



Council of the  
European Union

Brussels, 10 September 2014  
(OR. en)

13040/14

DROIPEN 103  
ENFOPOL 262

#### COVER NOTE

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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	5 September 2014
To:	Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2014) 554 final
Subject:	REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism

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Delegations will find attached document COM(2014) 554 final.

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Encl.: COM(2014) 554 final



Brussels, 5.9.2014  
COM(2014) 554 final

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND  
THE COUNCIL**

**on the implementation of Council Framework Decision 2008/919/JHA of 28 November  
2008 amending Framework Decision 2002/475/JHA on combating terrorism**

{SWD(2014) 270 final}

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# REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

## on the implementation of Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism

### 1. INTRODUCTION

#### 1.1. Background

Framework Decision 2002/475/JHA on combating terrorism ('FD 2002'<sup>1</sup>) provided the basis for the approximation of criminal law provisions on terrorist offences. In response to evolving threats of radicalisation, recruitment and terrorism new offences of public provocation, recruitment and training for terrorism were introduced by Framework Decision 2008/919/JHA ('FD 2008'<sup>2</sup>). Similar terrorism offences had already been introduced by the 2005, the Council of Europe Convention on the Prevention of Terrorism. Also, the UN had called upon States to explore ways and means to counter incitement of terrorist acts as well as terrorism manifestations on the internet.<sup>3</sup>

Member States were obliged to adopt and notify implementing measures by 9 December 2010. The Commission was to draw up a report based on this information. The Council should then have assessed, by 9 December 2011, whether Member States had taken the necessary measures to comply with FD 2008.<sup>4</sup> As of 1<sup>st</sup> December 2014, the Commission will have the competence to appraise Member States' compliance and to initiate infringement proceedings if necessary.

#### 1.2. Main elements and purpose of the 2008 Framework Decision

FD 2008 established three new offences linked to terrorism, i.e. 'public provocation to commit a terrorist offence', 'recruitment to terrorism' and 'training for terrorism'<sup>5</sup>. Member States are required to criminalise aiding and abetting the new offences<sup>6</sup>. Criminalisation of attempted recruitment and training for terrorism is optional<sup>7</sup>.

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<sup>1</sup> OJ L 164, 22/06/2002, p. 3–7.

<sup>2</sup> OJ L 330, 09/12/2008, p. 21–23.

<sup>3</sup> See UN Security Council Resolution 1624(2005) as well as the UN Global Counter Terrorism Strategy adopted in 2006.

<sup>4</sup> See Article 3(1) and (2) of FD 2008.

<sup>5</sup> See Article 1(1) of FD 2008 amending Article 3. Offences linked to terrorist activities as defined in Article 3 of FD 2002 only comprised aggravated theft, extortion and drawing up false administrative documents with a view to committing terrorist offences. The new offences were added as Article 3(1) (a) to (c) and the previous offences in Article 3 (a) to (c) became now Article 3 (1) (d) to (f).

<sup>6</sup> See Article 1(2) of FD 2008 amending Article 4 of FD 2002 (introducing Article 4(1) of FD 2002).

<sup>7</sup> See Article 1(2) of FD 2008 amending Article 4 of FD 2002 (introducing Article 4(4) of FD 2002).

FD 2008 aims to reduce the dissemination of messages and material that may incite people to commit terrorist attacks<sup>8</sup> and to adapt current legislation to changes in the *modus operandi* of terrorist activists and supporters. These include in particular the replacement of structured and hierarchical groups by semi-autonomous cells or lone actors and the increased use of the internet to inspire, mobilise, instruct and train local terrorist networks and individuals.<sup>9</sup> The provisions in place to implement FD 2002 were considered insufficient in that conduct such as disseminating messages of public provocation which did not actually incite a particular person to commit a terrorist offence, disseminating messages encouraging people to become terrorists without reference to a specific terrorist offence, or disseminating on the internet terrorist expertise not aimed at supporting the activities of a specific terrorist group, were not necessarily criminalised. FD 2008 was designed to close this gap, to promote law enforcement and to improve police and judicial cooperation.

