

Approximation of substantive criminal law in the EU

The way forward

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Content and impact of approximation: The case of terrorist offences (Council Framework Decisions of 2002 and 2008)*

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1. Context

On 5 September 2001, the European Parliament passed a recommendation on the role of the European Union (EU) in “combating” terrorism, calling on the Council to adopt a framework decision with a view to, *inter alia*, “approximating legislative provisions establishing minimum rules at European level relating to the constituent elements and penalties in the field of terrorism”¹. Less than a week later, the attack on New York was carried out and, within two weeks, the European Commission presented a Proposal for a Council Framework Decision on combating terrorism², which was adopted, with modifications, in June the following year³. As expected, the proposal made extensive reference to the attacks in the USA and recalled that the “legal rights affected by [terrorist offences] are not the same as legal rights affected by common offences”. Consequently, the criminalisation of terrorist offences as autonomous crimes was deemed indispensable for “preventing and combating (...)”

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¹ European Parliament recommendation on the role of the European Union in combating terrorism (2001/2016 (INI)), *OJ*, no. C 72 E, 21 March 2002, p. 135. For a more detailed analysis of the background of European law on terrorism, see F. GALLI and A. WEYEMBERGH, “Introduction”, in *Id.* (eds.), *EU counter-terrorism offences. What impact on national legislation and case-law?*, Bruxelles, Editions de l’Université de Bruxelles, 2012, p. 13, with further references.

² Proposal for a Council Framework Decision on combating terrorism, COM (2001) 521 final, 19 September 2001.

³ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ*, no. L 164, 22 June 2002, p. 3.

terrorism”, as a means of achieving the EU objective of providing citizens “with a high level of safety within an area of freedom, security and justice”⁴.

The proposal observed that there were significant differences in the national legal frameworks for the prevention and repression of terrorist offences in several EU Member States (MS). In fact, according to the Commission, only six MS punished terrorist offences as such. Hence, taking into consideration the competence provided for in Articles 29 and 31(1)(e) of the Treaty on the European Union (TEU), which already referred explicitly to terrorism, the adoption of a framework decision for the approximation of the substantive laws of MS was both legitimate and necessary so as to establish a common EU response to a common problem and also to facilitate judicial and police cooperation among the MS in that regard⁵.

The Council Framework Decision of 13 June 2002 on combating terrorism (2002 FD) included a definition of the minimum elements of crimes (*terrorist offences* and *terrorist group offences*) and minimum thresholds for maximum penalties. It is clear that the EU was competent to legislate on those issues under Article 31(1)(e) since the “field” of terrorism certainly includes terrorist group offences as well as public provocation to commit a terrorist offence, recruiting and training for terrorism, which were later introduced in Article 3 of the 2002 FD⁶. It also imposed minimum grounds of jurisdiction and the obligation for MS to investigate and prosecute those offences *ex officio* (i.e. irrespective of a report or accusation by possible victims), pursuant to Article 34 (2)(b) TEU⁷.

Concerning the original *terrorism-linked offences* (aggravated theft, extortion and drawing up false administrative documents with a view to the perpetration of a terrorist offence), the situation is different as they are *not* terrorist offences and cannot be seen as pertaining to that “field”. The 2002 FD does not define their constituent elements but imposes on MS the duty to consider them as “terrorism-linked offences”, which is, to say the least, an obscure obligation. In practical terms, the FD purported to extend to those offences the norms relating to penalties (Article 5(1) – but not 5(2)) and (optional) mitigation, liability of legal persons, jurisdiction and prosecution *ex officio*.

⁴ Article 29 of the Treaty on European Union, in the version then in force (TEU).

⁵ See G. DE KERCHOVE, “Impact de l’incrimination de terrorisme sur la coopération européenne en matière de lutte contre le terrorisme”, in F. GALLI and A. WEYEMBERGH (eds.), *op. cit.*, p. 216; and R. GENSON, “How far do the new EU counter-terrorism offences facilitate police cooperation?”, *ibid.*, p. 222.

⁶ See *infra*.

⁷ Under Article 34(2)(b), the EU was competent to approximate, through framework decisions, the “laws and regulations of the Member States”, including procedural and jurisdictional rules, whenever that might contribute to “the pursuit of the objectives of the Union” (Article 34(2) TEU), except for the incriminations and sanctions, the approximation of which was restricted to the domains designated in Article 31(1)(e). Through interpretation, it should be concluded that the imposition of minimum grounds of jurisdiction was also limited to those domains, unless the EU acted under Article 31(1)(d), with a view to preventing negative conflicts of jurisdiction (see P. CAEIRO, “Commentary on the ‘European touch’ of the Comparative Appraisal”, in A. KLIP (ed.), *Substantive Criminal Law of the European Union*, Antwerp, Maklu, 2011, p. 125).

