



*Committee on Legal Affairs
The Chair*

02.2.2017

Mr Claude Moraes
Chair
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (COM(2015)0625 – C8-0386/2015 – 2015/0281(COD))

Dear Mr Chair,

By letter of 19 December 2016 you requested, pursuant to Rule 39(2) of the Rules of Procedure, an opinion of the Committee on Legal Affairs on the appropriateness of the modification of the legal basis of the proposal for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (COM(2015)0625 - 2015/0281(COD)). The proposal was initially based on Articles 83(1) and 82(2) of the Treaty on the Functioning of the European Union ('TFEU'), but the co-legislators decided during their negotiations on the file that the mention of Article 82(2) TFEU was unnecessary and, accordingly, decided to delete it as a legal basis of the proposal.

I. Background

On 2 February 2015 the Commission presented a proposal for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (COM(2015)0625 - 2015/0281(COD)).

The Commission based its proposal on Article 83(1) and Article 82(2)(c) TFEU. In its Explanatory Memorandum, in particular in section 2 thereof, which concerns the choice of the legal basis and compliance with the principles of subsidiarity and proportionality, the Commission explained that the proposal intends to replace Council Framework Decision

2002/475/JHA on combating terrorism¹ and seeks to put in place updated EU level legislation establishing minimum rules on the definition of terrorist offences, offences related to a terrorist group or terrorist activities and penalties in this area. Consequently, Article 83(1) constituted a proper legal basis for the proposal.

Since the proposal includes provisions related to the victims' rights, the Commission initially considered that it should also be based on Article 82(2)(c), which enables the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to establish minimum rules concerning the rights of victims of crime to the extent that this is necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension.

According to your letter, the three institutions agreed to remove Article 82(2)(c) TFEU as a legal basis for the proposal during the inter-institutional negotiations. This modification was justified on the basis of the case law of the Court of Justice of the European Union according to which if a measure pursues a twofold purpose or that it has a twofold component one of which is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.

The institutions considered that in this file the predominant component was the establishment of minimum rules concerning the definition and sanctions of terrorism and that the inclusion in the directive of victims' rights was merely ancillary. Consequently, they decided to delete Article 82(2)(c) from the legal bases of the proposal.

On 8 December 2016 the Committee on Civil Liberties, Justice and Home Affairs voted the text agreed upon by the institutions in the inter-institutional negotiations. The vote in plenary is scheduled for 15 February 2017.

II. The relevant Treaty Articles

Article 82(2)(c) TFEU reads as follows:

Article 82
(ex Article 31 TEU)

(...)

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

(...)

(c) the rights of victims of crime;

¹ Council Framework Decision of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p.3)

(...)

Article 83(1) TFEU reads as follows:

Article 83
(ex Article 31 TEU)

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

(...)

III. The case law on legal basis

The choice of legal basis is important because the Union is constitutionally founded upon the principle of conferral of competences and its institutions can only act in a manner consistent with the mandate provided to them by the Treaty¹. Therefore, the choice of a legal basis is not discretionary.

Certain principles emerge from the case law of the Court of Justice as regards the choice of legal bases. First, in view of the consequences of the legal basis in terms of substantive competence and the procedure, the choice of the correct legal basis is of constitutional importance². Secondly, the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include, in particular, the aim and content of that measure³. The fact that an institution wishes to participate more fully in the adoption of a given measure, the work carried out in other respects in the sphere of action covered by the measure and the context in which the measure was adopted are all irrelevant.⁴

The choice of an incorrect legal basis may therefore justify the annulment of the act in question⁵.

¹ Opinion 2/00 of 6 December 2001, *Cartagena Protocol*, EU:C:2001:664, para. 3; Opinion 1/08 of 30 November 2009, *General Agreement on Trade in Services*, EU:C:2009:739, para. 110.

² Opinion 2/00 of 6 December 2001, *Cartagena Protocol*, EU:C:2001:664, para. 5; Opinion 1/08 of 30 November 2009, *General Agreement on Trade in Services*, EU:C:2009:739, para. 110.

