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Proposal for a

COUNCIL DECISION

on the signing, on behalf of the European Union, of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

On 24 September 2014, the UN Security Council adopted Resolution 2178(2014) on foreign terrorist fighters (FTF) under Chapter VII of the UN Charter (UNSCR 2178(2014)).

In October 2014, the Council called upon the Commission to explore ways to overcome possible shortcomings of the Framework Decision on Terrorism (Framework Decision 2002/475/JHA on combating terrorism as amended by Framework Decision 2008/919/JHA; “Framework Decision on Terrorism”) in light of, in particular, the UNSCR 2178(2014)¹. In the Joint Statement after the Riga JHA Council, Ministers agreed on the importance to consider possible legislative measures to establish a common understanding of terrorism offences in light of UNSCR 2178(2014).² In its Resolution of 11 February 2015, the European Parliament stressed the need to inter alia harmonise criminalisation of foreign-fighter-related offences and avoid prosecution gaps by updating the Framework Decision on terrorism.³

On 21 January 2015, the Committee of Ministers of the Council of Europe (CoE) established the Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE). Under the authority of the Committee of Experts on Terrorism (CODEXTER), the COD-CTE was tasked to prepare an Additional Protocol to the CoE Convention on the Prevention of Terrorism (CETS No. 196).

Following three rounds of discussions within the COD-CTE (23-26 February 2015, 9-12 March 2015 and 23-26 March 2015), CODEXTER discussed and eventually approved the Additional Protocol on 10 April 2015 at its 28th plenary meeting.

The Parliamentary Assembly of the Council of Europe gave its opinion on the Additional Protocol at the session of 20-24 April. The Additional Protocol has been preliminarily approved by the Committee of Ministers on 12 May 2015 with a view to final adoption on 19 May 2015. It will be opened for signature at a later date.

2. LEGAL ELEMENTS OF THE PROPOSAL

2.1 The aim and content of the Additional Protocol

The Additional Protocol aims at facilitating the swift, coordinated and effective implementation of certain aspects of the UNSCR 2178 (mainly those related to preventing and pursuing the departure of foreign terrorist fighters), furthering a common understanding of and response to foreign terrorist fighter-related offences, more broadly facilitating investigations and prosecutions of acts of a preparatory nature having the potential and danger of leading to the commission of terrorist offences and facilitating international cooperation through enhanced information exchange.

The Additional Protocol thus provides for the criminalisation of the following acts: Participation in an association or group for the purpose of terrorism (Article 2), receiving training for terrorism (Article 3), travelling or attempting to travel for terrorist purposes (Article 4), providing or collecting funds for such travels (Article 5) and organising and

¹ Council Conclusions of its meeting of 9-10 October 2014, "Foreign fighters: follow-up on the Conclusions of the European Council of 30 August 2014", Brussels 13 October 2014, Doc. No. 14160/14, point 3, 6th bullet point.

² Riga Joint Statement following the informal meeting of Justice and Home Affairs Ministers in Riga on 29 and 30 January, last bullet point of the conclusions.

³ European Parliament Resolution of 11 February 2015 on anti-terrorism measures (2015/2530(RSP)), point 26.

facilitating such travels (Article 6). Finally, Article 7 aims at enhancing information exchange by obliging Parties to designate a contact point to provide or treat requests for available information in a timely manner.

Article 2 is considered as an important instrument in effectively investigating and prosecuting those contributing with their activities to the commission of terrorist offences by terrorist groups. Article 3 provides for the criminalisation of acts of a preparatory nature, i.e. receiving terrorist training, complementing the existing offence of providing training as defined in Article 7 of the Convention CETS No. 196. At the same time, the provision in Article 3 enhances legal certainty and the effectiveness of Articles 4 – 6 of the Additional Protocol in that it provides for a definition of receiving terrorist training which is mentioned as one of the purposes of the travel. Finally, Articles 4 to 6 are meant to transpose operative paragraph 6 a) – c) of UNSCR 2178(2014). They expand the scope of criminalisation to other acts of a preparatory nature going beyond those already covered by the Convention CETS No. 196 (i.e. public provocation, training and recruitment to terrorism).

With the provision on enhanced information exchange/contact points in Article 7, the Additional Protocol responds to a call in operative paragraph 3 of the UNSCR 2178(2014) for more international cooperation while more specifically facilitating the prevention and investigation of departures to third countries with the purpose of committing terrorist offences or participating in terrorist training activities.⁴

2.2 The legal basis for the proposed decision

It is established case-law that the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include the aim and the content of the measure.⁵ If examination of a European Union 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 measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component.⁶

The predominant purpose of the Additional Protocol is to introduce criminal offences related to terrorism, for which the Union has competence based on Article 83(1) TFEU. The legal basis for signing the Additional Protocol must therefore include Article 83(1) TFEU.

No additional legal basis is required. In particular, Article 7 (on enhanced information exchange through designation of contact points) aims to facilitate the detection, prevention and investigation of those traveling or attempting to travel and thus facilitates the practical application of Article 4 of the additional protocol.⁷ It is therefore of an ancillary nature.

