



**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

DROIPEN 4

OUTCOME OF PROCEEDINGS

of : Working Party on Substantive Criminal Law

on : 23 and 24 January 2002

No. prev. doc. : 14904/01 DROIPEN 105 (COM (2001) 664 final)

Subject : Proposal for a Council Framework Decision on combating racism and xenophobia

On 30 November 2002 the Council received a Commission proposal for a Council Framework Decision on combating racism and xenophobia.

By letter dated 21 December 2001, the Council invited the European Parliament to give its Opinion on the proposal by 16 May 2002.

At its meeting on 23 and 24 January 2002, the Working Party on Substantive Criminal Law began examining the proposal on the basis of 14904/01 DROIPEN 105.

In presenting its proposal, and citing the explanatory memorandum in DROIPEN 105, the Commission pointed out that one of the main objectives of the proposal was to build on and strengthen the Council Joint Action of 15 July 1996 concerning action to combat racism and xenophobia. It also highlighted a number of other aspects mentioned in the explanatory memorandum, such as, for example, the two Directives adopted on the basis of Article 13 TEC, the activities of the European Monitoring Centre on Racism and Xenophobia, the work carried out by the Council of Europe, and international legislation on racism and xenophobia.

The Working Party then held an initial exchange of views on the proposal.

Broadly speaking, and subject to a more detailed examination, most delegations welcomed the proposal. However, several delegations noted that while combating racism was important, a balance needed to be maintained between the criminalisation of racist and xenophobic acts and fundamental rights such as freedom of expression, freedom of the press and freedom of assembly. A number of delegations were surprised that the proposal made no reference to "discrimination" (see Title I, point A(a) of the 1996 Joint Action).

The United Kingdom delegation entered a reservation on the proposal, since it was not convinced of the need for a Framework Decision. In its view, the proposal covered broadly the same ground as the 1996 Joint Action. The new development concerned the penalties, which, however, had been set at a low level and did not necessarily represent an advance. Conclusion 48 of the Tampere European Council on 15 and 16 October 1999, which dealt with common definitions, incriminations and sanctions, contained no reference to racist and xenophobic acts. The United Kingdom delegation stressed that its reservation concerned the substance of the proposal and that the issues addressed were extremely sensitive in the light of its national laws on freedom of expression and assembly, and national traditions as to which matters should come under the scope of criminal law and which should be regulated by other means. It referred to the Declaration by the United Kingdom in the Annex to the 1996 Common Action.

The Danish delegation expressed doubts regarding the need for the proposal, and stated that it was examining the question of which matters should be regulated at national level and which could usefully be regulated at EU level.

The Commission pointed out that, although racism and xenophobia were not mentioned in Tampere Conclusion 48, they were explicitly covered by Article 29 TEU. A genuine common policy on racism and xenophobia should in its view be established at EU level, as envisaged in the 1999 Vienna Action Plan.

After this general discussion, the Working Party started its examination of the proposal with Articles 1 to 4. The text of these Articles as it emerged from the discussions (with delegations' comments shown in the footnotes) is set out in the Annex.

The Chairman of the Working Party reminded the meeting that a questionnaire on the implementation of the 1996 Joint Action (to which delegations had been asked to respond by 15 February 2001) had been circulated in December 2000, and asked the two delegations which had not yet replied to it to do so as soon as possible. All the replies would be made available to the delegations.

Proposal for a

COUNCIL FRAMEWORK DECISION

on combating racism and xenophobia

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 29, 31 and 34(2)(b) thereof,

Having regard to the proposal from the Commission ¹,

Having regard to the Opinion of the European Parliament ²,

Whereas ³:

- (1) Racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States.

¹ OJ C...

² OJ C...

³ The recitals have not yet been examined.

- (2) The Action Plan of the Council and the Commission on how to best implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice ¹, the Conclusions of the Tampere European Council of 15 and 16 October 1999 ², the European Parliament in its resolution of 20 September 2000 ³ and the Commission's Communication to the Council and the European Parliament on the biannual update of the Scoreboard ⁴ to review progress on the creation of an area of "freedom, security and justice" in the European Union (second half of 2000) call for action in this field.
- (3) Joint Action 96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union ⁵, concerning action to combat racism and xenophobia needs to be followed by further legislative action addressing the need for further approximation of law and regulations of Member States and for overcoming obstacles for efficient judicial cooperation which are mainly based on the divergence of legal approaches in the Member States.
- (4) According to the evaluation of the 1996 Joint Action and work carried out in other international fora, such as the Council of Europe, some difficulties have still been experienced regarding judicial cooperation and therefore there is a need for further improvement of Member States' criminal laws in order to ensure the implementation of a comprehensive and clear legislation to combat racism and xenophobia effectively.

¹ OJ C 19, 23.1.1999, p. 1.

² <http://ue.eu.int/en/Info/eurocouncil/index.htm>.

³ OJ C 146, 17.5.2001, p. 110.

⁴ COM(2000) 782 final.

⁵ OJ L 185, 24.7.1996, p. 5.

