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Recent Council of Europe and European Union legislation on preventing terrorism and its impact on the criminal law of Member States (the example of Poland)

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Introduction

Some argue that centuries are defined not merely by chronological boundaries but also, even chiefly, by pivotal events which brought about dramatic changes to the world as a whole. In this sense, for example, the 19th century definitively ended and the 20th century began with the outbreak of the First World War.[1] If this is really the case, than one could make the argument that the 21st century actually began on 11 September 2001 with the coordinated terrorist attacks against targets in the United States, in particular the World Trade Center.

Terrorism was by no means an unknown phenomenon by that point. The term has been applied much earlier, e.g. in the context of the Israel-Palestinian conflict, the activities of certain paramilitary groups in the Basque conflict and the Troubles in Northern Ireland, as well as groups

[1] The period between 1789 and 1914 is sometimes referred to as the "long 19th century."

not aligned with a particular state, such as the Baader-Meinhof Group in Germany and the Nuclei Armati Rivoluzionari in Italy.

The attacks against the USA were however the first instance of international terrorism on such a scale. They were by far the deadliest attack to date and redefined the understanding of terrorism for the majority of the population as well as shaping the policies and strategies of most major world powers for many years to come.

With other attacks following in Europe, most notably the Beslan school siege in Russia, the March 11 attacks in Madrid (both in 2004) and the London bombings of 2005, the Member States of the European Union and the Council of Europe were prompted to increase their legislative efforts in order to fight international terrorism. They realised that it is not enough merely to combat terrorism, i.e. effectively prosecute perpetrators of terrorist acts,[2] but significant steps must be taken to thwart terrorist plots before they can come to fruition.

The European Union reacted first with the adoption of Council framework decision 2002/475/JHA of 13 June 2002 on combating terrorism[3] which provided a common definition of terrorist offences as well as providing for the criminalisation of participation in a terrorist group (Article 2). The framework decision also required criminalisation of acts ancillary to terrorist offences (incitement, aiding and abetting and attempt), as well as certain otherwise common offences but committed with a view to ultimately commit a terrorist offence (theft, extortion and drawing up false administrative documents).

This framework decision was later amended by Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism[4] which extended the list of punishable offences to include public provocation to commit a terrorist offence, recruitment for terrorism and providing training for terrorism.

[2] International conventions criminalising acts of terrorism were being adopted since the early 1970s. The Council of Europe's own Convention on the suppression of terrorism (ETS no. 090) was adopted as early as 1977.

[3] O J Series L no. 164 of 22.06.2002, p. 3.

[4] O J Series L no. 330 of 9.12.2008, p. 21.

Within the Council of Europe, the Council of Europe Convention on the prevention of terrorism[5] (hereinafter: "the Convention") was opened for signature in May 2005. The Convention included provisions relating to international cooperation, exchange of information, training of law enforcement staff but also, perhaps most importantly, provided a list of activities which served to facilitate future terrorist attacks — all of such acts were to be criminalised. These included public provocation to commit a terrorist offence (Article 5), recruitment for terrorism (Article 6), providing terrorist training (Article 7), as well as a number of ancillary offences, including participating as an accomplice, directing others in the commission of the offence and contributing to the commission as a member of an organised group (Article 9). Crucially, it was irrelevant for the establishment of responsibility if an actual terrorist offence was eventually committed or not (Article 8).

1. Changing times, changing legal frameworks

For a number of years both the EU and CoE systems were in alignment to a large degree. The list of punishable offences was very similar. While the manner of defining a terrorist offence was different,[6] its scope was similar and both organisations recognised that it is necessary to criminalise some further acts which are not terrorist offences themselves but aim to lay the groundwork for the commission of terrorist offences or otherwise facilitate it (e.g. public provocation, recruitment, providing training).

However, even this enhanced criminal law regime proved to be insufficient to combat a new wave of, thankfully more minor, terrorist attacks sweeping across Europe since 2014. Many of them were connected to the involvement of several European states in the armed intervention in the Syrian conflict.