Article 2 of FD 2008 clarifies that it will not have the effect of requiring Member States to take measures in contradiction of *inter alia* fundamental principles relating to freedom of expression. Article 3(1) reminds Member States of the need to ensure that the criminalisation shall be proportionate to the legitimate aims pursued and necessary in a democratic society, excluding all forms of arbitrariness and discrimination. These provisions reflect the safeguards in Article 12 of the Council of Europe Convention. Furthermore, the new offences are not meant to include the dissemination of material for scientific, academic or reporting purposes or the expression of polemic or controversial views in the public debate on sensitive political issues as guaranteed by the right to freedom of expression.

### **1.3. Scope of the implementation report**

The description and analysis in this report are primarily based on the information Member States provided, supplemented by publicly available information and findings of an external study.

The report focusses on the measures Member States have taken so far to implement the new offences, including the related ancillary offences and the respective penalties<sup>10</sup>. It assesses whether Member States have implemented FD 2008 within the specified timeframe, whether they fulfil the requirements of clarity and legal certainty and achieve the objectives of FD 2008. The scope and the potential for successful prosecutions under these offences also depend on the correct implementation of the (unaltered) provisions contained in FD 2002. While this report does not (re-)assess compliance with these provisions<sup>11</sup>, it nevertheless draws attention to the findings of previous implementation reports and the shortcomings

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<sup>8</sup> See recital 7 of FD 2008.

<sup>9</sup> See in particular recitals 4 and 5 of FD 2008. See also the most recent European Union Terrorism Situation and Trend Report 2014 published by Europol highlighting *inter alia* the use of the internet and social media as tools for planning, financing, recruitment, communication, instruction, training and propaganda believed to have contributed to the acceleration of (self-) radicalisation among EU citizens. See also recital 11 of FD 2008.

<sup>10</sup> See also recital 11 of FD 2008.

<sup>11</sup> In most cases, Member States only provided information necessary for assessing compliance with the amended Articles 3 and 4 of the Framework Decision.

identified therein.<sup>12</sup> Unless remedied, such shortcomings will affect the scope of the new offences of public provocation, recruitment and training for terrorism.

## 2. TRANSPOSITION BY MEMBER STATES

### 2.1. Criminalisation of the new offences of public provocation, recruitment and training for terrorism

Most Member States have criminalised public provocation, recruitment and training for terrorism, even if in some cases the scope of the provisions is more limited than intended by FD 2008.

Most Member States had to adopt specific provisions since the preparatory or inchoate behaviour had not been explicitly criminalised and did not fall under the general provisions relating to participation and attempt. Subsequent to the adoption of the 2005 Council of Europe Convention on the Prevention of Terrorism, a number of Member States had already adopted measures to criminalise the three new offences (**DK, EE, IT, LV, MT, FI and UK**).<sup>13</sup> Only a small number of Member States claimed that existing general provisions would cover the conduct in question.

Most Member States transposed FD 2008 by amending or introducing provisions in the Criminal Code, while a smaller number adopted or amended special acts on combating terrorism (**IE, CY, PT, RO, SE, UK**), or relied on other acts, such as the Press Law of 1881 (**FR**).<sup>14</sup>

Of those needing to adopt new measures, a relatively small number did so within the prescribed timeframe (**DE, ES, CY, NL, SI, SK, SE**). The other Member States transposed FD 2008 only in 2011 (**BG, CZ, AT, PL, PT**), 2012 (**FR, LU, RO**) or 2013 (**BE, HR, LT, HU**). Two Member States have not yet adopted the necessary legislation (**IE, EL**).<sup>15</sup>

#### 2.1.1. Public provocation

Article 3(1)(a) of FD 2002 as amended defines public provocation as "*...the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether*

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<sup>12</sup> See first implementation report of 8 June 2004 (COM(2004) 409 final and SEC(2004) 688) and second implementation report of 6 November 2007 (COM(2007) 681 final and SEC(2007) 1463). It results from these implementation reports that there are shortcomings as regards the implementation of the provisions relating to core terrorist offences (see Article 1 FD 2002), the liability of legal persons (see Articles 7 and 8 FD 2002) as well as the jurisdictional rules (see Articles 9 and 10 FD 2002).

