



EU anti-terrorism action plan: legislative measures in justice and home affairs policy

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Summary

The conclusions from the special EU Council of Justice and Home Affairs ministers on terrorism (3926/6/01, see *Statewatch* post 11.9.01 analyses: No 1) were succeeded by an “anti terrorism road-map” (SN 4019/1/01, 2.10.01). This has now been developed into a far-reaching action plan (12800/1/01, 17.10.01) with implications for a number of EU policy fields.

The following legislative measures are to be taken in the Justice and Home Affairs field (for an analysis of the *operational* actions to be taken see post 11.9.01 analyses: No 7):

- (1) “Eurojust” (the EU public prosecutions agency) to become operational
- (2) European Arrest Warrant to replace extradition
- (3) EU wide definition of terrorism
- (4) EU mechanism for freezing assets of suspects
- (5) 1995 & 1996 EU Extradition Conventions to be ratified by member states
- (6) 2000 EU Mutual Legal Assistance (MLA) Convention to be ratified by member states
- (7) Protocol extending obligations under 2000 MLA Convention to be ratified by member states
- (8) Immigration and asylum legislation to be examined “with reference to the terrorist threat”
- (9) Provisions on joint investigation teams in 2000 MLA Convention to come into force early
- (10) Mechanism for investigating “attacks on computer systems” and prosecuting “computer crime”
- (11) Ensure a balance between data protection and police efficiency with regard to the EC Directive on data protection in the telecommunications sector

* this list excludes the development of a framework for the coordination of national civil protection measures, which is also the responsibility of the Justice and Home Affairs Council.

Of the eleven measures above, six were proposed before September 11 and another four were firmly on the EU’s agenda. The only genuinely *new* ‘anti-terrorist’ measure is the commitment to examine immigration and asylum legislation “with reference to the terrorist threat” (point 8), which suggests a general tightening of controls on all asylum-seekers, immigrants and third-country nationals entering the EU.

The Framework Decision on terrorism (which would have been proposed at this time anyway, regardless of events in America) is the only measure that is specifically directed at ‘terrorism’. However, initial discussions suggest the scope of the definition may be so broad as to encompass legitimate dissent. All the other proposals in the action plan are geared towards the investigation and prosecution of a range of crimes, and none are limited specifically to terrorism.

A number of the proposals have raised important civil liberties and human rights issues, with the Framework Decisions of particular concern. European Arrest Warrants will replace all extradition procedures in the EU but will also remove some of the legal and procedural safeguards currently enjoyed by people sought by other states. The proposed mechanism for freezing assets has been negotiated in secrecy, with no drafts available to the public since February 2001. It is balanced heavily in favour of the prosecuting (or “requesting”) state, and in the long-term may replace the presumption

of innocence with an obligation on suspects to prove to the authorities in another country that their assets were acquired lawfully.

In sum, the “anti-terrorism” programme amounts to little more than the fast-tracking of a raft of law enforcement legislation that was already on the EU’s agenda and goes well beyond the investigation and prosecution of terrorism.

Analysis of proposals

[Point numbers in parentheses correspond to numbering in the EU action plan to combat terrorism, 12800/1/01, 17.10.01]

1. (13)

Make “Eurojust” operational

Eurojust is the EU’s public prosecutions agency. The Decision that will create Eurojust proper has been on the negotiating table since February 2000 and is scheduled for adoption in December 2001. The most contentious provisions have been data protection, Eurojust’s relationship with other EU bodies (particularly Europol), management, accountability and financing of the unit.

The provisional Eurojust began operating in January 2001, a member of “pro-Eurojust” told Statewatch that the agency is already working on 110 cases.

There is no reference to data protection in the Council Decision of December 2000 creating pro-Eurojust, despite a recommendation from the European Parliament that the 1981 CoE Convention and supplementary Recommendation 87 (15) should apply.

A headquarters Decision is also necessary, although it has been clear for sometime that the agency is to be based in The Hague alongside Europol.

Deadline: 6/7 December 2001, no later than the end of 2001

Status of measure pre September 11: a ‘Tampere measure’ (from Tampere (Finland) European Council conclusions in October 1999); proposed in July 2000; original deadline of end of 2001

References: Decision 2000/799/JHA setting up a provisional Judicial Cooperation Unit (Eurojust) (OJ 2000 L 324/2), Draft Council Decision setting up Eurojust, 11685/2/01, 20.9.01.