This time it was the Council of Europe which reacted more swiftly, with negotiations leading to the adoption of an Additional Protocol to the Convention on the prevention of terrorism (hereinafter: "Additional

[5] CETS no. 196.

[6] The EU adopted its own definition, while the CoE referred to acts prohibited by UN conventions.

Protocol") beginning as early as February 2015.[7] Some of the provisions which made their way into the Additional Protocol were inspired by UN Security Council Resolution 2178(2014) adopted on 24 September 2014, others were introduced by the CoE itself in order to fill identified gaps in the system of prevention of terrorism. With negotiations on the protocol proceeding swiftly, it was ultimately opened for signature on 22 October 2015 and came into force on 1 July 2017 with the required threshold of 6 ratifications being met.

The Additional Protocol introduced new types of offences which the state-parties were obliged to penalise in their national legal systems. These included participation in a terrorist group or association[8] (Article 2), receiving training for terrorism[9] (Article 3), travelling abroad for the purposes of terrorism (Article 4) and funding, organising or otherwise facilitating travelling abroad for the purpose of terrorism (Articles 5 and 6).

The Protocol is noteworthy for its attempt to tackle the problem of so-called "lone wolves," i.e. terrorists who are not part of any formalised group or association but rather were radicalised and undertook to carry out terrorist attacks by themselves. Since mere preparation to such an attack may comprise otherwise perfectly legal activities (such as appropriation of chemicals, motor vehicles, attending flight training or a shooting range, etc.), it was difficult to ascribe criminal responsibility to such persons before they carry out their plot, or at the very least make an attempt to do so. This in turn was seen as a delayed response, since the entire purpose of the Convention (and the Additional Protocol) was preventing the

[7] The negotiations themselves were handled by the special sub-committee CODEXTER (The Committee of Experts on Terrorism), now called the Council of Europe Committee on Counter-Terrorism (CDCT).

[8] It is noteworthy, that mere formal participation in such a group, without actually having carried out any activities for its purpose, is not required to be penalised, as per par. 33 of the explanatory report to the Additional Protocol. https://rm.coe.int/CoERM-PublicCommonSearchServices/DisplayDCTMContent?documentId=090000168047c5ec (accessed: 4.09.2019).

[9] This includes only receiving knowledge or skills from another person, such as a teacher, trainer or instructor. The Protocol does not obligate state-parties to criminalise self-study, as per par. 40 of the explanatory report.

terrorist attack from happening in the first place, rather than just punishing the perpetrators.[10]

The approach taken by the CoE, inspired by the UN Security Council, was to criminalise "terrorist travel," i.e. travelling abroad for the purposes of carrying out a terrorist attack, participating in terrorist training or providing such training. The scope of criminalisation is however limited to travelling to a state "which is not that of the traveller's nationality or residence." This is based on the notion that no person can be denied entry to their own state of citizenship or be penalised for doing so. The definition does however encompass persons leaving their homeland in order to receive instruction or training abroad and return home to carry out attacks (so-called "returnees"), since the first segment of their conduct does fall within the scope of Article 4.

The entire crux of this offence rests on the intent of the traveller. The exact manner of transposition of this provision to national legal systems may vary, however as a rule it is for the prosecution to demonstrate that a particular person had this "terrorist intent" when undertaking travel. It should not be seen as an excuse to introduce blanket bans on travelling to certain areas.[11]

It is conceivable to dispute whether this provision could have the desired effect on combating the activities of "lone wolves." After all, it is entirely possible for them to become radicalised without ever leaving their home country (in particular through the Internet). This concern was partially addressed by instruments adopted by the EU, as outlined below.

The European Commission presented its first proposal aiming to supplement the existing anti-terrorist legal framework in late 2015.[12] Despite a lengthier period of negotiations, the entry into force was swifter compared to the Convention, as it did not require a ratifications threshold. The instrument was adopted on 15 March 2017 as directive (EU) 2017/541 of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amend-

[10] See the preamble to the Convention.

