Combating Terrorism: EU Proposals

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Multi-sector anti-terrorism policy

- JHA Council 20 September 2001
  - harness measures already adopted at EU level
  - speed up process of creating an area of freedom, security and justice
- European Council 21 September 2001
  - approval plan of action to combat terrorism
    - enhancing police/judicial cooperation
    - developing international legal instruments
    - strengthening air security
    - coordinating the EU’s action: road map
Road map

• General Affairs Council
  – coordination and necessary impetus
  – detailed road map
    • instrument to monitor implementation
    • 63 objectives + indication of means, deadlines, responsibilities, progress made, forthcoming work
  – external relations/foreign affairs
  – regulation on specific restrictive measures directed against certain persons and entities
    • immediate freezing of funds 27 terrorist organisations
  – UN General Convention on International Terrorism
  – signing/ratification UN Financing of Terrorism Convention

• Transport Council
  – air security

• Ecofin Council (and JHA Council)
  – measures against funding of terrorism
  – measures against NCCT’s
  – enlargement FATF action to include measures to combat funding of terrorism

• JHA Council
  – Europol, Eurojust, joint teams, freezing assets, extradition conventions + MLAT’s, …
  – re-establishment internal Schengen border checks
  – criminal law definition terrorism
  – European arrest warrant
Criminal law definition terrorism

- state of the art
  - UN/ICAO: unlawful seizure of aircraft, unlawful acts against safety of aircraft, unlawful acts of violence at airports, unlawful acts against safety maritime navigation/fixed platforms Continental Shelf, crimes against internationally protected persons, taking of hostages, physical protection nuclear materials, suppression of terrorist bombings, suppression of financing terrorism, …
  - CoE: 1977 Convention on the Suppression of Terrorism

unprecedented pressure for speedy adoption Commission proposal for framework decision
- no borders within EU
- risk for loopholes to be exploited by international terrorist networks
- only specific anti-terrorism legislation in 6 MS
- new measures needed
- for punishing terrorist offences
  - committed with specific terrorist intent
  - defined with reference to national law
Specific terrorist intent

• i.e. in as far as unlawfully committed with the aim of seriously affecting, in particular by the intimidation of the population, or destroying the political, economic or social structures of a country or of an international organisation

• civil liberties issues
  – ‘affecting’ initially ‘altering’
  – no initial reference to ‘international organisation’ (G8)
  – ‘unlawful’: if not justified by international public law or even national law (unilateral military intervention?)

Ordinary national law offences

• murder and homicide; serious bodily injury; kidnapping or hostage taking; extortion; aggravated robbery

• seizure of or serious damage to state or government facilities, means of public transport, infrastructure facilities, places of public use and property
  • could include ‘urban violence’
  • concern about use protests and non-violent actions

• fabrication, possession, acquisition, transport or supply of weapons or explosives; releasing contaminating substances, or causing fires, explosions or floods, endangering people, property, animals or the environment; interfering with or disrupting the supply of water, power or any other fundamental natural resource; interfering with an information system
… ‘terrorist group’ related offences

- i.e. structured organisation of more than two persons, established over a period of time, acting in concert to commit terrorist offences – added value to ‘criminal organisation’ concept?
- punishable if committed with ‘terrorist intent’
  - directing a terrorist group
  - participating in the activities of a terrorist group
  - supporting a terrorist group, including funding for its activities
  - laundering the proceeds of terrorist or other offences committed as part of a terrorist group

Minimum maximum penalties

- directing a terrorist group: at least 20 years deprivation of liberty for and of 8
- other offences relating to terrorist groups: 8 years
- other terrorist offences: more severe penalties than those provided for the corresponding ordinary law offences under national law MS, unless already highest penalty level allowed for
- aggravating circumstances
- reduction of penalties
- liability of and sanctions for legal persons
Excessive compulsory jurisdiction

- national (extraterritorial) jurisdiction for the entire (virtual) territory of the Union and all its nationals, residents, legal persons and institutions
  - supposed to give a new dimension to the concept of the area of freedom, security and justice
  - flagrant violation Article 31, under d TEU: aim is to ‘prevent’ conflicts of jurisdiction
  - US arrogance in allowing for extraterritorial tribunals
- resolving jurisdiction conflicts and coordination of prosecutions with assistance of Eurojust
  - quid mutual recognition of decisions to prosecute?