<sup>13</sup> All Member States (except **CZ**) have signed the Convention. A number of Member States have not yet ratified it (**BE, CZ, IE, EL, IT, LT, MT, PT, UK**).

<sup>14</sup> For a detailed overview of the legislative measures Member States adopted, see table 1 of the Commission Staff Working Document (SWD(2014)xxx).

<sup>15</sup> The Irish Government submitted the Criminal Justice (Terrorist Offences) (Amendment) Bill 2012 and informed the Commission of its forthcoming submission to Parliament. The description in this report is based on that Bill. The Greek Government informed the Commission of the preparation of a Bill titled 'Ratification of the European Convention for the Prevention of Terrorism and the Protocol amending the European Convention on the suppression of terrorism and related legislation', but it did not submit this Bill.

*or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed;..."*

Less than half of Member States have adopted specific provisions explicitly criminalising the dissemination of messages to the public with a view to inciting terrorist offences, closely aligned to the wording of FD 2008 (**BE, DE, IE, ES, HR, CY, LU, RO, SI, FI, UK**). The remaining Member States chose to rely on provisions criminalising in more general terms 'provocation' (**BG, DK, MT, PL, PT, SK, SE**), 'incitement' (**EE, FR, IT, LV, LT, HU**) or the facilitation or support of terrorist offences (**CZ, NL, AT, PL**).

Relying on provisions which relate in more general terms to public incitement or provocation instead of relying on the mere intent to incite terrorist offences as required by FD 2008 risks criminalising only 'direct provocation'<sup>16</sup>, instead of 'indirect provocation' merely causing a danger that one or more offences be committed (**BG, EE, FR** where the provision is explicitly limited to direct provocation, **IT, LT, HU, MT**). 'Indirect provocation' may still be covered if the national provisions actually cover preparatory or facilitating behaviour (as this seems to be the case in **CZ, EE, NL, AT, PL, PT**), capture behaviour that merely causes a danger of a terrorist offence being committed (as this seems to be the case in **LV, AT, SK**) irrespective of the terrorist offences being committed or attempted (**CZ, SE**) or are applied by the national courts to behaviour that can be qualified as indirect provocation (as it seems to be the case in **DK**).

Some Member States clarify explicitly that public provocation is punishable irrespective of whether a person has actually been encouraged (e.g. **UK**) or whether the terrorist offence has actually been committed (e.g. **IE, CY, LU**) and also in cases in which the behaviour encourages terrorist offences generally (**UK**).

Some Member States criminalise not only provocation to commit terrorist offences, but also provocation to prepare and instigate such offences (**UK**) or incitement to train or be trained (**RO**). Some Member States criminalise not only the act of disseminating but also the act of obtaining or possessing material intended for terrorist propaganda purposes (**DE, UK**). While most Member States criminalise only intentional behaviour, in at least one Member States reckless behaviour is also criminalised (**UK**). Finally, some Member States have introduced more specific offences, such as the offence of public dissemination of terrorist propaganda in addition to the offence of encouragement of terrorism (**UK**), public glorification, promotion or approval of terrorism (**DK, ES, LT, AT, SI, SK**) or humiliation and contempt of victims of terrorism (**ES, LT**). On the other hand, in some cases, not all terrorist offences listed in Article 1 of FD 2002 seem to be covered (**DE**).

### *2.1.2. Recruitment for terrorism*

Recruitment for terrorism is defined in Article 3(1)(b) as amended as "*soliciting another person to commit one of the offences listed in Article 1(1)(a) to (h), or in Article 2(2)...*".

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<sup>16</sup> 'Direct provocation' describes cases in which incitement has resulted in a person committing or at least attempting to commit a terrorist offence, and in which incitement related to a specific terrorist offence.

