves necessary for ensuring a high level of security to citizens (Article 67(3) TFEU read with Article 75 TFEU).

The numerous references to terrorism in the TFEU underpin the importance the EU prescribes to combating it.

c) Is the protected interest possible to reconcile with the constitutional traditions of the Member States and the EU Charter on Fundamental Rights?

The legally protected interests are reconciled with both the constitutional traditions of the Member States and the CFR.

There is also a reference to fundamental rights both in the recitals and in the operative provisions of the instrument (however, the references in the operative provisions are more restrictive). Recital 10 provides:

“This Framework Decision respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they emerge from the constitutional traditions common to the Member States as principles of Community law. 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 Chapter VI thereof. Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate.”

There is only one operative provision of relevance. Article 1(2) provides:

"This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

d) In what way is the impact of the proscribed conduct on the protected interest especially harmful to the society?

Terrorism is, for obvious reasons, especially harmful to the society. In this context reference can be made to statements made by the EU in different contexts.

Terrorism constitutes a threat to democracy, to the free exercise of human rights and to economic and social development (The La Gomera Declaration adopted at the informal Council meeting on 14 October 1995).

Terrorism constitutes one of the most serious violations to the principles of democracy and the rule of law. This is alluded to in Article 1. There is more explicit and detailed justifications in the recitals.

There are, however, reasons to underline that not all of the acts proscribed in the Framework decisions, in themselves, have especially harmful consequences (even though that is their aim).

e) Does the EU legislator deal with the question of a legal interest worthy of protection, and is there any explicit and detailed justification as to whether a legal interest of this kind actually exists?

In the Framework decision there is direct justification on whether there is a legal interest worthy of protection. Article 1 provides:

"(1) Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

— seriously intimidating a population, or

— unduly compelling a Government or international organisation to perform or abstain from performing any act, or

— seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

shall be deemed to be terrorist offences."

Recital 1 and 2 provide:

"(1) The European Union is founded on the universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms. It is based on the principle of democracy and the principle of the rule of law, principles which are common to the Member States.

(2) Terrorism constitutes one of the most serious violations of those principles. The La Gomera Declaration adopted at the informal Council meeting on 14 October 1995 affirmed that terrorism constitutes a threat to democracy, to the free exercise of human rights and to economic and social development."

As already indicated, the problem with these Framework decisions, is not that the protected interest as such does not justify criminalization, but rather that there is a considerable distance between the acts and the protected interests themselves. This raises questions about when states are justified in proscribing conduct of preparatory nature and questions about fair labelling (i.e. is it fair to label possession of weapons combined with a terrorist intent as a consummated terrorist offence?).

2. On the ultima ratio principle

a) Does the EU have alternative mechanisms to Criminal Law sanctions to protect the legitimate interests (set out in 1)?

There are alternative measures used against terrorism. The EU legislator seeks to protect the legitimate interest with a number of measures centered on disrupting terrorist financing. Examples are the Third Anti-Money Laundering Directive1, the Cash Control Regulation2 (requiring disclosure of EUR 10,000 cash when entering or leaving the Union).

Please also note Council Decision 2009/1004/CFSP of 22 December 2009 updating the list of persons, groups and entities subject to Article 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism.

It could be questionable whether it is necessary—i.e. whether it is in line with the principle of ultima ratio—to proscribe all of the acts covered by the Framework decisions. In this context, the Manifesto provides:

“There are still examples showing that the European legislator does not continuously pay attention to the principle of ultima ratio and that he ignored the justification required by the principle of good governance. The amending Framework Decision on combating terrorism requires the Member States to classify the following conduct as offences linked to terrorist activities: the public provocation to commit a terrorist offence, the recruitment and training for terrorism, as well as the aiding or abetting, inciting and attempting. The provision is also supposed to counteract the tendency of using the internet as a “virtual training camp” for terrorists. However, the provision criminalises conduct that is committed before the actual commission of a terrorist offence. The European legislator leads the Member States to a criminal law that tries to prevent even mere dangers for legally protected interests. The provision criminalises conduct only leading to a criminal attitude of other persons or only supporting such attitude (super-preventative criminal law). Such extended criminal liability (“Vorverlagerung der Strafbarkeit”) abandons the requirement of even an abstract danger for a legally protected interest and hence is not compatible with the European principle of proportionality (and derived from that the principle of ultima ratio) which is an essential guideline for criminal policy.