Even if such an extension applies only when those crimes are committed with a view to perpetrating terrorist offences, one might question the competence of the EU to legislate in this area pursuant to Articles 31(1)(e) TEU and 34(2)(b), since they retain their status as “non-terrorist” offences both in their legal definition and in its application (convictions for common offences). On the other hand, it might be argued that the EU could legitimately legislate on the punishment of preparatory acts of terrorist offences and terrorist group offences *in general* (as they are still “constituent elements of criminal acts” in the “field” of terrorism) and it would therefore seem nonsensical that such competence ceased when those acts are *also crimes per se*.

However, for a given conduct to qualify as preparatory acts for a concrete offence, all the required *subjective* elements of the prepared offence must be present (in most cases, those elements are actually essential to determine *which* offence is being prepared). Consequently, terrorism-linked offences can only be considered as preparatory acts of terrorist or terrorist group offences – and, hence, under the prescriptive jurisdiction of the EU – when the aggravated theft, extortion, etc., are already part of a plan to commit a *concrete* terrorist or terrorist group offence. If that is not the case, the acts should be deemed not to be included in the scope of the FD.

Finally, according to the minimum rules scheme, the states retained the power to maintain or pass new legislation containing broader incriminations or grounds of jurisdiction as well as higher penalties.

In 2007, the Commission submitted a Proposal for a Framework Decision amending the 2002 FD⁸. The new instrument aimed at criminalising public provocation to commit a terrorist offence, recruitment and training for terrorism. In the Commission’s view, that kind of conduct had become particularly dangerous because it now had global reach thanks to the use of modern technologies such as the internet.

Although the duty to criminalise those acts already existed under the Council of Europe Convention on the Prevention of Terrorism (2005), the Commission found it “important” to include them in the FD so that they would be subject to “the more integrated institutional framework of the European Union (...), the specific legal regime [of the FD], in particular in respect of the type and level of criminal penalties and compulsory rules on jurisdiction” and the “cooperation mechanisms referring to the Framework Decision”.

The second Framework Decision was eventually adopted by the Council in 2008 (2008 FD)⁹, pursuant to Article 31(1)(e) TEU¹⁰.

⁸ Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism (presented by the Commission), COM (2007) 650 final, 6 November 2007.

⁹ Council Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism, *OJ*, no. L 330, 9 December 2008, p. 21.

¹⁰ See *supra*.

2. Content of the 2002 FD (as amended)

A. Elements of the offences (mandatory minimum incrimination)

1. Terrorist offences

The 2002 FD was quite “ambitious”¹¹, since it could not base itself on a pre-existing, comprehensive and commonly agreed definition of terrorism as a criminal offence, either at the European or at the international law level¹². Nevertheless, the structure of the terrorist offences established in the FD seems to have taken inspiration from Article 2(1)(b) of the UN Convention for the Suppression of the Financing of Terrorism (1999).

In fact, Article 1, 2002 FD provides for a comprehensive definition of terrorist offences, according to which the intentional acts referred to in Article 1(1)(a) to (i) (the list of “underlying offences”, harming or endangering life or limb, or personal freedom, as defined in MS criminal law) shall be deemed to be terrorist offences if two other elements are present. The *objective* element consists of the requirement that the acts, given their nature or context, be capable of seriously damaging a country or an international organisation. Regarding the *subjective* element, the acts must be guided by one of the following specific purposes (“terrorist intent”): seriously intimidating a population; unduly compelling a government or international organisation to perform or abstain from performing any act; or seriously destabilising or destroying the

¹¹ E. DUMITRIU, “The E.U.’s Definition of Terrorism: The Council Framework Decision on Combating Terrorism”, *German Law Journal*, 5, 2004, p. 585 f.

¹² The eight United Nations conventions and protocols passed between the early 1960s and the early 1990s concerning conduct that might be deemed as terrorist offences do not even use the term ‘terrorism’ (see A. CASSESE, *International Criminal Law*, 2nd ed., 2008, p. 169 f.). As the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism has never entered into force, the European Convention on the Suppression of Terrorism (1977) was the first international binding normative instrument explicitly directed against terrorism. However, in spite of that, it did not provide for a *specific* and *autonomous* definition of terrorism as a discrete criminal offence. Terrorism is a crime under customary international law when it amounts to a war crime or a crime against humanity (A. CASSESE, *ibid.*, p. 171 f.). Save for those cases, the question of whether terrorism qualifies as an international offence in time of peace under customary law remains controversial: for an affirmative answer, see A. CASSESE, *ibid.*, p. 162 f., as well as the recent decision of the Appeals Chamber of the Special Tribunal for Lebanon (UN Special Tribunal for Lebanon (Appeals Chamber), Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I, 16 February 2011). This stance has been convincingly criticised by a number of authors: see, before the decision of the Special Tribunal, G. WERLE, *Principles of International Criminal Law*, 2nd ed., The Hague, TMC, 2009, p. 30, marginal number 85, and T. WEIGEND, “The Universal Terrorist. The International Community Grappling with a Definition”, *JICJ*, 4, 2006, p. 915; and, afterwards, B. SAUL, “Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism”, *LJIL*, 24, 2011, p. 677. In a similar direction, K. AMBOS, “Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?”, *LJIL*, 24, 2011, p. 670, to whom terrorism is not (yet) a crime under international law, but may be “on the brink” of becoming one.

fundamental political, constitutional, economic or social structures of a country or an international organisation.