2.3 The necessity of the proposed decision

Article 3(2) TFEU provides that the Union has exclusive competence “*for the conclusion of an international agreement ... in so far as its conclusion may affect common rules or alter their scope.*” An international agreement may affect common rules or alter their scope where the area covered by the agreement overlaps with Union legislation or is covered to a large

⁴ See also point 63 of the explanatory report to the Additional Protocol.

⁵ See, for instance, Case C-490/10 Parliament v Council, EU:C:2012:525, paragraph 44, and the case-law cited.

⁶ Case C-490/10 Parliament v Council, paragraph 46.

⁷ See points 64-68 of the explanatory report to the Additional Protocol.

extent by Union law.⁸ Moreover, to assess whether an area is covered to a large extent by Union law account must be taken not only of Union law as it currently stands in the area concerned, but also of its future development, in so far as that is foreseeable.⁹

The Union has already adopted measures in the area covered by the Additional Protocol, including substantive criminal law provisions as well as a provision on enhanced information exchange.

The EU legal framework governing criminal offences related to terrorism is laid down in the Framework Decision on Terrorism. The Additional Protocol widens the scope of the offences that must be criminalised¹⁰ or introduces offences similar to those already contained in the Framework Decision¹¹.

The relevant Union instruments related to police cooperation are notably:

(a) the Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union¹²,

(b) the Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combatting terrorism and cross-border crime (Prüm-Decision),¹³ and

(c) the Council decision 2005/671/JHA on the exchange of information and cooperation concerning terrorist offences¹⁴.

These instruments regulate on the one hand information exchange for the purpose of criminal investigations in terrorist related matters and the establishment of contact points for the exchange of information on the other. Europol in particular supports the police cooperation between Member States and amongst Member States and selected Third States, to adequately respond to the phenomenon of foreign terrorist fighters.

The conclusion of the Additional Protocol may therefore affect common rules or alter their scope.

Moreover, as regards the foreseeable future development of Union law, following calls by the Council to explore ways to overcome possible shortcomings in the existing legal framework, discussions are currently ongoing on a possible revision of the Framework Decision in particular in light of UNSCR 2178(2014).

As announced in the European Agenda on Security, the Commission will launch an impact assessment in 2015 with a view to updating the Framework Decision on Terrorism in 2016, taking into account the negotiations on an Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.¹⁵

⁸ Case 22/70 *Commission v Council* [1971] ECR 263, so-called ERTA case

⁹ Case C-66/13, *Green Network*, EU:C:2014:2399, paragraphs 61-64, and case law cited therein.

¹⁰ Articles 3 to 6 of the Additional Protocol.

¹¹ Article 2 of the Additional Protocol criminalising the participation in activities of a terrorist group which is similar to Article 2 of the Framework Decision on Terrorism.

¹² OJ L386/9 of 29/12/2006

¹³ OJ L 210/1 of 06/06/2008

¹⁴ OJ L 253/22 of 29/09/2005

¹⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Agenda on Security, COM(2015) 185 final of 28 April 2015, not yet published in the OJ.

The proposed decision is therefore necessary, as the Additional Protocol must be signed on behalf of the Union..

3. TERRITORIAL APPLICATION

In accordance with Protocol 22 of the Treaty of the European Union, the Additional Protocol signed and eventually concluded by the European Union is binding upon and applies in all EU Member States with the exception of Denmark.

In accordance with Protocol 21 of the Treaty of the European Union, the Additional Protocol signed and eventually concluded by the European Union is binding upon and applies in the United Kingdom only insofar as this Member State notifies the Council of its wish to take part in the adoption and application of this instrument.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(1), in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 1 April 2015 the Council authorised the Commission to open negotiations for the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196).
- (2) The Additional Protocol aims at facilitating the implementation of United Nations Security Council Resolution 2178(2014) on Foreign Terrorist Fighters and, in particular, at establishing criminal offences for certain acts identified in operative paragraph 6 of that Resolution.
- (3) A common understanding of foreign terrorist fighter related offences and criminal offences of a preparatory nature with the potential to lead to the commission of terrorist acts, would contribute to further enhancing the effectiveness of the criminal justice instruments and cooperation at Union and international level.
- (4) The Additional Protocol should therefore be signed on behalf of the European Union
- (5) [In accordance with Article 3 of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom has notified its wish to take part in the adoption and application of this Decision.]
- (6) OR: [In accordance with Articles 1 and 2 of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, the United Kingdom is not taking part in the adoption of this Decision and is not bound by it or subject to its application.]
- (7) In accordance with Articles 1 and 2 of Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application,

HAS ADOPTED THIS DECISION:

Article 1

The signing of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) is hereby approved on behalf of the European Union, subject to the conclusion of the said Protocol. The text of the Additional Protocol to be signed is attached to this Decision.

Article 2

The Council Secretariat General shall establish the instrument of full powers to sign the Protocol, subject to its conclusion, for the person(s) indicated by the negotiator of the Protocol.

Article 3

This Decision shall enter into force upon its adoption.

Done at Brussels,

*For the Council
The President*