[11] Para. 47 of the explanatory memorandum.

[12] Proposal for a directive of the European Parliament and the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism of 2 December 2015, COM(2015) 625 final.

ing Council Decision 2005/671/JHA[13] (hereinafter: "The Directive"). The deadline for transposition was set for 8 September 2018 (Article 28 (1)).

The Directive retains the crimes previously set out in framework decision 2002/475/JHA but introduces new ones as well. These include receiving training for terrorism (Article 8), travelling for the purposes of terrorism (Article 9), organising or otherwise facilitating travelling for the purposes of terrorism (Article 10). Furthermore, public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism, as well as financing terrorism, which were penalised before, were all listed as individual provisions (Articles 5, 6, 7 and 11 respectively).[14]

2. Differences between the CoE system and the EU system

It is interesting to compare the exact wording used in the Convention and Additional Protocol with that employed in the Directive. While at first glance it might seem that the EU and CoE systems are in alignment once again, there are subtle differences in the formulation of provisions which mean that the exact scope of criminalisation is slightly different.

2.1. Public provocation

Both the Convention and the Directive define public provocation as "distribution, or otherwise making available, of a message to the public," with the intent to incite the commission of a terrorist offence, if it causes danger that such an offence actually is committed. However, the scope of penalisation introduced in the Directive is more precise than the requirements of the Convention by also expressly making reference to glorification of terrorist acts as a form of public provocation. While the Convention does provide for "indirect provocation," which may be interpreted to

[13] O J Series L no. 88 of 31.03.2017, p. 6. Due to the entry into force of the Treaty of Lisbon, the EU could no longer adopt framework decisions. Any amendments to previous framework decisions now have to take the form of directives adopted on the new legal basis (see Article 83 (1) TFEU).

[14] The Directive also included certain more minor, but still noteworthy changes such as extending the definition of a terrorist offence to include illegal interference with IT systems (Article 3 (1)(i)) and introducing specific regulations relating to victims of terrorism (Articles 24–26).

include provocation by way of glorification,[15] one must concede that the definition adopted in the Directive is superior by dispelling any doubts in this matter.

2.2. Receiving terrorist training

As already mentioned above, the wording of Article 3 of the Additional Protocol makes it clear that any instruction, knowledge or skills must be obtained from "another person" in order to fall within the definition of receiving terrorist training. This must be construed as meaning that the instructor is actively involved in the training at least to some degree, although there is no requirement that the persons involved actually physically meet — using communication technologies, especially the Internet, suffices. It is however clear both from Article 3 itself and the explanatory report to the Protocol (par. 40) that self-study, such as accessing articles or websites and merely receiving messages, is excluded from the scope of criminalisation.

The wording used in Article 8 of the Directive is similar — it also refers to receiving instruction but omits the reference to "another person." Recital 11 of the preamble makes it clear that the intention was for self-study to be covered by the provision.[16] It also provides for an exception that merely visiting websites or collecting materials for legitimate purposes, such as academic or research purposes, is not considered to be receiving training for terrorism. This much however should be obvious since a person accessing such information for a legitimate purpose clearly does not have the terrorist intent required by Article 8 of the Directive.

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[15] CODEXTER admits that it did not see fit to accept a more specific definition proposed by the Parliamentary Assembly (Opinion No. 255 (2005), paragraph 3.vii and following), and of the Commissioner for Human Rights of the Council of Europe (document BcommDH (2005) 1, paragraph 30 *in fine*) which suggested that such a provision could cover "the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour." See para. 95 of the explanatory report to the Convention https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3811 (accessed: 6.09.2019).

[16] The recital also provides an example where the mere act of downloading a manual on constructing explosive devices is to be considered receiving terrorist training (provided of course that the person doing so has the intention to carry out a terrorist offence).