³ See, among others, judgment of 25 February 1999, *European Parliament v Council*, joined Cases C-164/97 and C-165/97, EU:C:1999:99, para 16; judgment of 30 January 2001, *Spain v Council*, C-36/98, EU:C:2001:64, para. 59; judgment of 12 December 2002, *Commission v Council*, C-281/01, EU:C:2002:761, paras 33-49; judgment of 29 April 2004, *Commission v Council*, C-338/01, EU:C:2004:253, para. 55.

⁴ See judgment of 4 April 2000, *Commission v Council*, C-269/97, EU:C:2000:183, para 44.

⁵ Opinion 2/00 of 6 December 2001, *Cartagena Protocol*, EU:C:2001:664, para. 5.

In principle, a measure is to be founded on a single legal basis. An act may be founded on several legal bases only “exceptionally”¹. A dual legal basis can nevertheless be used where a measure pursues simultaneously various objectives or has several linked components, without one being secondary and indirect in relation to the other.² If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component one of which is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.³ Additionally, the procedures laid down in each legal basis for the adoption of the said measure should not be incompatible with each other.⁴

IV. The aim and content of the proposed regulation

According to Article 1 of the proposal, as amended by the institutions during their informal negotiations, the subject matter of the proposal is the establishment of “minimum rules concerning the definition of criminal offences and sanctions in the area of terrorist offences, offences related to a terrorist group and offences related to terrorist activities, *as well as* measures of protection and support of and assistance to victims of terrorism.” (Emphasis added).

Since the adoption of Council Framework Decision 2002/475/JHA on combating terrorism, the terrorist threat has dramatically grown and evolved, especially in recent years. International and regional organisations have not remained inactive before this phenomenon and have issued new standards in the form of resolutions, conventions and recommendations with a view to combating terrorism more efficaciously. In order to implement the obligations arising from these instruments, the Commission considered it necessary to revise Council Framework Decision 2002/475/JHA on combating terrorism. The present proposal aims at replacing the Council Framework Decision 2002/475/JHA by a new directive which will adapt the EU legal framework concerning the definition of offences relating to terrorism activities to the most recent international standards and obligations.

Those international standards and obligations are to be found, in particular, in the UN Security Council Resolution 2178(2014) on threats to international peace and security caused by terrorist acts adopted on 24 September 2014⁵; in the Additional Protocol of 22 October 2015⁶ to the Council of Europe Convention on the prevention of terrorism⁷, and in the revised interpretative Note to Recommendation 5 on the criminal offence of terrorist financing of the Financial Action Task Force (FATF) Recommendations issued in 2012 concerning terrorist

¹ Case C-411/06, *Commission v Parliament and Council*, EU:C:2009:518, para. 47 and case law cited therein.

² Case C411/06, *ibid.* See also Case C-43/12, *Commission v European Parliament and Council*, EU:C:2014:298, para. 30 and case cited therein.

³ Case C-137/12, *Commission v Council*, EU:C:2013:675, para. 53; Case C-411/06, *Commission v Parliament and Council*, EU:C:2009:518, para. 46 and case-law cited therein; Case C-490/10, *Parliament v Council*, EU:C:2012:525, para. 45; Case C-155/07, *Parliament v Council*, EU:C:2008:605, para. 34.

⁴ Case C-300/89, *Commission v Council* ("Titanium dioxide"), EU:C:1991:244, paras. 17-25.

⁵ http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf

⁶ Treaty No.217: Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism - Riga, 22.X.2015 - <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/217>. The European Union signed the Additional Protocol and the Convention on 22 October 2015.

⁷ Treaty No. 196: Council of Europe Convention on the Prevention of Terrorism - Warsaw, 16.V.2005 - <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196>

financing¹. The revised Interpretative Note now clarifies, in light of the UN Security Council Resolution No. 2178(2014), that Recommendation 5 requires countries to criminalise financing the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training.

The greater part of the agreed text concerns, in fact, the harmonisation of the definition of criminal offences and sanctions for natural persons (Article 2 to 16) and liability and penalties for legal persons (Articles 17 and 18).