Most Member States have adopted specific provisions criminalising the act of soliciting another person to commit a terrorist offence and to participate in the activities of a terrorist group. Recruitment to carry out terrorist offences (within the meaning of Article 1 of FD 2002) and recruitment into a terrorist group (within the meaning of Article 2 of FD 2002) are part of one and the same provision in just under half of Member States (**BE, CZ, DK, ES, HR, LT, LU, HU, NL, SI, FI**). Several other Member States have separate provisions for both forms of recruitment (**DE, FR, AT, UK**). In some Member States, only recruitment to carry out terrorist offences appears to be punishable, and not recruitment to take part in the activities of terrorist groups as defined in Article 2(2) of FD 2002 (**BG, EE, IE, MT, PT, RO, SK, SE**, doubtful in **CY** and **LV** whether reference to terrorist acts captures also participation in a terrorist group).

Of the Member States that introduced new specific provisions to cover the new offences, few used the term 'solicit' in their definition of recruitment (**HR, LU, SK** 'request', **MT**: 'solicit' or 'recruit'). Most Member States appear to have chosen the term 'recruit' (**BE, BG, DE, EE, IE, IT, ES, LV, LT, MT**: 'solicit' or 'recruit', **PT, RO, SI**: 'conscription', **FI**) or other terms such as 'seek to induce' (**SE**), 'inciting' and 'provoking' (**NL**), 'instigation' (**HU**) or 'encouragement' (**CY**). In some Member States, it is argued that the term 'recruit' would require some sort of plan or minimum institutional framework to which the recruited person is supposed to adhere to (**PT**). This may raise doubts as to whether encouraging a 'lone actor' to commit terrorist acts is actually criminalised under the national provisions.

While most Member States refer to recruitment (or synonyms) in general terms, a small number specify in more detail the punishable behaviour (in **FR** the definition refers to offering gifts and other benefits to threaten or pressure a person to commit a terrorist offence). This may unduly restrict the scope of the provision in that it could not cover cases where a person is encouraged in other ways.

Few Member States clarify explicitly that recruitment is punishable even if the person does not consent to committing the terrorist offence (**CY, LU**).

Some Member States invoke existing or general provisions covering various forms of participation in a terrorist offence (e.g. **CZ, AT**), facilitation of a terrorist offence (e.g. **PL**), support to a terrorist group (e.g. **CZ, DE, AT**), incitement to commit terrorist offences or to belong to a proscribed group (e.g. **UK**), attempted participation, conspiracy (**DE, FR**: '*association de malfaiteurs*') or other preparatory activities (e.g. **HU, UK**). A potential risk is that provisions relating to the support of terrorist organisations or the participation in a conspiracy do not capture recruitment of "lone actors" (e.g. **CZ, DE, FR, UK**). This may become a concern if no other provision criminalises this behaviour. The reliance on general provisions may also raise doubts as to whether inchoate offences are actually criminalised. This will depend on the interpretation and application of concepts such as the facilitation of or preparatory acts to terrorist offences.

While in some cases, recruitment would not seem to cover all offences listed in Art 1 (1)(a) to (h) of FD 2002 (**IT**), other Member States criminalise not only recruitment to commit a terrorist offence but also recruitment to facilitate (**DK**), prepare (**FI**) or participate (**LT, SI**,



**SK**) in the terrorist offence. In some Member States, the definition of recruitment extends to terrorist financing (**DK**). In certain Member States, any person who is aware that his or her activity promotes terrorist offences can be punished (**FI**). Lastly, some countries also criminalise allowing oneself to be recruited (e.g. **DK**).

### 2.1.3. *Training for terrorism*

Training for terrorism is defined in Article 3(1)(c) as amended as '*providing instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of committing one of the offences listed in Article 1(1)(a) to (h), knowing that the skills provided are intended to be used for this purpose.*'

Most Member States have adopted specific provisions explicitly criminalising the instruction in methods and techniques for the purpose of committing terrorist offences drafted closely aligned to the wording of FD 2008 (**BE, DE, IE, HR, IT, CY, LU, MT, AT, PT, RO, SI, SK, FI, SE, UK**).

Some Member States refer in more general terms to 'training for committing terrorist offence' (**BG, DK, EE, ES, LV**) or to the 'provision of information, knowledge and skills for committing a terrorist offence' (**LT, NL**), without mentioning the specific skills listed in Article 3 of FD 2008 (even if, in some cases, additional clarifications appear to be given in explanatory notes to the law; e.g. **DK**).