As such, the scope of criminalisation required by the Directive is wider than the Additional Protocol, with EU law requiring the penalisation of self-study, whereas the CoE system only presents it as an option to state-parties.[17]

2.3. Terrorist travel

Perhaps the most significant disparities concern the definition of the offence of travelling for terrorist purposes. Under Article 4(1) of the Additional Protocol the purpose of the traveller must be the "commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism." The definition provided in Article 9(1) of the Directive is lengthier and more verbose but essentially boils down to covering the same type of conduct.

The differences come in the additional requirements for criminalisation. Under the Additional Protocol, state-parties are required to make it punishable to travel from their territory to a different country or by its nationals, regardless of where the travel originated or what the destination was.[18] Article 4(1) makes it clear however that travelling into the perpetrator's country of nationality or residence falls outside the scope of criminalisation. As such, there is no obligation to prosecute a person travelling to their state of residence for this offence, even if that person does travel for one of the purposes set out above. Article 4(3) expressly states that state-parties are also obliged to criminalise the mere attempt to travel for terrorist purposes.

The Directive in turn adopted the somewhat unusual (though certainly not unheard-of) route of giving Member States a choice (Article 9(2)). In addition to criminalising travel from their territory they are required to also criminalise *either* travelling into their territory *or* preparatory acts undertaken by a person entering that Member State with the intention to commit a terrorist offence.[19] This solution seeks to resolve the issue connected with "lone wolf" returnees — persons who were radicalised abroad and are returning to their own state with terrorist intent.

[17] Para. 40 of the explanatory report *in fine*.

[18] Para. 49 of the explanatory report *in fine*.

[19] Naturally, there is nothing preventing Member States from criminalising both types of conduct in their national legal systems if they so choose.

The Directive does not provide a definition of what such "preparatory acts" are, though. Recital 12 states only by way of an example, that they might include planning or conspiracy, with a view to committing or contributing to a terrorist offence. As such, if a Member State decides to avail itself to the second option, there is actually a significant amount of leeway in the manner this provision can be implemented into the national legal system. This may potentially lead to certain discrepancies between individual states and a somewhat uneven scope of criminalisation.

Nevertheless, by at least attempting to cover returnees, the Directive certainly goes a step beyond what was laid down in the Additional Protocol. Even though individual Member States may introduce varying levels of criminalisation, the scope of the criminalisation will certainly be broader.

The consequences of the abovementioned discrepancies are twofold. Naturally, the first one is that states which are both members of the EU and parties to the Convention and Additional Protocol must make their national legal systems compliant with the more far-reaching requirements, which as a rule means the EU system. States which are not members of the EU are only required to implement the sometimes less stringent requirements of the Convention and Additional Protocol but are of course free to go beyond that and align their national systems with EU requirements.

The second consequence concerns exchange of information between law enforcement agencies. The Additional Protocol features provisions relating to the exchange of information on persons travelling abroad for the purpose of terrorism (Article 7). Within the EU, there is a separate piece of legislation relating to exchange of information, namely Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences.[20] This in itself presents a different scope of obligation to exchange information between states which are Member States of the EU as opposed to states which are only party to the Additional Protocol. The different scope of criminalisation only further increases these variations.

[20] O J Series L no. 235 of 29.09.2005, p. 22. This decision was amended by the Directive in order to bring it into line with the new definition of a terrorist offence. The consolidated text available at https://eur-lex.europa.eu/eli/dec/2005/671/2017-04-20 (accessed: 16.09.2019).

3. Example of implementation — Poland

Over half of Council of Europe states are members of the EU bound by the Directive.[21] As such, it is worth examining what impact the recent instruments had on national legal systems on the example of a state which belongs both to the Council of Europe and the European Union. Poland is a good case in point as it exhibited both good and poor aspects of the implementation process.