The use of the indefinite article "a" to indicate the possible targets of terrorist offences (*a* population, *a* country, *a* government or *an* international organisation) significantly widens the ambit of protection of traditional anti-terrorism law, which was bound, in most jurisdictions, to the nation state and its population. Together with the common (minimum) definition of terrorist offences, the punishment of European and international terrorism – directed against the Union itself (its institutions, bodies and agencies), as well as other states, together with their nationals and residents – is certainly one of the most relevant features of the FD.

In this regard, the foreign or transnational nature of the protected interests (relating to the contents of the *fattispecie*) should not be confused with the extraterritorial scope of the norms (relating to the reach of a given penal law system).

2. *Terrorist group offences*

Article 2 provides for a definition of terrorist group offences. MS have the obligation to incriminate the act of *directing* or *participating* (including funding) in the activities of a structured group of more than two persons, established over a period of time, acting in concert to commit terrorist offences. The same norm defines "structured group" as one that "is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure".

3. *Terrorism-linked offences*

Article 3 contains a list of offences linked to terrorist activities comprising aggravated theft or extortion with a view to committing a terrorist offence as well as forgery of administrative documents with a view to committing a terrorist offence (except where the underlying offence is threats) or to participate in a terrorist group.

In the view of the drafters of the FD, the ultimate terrorist purpose of those acts justifies that they be treated, in some aspects, as if they were terrorist offences.

The 2008 FD has extended this list so as to encompass the offences set out in the Council of Europe Convention on the Prevention of Terrorism (2005), *i.e.* public provocation to commit a terrorist offence; recruitment for terrorism (soliciting another person to commit terrorist offences or terrorist group offences); and training for terrorist offences. The obvious (and dangerous) proximity of those "new offences" to the exercise of fundamental rights and freedoms has led the drafters to state emphatically, in Article 2, that measures to be taken by the MS cannot contradict fundamental principles relating to freedom of expression and freedom of the press.

4. *Incitement, complicity and attempt*

Article 4 of the FD establishes that MS shall provide for the punishment of inciting (except for the "new offences"), aiding or abetting any of the previous offences, as well as the attempt to perpetrate terrorist offences (except where the underlying offence consists of possession of weapons or explosives, or of threats to commit a terrorist offence) or terrorist-linked offences (except for the "new offences").

5. *Legal persons*

Article 7 of the 2002 FD provides for the (criminal or administrative) liability of legal persons for the preceding offences, entailing the penalties set forth in Article 8, as long as they are committed for their benefit by “any person (...) who has a leading position within the legal person”, based on “a power of representation of the legal person, an authority to take decisions on behalf of the legal person [or] an authority to exercise control within the legal person”.

B. Sanctions (mandatory features and minimum levels)

The sanctions applicable to all three categories of crimes should be effective, proportionate and dissuasive, allowing for extradition proceedings.

In the case of terrorist offences, they should also be heavier than those applicable to the underlying offences (common murder, kidnapping, etc.) so as to reflect the specificity of the terrorist (objective and subjective) elements, save where the former are already punishable with the maximum penalties provided for by national law.

As for terrorist group offences, the European legislator set minimum maximum custodial sentences: not less than fifteen years imprisonment for “directing” the terrorist group (or eight years in the case where the group purports only to produce threats with terrorist intent), and not less than eight years for “participating” in its activities.

C. Jurisdiction (mandatory grounds of jurisdiction)

Article 9 imposes on MS the duty to establish certain grounds of jurisdiction: territoriality; flag (of the vessel) or registration (of the aircraft); active nationality or residence of the offender, or place of establishment of the legal person for whose benefit the offence is committed; protection (institutions or population of the MS and European institutions and bodies based in that MS); and surrogate (vicarious) jurisdiction (on refusal of extradition or surrender).

D. Investigation and prosecution

The 2002 FD imposes on MS the duty to investigate/prosecute the three categories of offences *ex officio*, i.e. irrespective of a report, complaint or accusation by possible victims.

E. Powers conferred on Member States

Alongside the preceding obligations, the FD includes some options for the MS, namely the powers to extend their jurisdiction over offences perpetrated in the territory of another MS (a sort of European territoriality); to reduce the punishment for offenders who renounce their activity and cooperate with the authorities; and to incriminate the attempt to recruit or to train for terrorist offences.