Article 2 deals with definitions relevant to the subsequent provisions. Article 3 of the proposal defines which offences should be considered as terrorist offences in the Member States. Article 4 concerns the offences relating to a terrorist group and it requires Member States to criminalise the direction or participation in the activities of a terrorist group, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group. Article 5 defines the crime of public provocation to commit a terrorist offence. Article 6 outlaws the recruitment of persons to commit or contribute to the commission of terrorist offences or join an association or group for that purpose. Article 7 of the proposal criminalises the act of providing training for terrorism. Article 8 makes it criminal to receive training for terrorism and Article 9 the fact of travelling to another country for terrorist purposes. Article 10 requires Member States to criminalise conduct enabling travel with terrorist purpose. Article 11 requires Member States to criminalise the provision of funds to commit terrorist offences and offences related to terrorist groups or terrorist activities. Article 12 provides for other offences related to terrorist activities, such as aggravated theft, extortion or drawing up or using false administrative documents with terrorist purpose. Articles 13 to 23 of the proposal provide for general provisions relating to the offences provided for in Articles 3 to 12 of the proposal, including penalties for natural persons (Article 15), mitigating circumstances (Article 16), liability of and penalties for legal persons (Articles 17 and 18), jurisdiction over and prosecution of the offences referred to in the proposal (Article 19), investigative tools and confiscation (Article 20), measures against public provocation content online (Article 21), amendments to Council decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences²(Article 22), and respect of fundamental rights and freedoms (Article 23). Articles 27 to 31 of the proposal provide for final provisions relating to the replacement of Framework Decision 2002/475/JHA on combating terrorism (Article 27), transposition (Article 28), the Commission's reporting obligations (Article 29), entry into force (Article 30) and addressees (Article 31).

These provisions are contained in four titles out of six: Title I — Subject matter and definitions, Title II — Terrorist offences and offences related to a terrorist group, Title III — Offences related to terrorist activities, Title IV — General provisions relating to terrorist offences, offences related to a terrorist group and offences related to terrorist activities. Title VI contains final provisions, common to all directives.

¹ For the FATF recommendations and their interpretative note, please consult: <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaundryandthefinancingofterrorismproliferation-thefatfrecommendations.html>

² OJ L 253, 29.9.2005, p.22.

In addition to the above, the proposal also establishes measures of protection and support of an assistance to victims of terrorism which are contained within a single Title V. Articles 24 to 26 and their corresponding recitals deal with this issue.

Article 24 requires Member States to ensure that investigations into and prosecutions of offences covered by the directive are not dependent on a report or accusation made by the victim or other person subjected to the offence and that support services addressing the specific needs of victims of terrorism are made available immediately in accordance with mechanisms and protocols within the framework of their national emergency-response infrastructures. It also provides for the availability of adequate medical treatment and legal aid for the victims of terrorism. Article 25 requires Member States to set up measures for the protection of victims of terrorism and their relatives. Article 26 provides for the rights of victims of terrorism resident in another Member State.

It must be noted that in these provisions, and more specifically in Articles 24 and 25, several and almost systematic references are made to Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.¹ These references appear now in the agreed text as the outcome of the inter-institutional negotiations.

V. Determination of the appropriate legal basis

From the foregoing analysis of the aim and content of the proposal it seems apparent that the fight against terrorism through the harmonisation of criminal law is clearly a predominant component of the act and that, therefore, the use of Article 83(1) TFEU as a legal basis is fully justified.

It should thus be assessed whether the aim and content of the provisions relating to the protection, support and rights of victims of terrorism (Articles 24 to 26 of the proposal) are equivalent or also predominant components of the act so as to require the inclusion of Article 82(2)(c) TFEU as a legal basis of the proposal or, on the contrary, they can be considered merely incidental, which would justify the deletion of that Article as a legal basis.

In this context, it should be noted that the comparative analysis of Articles 24 to 26 of the agreed text and of Directive 2012/29/EU shows that the agreed text builds to a large extent on existing provisions and mechanisms without introducing substantial changes to the existing legal framework. It mainly contributes to making the specific needs of victims of terrorism more visible.

Only three articles out of a total of 31 deal with the rights of victims and each of these provisions - and their corresponding recitals - emphasise that specific needs are addressed, namely the needs of victims of criminal offences that are defined in the main parts of the text. Those needs are, in any case, addressed on the basis of the existing legal framework and with mechanisms already established by Directive 2012/29/EU.

The fact is that Directive 2012/29/EU emerges as being the piece of legislation which

¹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315, 14.11.2002, p.57)

establishes the general legal framework for the protection, support and for the rights of victims of terrorism. Directive 2012/29/EU is based on Article 82(2) TFEU. The provisions provided for in Articles 24 to 26 of the proposal are intended to complete that legal framework. According to Article 24(7) of the agreed text, the “Directive shall apply in addition to and without prejudice to measures laid down in Directive 2012/29/EU”.