[1] OJ L 309, 25.11.05, p.15.

[2] OJ L 309, 25.11.05, p.9.

As long as a certain conduct does not even constitute a present danger for legally protected interests, its criminalisation is not necessary. In any case the European legislator should give – in accordance with the principle of good governance – a detailed justification why he did not impose a less severe measure, such as increasing monitoring of the internet or obligating operators of websites."

No amendment has been made to the Framework Decision since the Manifesto was published.

b) Can the European legislator demonstrate that the effectiveness of alternative, non-penal/criminal measures is inadequate in practice?

No serious such attempt has been made. However, arguably there is nothing controversial in saying that the ultima ratio requirement is satisfied in the case of consummate terrorist offences. That such terrorist offences should be met by criminal law sanctions is a quite reasonable position. The question which remains is whether the criminalization should be as broad as it is in the Framework decisions.

c) Does the EU legislator deal with the question of alternative protective measures, and is there an explicit and detailed explanation as to whether resort to criminal law (of Member States, where appropriate) is necessary?

There is no real attempt made to justify the need for criminal law (see *supra*).

d) Do the proscribed types of conduct in the draft instrument require criminal sanctions as a last resort?

In general this question can be answered in the affirmative but, as indicated above, reservations have been made as regards the distance between the acts proscribed and the protected interests.

3. On the principle of guilt

a) Does the punishment provided for in the instrument relate in a proper way to the actual responsibility of the individual?

The Manifesto provides:

"Regarding the principle of guilt it is furthermore alarming that the legislator does not pay attention to the fact that the penalty scale should be in due proportion to the dangerousness of the offence.

The Framework Decision on combating terrorism requires the Member States to criminalise the directing of a terrorist group, Art. 2 (2) (a), and the knowing participation in the activities of a terrorist group, for example by supplying information or material resources or by funding its activities, Art. 2 (2) (b). In its Art. 5 (3) the provision establishes a maximum sentence of not less than fifteen years for the offences listed in Art. 2 (2) (a) and for the offences listed in Art. 2 (2) (b) a

maximum sentence of not less than eight years. Regarding the principle of guilt respectively the proportionality of penalty scales it may be problematic that terrorist groups are not necessarily targeted on the commission of grave offences (such as attacks at a person's life or physical integrity, hostage taking or the production of weapons of mass destruction). In fact they may only be directed towards the threatening to commit terrorist offences, Art. 1 (1) (i).

As regards the "participation in the activities of a terrorist group" the framework decision establishes a maximum sentence of not less than eight years, regardless of whether the group targets the commission or only the threatening to commit terrorist offences. No expression is given to the fact that the different kinds of participation vary in their dangerousness. The legislator did not sufficiently regard the severity of guilt. As to the "directing of a terrorist group" it is even more questionable whether the principle of guilt has been respected. On the one hand Art. 5 (3) reduces the minimum-maximum-penalty for the directing of a terrorist group that refers only to the threatening to commit terrorist offences (eight years instead of fifteen). Given that the mere threatening to commit is less dangerous than the commission of a terrorist offence, the reduction of the sentence is commendable. On the other hand, the European legislator establishes the same minimum-maximum-penalty for both the leader of the group and the follower who participates in a terrorist group directed towards the mere threatening. Unfortunately the legislator failed to reduce the level of the envisaged sanctions for these participants. By establishing the same minimum-maximum-penalty for offences causing different social damages the European legislator violates the principle of guilt, respectively the requirement of proportional penalties."

No amendment has been made to the Framework decision since the Manifesto was published. In general terms the problem with the Framework decision is mainly that it puts acts of a very different nature (threats, acts of possession and consummated offences etc.) on the same footing. Thus, when the acts proscribed are clearly different in nature the requirements as regards the penalties should be differentiated to the same extent.

b) Do these sanctions correspond to individual guilt in terms of their type and gravity?

There may be a problem with the Framework decision in this respect. See above (a).

c) Does the legislator explicitly deal with the question whether these sanctions are appropriate having regard to the guilt of the individual?