2. (14)

European Arrest Warrant (see Statewatch post 11.9.01 analyses: No 3)

The European Arrest Warrant raises constitutional issues for some member states in regard to the possible extradition of their own nationals, and several states are opposed to the removal of the dual criminality requirement (that the offence for which extradition is sought is recognised and penalised by both states).

The proposal itself is not limited to terrorist offences but covers any offences where extradition procedures would previously have applied. ‘Eurowarrants’ will also be issued by authorities in one member state to order that a person in another be searched, detained or surrendered by police in that state.

The scope of this proposal is in fact so broad that it exceeds the aim of creating a “single European legal area for extradition” that an EU action plan of last year suggested was a “long-term objective” for 2010. It also contradicts other legislative schedules, which all stated that integration would take place

gradually, starting with the “simplification” of extradition for *serious* offences.

European Arrest Warrants are part of a far-reaching package of forthcoming proposals to implement the principle of the mutual recognition of criminal judgments in the EU – that Court Orders and Decisions taken in one member state are recognised and enforced by all the others. The agenda is already unbalanced in favour of facilitating the free movement of investigations and prosecutions ahead of the need to guarantee the fundamental rights of suspects and defendants. Criminal lawyers and human rights organisations were already urging caution and will be dismayed by the speed in which the EU intends to agree these measures.

Deadline: Details to be fixed urgently and no later than 6/7 December 2001

Status of measure pre September 11: due to be proposed by the Commission in third quarter 2001 as part of mutual recognition programmed.

References: Proposed Framework Decision on a European Arrest Warrant from the Commission, COM (2001) 522, 19.9.01; Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, 13750/1/00, 24.11.00.

3. (15)

Definition of terrorism

The proposed Framework Decision on terrorism from the Commission includes a possible broadening of the concept of terrorism to cover protests at international summits and “urban violence”. It has been criticized by human rights groups. Preliminary discussions in the Council have reaffirmed the Commission’s approach and proposed an even broader definition.

The proposal seeks to harmonise criminal penalties for a common list of terrorism offences. An EU Framework Decision on trafficking in human beings was subject to a lengthy hold-up because of reservations by the Austrian, Danish and Netherlands delegations on the sentencing provisions.

“Significant political agreement” among the member states after just 15 weeks negotiation is perhaps ambitious but certainly not impossible. The trafficking Framework Decision was proposed on 21 December 2000 and there was political agreement on all points except sentencing by the end of May 2001; sentencing was finally agreed at the 27-28 September JHA Council.

Deadline: Details to be fixed urgently and no later than 6/7 December 2001

Status of measure pre September 11: due to be proposed by the Commission in third quarter 2001.

Reference: Proposed Framework Decision on terrorism from the Commission, COM (2001) 521, 19.9.01; Proposed Framework Decision on on trafficking in humans from the Commission, COM (2000) 854, 21.12.00.

4. (16)

Freezing of assets

The proposal on the mutual recognition and execution of orders to freeze assets and on evidence of suspects by all member states was made in November 2000. It was originally drafted to covers drugs trafficking, EC budget fraud, money laundering, counterfeiting of the euro, corruption and trafficking human beings, but has presumably been amended to include terrorism .

Negotiations on this proposal have been underway for almost a year. The latest version of the text in the public domain is from February 2001 and it is alarming that a criminal law proposal of such importance should be drafted in secret.

The mechanism proposed in February 2001 provides for the automatic execution in one state of orders to freeze assets or evidence from another. Member states are essentially to treat these orders as they would national freezing orders. A ‘freezing certificate’ is issued by the ‘requesting state’. It contains no

substantive evidence or grounds for suspicion. As long as the certificate has been filled in correctly, the requested state must enforce the order. An appeal, without suspensive effect, may be lodged by the person whose assets or property has been frozen in accordance with the national law of the requesting or requested state. If the appeal is lodged in the requested state, the substance of the order may not be challenged.

Ultimately, this Framework Decision may in practice replace the presumption of innocence with a requirement on suspected criminals to prove to authorities in another country that their assets were acquired lawfully. But not before these assets have been frozen by the member state whose territory they are in.

The UK has proposed new legislation on the freezing of assets under which a Criminal Assets Recovery Agency will be created. Judges will decide whether to freeze assets on the “balance of probabilities and suspects will then have to prove, initially to the police and then at trial, that their assets were obtained lawfully.