3. **Impact on domestic law**

The impact of a framework decision (or a directive) on the criminal law of a particular MS should not be assessed through a straight comparison between the text of the European act and the relevant national law and case law, examining semantic

correspondence to ascertain compliance. Impact is better described as a process, which encompasses all the decisions taken by national authorities regarding the implementation of European law.

In fact, the specific feature of framework decisions and directives (in criminal matters) is that MS are called upon to: (i) check whether their laws make it possible for the (binding) "results" set in these legal acts to be achieved and, if that is not the case, (ii) adopt the adequate legislative measures to that effect, choosing the "form and methods". Both moments are part of the impact process and were deliberately designed for the MS to interpret the European acts, assess their own legal system and proceed with legislative action.

Section A below addresses two problematic issues in the transposition of the 2002 FD. In the first case, national authorities and the European Commission have actually expressed divergent views on the binding content of the FD. In the second one, a thorough interpretation of the FD in the light of the Treaties might have led to the same result. Under the legal framework then in force, disagreement about the interpretation of FDs in general could not be adjudicated by the European Court of Justice in infringement proceedings¹³. The absence of an impartial third party endowed with the power to state the correct interpretation of secondary legislation with authority left the disagreement unsettled at a normative level: MS might stick to their own construction of what the "binding results" were, as they actually did, covered (at least at a formal level) by the exercise of their legitimate powers. At worst, this stance could only be subject to a political assessment by the Council¹⁴. Hence, from an EU perspective, it could be upheld that the margin of discretion left to the MS in the implementation of framework decisions should be as narrow as possible so as to avoid 'legitimate' discrepancies to the maximum extent.

On the other hand, the obligation to put in place hard-hitting norms whose impact cannot be "cushioned" and adapted to national environments has sometimes prompted imbalances rather than harmonisation. Section B describes one of these cases.

The Treaty of Lisbon has abolished framework decisions and has replaced them with directives. This means that defective transposition of EU acts in criminal matters can now give rise to infringement proceedings. In the current legal context, there is much less of a risk of the defective transposition of an EU act continuing for a

¹³ Regarding framework decisions, the Commission observes: "Whereas the Commission has within the first pillar the authority to start an infringement procedure against a Member State this possibility does not exist within the TEU. (...) Nevertheless, as the Commission fully participates in third pillar matters, it is coherent to confer on it a task of a factual evaluation of the implementation measures enabling the Council to assess the extent to which Member States have taken the necessary measures in order to comply with this Framework Decision" (Report from the Commission based on Article 11 of the Council FD of 13 June 2002 on combating terrorism, COM (2004) 409 final, 8 June 2004, p. 5).

It should be noted that the tighter scrutiny by EU bodies to which the implementation of directives is subject does not affect the *existence* of MS powers in that realm, only the competence to define their scope and boundaries.

¹⁴ See Article 11(2) 2002 FD and Council document 11687/2/04 REV 2 DROIPEN 40, 12 October 2004.

long period of time. Hence, it is argued that such a risk should not play a role in determining the extent to which MS should be accorded a margin of discretion in the implementation of directives in criminal matters.

A. Construing “binding results”

1. Labelling terrorist offences

The sharing of competence between the EU and the MS described above might attract divergent views on what should be deemed as a “binding result”, especially when, as is the case, framework decisions/directives are designed to set a comprehensive common regime, where partial lack of transposition might compromise the “result” as a whole¹⁵.

A good example is the debate over the existence of an obligation to incriminate terrorist offences as a separate set of crimes and branding them with that label¹⁶. Article 1(1) of the 2002 FD establishes that “each Member State shall take the necessary measures to ensure that [the designated acts] *shall be deemed to be terrorist offences*”. In this particular case, the several linguistic versions of the norm seem to have, *ne varietur*, the same meaning¹⁷: the FD requires MS to consider the listed acts *to be* terrorist offences as soon as the specific elements are present. In other words, domestic legislation cannot limit itself to punishing those acts: it must reflect the *change of nature* of common offences to terrorist crimes and name them as such.

In the authors’ view, there is merit in the contention that this is a “result” that is binding on MS. Singling out terrorist offences and giving them an autonomous status *vis-à-vis* the underlying ‘common’ offences plays a threefold role. In the first place, it differentiates, at a normative level, conduct that is inherently different – not only in its subjective elements, but also in respect of the harmed or endangered legal interests¹⁸ – and should be treated as such. In the second place, and as a consequence, it allows for the expression “terrorist offences” to become an essential “anchorage

¹⁵ “Partial or in-existent implementation of an article or part of an article will also reflect on linked provisions that considered independently might seem to comply with the requirements of the Framework Decision and will affect the system as a whole” (Report from the Commission, 2004, *op. cit.*, p. 5). Nevertheless, the circumstance that the result intended is a “system as a whole” does not preclude the need to establish the competence of the EU to legislate on each “partial” result (constituent elements of the offences, penalties, jurisdiction, etc.).

