



Council of the
European Union

Brussels, 27 January 2016
(OR. en)

**Interinstitutional File:
2015/0281 (COD)**

5467/16
ADD 1

LIMITE

**DROIPEN 13
COPEN 20
JAI 47
CODEC 58**

NOTE

From: Swedish Delegation
To: Delegations

No. prev. doc.: 5214/16; 5201/1/16 REV 1
No. Cion doc.: 14926/15

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

A narrower version of Article 2 of the 2008 Framework Decision

Proposal

We propose adding the following text as a new article or part of a more general article referring to human rights and fundamental freedoms:

Member States are not required to take measures in contradiction of constitutional rules relating to freedom of the press and freedom of expression in other media governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

Comment

Our text is modelled on Article 2 of the 2008 Framework Decision but has been scaled down so as to include only those elements that would be strictly necessary to resolve our problems arising from special constitutional rules applicable to offences committed through the press and some other media. For instance the general reference to freedom of expression has been deleted. This shows our amendments to the current article:

~~This Framework Decision shall not have the effect of requiring Member States~~ are not required to take measures in contradiction of constitutional rules ~~fundamental principles~~ relating to ~~freedom of expression, in particular~~ freedom of the press and the freedom of expression in other media ~~as they result from constitutional traditions or rules~~ governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

An possibility to exempt one's own citizens travelling home

Proposal

We propose adding a second paragraph to Article 9 along the following lines:

1. Member States shall take the necessary measures to ensure that travelling to another country for the purpose of the commission of or contribution to a terrorist offence referred to in Article 3, the participation in the activities of a terrorist group referred to in Article 4 or the providing or receiving of training for terrorism referred to in Articles 7 and 8 is punishable as a criminal offence when committed intentionally.

2. A Member State may exempt such acts when committed by one of its citizens travelling to the Member State in question.

Comment

We would have constitutional problems with provision requiring us to criminalise our own citizens' journeys into Sweden. (While such an obligation would not seem to follow literally from the proposed wording of Article 9 – “Member States shall [...] ensure that travelling to **another** country” – it is clear from the discussions in DROIPEN that this is the intended interpretation.)

Some form of safeguard is therefore needed. We have perceived that there is insufficient support for the amendment that we first suggested, “travelling to another country which is not that of the traveller’s nationality”. For that reason we propose instead an amendment that is narrower and furthermore does not touch the offence as such.

The relevant constitutional provision is Chapter 2, Article 7 of the Instrument of Government, which states that no Swedish citizen may be deported from or refused entry into the Realm.

The interpretation of this article in relation to terrorist travel has been carefully deliberated in the process of implementing UNSCR 2178 (2014). In Government Bill no. 2015/16:78 (submitted to Parliament in December 2015), the Government (whose reasoning is in line with the conclusions of the Inquiry that first looked into this issue) considers the possibility of going further than required by the resolution by criminalising those who travel to their country of nationality or residence. It points to several factors that speak in favour of such criminalisation but concludes, with reference to Chapter 2, Article 7 of the Instrument of Government and Article 3 of Protocol 4 to the ECHR, that the new provision on terrorist travel should not include travelling to one’s country of citizenship. (The proposal was, however, drafted so that the offence includes those travelling to their country of residence.)

We are aware that our reading of the EHCR seems to differ from that of other Member States; it may, perhaps, be influenced by our tradition of constitutional interpretation.

Finally, we would like to point out that prosecuting a returnee for a terrorist act (or for that matter any criminalised act, such as a terrorist-related offence or attempting, inciting, aiding or abetting a terrorist offence) would *not* be in violation of Constitution. Our concern is the fact that, under the proposed wording of Article 9, the only act needed to incur criminal liability would be for a Swedish citizen to travel into Sweden, with an intention being the only additional element required.