It is worth noting at the outset that while Poland was among the group of states to sign the Additional Protocol on the very first day it was open for signature,[22] as of September 2019 no steps were taken to ratify it. As such, Poland is not legally bound by the Additional Protocol, although in accordance with the general rules on international treaties, it is prohibited from taking any steps which could frustrate its object and purpose.[23]

Polish national legislation implements the new provisions on preventing terrorism chiefly in the Criminal Code[24] (hereinafter: "CC"). Notably, several new offences were added to the Criminal Code by the Act of 10 June 2016 on antiterrorist activities[25] (hereinafter: "TerAct") which was ostensibly supposed to implement the Directive. Keeping with the structure of the Directive, an examination how the various types of crimes are transposed into the national legal system is as follows.

It must be noted however that financing of terrorism is a broad topic which includes very comprehensive legal frameworks aimed at preventing it, often linked with money laundering.[26] Article 11 of the Directive which

[21] The United Kingdom, Ireland and Denmark opted out of participation in the Directive and are not bound by it, as per its recitals 41 and 42.

[22] On 22 October 2015 at a ceremony held in Riga. The other countries who signed the Additional Protocol on that day were Belgium, Bosnia and Herzegovina, Estonia, France, Germany, Iceland, Italy, Latvia, Luxembourg, Norway, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

[23] See article 18(a) of the Vienna Convention on the law of treaties concluded in Vienna on 23 May 1969.

[24] Act of 6 June 1997 — Criminal Code, consolidated text: Journal of Laws of 2018, item 1600, as amended.

[25] Consolidated text: Journal of Laws of 2019, item 796.

[26] This includes, among others, the 1999 International Convention for the Suppression of the Financing of Terrorism adopted within the UN, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

provides for criminalisation of terrorist financing should be examined in the broader context of these regulations. For this reason and the topic of the present text, as well as due to space limitations, the offence of financing terrorism will not be examined in the present paper. It is a question which warrants a comprehensive analysis on its own.

3.1. Public provocation

Article 255 CC provides for a general criminalisation of public provocation to commit any type of criminal offence, including terrorist offences. The scope of the provision covers public incitement to commit an offence but, crucially, Article 255 § 3 CC also criminalises public glorification of the commission of a crime, carrying a penalty of a fine, restriction of liberty[27] or imprisonment of up to one year. The Polish legal system therefore does not face the problem of having to prove that glorification amounts to provocation outlined above, since public glorification is penalised irrespective of whether it incites another person to commit an offence or not. It is also irrelevant whether the glorified crime was already committed, is only expected to be committed or is never even actually committed at all.[28] The provision does not specify a particular way the provocation or glorification is to be made, so it must be construed to cover all such instances, even those committed using the Internet.

It can be therefore concluded that the Polish provisions more than meet the requirements both of Article 5 of the Directive and article 5 of the Convention.

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and on the Financing of Terrorism (CETS no. 198), the activities of the Financial Action Task Force (FATF), the MONEYVAL committee within the Council of Europe and Directive 2005/60/EC of the European Parliament and the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (O J Series L no. 309 of 25.11.2005, p. 15).

[27] The penalty of restriction of liberty can take the form of either community service or deductions from remuneration, the latter form essentially making it a fine somewhat extended in time.

[28] *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 212–277d*, eds. W. Wróbel, A. Zoll, Warsaw 2017, pp. 510–511; *Kodeks karny. Komentarz aktualizowany*, ed. M. Mozgawa, LEX/el. 2019, commentary on Article 255, pt 5.

3.2. Recruitment for terrorism

It is worth remembering that recruitment for terrorism is defined as soliciting another person to commit or participate/contribute to in the commission of a terrorist offence or joining a terrorist group. In the Polish system, this offence is handled through the concept of "incitement" (Article 18 § 2 CC). Inciting another person to commit an offence carries the same penalty as the offence itself. Since the Criminal Code covers both terrorist offences (as defined in Article 115 § 20 CC) and membership of a terrorist group or organisation (Article 258 § 2 and 4 CC), the full scope of recruitment is covered by this institution. As a side note, it is worth pointing out that while Article 4(b) of the Directive criminalises participation in the activities of a terrorist group, Article 258 § 2 CC also criminalises mere formal membership in such groups, even if it is completely passive and does not amount to participating in its activities in any way.[29]