To the extent that Member States rely on existing general provisions on participation, preparation, facilitation or support of terrorist offences (**CZ, HU, PL**), it is unclear whether national law criminalises the provision of training in cases in which no terrorist offence has been committed or attempted. This will ultimately depend on the interpretation and application of these concepts in national law. Furthermore, it is unclear whether the concept of conspiracy " (e.g. '*association de malfaiteurs*' in **FR**) encompasses the mere dissemination of training material with no established links to a terrorist group.

Most Member States criminalise both instruction and training (e.g. **BE, DK** also referring to 'teaching', **IE, IT, MT, AT, PT, RO, UK**), while some refer only to training (**BG, EE, ES, LV, FI**) or some form of instruction (**DE, HR** and **CY**: 'providing guidance', **LU, NL**: 'providing information' and 'teaching', **SI, SK**: 'providing expertise', **SE**). Whilst the term 'training' could be understood to imply some kind of relationship between the trainer and the trainee, 'instruction' would cover the dissemination of information for self-instruction (e.g. **IT, AT**).

Some national provisions provide further clarifications, for example, that training is punishable if provided to one or more particular persons (**BG, UK**) or generally (**UK**) or that the skills may be used for already specified acts of terrorism or terrorism offences generally (**UK**) or that training is punishable even if the trainee will not carry out or participate in a terrorist attack (**DK, LU**).

Intent is usually required for the actions to constitute an offence, but in some Member States, awareness that the instruction given encourages people to commit terrorist offences (**FI**) or

negligence (**UK** in relation to attendance at training camps) are sufficient. In other cases, the required intent seems to be presumed with the defendant bearing the burden of proof that giving or receiving instruction or training was done lawfully (**IE, UK**).

While in some Member States, terrorist offences for which training is provided do not include all the offences enumerated in Article 1(1) of FD 2002 (e.g. **DE, IT**), other Member States go beyond the requirements, by stipulating, for example that training is criminalised also in relation to the financing of terrorism (**DK**) or when the skills are to be used by a terrorist organisation (**CY**). In some Member States, training is not only punishable if provided with the purpose of committing a terrorist offence but also with the purpose of participating in such acts (**SI**) or of committing crimes with the objective of preparing or facilitating a terrorist crime (**NL, FI, UK**) or assisting the commission or preparation by others of terrorist acts (**UK**). Furthermore, several Member States criminalise the act of receiving training or instruction, also referred to as 'passive training' (**BE, DK, DE, IE, NL, AT, RO, UK**). Some Member States have adopted additional specific provisions criminalising the attendance at training camps (e.g. **UK**).

## **2.2. Ancillary offences**

### *2.2.1. Aiding and abetting*

Article 4(1) of FD 2002 as amended requires Member State to take the necessary measures to ensure that aiding or abetting the new offences as defined in Article 3 is made punishable. Almost all Member States have criminalised aiding and abetting of the new offences. In most Member States, general provisions on aiding and abetting are automatically applicable to the new offences. Only **CY** has explicitly stated in the relevant provisions that aiding and abetting of the new offences is not an offence.

### *2.2.2. Attempt*

Article 4(4) of FD 2002 as amended gives Member States the option to criminalise attempted training or recruitment to terrorism. In most Member States the general rules on attempt apply without further distinction or qualification to all crimes or offences and thus also the new terrorist offences. As a result, most Member States have criminalised attempt to recruit and train a person for terrorist purposes and attempted public provocation (**BE, BG, CZ, EE, ES, HU, LV, LT, MT, NL, AT, PL**). In some Member States, jurisprudence would however appear to consider that general provisions on attempt are not applicable to inchoate offences (e.g. **IT**).

In certain Member States, attempt is only punishable in the case of felonies, criminal offences, crimes with certain minimum sanctions and not in the case of less serious offences. While in some Member States all three new offences are classified as such crimes (**DK, HR, PT**), in others, they are not. Attempt is therefore not punishable (**DE; SI** doubtful).

