



**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

DROIPEN 71

NOTE

from : Presidency
to : Article 36 Committee

No. prev. doc. : 12221/02 DROIPEN 63
No. Cion prop. : 14904/01 DROIPEN 105 (COM(2001) 664 final)

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

During its meeting on 3 and 4 October 2002, the Working Party on Substantive Criminal Law continued its examination of the above proposal on the basis of 12221/02 DROIPEN 63.

The proposal was subject to a general reservation by the Italian delegation. It was subject to parliamentary reservations by the United Kingdom, French, German, Swedish, Netherlands and Irish delegations.

The Commission has maintained its reservation concerning the legal basis of the instrument, as it considers that the discrimination, covered by Article 1 (a) of the instrument, should be dealt with in a first pillar instrument.

Concerning Article 1 a number of Member States find the obligation to criminalize in article 1 too wide and unclear. Some Member States have indicated that the words “at least when threatening, abusive or insulting” in the chapeau of Article 1 help clarify the scope of this Article and some Member States have indicated that a provision enabling Member States to exclude certain specified conduct from criminal liability is necessary.

Other Member States have only been able to accept the broad scope of Article 1 combined with the possibility to apply their constitutional rules and fundamental principles relating to certain freedoms and national legislation governing the rights and responsibilities of the press.

On this background Article 1, 6 bis and 6 ter are to be seen as a global compromise between those Member States, who want a wide scope of the provision in Article 1 on which conduct Member States are to criminalize, but wish to apply their constitutional rules and fundamental principles relating to certain freedoms and national legislation concerning the rights and responsibilities of the press and those Member States who want to clarify and to a certain extent narrow down the scope of Article 1.

On the basis of comments made during the meeting, the Presidency has prepared the revised text in the Annex for future discussions. Changes are underlined as compared to 12221/02 DROIPEN 63.

The Article 36 Committee is invited to examine the parliamentary scrutiny reservations by certain delegations, the global compromise in Articles 1, 6 bis and 6 ter and the reservations set out in the Annex with a view to reaching an agreement on the draft.

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.
- (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.

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.

- (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.
- (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,

¹ OJ L 180, 19.7.2000, p. 22.

HAS DECIDED AS FOLLOWS:

(...)¹

Article 1²

Offences concerning racism and xenophobia

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable, at least when threatening, abusive or insulting³:

- (a) public incitement to discrimination⁴, violence or hatred in respect of a group of persons or a member of such a group defined by reference to race, colour, descent⁵ or national or ethnic origin;
- (b) the commission of an act referred to in point a) by public dissemination or distribution of tracts, pictures or other material;

¹ Article X, concerning the definition of a "legal person", has been moved to Article 5.

² The ES delegation preferred a broader scope of the Framework Decision, including e.g. discrimination based on sexual inclination, religion or belief, illness, etc.

³ The Presidency's compromise was acceptable to all delegations except the FR and LUX delegations and COM, which introduced reservations on it.

⁴ Reservation by COM.

⁵ It has been agreed to add a recital specifying that the word "descent" shall be interpreted in accordance with note 19 of the explanatory report to the additional protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems in order to allow the IT and IRL delegations to lift their scrutiny reservations as to keeping the word "descent" in the text.

- (c) public condoning 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 at least when¹ recognised as such by a final and binding decision by a competent court, directed against a person or a group of persons defined by reference to race, colour, descent or national or ethnic origin;
- (d) public denial or gross 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 at least when recognised as such by a final and binding decision by a competent court, directed against a person or a group of persons defined by reference to race, colour, descent or national or ethnic origin.

2. Each Member State shall take the necessary measures to ensure that the acts referred to in paragraph 1 are punishable when directed against a group of persons or a member of such a group defined by reference to religious conviction where this is a pretext for directing the acts against the groups of persons or members of such groups referred to in paragraph 1².

¹ Concerning Article 1(1) (c), the B, FR, ES and LUX delegations and COM maintained their reservation as they thought Member States should be obliged to prosecute the condoning of the acts referred to in this provision even where these acts were not recognized as genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court by an international court.

² Reservation by the FR delegation, which thought that "religious convictions" should be included in paragraph 1(a), (c) and (d). The FR delegation wanted the acts referred to in Article 1 (1) when a group of persons is defined by reference to religious conviction to be punishable even if the acts were not motivated by racism or xenophobia. This would imply a widening of the scope of the Framework Decision and the deletion of paragraph 2.

Article 2

Aiding and abetting

Each Member State shall take the measures necessary to ensure that aiding and abetting in the commission of the conduct referred to in Article 1 is punishable.

Article 3

*Sanctions*¹

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 1 and 2 is punishable by criminal penalties of a maximum of at least [one to three years] [two to five years] of imprisonment².

¹ The B delegation and COM called for the reintroduction of Article 3 paragraph 3 of DROIPEN 49 (ancillary or alternative sanctions), corresponding to Article 6(4) of the initial proposal in DROIPEN 105.

² Most delegations expressed a preference for a penalty level of at least 1 to 3 years in Article 3. 7 delegations (NL, GR, D, FIN, ES, IT, B) expressed a wish to delete the reference to Article 2.