It should be noted though that Article 14(2) of the Directive specifically requires that Member States also criminalise incitement to commit any of the offences listed therein. This includes incitement to recruit for terrorism. Since recruitment itself is handled as incitement in the Polish system, there may be some doubt whether it is possible to incite another person to incite further, in a sort of tiered legal structure. This however was clarified by the Supreme Court which stated that it is in fact possible to be convicted of incitement to incite and even attempted incitement to incite.[30]

3.3. Providing terrorist training

Article 255a § 1 CC states that whoever disseminates or publicly presents content which may facilitate the commission of a terrorist offence, with the intent that such an offence be committed, is criminally liable. The definition of this crime in the Polish system is rather broad and flexible, it encompasses activities which are not aimed at any specific persons and

[29] Judgment of the Court of Appeals in Lublin of 24 November 2009, case file no. II AKa 188/09. See also: *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 212–277d*…, p. 536 on the matter of "sleeper cells."

[30] Resolution of 7 Judges of the Supreme Court of 21 October 2003, case file no. I KZP 11/03. See also: *Kodeks karny. Komentarz aktualizowany*, ed. M. Mozgawa, LEX/el. 2019, commentary on Article 18, pt 34.

also covers instances where the content may only potentially facilitate the commission of a terrorist offence, but not necessarily actually does. The provision also uses the term "content" rather than the more specific terminology of "instruction" used both in the Directive and the Convention. This means that it would cover unstructured and disjointed information which requires additional effort on the part of the receiving person to organise in order to be usable in any way.

As with public provocation, this broad approach should be recognised as meeting the threshold of both the Directive and the Convention and even actually going beyond the requirements presented therein.

3.4. Receiving terrorist training

Receiving terrorist training, as the mirror image of providing such training, is covered by Article 255a § 2 CC. The scope of this offence encompasses participation in training which may facilitate the commission of a terrorist offence, with the intention that such an offence be committed.

As with providing training, it doesn't have to be demonstrated that the training definitely will facilitate the commission of a terrorist offence, only that it may achieve this effect. However, both the wording of the provision and its placement in the legal framework makes it clear that the perpetrator must participate in actual training. This may be contrasted with a rather broader scope of Article 255a § 1 CC which mentions dissemination of any content, which may, but does not have to, mean actual training. Since the lawmakers decided not to use the same terms in both paragraphs of Article 255a CC, it is clear that their intention was to differentiate the grounds for criminal responsibility. As such, for the purposes of Article 255a § 2 CC, training must be at least in some way structured and provided by an entity other than the participant.[31]

It must be therefore stated that all forms of self-study fall outside of the scope of Article 255a § 2 CC. While self-study could potentially be classified as preparation to commit a terrorist offence, it must be noted that penalisation of preparation to commit an offence is an exception, rather

[31] *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 212–277d…*, pp. 516–517.

than a rule in Polish criminal law.[32] Since the Polish system adopted a general definition of a terrorist offence based on the intent of the perpetrator and the severity of the penalty (article 115 § 20 CC), rather than indicating specific crimes as terrorist offences, it must be concluded that in the vast majority of offences which can potentially be terrorist offences, preparation is not criminalised. Since, as noted above, the Directive makes it clear that self-study should also be penalised, in this respect the Polish standards seem to fall short of EU requirements.

3.5.Terrorist travel

The scope of criminalising terrorist travel was probably the most controversial of the offences mentioned in the present text, hence the narrow definition adopted in the Additional Protocol and the legal alternative presented by the Directive. The Polish authorities ostensibly implemented the provisions on terrorist travel by adding Article 259a to the Criminal Code. It is noteworthy however that this was done in the aforementioned TerAct, which was adopted on 10 July 2016, whereas the Directive itself was only finally adopted on 15 March 2017. Polish authorities at the time were intent on introducing anti-terrorist legislation in anticipation of the upcoming NATO summit and the Papal visit connected with World Youth Day 2016. As such, the implementing legislation was, by necessity, based on the then-current draft of the Directive. As it was however, the draft's provisions on terrorist travel were subsequently modified.