A detailed analysis of these provisions and of the corresponding recitals confirms this statement. The proposal leaves untouched the definition of “victim” as established by Article 2 of Directive 2012/29/EU. Paragraph (1) of Article 24 repeats the principle already contained in Recital (40) of Directive 2012/29/EU (ex officio prosecution of criminal offences). Paragraph (2) refers to support services which are already in place according to Directive 2012/29/EU and makes clear that specialist support may be provided by “existing entities”. The provisions of paragraphs (3) and (4) of Article 24 build to a large extent on Chapter 2 of Directive 2012/29/EU on the “Provision of information and support”. Moreover, paragraph (4) reflects Article 26 of Directive 2012/29/EU on Cooperation and coordination of services. Paragraph (5) of Article 24 deals with medical care for victims of a terrorist attack, underlining that this should be provided “in accordance with their national health care system”. Recital (38) and Article 4(1)(a) of Directive 2012/29/EU already addressed the issue of medical support for victims. Paragraph (6) of Article 24 refers to legal aid to which victims should have access “in accordance with Article 13 of Directive 2012/29/EU”. Article 25 concerns measures for the protection of victims of terrorism which should be available “in accordance with Directive 2012/29/EU”. In Article 26, the rights of victims of terrorism resident in another Member State are dealt with. Article 17 of Directive 2012/29/EU also bears the title “Rights of victims resident in another Member State” and contains similar provisions.

Various other provisions are contained in the act, such as investigative tools and confiscation, information exchange, measures concerning online content, as well as assistance and protection of victims. However, these provisions do not seem to pursue an autonomous, *sui generis* objective. They rather seem to reinforce and support the predominant component in order to give a comprehensive response to the serious violation of values that terrorism represents.

Therefore, even if it would be possible, in principle, to add Article 82(2) (c) TFEU as a legal basis to the proposal at stake, this provision does not concern, in the light of the evaluation of the aim and content of the proposal as it stands now, a predominant or an equivalent objective or component. That evaluation also leads to the conclusion that the provisions of the agreed text concerning victims’ rights should not be qualified as pursuing a separate, autonomous objective. Nor should they be considered as not being secondary in relation to the main objective. Therefore, the criteria defined by the case-law of the Court of Justice for the exceptional case when an act can be based on various corresponding legal bases do not seem to be necessarily fulfilled.

It is thus advisable to consider the provisions on victims’ rights as being possibly ancillary to the predominant component of the act, which is to ensure a high level of security through harmonisation of substantive criminal law, and that therefore the inclusion of Article 82(2)(c) TFEU as a legal basis of the proposal is possibly unnecessary and its deletion justified.

VI. Conclusion and recommendation

In the light of the foregoing analysis, it is concluded that Article 83(1) TFEU can be considered as being the correct legal basis for the proposal for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, since the fight against terrorism through the harmonisation of criminal law is clearly the predominant component of the act.

At its meeting of 31 January 2017 the Committee on Legal Affairs accordingly decided, by 18 votes in favour, 2 against and 2 abstentions¹, that the deletion of Article 82(2)(c) as a legal basis of the proposal would be possible since this provision does not concern, in the light of the evaluation of the aim and content of the proposal as it stands now, a predominant or an equivalent objective or component thereof.

Yours sincerely,

Pavel Svoboda

¹ The following were present for the final vote: Pavel Svoboda (Chair), Lidia Joanna Geringer de Oedenberg (Vice-Chair), Jean-Marie Cavada (rapporteur), Mady Delvaux (Vice-Chair), Max Andersson, Joëlle Bergeron, Marie-Christine Boutonnet, Kostas Chrysogonos, Sergio Gaetano Cofferati, Therese Comodini Cachia, Angel Dzhambazki, Rosa Estaràs Ferragut, Evelyne Gebhardt, Sajjad Karim, Sylvia-Yvonne Kaufmann, Gilles Lebreton, António Marinho e Pinto, Jiří Maštálka, Emil Radev, Julia Reda, Evelyn Regner, József Szájer, Axel Voss, Tadeusz Zwiefka.