Article 4¹

Racist and xenophobic motivation

For offences other than those referred to in Articles 1 and 2, Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating factor, or, alternatively, that such motivation may be taken² into consideration by the courts in the determination of the penalties.

Article 5

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for the conduct referred to in Articles 1 and 2, committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- (a) a power of representation of the legal person, or
- (b) an authority to take decisions on behalf of the legal person, or
- (c) an authority to exercise control within the legal person;

¹ Scrutiny reservation by the NL, GR and UK delegation. The UK delegation proposed the deletion of the second part of the sentence (starting by "or, alternatively, ..."). Reservation by COM.

² COM proposes to replace the words "may be taken" by "is taken".

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of the conduct referred to in Articles 1 and 2 for the benefit of that legal person by a person under its authority.¹

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators (...) or accessories in the conduct referred to in Articles 1 and 2.

4. "legal person" means any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations.

Article 6

Sanctions for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

- a) exclusion from entitlement to public benefits or aid;
- b) temporary or permanent disqualification from the practice of commercial activities;
- c) placing under judicial supervision;
- d) a judicial winding-up order;

¹ Scrutiny reservation by the UK delegation on Article 5 paragraph 2. The UK delegation questioned if there is any need in practice for this provision.

2. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(2) is punishable by effective, proportionate and dissuasive sanctions or measures.¹

*Article 6bis*²

Provided that at least one person can be held liable this Framework Decision shall not prevent any Member State from applying its constitutional rules and fundamental principles relating to freedom of association and trade union, freedom of the press and freedom of expression in other media and national legislation governing the rights and responsibilities of the press.

Article 6 ter

A Member State may exclude from criminal liability conduct referred to in:

- a) Article 1(a)(c) and (d) where the conduct is not carried out in a manner liable to disturb the public peace
- b) Article 1(a) where the conduct relates to public incitement to discrimination and is committed without the intention of incitement to violence or hatred directed against a group of persons or a member of such a group as referred to in Article 1.
- c) Article 1(c) and (d) where the conduct is committed without the intention of incitement to violence or hatred directed against a group of persons or a member of such a group as referred to in Article 1.

¹ Reservation by the UK delegation on Article 6 paragraph 2. See footnote 1, page 11.

² Articles 6 bis and 6 ter have been presented by the Presidency, as a global compromise together with Article 1. Most delegations could with some adjustments accept this package. The UK and German delegations maintained scrutiny reservations on Article 6 bis. The FR and B delegations entered scrutiny reservations on Article 6 ter. The PT and FIN delegations entered scrutiny reservations on both Articles 6 bis and 6 ter.

Article 7

Initiation of prosecutions

Each Member State shall take the necessary measures to ensure that investigations into or prosecution of conducts referred to in Articles 1 and 2 shall not be dependent on the report or accusation made by a victim of the conduct, at least in the most serious cases where the conduct has been committed in its territory.

Article 8

Jurisdiction

1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the conduct referred to in Articles 1 and 2 where the conduct has been committed:

- (a) in whole or in part within its territory; or
- (b) by one of its nationals; or
- (c) for the benefit of a legal person that has its head office in the territory of that Member State.

2. When establishing jurisdiction in accordance with paragraph 1(a), each Member State shall take the necessary measures to ensure that its jurisdiction extends to cases where the conduct is committed through an information system and:

- (a) the offender commits the conduct when physically present in its territory, whether or not the conduct involves material hosted on an information system in its territory;
- (b) the conduct involves material hosted on an information system in its territory, whether or not the offender commits the conduct when physically present in its territory¹.

¹ Scrutiny reservation by the PT delegation.

3. A Member State which under its laws, does not as yet extradite or surrender its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, the conduct referred to in article 1 and 2 when it is committed by one of its own nationals outside its territory.^{1 2}

4. A Member State may decide not to apply, or to apply only in specific cases or circumstances, the jurisdiction rule set out in paragraphs 1 (b) and (c).

5. Member States shall inform the General Secretariat of the Council and the Commission accordingly where they decide to apply paragraph 3, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

Article 9

Implementation

1. Member States shall take the necessary measures to comply with this Framework Decision by 30 June 2004.

2. By the same date Member States shall transmit to the General Secretariat of the Council and to the Commission the text of any provisions transposing into their national legislation the obligations imposed on them under this Framework Decision. By 30 June 2005 at the latest on the basis of a report drawn up on the basis of this information and a written report from the Commission, the Council shall assess whether Member State have taken the necessary measures in order to comply with this Framework Decision³.

¹ Scrutiny reservation by COM.

² The Greek delegation announced that it might submit the same declaration as it did in connection with the joint action on combating racism and xenophobia.

³ The text has been aligned with provisions on implementation in other Framework Decisions

Article 10

Repeal of Joint Action 96/443/JHA

The Joint Action 96/443/JHA is hereby repealed.

Article 11

Entry into force

This Framework Decision shall enter into force on the third day following that of its publication in the *Official Journal of the European Communities*.

Done at Brussels,

*For the Council
The President*

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