Article 259a CC penalises crossing the Polish border in order to commit any of the following acts abroad: commit a terrorist offence, join or form a terrorist group or provide or receive terrorist training. Therefore, while it includes all forms of intention on the part of the perpetrator required by Article 4 of the Additional Protocol and Article 9(1) of the Directive, it does fall short of the additional requirements provided for in Article 9(2) of the Directive, which also requires criminalising either travelling into the relevant member State or, alternatively, activities which constitute preparation.[33]

[32] Article 16 § 2 CC states that preparation is only criminalised if it is expressly provided for by an act of law.

[33] See pt 3.3. above.

It must be noted that, as mentioned above, not all forms of receiving terrorist training are covered by legislation meant to implement Article 8 of the Directive. Since one of the purposes of travel can be to receive terrorist training, a difference of scope affects also the possibility to prosecute for this offence. Notably, a person travelling abroad in order to conduct self-study in techniques to commit a terrorist offence will fall outside of the scope of Article 259a CC.

Furthermore, Article 259b CC introduces specific grounds on which a public prosecutor is entitled to grant leniency to a person committing the crime of terrorist travel. At the request of a public prosecutor, the court is obligated to apply extraordinary mitigation of the penalty or conditionally suspend its execution if the perpetrator voluntarily either: a) abandoned the commission of offences for the purpose of which he was travelling and disclosed all important details of the offence to law enforcement authorities or prevented the offence from being committed or b) abandoned aiding another person in the commission of the offence set out in Article 259a CC and disclosed all important details of the offence, in particular the identity of other travellers, to law enforcement authorities.

While the Directive does not interfere with national legal systems with regard to general principles, such as applying leniency, it must be noted that this specific form of leniency only applies to the offence of travelling for terrorist purposes. The public prosecutor is solely authorised to decide its application, which can seriously influence the outcome of proceedings, since his request is binding on the sentencing court. There can be some doubts whether this solution satisfies the requirements of Article 15(1) of the Directive which requires that penalties are effective, proportionate and dissuasive, in particular when the prosecutor can request that the penalty be conditionally suspended.

According to the justification of the draft law which introduced this provision, it aims to increase the ability of law enforcement authorities to prosecute perpetrators of serious terrorist offences by granting impunity to persons aiding them in exchange for information, as well as weakening the bonds of solidarity between members of terrorist organisations.[34]

[34] Justification to the draft Act on anti-terrorist activities of 16 May 2016, Sejm of the 8th term, Sejm document no. 516.

While this objective is certainly justifiable, such effects could have been achieved by employing similar institutions already in place in the law at the time, in particular those relating to providing information to law enforcement authorities on co-perpetrators or other offences (Article 60 § 3 and 4 CC), as well as those relating to repentant members of criminal organisations, including terrorist groups (Article 259 CC). As it is, introducing additional grounds for leniency applicable specifically and solely to terrorist travel may raise doubts as to whether the Directive is properly implemented with respect to this offence.

3.6. Organising or otherwise facilitating terrorist travel

No specific provision was introduced into Polish law to implement this crime. However, criminalisation to the extent required both by Article 6 of the Additional Protocol and Article 10 of the Directive is ensured through the concept of aiding another person in committing an offence (article 18 § 3 CC). This covers all forms of organisation and facilitation of the commission of an offence, in particular providing tools, means of transportation, advice or information. Naturally the aider must have the intention that the offence be committed and therefore know what the purpose of his aid is. This is in line with both the Directive and the Additional Protocol.

Conclusions

The requirements of the Directive, Convention and Additional Protocol are a certain minimal threshold. States are free to go beyond what is required of them and introduce more far-reaching provisions into their national legal systems. They are also given a certain leeway in the precise method of implementing those requirements, particularly in relation to terrorist travel. This provides a field to evaluate the method adopted by a particular state, in this case — Poland.