According to a report from the Article 36 Committee two questions of principle have held-up negotiations. The first concerns provision for the restitution of frozen property to its rightful owner, which was included in initial drafts of the proposal but now seems to have been dropped due to opposition from a number of member states. The matter is also complicated by the EU Legal Service opinion that restitution claims are civil law matters (first pillar). Due to the pressure on the Council to adopt the measure quickly, it appears that the freezing of assets for the purpose of restitution will be excluded from the scope of the Framework Decision and an additional instrument will follow “as soon as possible”.

The second sticking point in the negotiations has been the list of offences covered by the proposal. The member states are considering a number of options - a generic list, a more precise list containing references to definitions of offences in other EU legislation, a broader scope (without a list) containing a clause allowing member states to insist on dual criminality or a requirement that the offence carry a minimum penalty in the issuing state.

In respect to freezing the assets of alleged “terrorists” in connection with events of September 11th, this criminal law procedural measure is unlikely to have any instant effect due to other legislative measures taken by the Commission. In this case, the urgency with which the EU governments are to adopt the measure may be misguided.

On 2 September, the Commission proposed a Council Regulation freezing “against certain persons and entities with a view to combating international terrorism” (the ‘proscribed list’ in COM (2001) 569, see *Statewatch News Online*). However, it has since adopted two regulations on freezing suspected Taliban funds using the implementing powers it has under a Council Regulation on the Taliban from March this year. It could not do this until the Security Council sanctions committee had acted, the initial Commission proposal now appears to have been superseded.

Deadline: to be adopted 6/7 December 2001.

Status of measure pre September 11: proposed November 2000, part of mutual recognition programme.

References: French, Swedish and Belgian proposal on the execution of orders assets and evidence 13986/00, 30.10.00, see 5126/01 for latest available draft, 2.2.01. Article 36 Committee report of Framework Decision on freezing assets and evidence, 12636/01, 10.10.01; Commission proposal for a Council Regulation on specific restrictive measures directed against certain persons and entities with a view to combating international terrorism, COM (2001) 569, 2.10.01; Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan; Commission Regulation (EC) No 1996/2001 of 11 October 2001 amending Council Regulation (EC) No 467/2001; Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending Council Regulation (EC) No 467/2001.

5. (17)

Entry into force of 1995 and 1996 EU Conventions on extradition

Full ratification of the EU extradition conventions is optimistic. Five states have yet to ratify the 1995 EU Convention on simplified (consented) extradition procedure (France, UK, Ireland, Italy, Belgium) and four have yet to ratify the 1996 EU Convention on (disputed) extradition between the member states (France, UK, Ireland, Italy).

Deadline: 1 January 2001

References: Convention on simplified extradition procedures between the Member States of the EU, signed 10.3.95; Convention on extradition between the Member States of the EU, signed 27.9.96.

6. (18)

Entry into force of 2000 EU Mutual Legal Assistance Convention

The MLA Convention provides a framework for EU police and legal cooperation and procedures to be followed. Critical provisions are those on the exchange of information, custodial transfers, court hearings by video/telephone conference, controlled deliveries, joint investigation teams (see point 9 below), covert investigations and the interception of telecommunications. In evidence to the House of Lords scrutiny committee, *Statewatch* observed: “if concerns about serious crime and the need for increased powers of police surveillance on the one hand are balanced by the need to provide for scrutiny, accountability and safeguards for the rights of the citizen on the other, it is hard to see how this measure would pass this test”.

The Convention has to be ratified by national parliaments in the member states. None of the member states have ratified the MLA Convention yet.

Deadline: during 2002

Reference: Convention on mutual assistance on criminal matters between the Member States of the EU (OJ 2000 C 197/1).

7. (19)

Mutual assistance in respect of money laundering and financial crime

There was political agreement on this protocol to the 2000 MLA Convention at the May 2001 JHA Council and the protocol was signed on 16 October 2001 at the JHA Council. The protocol extends the MLA Convention to place obligations on member states to provide information on bank accounts, banking transactions, surveillance of banking transactions and removes some of the existing grounds on which member states can refuse to cooperate with requests (banking secrecy, if the request is only related to fiscal offences and the ‘political offence’ exception).

The protocol also gives Eurojust a role in seeking “practical solutions” if one member state refuses to cooperate with a request for legal or police assistance from another. The protocol will have to be ratified by national parliaments in the member states.

Deadline: not specified

Status of measure pre September 11: initially proposed as free-standing Convention in June 2000.

Reference: Draft Protocol to the 2000 Convention on mutual assistance in criminal matters between the Member States of the European Union, 10076/01, 29.6.01.