The Framework decision does not deal explicitly with the question of whether the sanctions it prescribes are appropriate having regard to the guilt of the individual.

4. On the principle of legality

a) If the legal instrument aims to introduce a supranational criminal offence:

aa) Do the elements of crimes (objective and subjective) clearly emanate from the text of the legal instrument itself?

Not applicable.

bb) Are the sanctions provided for foreseeable?

Not applicable.

b) If the legal instrument aims to harmonise national criminal law provisions:

aa) To the extent that the obligation to amend national criminal law does not give any leeway for implementation (and thus exhaustively defines the criminal offence): Are the objective and subjective prerequisites for criminal liability as well as the sanctions which could be imposed foreseeable (as supra a)?

Arguably, the Framework decision provides such leeway. Thus the Member States will be responsible for ensuring that the implementing legislation is consistent with the principle of legality (see the reservation in section bb) below). There are a number of interpretative questions which might result in differences as regards the implementation in the Member States (for example, Article 3(1)(b) does not carry an explicit subjective element. Please contrast that to the wording of Article 3(1)(a) and (c) which explicitly mentions “intent” and “knowing” respectively; it is an open question how this should be interpreted).

bb) Do national legislators have the opportunity to implement each single proscription imposed by the European legislative act in such a concrete manner that this results in a strict and unambiguous provision of national criminal law (please give reasons for the answer using possible examples on how to formulate the implementing law)?

In general the answer is yes. It could be debated, however, whether it is possible to turn the general requirement that the act should be such that it could seriously damage a country or an international organisation into a fully intelligible prerequisite for an offence.

c) Does the legal instrument introduce retroactive rules, or does it compel Member States to introduce such rules?

No it does not.

d) Is any potential retroactivity justified with reference to the principle of lex mitior?

Not applicable.

e) Have national parliaments, organizations, and citizens been informed about the legal instrument in a timely and comprehensive manner, and have they been given a reasonable possibility to voice their own opinion?

Important if/when the Framework decision is 'Lisbonised' (i.e. transformed into a directive).

5. On the principle of subsidiarity

a) Why are criminal law measures at Member State level insufficient?

The principle of subsidiarity permits the EU to take action only if, and in so far as, the objectives of the proposed action cannot be sufficiently achieved by the Member States.

Recital 9 provides:

"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 reciprocity, be better achieved at the level of the Union, the Union may adopt measures, in accordance with 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 those objectives."

Recital 6 calls for an approximation of Member States' law in this field.

In practical terms it appears that certain measures set out in the Framework decision (2008 version) are already provided for in other instruments, such as the Council of Europe Convention on the Prevention of Terrorism (which itself has a greater geographical reach and which is also more problematic from the point of view of "Vorverlagerung"). Implementation and ratification of that convention by all Member States may achieve the same result as the Framework decision in certain areas.

Since there is little effort being made to actually justify the conclusion that the requirements of the principle of subsidiarity are actually met, it is difficult to make any real evaluation. The need for the instrument and the need for action at EU level should have been justified more thoroughly in the first place.

b) Why is the objective of each measure –whether in terms of its scope or its impact – better served at EU level?

See above.

c) Does the EU legislator deal with the question of subsidiarity and is there an explicit and detailed evaluation of the fulfilment of this requirement in the legal instrument – taking into account all the alternatives and weighing up all the circumstances?

The Manifesto provides:

"[T]he following example show[s] that the principle of subsidiarity is still not observed in many cases:

Art. 5(2) of the Framework Decision on combating terrorism also give[s] cause for concern ... [it] require[s] the Member States to punish offences more severely if..[it is] committed..with a terrorist intent. Although th[is] provision impose[s] relatively "soft" obligations on the Member States, which might all in all be sensible and conform to their practice, [it is] not (and can hardly be) supported by arguments why a solely national solution does not suffice."

d) Have national parliaments expressed their views as to the preservation of the subsidiarity principle and, if so, what was their opinion? Has the EU legislator explicitly considered these arguments?

To be followed up if/when the instrument is 'Lisbonised'.

6. On the coherence of domestic criminal justice systems

a) Do the criminal law provisions of the legal instrument undermine the coherence of the criminal justice system of one or more Member States?