¹⁶ See Report from the Commission, 2004, *op. cit.*, p. 5; and M. BÖSE, “The impact of the Framework Decision on combating terrorism on counterterrorism legislation and case law in Germany”, in F. GALLI and A. WEYEMBERGH (eds.), *op. cit.*, p. 66 f., with further references.

¹⁷ “(...) als terroristische Straftaten eingestuft werden (...)”; “(...) pour que soient considérés comme infractions terroristes (...)”; “(...) siano considerati reati terroristici (...)”; “(...) worden aangemerkt als terroristische misdrijven (...)”; “(...) sejam considerados infracções terroristas (...)”; “(...) skall betraktas som terroristbrott (...)”.

¹⁸ See *supra*.

point” to which other norms (on penalties¹⁹, jurisdiction²⁰, judicial cooperation, etc.) refer²¹. Last but not least, naming terrorist offences as such helps in ensuring that the special (or even exceptional) rules that apply to them do not extend to the “common” underlying offences – provided, of course, that the label is not subject to manipulation and abuse²².

Nevertheless, the negative effects of not incriminating terrorist offences as such on the establishment of a common regime on the prevention and repression of terrorism should not be overestimated. Despite the extensive approximation sought by the FDs, national laws remain significantly different because many of them go beyond the scope of the European definition. In some cases, the existing domestic notion of terrorist offences already complied with the 2002 FD and needed no specific amendment²³. In other cases, MS took the opportunity to pass laws that reach far beyond that concept²⁴.

Consequently, if it is true that the failure to single out terrorist offences and name them as such can hamper the creation of a European *core regime* of terrorist offences, it is nonetheless also true that domestic legal systems might contain *other* terrorist offences subject to *other* rules, leading to a sort of dual regime on terrorism (European *versus* national sources of law), which clearly undermines harmonisation. When such a dual regime does not exist, the broader definition of terrorist offences in national law ends up making the ‘European regime’ applicable to an array of criminal acts *considerably wider* than those intended by the FD. In this respect, it should be noted that this spillover effect is of immediate European concern, namely the extended application of the rules on (optional) extraterritorial jurisdiction over acts committed

¹⁹ As said, the FD imposed the obligation to punish terrorist offences more severely than the underlying offences, which means that the sanctions applicable to the former should be separate and higher than those applicable to the latter so as to ensure that a terrorist offence can be punished more harshly than the gravest act subsumable to the corresponding underlying offence.

²⁰ See *infra*.

²¹ J. VESTERGAARD, “Denmark: criminal law as an anchorage point for proactive anti-terrorism legislation”, in F. GALLI and A. WEYEMBERGH (eds.), *op. cit.*, p. 169.

²² P. CAEIRO, “Concluding remarks”, *ibid.*, p. 308 f.

²³ Namely, France, Germany, Spain and the United Kingdom – see, respectively, the assessments of the national rapporteurs, in F. GALLI and A. WEYEMBERGH (eds.), *op. cit.*: H. LABAYLE, “Les infractions terroristes en droit pénal français. Quel impact des décisions-cadres de 2002 et 2008?”, p. 62; M. BÖSE, “The impact of the Framework Decision on combating terrorism on counterterrorism legislation and case law in Germany”, p. 77; M. CANCIO MELIÀ, “The reform of Spain’s antiterrorist criminal law and the 2008 Framework Decision”, p. 108; and J. SPENCER, “‘No thank you, we’ve already got one!’ Why EU anti-terrorist legislation has made little impact on the law of the UK”, p. 119.

²⁴ E.g., Austria: see R. KERT, “Austrian counter-terrorism legislation and case law”, in F. GALLI and A. WEYEMBERGH (eds.), *op. cit.*, p. 134.

in the territory of other MS²⁵ and on surrender *not* subject to the control of dual criminality²⁶.

In short, failure to incriminate terrorist offences separately and label them as such may lead to the defective transposition of the FD as a whole, but it should be seen as relatively minor damage inflicted on a common regime on terrorist offences that barely exists.

2. *Interpreting framework decisions in the light of the EU Treaties*

Transposition is primarily about interpretation. As with any other legal act, framework decisions and directives must be interpreted in the light of the constitutional setting to which they belong. In this respect, one of the most challenging features of the framework decisions' impact on national law is the need to put together (i) the incrimination of domestic, European and international terrorist offences, (ii) the required grounds of jurisdiction and (iii) the competence of the EU to legislate on those matters.