Europen arrest warrant

- Commission proposal for framework decision
- likely political agreement/adoption in JHA Council on 6-7 December
- numerous weaknesses
- general comments re choice of the instrument
  - framework decision only to be used for approximation criminal law
  - entire convention-based extradition acquis to be declared non-applicable by ministerial decision?
  - convention required
  - general trend to avoid recourse to conventions
Terrorism-related aspects

- terrorism issue drastically speedened up EU process
- general abolishment double criminality rule
  - discussion negative/positive list & threshold
  - 1996 EU extradition Convention abolished double criminality for terrorism
- precedence European arrest warrant
  - over extradition request 3rd non-CoE state (such as US)
- denial conceptual link asylum/extradition law
  - asylum: to be granted in case of likely prosecution on discriminatory (inter alia political) grounds
  - extradition: political offence/non-discrimination exception

Political offence exception

- refusal due in case of political(ly) (inspired) offence (e.g. political terrorism)
- official rationale: neutrality, i.e. non-interference in internal political dynamics (establishment vs opposition) requesting state
- non-official message: likeliness extradition requested on political grounds
- evolution (CoE 1977 – EU 1996): exception not be invoked for (criminal organisation or association to commit offences aimed at) terrorist offences
Non-discrimination exception

- refusal due in case of likeliness of prosecution on discriminatory (inter alia political) grounds
- rationale: coherence with Geneva Convention (extradition as opposed to granting asylum or giving shelter)
- Protocol to TEU on asylum for EU nationals
- unilateral Belgian counter-declaration
- 1999 Tampere European Council
- Spanish bilateral initiatives
- draft framework decision European arrest warrant

Protocol to TEU on ‘internal’ asylum
- MS constitute ‘safe countries of origin’ per se
- internal applications presumed manifestly unfounded
- background: Belgo-Spanish ETA-case (Morena-García)

unilateral Belgian counter-declaration
- ‘safe country of origin’ principle accepted
- ‘manifestly unfounded’ principle rejected
- continued individual examination of asylum request in line with Geneva Convention obligations
- question: can MS agree to rule out individual state responsibility under Geneva Convention?
• 1999 Tampere European Council
  – future cornerstone of judicial co-operation: mutual recognition of judicial decisions (in criminal matters)
  – November 2000 mutual recognition implementation plan
  – ‘single legal area for extradition’
    • based on mutual recognition arrest warrants and sanctions involving deprivation of liberty
    • simple surrender instead of extradition procedure
    • only a possible long-term option (2010)

• Spanish bilateral initiatives
  – several bilateral (pre-)treaties implementing a ‘surrender’ system and replacing extradition
  – rather aggressive policy (anti-ETA-terrorism)
  – aimed at gradual building up of support for a ‘closer co-operation’ (Articles 43-45 TEU) surrender framework
  – to be tabled during Spanish Presidency
  – 11 September WTC attack
    • global call for war against terrorism
    • speeded up EU decision-making process
• draft FD European arrest warrant and surrender procedures between EU MS
  – political offence exception generally abolished
    • not only in case of (criminal organisation or association to commit offences aimed at) terrorist offences (as in 1996 EU extradition Convention)
  – non-discrimination exception formally abolished
    • infringing upon individual MS responsibility Geneva Convention
    • quid enlargement & human rights issues
  – initial reference (pre-amble) to provisions EU Charter of Fundamental Rights relating to non-discrimination and right to asylum removed

Conclusion: Enhanced security …

• … at the expense of freedom and justice?
  – ad hoc stepping up repression
  – without proper gap analysis
  – instead of relying on existing possibilities
  – added value unclear
  – high risk of disproportionate measures and restrictions of civil liberties (indefinite pre-trial detention UK)
  – lack of respect for fundamentals TEU & HR Charter
  – radical abolishment essential safeguards against discriminatory prosecution and internal human rights infringements