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NOTE

From: Presidency
To: Delegations

Subject: Lunch Discussion paper "Combating antisemitism by means of criminal law"

Delegations will find attached a Discussion paper on 'Combating antisemitism by means of criminal law' for the Working Lunch of the Justice Ministers on 7 December 2018.

Justice Council

Lunch Discussion paper

“Combating antisemitism by means of criminal law”

7 December 2018

The European Union and its Member States are expressly committed to combating antisemitism and all forms of racism, xenophobia, as well as other forms of intolerance and discrimination.

The unanimously adopted **Framework Decision 2008/913/JHA of the Council on combating certain forms and expressions of racism and xenophobia by means of criminal law**¹

(hereinafter 'the Framework Decision') is an important instrument in this context. It is based on the premise that racism and xenophobia are in direct violation of the principles of freedom, democracy, respect for human rights and fundamental freedoms and the rule of law upon which the European Union was founded and which are common to all Member States. The Framework Decision requires the Member States to prosecute especially serious forms of racism and xenophobia under criminal law, in particular in the context of two criminal offences, commonly called racist or xenophobic “hate speech” and 'hate crime'.²

In its **report³ on the implementation of the Framework Decision** of 2014, the Commission evaluated the extent to which the Member States have implemented all provisions of this legal act. The report essentially concluded that some Member States have not yet completely and/or properly implemented all provisions of the Framework Decision, in particular concerning the act of denying, approving or grossly trivialising genocide, crimes against humanity and war crimes directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.

¹ OJ L 328 of 6 December 2008, p. 55.

² These terms are not used in the Framework Decision, however.

³ COM(2014) 27 final.

The Commission emphasised that it considered the complete and proper legal implementation of the Framework Decision to be the first step towards effectively and uniformly combating racism and xenophobia by means of criminal law in the entire European Union. In conclusion, the Commission announced the start of bilateral discussions in 2014 with all Member States to ensure a complete and proper implementation of the Framework Decision, with due consideration of the Charter of Fundamental Freedoms, and especially of freedom of expression and association.⁴

In November 2018, the 'EU High-Level Group on combating racism, xenophobia and other forms of intolerance' established in 2016 published a **Guideline for a Practical Application of the Framework Decision**. This guideline aims to promote a common understanding of the provisions of the Framework Decision with regard to effectively implementing domestic implementation measures and thus supporting the Member States with the practical application of the Framework Decision.

Indeed, reports by FRA, international bodies and civil society show that gaps remain in terms of ensuring that instances of hate speech are promptly detected, investigated and prosecuted, and that any alleged racist motive associated with a crime is unmasked and inquired upon as from a very early stage of the investigation, and effectively taken into account by the judicial authorities throughout criminal proceedings, until the moment a decision is handed down by a prosecutor or a judge.

The **denial of the Holocaust** is prosecuted in **Austria, Belgium, France, Germany, Italy, Israel, Liechtenstein, Lithuania, Latvia, Luxembourg, Poland, Romania, Slovenia, Spain and the Czech Republic**. The details vary considerably with regard to the criminal acts and the scope of application (in some cases only National Socialist crimes against humanity are covered, in others – mainly in States which were previously governed by Communist regimes – they also cover Communist crimes, while in others all crimes against humanity are covered).

⁴ Pursuant to Article 10 of Protocol No. 36 to the Lisbon Treaty, infringement proceedings for framework decisions were not possible prior to 1 December 2014.

The criminal offence of **hate speech** exists in all Member States, with considerable variations, as with the **aggravating factor** of acting for racist, xenophobic or similar motives. This follows from the obligation to implement the Framework Decision 2008/913/JHA, and partly from the very fact that 17 Member States have already ratified the Additional Protocol to the Convention on Cybercrime.

Difficulties in combating hate speech and Holocaust denial mainly emerge in cross-border judicial cooperation. Public prosecutors increasingly report problems when requesting information from social media providers in proceedings against perpetrators of such criminal acts. Also, in purely domestic cases, social media providers frequently request letters rogatory for the purpose of investigating the authors of punishable content. Such letters rogatory are rejected by certain States with reference to constitutional guarantees of freedom of speech or freedom of the media.

It should be pointed out in this context that infringing the right of free expression is only permitted to the extent necessary in a democratic society. From this point of view, however, the punishment of Holocaust denial or the use of Nazi symbols has been considered permissible by various judgments (ECtHR *Nix vs Germany*, No. 35285/16, UNHRC Communication No. 550/1993 *Robert Faurisson v. France*). Cross-border prosecution of hate-speech and holocaust denial should therefore not be rendered impossible owing to guarantees of fundamental rights. Europe-wide measures should be taken to eliminate the difficulties in cross-border cooperation.

Data recorded by those Member States who collect official data,⁵ as well as the second wave of the FRA survey on discrimination and hate crimes against Jewish people in the EU⁶ demonstrate a worrying increase in the number of manifestations of hate speech, hate crimes, racism, xenophobia and intolerance in Europe affecting minorities and other vulnerable groups, including Jewish people.

⁵ <http://fra.europa.eu/en/publication/2018/hate-crime-recording>

⁶ <http://fra.europa.eu/en/publication/2018/2nd-survey-discrimination-hate-crime-against-jews>.

Moreover, an online survey conducted in September 2018⁷ showed that the knowledge of the Holocaust is still very low (a third of the persons surveyed indicated that they knew only a little or nothing at all about the Holocaust). 40 % of the participants voiced the view that Jews were subject to the risk of racist violence, and half of the participants were of the opinion, that the governments should do more to combat anti-Semitism. A French study came to similarly alarming results.⁸ Also, a Conference held in November 2018 in Vienna on the subject 'Europe beyond anti- Semitism and anti- Zionism – securing Jewish life in Europe' demonstrated the need for Europe-wide measures.

For these reasons, Ministers are invited to reply to the following questions:

- **Does your Member State share the view of the Presidency that there is a need for action to enhance the fight against antisemitism by means of criminal law?**
- **Which measures should be taken for this purpose?**

⁷ <http://www.comresglobal.com/polls/cnn-anti-semitism-in-europe-poll-2018/>.

⁸ <http://www.faz.net/aktuell/politik/ausland/antisemitismus-in-frankreich-fast-70-prozent-mehr-uebergrieffe-15882247.html>.