As outlined above, according to Article 1 of the FD, the intentional acts listed in Article 1(1)(a) to (i), as defined under national law, shall be deemed terrorist offences if, given their nature or context, "they may seriously damage a country or an international organisation" (objective element) and if "they are committed with the aim of seriously intimidating a population or unduly compelling a government or international organisation to perform or abstain from performing any act or seriously destabilising or destroying" the fundamental structures of a country or an international organisation (subjective element)²⁷.

The legal interests protected by this incrimination seem to range from traditional internal public peace within a country to world peace, where the entities against which the offences are perpetrated²⁸ bear no link whatsoever with the EU or the MS. However, the universal dimension of the protection apparently provided by the FD must be confronted with the powers assigned to the EU in criminal matters, bearing in mind the principle of conferral²⁹. In fact, and notwithstanding the growing external

²⁵ Article 9(1)(a) 2002 FD.

²⁶ Article 2(2) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ*, no. L 190, 18 July 2002, p. 1.

²⁷ The argument developed in the following considerations also applies, *mutatis mutandis*, to terrorist group offences, since they are defined as groups of persons who "act in concert to commit terrorist offences".

²⁸ Traditionally, the analysis of terrorist offences distinguishes between primary targets (the concrete victims against whom the violent act is directed) and secondary targets (the state or populations that the act is intended to threaten or terrorise). In the past, the latter equalled the nation state and the resident population. Yet, with the criminalisation of international terrorism, the entities that can be "seriously damaged" might not coincide with the ones that the offender intends to compel, terrorise, etc.: a terrorist bombing directed against a state (secondary "immediate" target) might be intended to compel, say, the International Monetary Fund (secondary "ultimate" target) to take a certain decision, and *vice-versa*.

²⁹ In *Lindqvist* the European Court of Justice ruled: "Consequently, it is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent

dimension of the area of freedom, security and justice (AFSJ)³⁰, there is considerable doubt as to whether the EU can impose on MS the obligation to protect third states or international organisations *through criminal law* without further requirements.

The Union's powers relating to the prevention and repression of crime in general, and terrorism in particular, are exercised with the purpose of providing citizens with a high level of security within a common area of freedom, security and justice³¹. Unlike certain international organisations that enjoy an unrestricted scope of action (e.g. the United Nations) – but not legislative powers of the same kind – the EU must bind its intervention to the protection of the AFSJ. In this sense, the AFSJ is a parameter that serves both to justify and to limit the obligations deriving from the FDs.

Therefore, the EU has a legitimate claim to impose on MS the incrimination of terrorist offences that jeopardise the AFSJ in any way: those that might impinge upon the MS and their population or the EU institutions or bodies (either as primary or secondary, immediate or ultimate targets), wherever they are committed, and those that, albeit targeting third states, are committed in European territory. In all those cases, it can be said that the terrorist offences affect, directly or indirectly, the AFSJ – or, more accurately, the public peace that should be enjoyed by the population residing in that space. It should be stressed that this reasoning does not relate, at all, to the jurisdictional issues dealt with in Article 9 of the 2002 FD: at this stage, we are still in the process of characterising the powers of the EU to define the ambit of protection of MS criminal law against terrorist offences (the content of the incriminations).

If we take one step further, 'international terrorism' (whatever the content of that expression might be) is said to endanger every state and international organisation, which would offer a sound basis for EU action in this field as an indirect way to protect the AFSJ. Nevertheless, one might question whether the EU enjoys the competence to impose on MS the obligation to punish *concrete* terrorist offences perpetrated outside the AFSJ that do not affect, in one way or the other, the MS, European institutions or population. In fact, if one assumes that terrorism is not a discrete crime under international law³², the punishment of terrorist offences that do not have the remotest link to the AFSJ can only rely on an offender-centred (as opposed to act-centred) type of criminal law: "a terrorist is a terrorist", etc.³³. Apart from being inherently illegitimate, such an approach is arguably outside the scope of

with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order *or with the other general principles of Community law*" (emphasis added). See ECJ, 6 November 2003, Judgement C-101/01, *Lindqvist*, ECR, p. I-12971, para. 87.

³⁰ See J. MONAR, *The External Dimension of the EU's Area of Freedom, Security and Justice. Progress, potential and limitations after the Treaty of Lisbon*, SIEPS, 2012, 1; and V. MITSILEGAS, "The European Union and the Globalisation of Criminal Law", *Cambridge Yearbook of European Legal Studies*, 12, 2009-2010, p. 337 f.

³¹ Article 67 TFEU.

³² See *supra*.

³³ See M. CANCIO MELIÁ, *Los Delitos de Terrorismo: Estructura Típica e Injusto*, Madrid, Reus, 2010, p. 23.

EU legislative competence in criminal matters even if it might guide certain *political initiatives* directed against international terrorism at large³⁴.

