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Subject: 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
- drafting proposals

Following the last DROIPEN meeting of 19-20 January 2016 and the requests for clarification made by some delegations concerning the Italian proposal sent to the Secretariat of the Council on 12.1.2016, Italy would like to provide the following written comments.

Article 21a proposed by the French delegation (Italian suggestions in bold):

Investigative tools

To ensure the success of investigations and the prosecution of terrorist offences, offences relating to a terrorist group, and offences related to terrorist activities, as referred to in Articles 3 to 14, Member States shall ensure that those responsible for investigating and prosecuting such offences have the possibility to make use of effective investigative tools such as those which are used in combating organised crime or other serious crimes.

Member States shall also take the necessary measures to ensure that information gathered by the national relevant authority concerning prisoners who are radicalized to violent extremism or are at risk of radicalization are transmitted to those responsible for preventing, investigating and prosecuting offences referred to in Articles 3 to 14.

The Italian proposal is aimed at complementing the French proposal and enhancing its effectiveness. Information lawfully gathered by National Penitentiary Authorities, in their administrative or security activities involving prisoners who are radicalized to violent extremism, or are at risk of radicalization, may be an important investigative tool for preventing, investigating or prosecuting the terrorist offences set out in this directive, provided that it is systematically and promptly shared with national prosecutors or investigative judges. The idea behind this proposal is that each Member State should be free to choose, at national level, the most appropriate measures to channel the above mentioned information, according to its internal penitentiary and justice systems, and taking into account information sharing modalities already existing between national authorities. Each member State should also ensure that these measures comply with the national and international legal framework on data protection and respect for the rule of law and human rights. Since 2007 the Italian experience in this field has been the following. The Italian Penitentiary Administration, which is part of the Ministry of Justice, has a central penitentiary police service (called “Nucleo Investigativo Centrale” – NIC), that is tasked, at national level, to coordinate and support judicial investigations related to organised crime and terrorism offences perpetrated in prison, or connected to the prison environment.

Every month the Head of the NIC drafts a note in which he/she describes the observed connections between prisoners and criminal organisations involved in organised crime and terrorism. This note is only based on judicial or administrative acts and information that are also accessible to prisoners or known by them, such as the behaviour reports prepared by the penitentiary officers in charge of following the inmates’ rehabilitation process; letters of reprimand; reports on detainees’ conduct that – although not illicit - had an impact on the prison’s security and management; existing records, required by the national law, concerning contacts that the inmates have with the external community such as people that visit them in prison or send them packages or money from outside; data related to the location of the cells where they are restricted, which allow to have a full picture of the contacts they may have with other inmates. The note drafted by the Head of the NIC is, *inter alia*, sent to the Italian central judicial authority that is in charge of coordinating investigations at national level on terrorism and organised crime, i.e. the DNA – National Anti-mafia and Anti-terrorism Directorate. This is the channel chosen by Italy to provide judicial investigators with important pieces of information regarding penitentiary behaviours which may be relevant in their activity of prevention and prosecution of terrorist offences.

If all Member States would put in place similar internal measures, the gathered information at national level could be spontaneously exchanged with the other Member States, when it has a transnational relevance. A cross-border dimension could derive, for example, from the inmate's citizenship or area of interest: we could imagine the case of another Member State's citizen detained in Italy that is about to be released and the Italian Authority considers that the Member State of which he/she is national may be interested to share the above described information retrieved during the detention period; or the case of an Italian citizen that was found to have connections with (or to express support to) suspected terrorists based in another Member State. Last but not least, the 2012 *Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector* underlines that the institutional barriers often prohibit effective counterterrorism cooperation and information sharing between governmental organs, and can be as significant an obstacle to an effective criminal justice system as deficient legislation. In particular, *Good Practice no. 2* invites States “to consider, where appropriate, promulgating measures and mechanisms establishing a legal framework aimed at enhancing inter-agency cooperation and information sharing, while maintaining necessary protections for personal data. In this context, law enforcement agents, prosecutors and other relevant officials should work together while respecting their competencies, as determined by the applicable legal framework, to enable an effective and integrated criminal justice system”. Since effective investigation of terrorist threats often involves the gathering and analysis of information collected by multiple agencies within a single government, it seems crucial to connect disparate pieces of information drawn from different sources in order to identify and disrupt a terrorist plot and to prosecute terrorism cases. Thus the sharing of information aimed at preventing and prosecuting terrorist offenses among all the national authorities involved, including the penitentiary ones, is an important means of preventing and prosecuting terrorist acts. Moreover, under *Good Practice 11*, States are specifically encouraged to share with each other relevant experiences and information about the incarceration and reintegration of terrorists.