The clear criminalisation of public glorification of a terrorist offence certainly is a good way to meet the standards of the Directive and Convention. It allows the curbing of activities of individuals who would applaud or justify acts of terrorism, such as alleging that the victims of terrorism

deserved their fate or portraying terrorists as martyrs. Such messages can lead to sympathising and radicalisation and ultimately to further acts of terrorism. However, when applying such provisions, any state must be especially wary not to unduly extend their scope and in this way limit freedom of speech guaranteed by Article 10 of the ECHR.[35]

Another good example is criminalising mere membership in a terrorist group or organisation. While it may be difficult to demonstrate that a particular person belongs to such an association without actually participating in its activities, the object here is in fact quite similar to criminalising glorification. Letting mere passive membership go unpunished could create the sense that the group is in fact legitimate and membership in it, and as an extension, subscribing to its goals, is not something frowned upon.

However, the manner of implementing the international requirements into Polish law is not without its problems, as already mentioned above.

The scope of receiving terrorist training is misaligned with the requirements of the Directive since it does not cover self-study.

Furthermore, the provisions on terrorist travel do not take into account the requirements of Article 9(2) of the Directive, as neither of the additional forms of criminalisation has been implemented. This is undoubtedly a result of the attempt to implement the Directive before it was finally adopted based on the draft at the time. This faulty transposition, however, only goes to show that Member States should actually wait until the text of the Directive is finalised before initiating works to implement it.[36]

There can also be doubts whether the extraordinary powers of the public prosecutor to grant leniency to a perpetrator of terrorist travel are in

[35] See e.g. General comment no. 34 of the UN Human Rights Committee of 12 September 2011 (pt 46) and judgments of the ECtHR in cases such as Association Ekin v. France (application no. 39288/98) or Belek and Velioğlu v. Turkey (application no. 44227/04).

[36] Attempts to rectify this situation were only made recently. The Polish government presented a draft act amending Article 259a CC in April 2019 (Sejm document no. 3386). This draft sought to remove the restriction that the offence the traveller seeks to commit must be committed abroad, therefore also criminalising terrorist travel into Poland and meeting the requirement of Article 9(2)(a) of the Directive. However, the proposal was not considered by the Sejm in time and is set to be abandoned in the light of the October 2019 general elections and the forming of a new Sejm. As such, any draft law correcting the deficiencies in implementation will have to be submitted again.

line with the Directive. This issue, should it ever arise in practice, could be clarified by the Court of Justice of the EU by way of answering a preliminary question (Article 267 TFEU).

The above remarks seek to demonstrate both good and bad practices in implementing recent instruments on prevention of terrorism. Hopefully they may be useful to Member States in drafting their own legislation in the future, as well as to lawyers who will have to apply those provisions in practice.

References

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Summary

The paper seeks to draw comparisons between recent instruments adopted by the Council of Europe (CoE) and the European Union (EU) in the field of prevention of terrorism. The examined instruments are the CoE convention on the prevention of terrorism of 2005 with its additional protocol of 2015 and the EU's 2017 directive on combating terrorism. The paper demonstrates the different scope of criminalisation required by these instruments, highlighting areas in which the EU's legal regime is stricter, providing for criminalisation of a wider array of activities aiming to prepare for the commission of terrorist offences (in particular with regard to public provocation, receiving terrorist training and terrorist travel). The paper then examines implementation of both sets of international instruments into a national legal system using the Polish transposition as an example. Both good and poor examples of implementation are presented. The former includes comprehensive criminalisation of public provocation to commit a terrorist offence and membership of a terrorist organisation, while the latter includes insufficient transposition of provisions requiring the criminalisation of receiving terrorist training and terrorist travel as well as introducing unwarranted powers of the public prosecutor to grant leniency to terrorist travellers.

Keywords: prevention of terrorism, Council of Europe, European Union, Directive 2017/541, terrorist travel