In sum, should the answer to the competence question be in the negative, Article 1(1) of the 2002 FD would be partly *ultra vires* and could be construed restrictively by the legislators of the MS, in accordance with the competence assigned to the EU in Articles 29 and 31(1) TEU.

In light of the preceding considerations and turning now to the jurisdictional rules laid down in Article 9 of the 2002 FD, which define the reach of the substantive norms, there should be no obstacles to the transposition into national law of Article 9(1)(a), (b) and (e) of the 2002 FD, which embody, respectively, the rules of territoriality, flag (of the vessel) / registration (of the aircraft) and national / European protection. In respect of the latter, one might regret that the FD has limited extraterritorial jurisdiction by reserving it to the MS in which the European institution or body is based³⁵. This is one of the few cases where an EU-wide assignment of extraterritorial jurisdiction to all MS would be clearly justified: all MS should be able to prosecute and try extraterritorial offences perpetrated against the Union because all are affected by them in the same manner³⁶.

Yet, if we accept the answer suggested *supra*, regarding the lack of competence of the EU to protect third states against terrorist offences committed in non-European territory, a different conclusion might be drawn in respect of Article 9(1)(c) and (d) (respectively, extraterritorial jurisdiction over offences committed by nationals or residents, or for the benefit of a legal person established in the MS). Both suppose offences perpetrated outside the area of freedom, security and justice, with no link to European targets (the full protection of the latter is provided already by the protective principle). Consequently, it can be argued that the jurisdictional rules referring to that part of the incrimination have no object and cannot be seen as a "binding result" either.

Member States may, if they deem it adequate, implement (or even go beyond) the solutions provided by the EU without the necessary competence, as long as, in doing so, they do not contravene international law. But, in that case, they will be implementing their own law, which will remain at their disposal for modification or repeal.

³⁴ See V. MITSILEGAS, *op. cit.*, p. 407: "The abolition of the pillars does not avoid uncertainty with regard to whether EU external action on terrorism falls under criminal law or foreign and security policy (...)"

³⁵ Arguably, MS can extend, on their own, the protection rule to (extra-European) terrorist offences against the EU, which would certainly be seen as compatible with international law.

³⁶ Instead, the optional ground of jurisdiction provided for in Article 9(1)(a) (offences committed in the territory of other MS) should have been avoided because it constitutes a useless violation of Article 31(1)(d) TEU, which sets the prevention of conflicts of jurisdiction as an objective (or a feature, depending on the linguistic versions of the Treaty) of the "common action in judicial cooperation in criminal matters": see P. CAEIRO, *op. cit.*, p. 130.

B. Minimum sanctions

Although this is not the place to delve into a general theory of punishment, some of its aspects are of direct interest here. It is well known that the establishment of applicable penalties is determined via a normative “calculation” that relates the offence and the sanction according to the fundamental principle of proportionality. In a sense, this judgement has an absolute nature because it represents a (normative) correspondence between two entities and does not therefore refer to a third party: e.g. life imprisonment (or twenty-five years imprisonment) as a maximum applicable penalty might be seen as proportional to the gravity (*lato sensu*)³⁷ of genocide.

However, within a legal system that provides for the punishment of offences of diverse gravity, proportionality also has a “relative” dimension³⁸, comparing the penalties applicable to those offences so as to attain a balanced – and, thus, just³⁹ – global result⁴⁰. Each system sets its own minimum and maximum thresholds for punishment and all the offences have their place on that scale, in a (potentially) coherent whole⁴¹.

Article 5(3) 2002 FD 2002 provides for quantitative minimum (maximum) thresholds of the penalties applicable to directing or participating in a terrorist group (respectively, fifteen years⁴² and eight years imprisonment). The obligation for the MS to implement those minimum penalties is clear and definitive.

Still, one is left to wonder how the EU legislator has reached those values. Why fifteen years imprisonment, and not twenty, or ten? The question is relevant because the EU cannot follow the same procedure applicable in domestic law as there is no such thing as a European system of penal sanctions, *i.e.* a European parameter that might endow those penalties with a position – a *meaning* – in the proportionality scale. True, these offences are defined by European law and the EU is certainly entitled to express its (binding) view on the severity of the applicable punishment. However, the norms that *actually* punish terrorist offences are also part of twenty-seven national legal systems with quite diverse penal scales. A maximum penalty of fifteen years

³⁷ For the purpose of this study, it is irrelevant whether proportionality of the penalty should refer to the gravity of the offence/guilt of the offender (as propounded by retributive theories), or rather, as the authors would prefer, to the prevention of crime (deterrence, restatement of the validity of the violated norm, etc.): in a system governed by the rule of law, all punishment should be subject to the principle of proportionality, irrespective of the theoretical approach one might follow.