The Manifesto provides:

"However in practice the European institutions are far from consequently following a (vertically and horizontally) coherent approach in criminal law policy. If framework decisions lack clauses like the one described above, the sanctions imposed in compliance with EU law might be out of sync with the rest of the finely balanced criminal sanctions. Art. 5 (3) of the Framework Decision on combating terrorism set the minimum-maximum-penalty for directing a terrorist group or participating in the activities of such a group to fifteen years and put the Finnish criminal law under pressure because the longest deprivation of liberty for a fixed term had amounted to twelve years before. The framework decision could only be transposed by implementing a maximum sentence of 12 + 3 years – contrary to the Finnish criminal law system.

The lack of horizontal coherence can – again – be shown with the Framework Decision on combating terrorism which establishes a different minimum-maximum-penalty for the leader of a terrorist group depending on whether the group aims at the committing or the threatening to commit terrorist activities. As regards the participation in terrorist activities the framework decision does not contain such a distinction. Hence, in such cases the same minimum-maximum-penalty is applied to both the leader of the group and the followers."

The Framework Decision shows respect for national identity and coherence on a national level by not requiring criminal law sanctions for legal persons. Article 8 provides:

"Penalties for legal persons

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7 is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties, such as:

(a) exclusion from entitlement to public benefits or aid;

(b) temporary or permanent disqualification from the practice of commercial activities;

(c) placing under judicial supervision;

(d) a judicial winding-up order;

(e) temporary or permanent closure of establishments which have been used for committing the offence."

b) In terms of systematicity and substantive content, is the legal instrument in line with other EU legal instruments related to criminal law?

At least the instrument does not seem to be in contradiction with other EU instruments. The requirement of Article 1(1) (that the act must be such that it "may seriously damage a country or an international organisation") is hard to reconcile with the fact that also (see Article 1(1)(f)) possession of weapons may constitute a terrorist offence. Is it really possible that the mere possession of weapons may seriously damage a country or an international organisation?

c) Does the EU legislator deal with the question of horizontal and vertical coherence, and is there an explicit and detailed explanation as to whether the legal instrument does not undermine the coherence of domestic criminal justice systems or at least whether any such undermining is inevitable – particularly in view of the obligation to respect the national identity of each Member State?

No.

OVERALL EVALUATION

❒ The legal instrument fully satisfies the requirements of the Manifesto on European Criminal Policy.

❒ The legal instrument on the whole satisfies the requirements of the Manifesto on European Criminal Policy. Amendments are necessary only on certain points (see recommendations).

☒ The legal instrument only partially satisfies the requirements of the Manifesto on European Criminal Policy. Significant amendments are required (see recommendations).

❒ The legal instrument on the whole does not satisfy the requirements of the Manifesto on European Criminal Policy. Extensive and structural amendments are required (see recommendations).

❒ The legislative act does not in any way satisfy the requirements of the Manifesto on European Criminal Policy. The proposal/enactment of such a legal instrument must be wholly reexamined (see recommendations).

RECOMMENDATIONS FOR THE AMENDMENT OF SPECIFIC PROVISIONS OF THE PROPOSED DIRECTIVE:

The need for action and the need for action at EU level should have been justified more thoroughly. At this stage, where there are more far-reaching instruments, *e.g.*, within the Council of Europe, it is hard to start with a clean slate.

This, *i.e.* that a clean slate does not exist, also applies to the relatively far-reaching requirements as regards the criminalisation of non-consummate offences. If/when the instrument is redrafted, the EU should aim to make the requirements in this regard less onerous, making sure that the Member States are able to criminalize these acts in a way that is consonant with their own traditions and their own legislative styles or techniques. Since the instrument is already implemented in most, if not all, Member States, this is of importance mainly for the purpose of ensuring that controls and follow-up made by the EU institutions will not be unnecessarily meticulous.

The different nature of the acts proscribed should be more clearly reflected in the requirements on penalties. For example: a mere threat of kidnapping or hostage-taking should not be put on the same level as the actual kidnapping and taking a hostage, the possession of weapons should not be put on the same level as attacks with fatal consequences etc. See also the text in section 3(a).

The problem indicated in section 6(b) should be dealt with.