In other Member States, attempt is punishable if specifically provided for. Some Member States have explicitly criminalised attempt to commit any of the three new offences (**IE, SE, UK**). Some have criminalised only attempt to train and recruit a person for terrorist purposes

(LU, SK, FI) and others do not criminalise attempt (CY: explicitly excluding the punishability of attempt of the new offences, RO).

### 2.3. Penalties for natural persons

The level of penalties vary significantly between Member States.<sup>17</sup> The minimum term for imprisonment ranges from below one year to up to 20 years. Similarly, the maximum term varies between two and 25 years or life imprisonment. Fines can be an alternative (DK, DE, IE, LU, NL, UK) or an additional penalty to imprisonment (BE, IE, FR, LU, UK).

Over half of Member States impose the same penalty for all three new offences (BE, BG, CZ, EE, IE, HR, LU, HU, MT, PL, SI, SK, SE). In Member States with different penalties for the three new offences, the penalties for public provocation are in general lower than for the other two offences (DK, DE, ES, IT, CY, LV, LT, PT, RO, FI, UK).

Where Member States criminalise being recruited or receiving training or instructions as well as recruiting and giving training or instructions, in most cases the same penalty range is applied (DK, DE, IE, NL, AT). In other cases, taking part in training is criminalised carrying a lower penalty than providing the training (RO). Similarly, where Member States have criminalised not only the dissemination, but also the act of obtaining or possessing terrorist propaganda, the same penalties apply for both offences (DE, UK). Where a distinction is made between provocation and the apology/glorification of terrorism, some Member States provide for lower penalties for apology of terrorism (DK, ES), whereas other Member States apply the same penalty (DK, AT, SI, SK, UK). Where Member States criminalise training and instruction, in most cases the same penalty is applied to both. In other Member States however the penalty for instruction is lower than the penalty for training (AT). Several Member States apply different penalties depending on whether recruitment is done on behalf of a terrorist group, in which case higher penalties can be imposed (DK, HU, AT).

## 3. CONCLUDING REMARKS

Most Member States have adopted measures designed to criminalise public provocation, recruitment and training for terrorism in accordance with FD 2008. The Commission notes that two Member States (IE and EL) have not yet implemented the FD 2008 and urges them to adopt the necessary legislative measures without further delay. While most Member States are broadly in compliance with FD 2008, there are a number of potential concerns in particular in relation to the criminalisation under national provisions of 'indirect provocation' and recruitment of 'lone actors'. Member States are invited to provide the Commission with additional explanations and information to allow it to complete its assessment.

Discussions on the impact of counter terrorism legislation on fundamental rights had taken place mostly in relation to the adoption of measures implementing FD 2002 and to a lesser

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<sup>17</sup> For a detailed overview of the applicable penalties, see table 2 of the Commission Staff Working Document.

extent in relation to the new offences<sup>18</sup>. While fundamental rights concerns may play a role in the interpretation and application of the national provisions establishing the three new offences, they do not appear to have made it necessary to limit the scope of the relevant legal provisions under national law.<sup>19</sup>

The Commission notes that stakeholders advocate enhanced exchanges of experiences and practices between prosecutors and judges and see the need to integrate law enforcement efforts into a more comprehensive approach which should include early prevention of radicalisation and recruitment to terrorism.

The Commission encourages Member States to monitor and evaluate the application of criminal law provisions on terrorism in practice. In doing so, consideration should be given to the protection of fundamental rights as well as the broader policy approach of tackling radicalisation and recruitment to terrorism.

The Commission will continue to monitor the effectiveness and impact of the Framework Decision on terrorism.

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<sup>18</sup> Discussions related to *inter alia* issues of legal certainty, the respect of the principle of proportionality of sanctions for offences of a preparatory nature and the potential tension between freedom of speech and the offence of public provocation.

<sup>19</sup> In their notifications to the Commission, Member States did not invoke Article 2 or 3 of FD 2008 in order to limit the scope of the new terrorist offences or maintain fundamental rights concerns as a reason not to implement the new offences.