8. (20)

Examination of legislation with respect to the terrorist threat

The Action Plan refers to “a Commission report” underway “for rules on asylum and immigration” and seems to suggest a general tightening of controls on all asylum-seekers, immigrants and third-country nationals entering the EU.

In the JHA Conclusions of 20.9.01, the Commission was invited to “examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments”, a clear reference to the 1951 Geneva Convention and further indication as to what this “examination” will entail. Examination of the obligations in the European Convention on Human Rights can also be expected.

Deadline: end of 2001

9. (21)

Setting-up of joint investigation teams

The joint teams scenario is based on early implementation of provisions in the MLA Convention on joint investigation teams, with the participation of prosecutors from the provisional Eurojust (the EU’s public prosecutions office) and possibly Europol.

It is a continuation of the Tampere objective of providing a legislative framework for Europol participation in joint investigation teams operating in two or more member states.

For Europol to participate fully, the 1995 Europol Convention must be amended by way of a protocol to be ratified by national parliaments. A Recommendation in 2000 on Europol ‘support’ to joint teams allows the agency to play a minimal role, but until the Convention is amended, Europol officers should not be liaising directly with national police forces on specific investigations. However, at an operational level, it appears that Europol has already been participating in de facto joint teams for some time in contravention of Article 4(2) of the 1995 Convention.

The draft framework Decision authorises joint teams “to carry out criminal investigations concerning trafficking in drugs and human beings as well as terrorism”.

Members of a joint investigation team working in a member state other than their own are regarded as seconded to the national authorities (Article 1(4)) and may be entrusted to undertake certain investigative measures and be present when investigative measures take place with the consent of their hosts (Articles 1(5-6)).

Any intelligence that seconded agents lawfully come across during the course of investigations in a ‘foreign’ jurisdiction may be used for any purpose whatsoever with the consent of the authorities of the member state in which it originated (Article 1(10) (d)). There is no reference to international data protection law in the proposed Framework Decision.

The proposal authorises the participation of Europol and pro-Eurojust in joint teams (Article 1.12) with the consent of the state setting-up the team and the pre-ambule suggests that the member states “should have the possibility to decide” whether “representatives of authorities of non-member states, and in particular ...[from] the United States” can participate (Paragraph 1).

The Framework Decision is to be implemented by 1 July 2001.

The Commission is due to propose a measure on the democratic control of Europol and joint investigation teams during the fourth quarter of 2001. Will this proposal be fast-tracked in the same way? There is no mention of it in the Conclusions or the proposal on joint teams.

Deadline: to be adopted 6-7 December 2001.

Status of measure pre September 11: a Tampere measure; discussion and proposed legislative measures since early 2000.

Reference: Belgian, Spanish, French and UK proposed Framework Decision on joint investigation teams, 11990/01, 19.9.01.

10. (22)

Repression of crime involving the use of electronic communication systems

Framework Decisions on (1) attacks on information systems and (2) the mutual recognition of pre-trial orders in investigations into computer crime are to be adopted “as soon as possible” after submission by the Commission.

Both proposals follow on from the Commission communication on cybercrime in January 2001. Measure (1) was due to be proposed in June 2001, and measure (2) in December 2001, according to the Commission’s work programme and Tampere ‘scoreboard’.

Given the potential scope and effect of these criminal law framework decisions it is alarming that decision-making is to be fast-tracked in the name of ‘anti-terrorism’.

Deadline: to be adopted as soon as possible after Commission presents proposals.

Status of measure pre September 11: both on agenda (see above).

Reference: Commission communication on cyber-crime (COM (2000) 890, 26 Jan. 2001).

11. (23)

Ensure a balance between data protection and police efficiency

The means by which this “balance” is to be struck is the current proposal to revise the EU Directive on privacy in the telecommunications sector.

Law enforcement agencies want to remove an obligation on service providers to erase or make anonymous communications data after it has been held for billing purposes (the only purposes allowed under existing Directives). EU data protection Commissioners, the European Commission’s internal market directorate and MEP’s oppose this.

Most member states already have legislation allowing them to surveil and intercept the telecommunications of suspected terrorists.

Deadline: immediate

Status of measure pre September 11: discussions on law enforcement access to telecommunications data in context of EC data protection Directives since September 2000.

Reference: See <http://www.statewatch.org/soseurope.html> for the latest EU legislative developments on the surveillance of telecommunications and retention of data, including the proposed amendment to EC Directive on privacy in telecommunications sector.

For updates please see:

<http://www.statewatch.org/observatory2.htm>