- (5) It is necessary to define a common criminal law approach in the European Union to this phenomenon of racism and xenophobia in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties and sanctions are provided for natural and legal persons having committed or being liable for such offences.
- (6) Racist or xenophobic motivation should be taken into account as an aggravating factor when imposing penalties for ordinary offences. This would constitute a direct response to perpetrators of such offences and have a deterrent effect.
- (7) An offence concerning racism and xenophobia committed in the exercise of a professional activity, should be considered as an aggravating circumstance since it entails an abuse and is particularly reprehensible.
- (8) It should be ensured that investigations and prosecutions of offences involving racism and xenophobia are not dependent on reports or accusation made by victims, who are often particularly vulnerable and reluctant to initiate legal proceedings.
- (9) Judicial cooperation in criminal matters should be promoted to combat more effectively racist and xenophobic offences by establishing clear rules on jurisdiction and extradition.
- (10) Operational contact points should be established for the exchange of information or adequate use should be made of existing cooperation mechanism.

- (11) All Member States have ratified the Council of Europe Convention of 28 January 1981 for the protection of individuals with regards to automatic processing of personal data. The personal data processed in the context of the implementation of this Framework Decision will be protected in accordance with the principles of the said Convention.
- (12) Since the objectives of ensuring that racism and xenophobia be sanctioned in all Member States by effective, proportionate and dissuasive criminal penalties and improving and encouraging judicial cooperation by removing potential obstacles, cannot be sufficiently achieved by the Member States individually, as rules have to be common and compatible, and can therefore better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as referred to in Article 2 of the EU Treaty and as set out in Article 5 of the EC Treaty. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.
- (13) This Framework Decision is without prejudice to the powers of the European Community.
- (14) Joint Action 96/443/JHA should be repealed since with the adoption of the Treaty of Amsterdam, of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ¹ and of this Framework Decision, it has become obsolete.

¹ OJ L 180, 19.7.2000, p. 22.

(15) This Framework Decision respects the fundamental rights and observes the principles recognised in particular by the European Convention on Human Rights, in particular Articles 10 and 11 thereof, and by the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof.

(16) This Framework Decision lays down provisions for approximation of laws and regulations of the Member States and for closer cooperation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia,

HAS DECIDED AS FOLLOWS:

Article 1 – Subject-matter

(deleted) ¹

Article 2 – Scope

(deleted) ²

¹ On the basis of delegations' comments, Article 1 was deleted and transferred to a new recital (No 16). The Commission would have preferred to keep the text in an Article for reasons of good legislative practice.

² The Working Party agreed to delete Article 2 on the grounds that it was superfluous and could give rise to confusion, particularly in relation to Article 12. The Commission would have preferred to retain the Article for reasons of good legislative practice.

Article 3 – Definitions

For the purposes of this Framework Decision, the following definitions shall apply:

- [(a) "*racism and xenophobia*" means the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups;]¹

- (b) "*racist or xenophobic group*" means as a structured organisation established over a period of time, of more than two persons, acting in concert to commit offences referred to in Article 4, paragraphs (a) to (e);²

- [(c). "*legal person*" means any entity having such status under the applicable law, except for States and other public bodies in the exercise of State authority and for public international organisations.]³

¹ Most delegations would prefer to delete (a) and include all aspects of punishable conduct directly under Article 4.

² Point (b) goes together with Article 4(f). A number of delegations (F/DK/UK/NL/EL/I) expressed misgivings about point (b). Some of them considered that it should be deleted and incorporated into Article 4(f), while others (NL/EL) wanted the deletion not only of point (b) but also of Article 4(f).

³ The Chairman of the Working Party pointed out that in the negotiations on the draft Framework Decision on combating terrorism, the definition of legal persons had been considered superfluous and was therefore deleted. The Working Party agreed to return to the matter of whether to delete point (c) on another occasion.

*Article 4 – Offences concerning racism and xenophobia*¹

Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence:

- (a) public incitement to violence or hatred for a racist or xenophobic purpose or to any other racist or xenophobic behaviour which may cause substantial damage to individuals or groups concerned;
- (b) public insults or threats towards individuals or groups for a racist or xenophobic purpose;
- (c) public condoning for a racist or xenophobic purpose of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court;

¹ A number of delegations argued that discrimination should be included and expressed a preference for the wording of Title I, point A(a) of the 1996 Joint Action. The United Kingdom delegation wanted the test to include the substance of the United Kingdom declaration attached to the 1996 Joint Action (the relevant behaviour should be threatening, abusive or insulting and be carried out with the intention of stirring up racial hatred or likely to do so). The Commission explained that discrimination had not been included because it was now covered by Article 13 TEC. A number of delegations entered scrutiny reservations and others requested the deletion of point (f). The Working Party agreed to continue its examination of Article 4 at a forthcoming meeting.

- (b) public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 in a manner liable to disturb the public peace;
 - (e) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;
 - (f) directing, supporting of or participating in the activities of a racist or xenophobic group, with the intention of contributing to the organisation's criminal activities.
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