Along the same line, the 2014 *The Hague-Marrakesch Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon*, and in particular its *Good Practice no. 7*, stipulates that States can obtain information about known and suspected FTFs not only from time-tested law enforcement techniques such as the use of wiretaps, confidential informants and proactive community engagement, but also from other types of lawful monitoring. Where possible, they are encouraged to share this information with local authorities, other national agencies, and, since most recruitment and facilitation networks are multi-national, bilaterally and multilaterally with partners in order to aid in the identification and interdiction of those networks.

Article 21 b - New Article proposed by the Italian delegation

Exchange of information and cooperation concerning terrorist offences

Each Member State shall take the necessary measures to ensure that any relevant information concerning any of the offence(s) referred to in Articles 3 to 14 and any relevant information referred to in Article 21a, par. 2, which affects or may affect another Member State, is effectively and timely transmitted to the competent authority(ies) of that Member State established according to Article 2, par. 2, of Council Decision 2005/671/JHA of 20 September 2005.

Legal basis: Some delegations have asked to clarify whether the proposed Article 21b falls within the scope of the directive's legal basis. Indeed, if we look at the proposal as a standing-alone provision, it might seem that art. 82(1) TFEU, rather than art. 83(1), would be its appropriate legal basis. Nevertheless the proposed text has to be framed in the context of the whole directive, which is primarily aimed at putting in place updated EU level legislation establishing minimum rules on the definition of terrorist offenses, thus obtaining more coherent, comprehensive and aligned national criminal law provisions. The proposed Article 21 (2) is aimed at facilitating the exchange of information and cooperation, given that terrorist offences have a transnational dimension: it is therefore an instrument to better achieve the objective of the criminalization of conduct set out in the directive, and is intended to be only secondary and accessory in respect of the other provisions. Since the harmonization of national legislations continues to be the main purpose and component of the directive, article 83(1) appears to be the only appropriate legal basis for the whole measure, not being necessary to provide for a second legal basis with the only purpose of justifying a provision which is accessory and functional to achieve the aim of the criminalization in the cases of transnational offences. Moreover, this conclusion seems to be perfectly in line with the Court of Justice's settled case-law, which has clarified that *"If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component"* (see Case C-411/06 Commission v Parliament and Council, paragraph 46-47; Case C 178/03 Commission v Parliament and Council, paragraph 42, and Case C 155/07 Parliament v Council, paragraph 35).

Additional information concerning the proposed exchange of information: Without prejudice to the already existing EU information sharing instruments applicable to terrorist offences, the proposed provision is aimed at fostering a prompt and effective spontaneous exchange of information between Member States, by boosting the role of the Central National Judicial Authorities that have been already designated by Member States as Eurojust National Correspondents for terrorism matters. Council Decision 2005/671/JHA stipulates that these Authorities are tasked with the transmission to Eurojust of a specific (and closed) set of information referred to in Article 2 (5). The Italian proposal would like to increase their competences and favor a quick and direct exchange of information between them with the aim of fully exploiting: a) their possibility to have access to and collect all relevant information at national level concerning prosecutions and conviction for terrorist offences, according to Article 2 (2); b) their comprehensive awareness of investigations and judicial proceeding related to terrorist cases performed at national level.

If the other delegations consider that it would be preferable to discuss the Italian proposal on Article 21 b in other Council Working formats in the light of a more comprehensive approach, Italy would nevertheless insist to keep the discussion open on this table at least with regard to the exchange of the information referred to in the proposed Article 21a(2), should it be retained by the DROIPEN Working Party. This is because the provision in Article 21a(2) may have a transnational added value only if the directive also sets out the channel to exchange the information concerning prisoners who are radicalized to violent extremism or are at risk of radicalization, since there is - in our view - no existing EU cooperation instrument that could capture this information sharing. In the light of the above, the alternative (and more limited) Italian proposal for Article 21 b would read as follows:

Each Member State shall take the necessary measures to ensure that information referred to in Article 21a (2) which affects or may affect another Member State, is effectively and timely transmitted to the competent authority(ies) of that Member State established according to Article 2, par. 2, of Council Decision 2005/671/JHA of 20 September 2005.