³⁸ J. DE FARIA COSTA, *Direito Penal Especial. Contributo a uma Sistematização dos Problemas “Especiais” da Parte Especial*, Coimbra, Coimbra Editora, 2004, p. 57.

³⁹ In Dante’s famous formula, “*iustus est realis et personalis hominis ad hominem proportion*” (D. ALIGHIERI, *De Monarchia*, Liber II, 5.1).

⁴⁰ This is what Romance languages call *perequação* (*péréquation*, *perequazione*), from the latin *peraequatio* (equal distribution): see J. DE FARIA COSTA, *op. cit.* A similar argument is developed by P. ASP, *The Substantive Criminal Law Competence of the EU*, Stockholm, 2012, p. 199 f., using the concepts of “ordinal” (relative) and “cardinal” (absolute) proportionality.

⁴¹ On the principle of coherence (*rectius*: the principle of respect for the coherence of national systems), see EUROPEAN CRIMINAL POLICY INITIATIVE, “A Manifesto on European Criminal Policy”, ZIS, 2009, p. 709; and, in more detail, P. ASP, *op. cit.*, p. 206 f.

⁴² Or eight years if the group purports to commit terrorist threats only.

imprisonment is unlikely to have the same meaning in Italy or Portugal as in Sweden or the Netherlands.

If differences in the concrete application and execution of the penalties among the MS (and the inherent “unequal” treatment) can be written off as costs of (limited) harmonisation (as opposed to unification) – they are not concerned by approximation –, the same cannot be said when a European act sets a minimum maximum penalty that, in the abstract, corresponds to the harshest sanctioning level in one MS and to the lower half of the scale in the other. In short, setting minimum quantitative thresholds can lead to fake harmonisation because the relevance given to the same offence will vary from MS to MS, according to each one’s penal scale⁴³.

As the first signatory of this study has argued elsewhere, European legislation on applicable penalties could avoid those shortcomings by following a three-step procedure.

In the first place, the EU should establish, by means of a directive, a three or four-position *general* penal scale (light, medium, serious and most serious penalties), imposing on MS the obligation to pass legislation in order to fill in those categories with values drawn from their own systems⁴⁴. Once this equivalence is implemented in the MS, the EU will be able to impose on MS the obligation to ascribe, *e.g.* (at least) “serious penalties” for a given offence, and this assessment will prevail over any possible national evaluation tending to provide for more lenient penalties. Finally, the European concept of “serious penalties” will be transposed, in each MS, according to the previously defined national parameters.

The obvious advantage of such a mechanism of double qualification, or double determination, lies in the circumstance that the European assessment of the gravity of punishment would still be uniform and binding on the MS, ensuring at the same time a kind of *peraequatio* at the European level. Actually, this mechanism is already present in the definition of some elements of criminal offences: for instance, if a European act provides for the punishment of attempt, or complicity, it is for the national systems to fill in those *forms*⁴⁵. At the end of the day, depending on the *applicable* national law, the same conduct can be considered as (punishable) attempt or as (non-punishable)

⁴³ H. SATZGER, *Internationales und Europäisches Strafrecht. Strafanwendungsrecht. Europäisches Straf- und Strafverfahrensrecht. Völkerstrafrecht*, 4. Aufl., Baden-Baden, Nomos, 2010, p. 123, marg. n° 45.

⁴⁴ *E.g.* the category ‘light penalties’ corresponds to imprisonment for a maximum of one year or a fine, ‘medium penalties’ to imprisonment for a maximum of five years and so forth. This mechanism is conceived for minimum maximum penalties, but can also be adapted, *mutatis mutandis*, to minimum minimum thresholds – or, should there be a most welcome change in the “minimum rules” competence set in the Treaties, to maximum (minimum and maximum) penalties.

⁴⁵ Double qualification might even be required for a proper construction of the relationship between jurisdiction (of an internationalised court) and the applicable (domestic) substantive norms: see P. CAEIRO, “Commentary”, in A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of the International Criminal Tribunals. Timor Leste. The Special Panels for Serious Crimes 2001-2003*, vol. 13, Louvain-la-Neuve, Anthemis, 2008, p. 823.

preparatory acts – but that does not hamper the European law's aim of punishing *attempt*.

It might be objected that the EU has no competence for adopting a directive aimed at the harmonisation of penal sanctions *in the abstract*, but solely for establishing "minimum rules" concerning the applicable penalties in the fields designated in Article 83(1) and (2). The authors do not share that view. First, a directive with the said content could certainly be seen as a minimum rule (in the sense of a pre-condition) concerning "the definition of (...) sanctions" in the fields subject to approximation. Secondly, the general scope of the directive would not infringe upon that material limitation because it would not entail *per se*, in any sense, an obligation to modify the penalties provided for by the MS systems, which would first emerge with the specific definition, by the means of a directive, of actual sanctions applicable to the offences under the EU's (prescriptive) jurisdiction.