



**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

DROIPEN 34

NOTE

from: Presidency

to: Council

Nos prev. docs: 5118/07 DROIPEN 1
7742/07 DROIPEN 24

8180/07 DROIPEN 29+REV 1+REV 2

No. Cion prop.: 14904/01 DROIPEN 105 COM(2001) 664 final

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

I. INTRODUCTION

The original proposal for a Framework Decision on combating racism and xenophobia was submitted by the European Commission on 29 November 2001. Despite extensive discussions, however, the Justice and Home Affairs Council was unable to reach agreement on the proposal at its meeting in February 2003.

The European Parliament gave its opinion on the draft on 4 July 2002.

On 24 February 2005 the Justice and Home Affairs Council instructed the Working Party on Substantive Criminal Law to resume discussions of the draft Council Framework Decision. The Framework Decision was then considered by the Article 36 Committee at its meetings on 4 April and 10 May 2005, on the basis of 8405/05 DROIPEN 20, and by Coreper at its meeting on 26 May 2005 (8994/1/05 DROIPEN 24 REV 1 ADD 1). A compromise proposal prepared on this basis for the Justice and Home Affairs Council meeting on 2 June 2005 did not meet with all delegations' support.

At its meeting on 25 January 2007, the Article 36 Committee resumed discussions of the draft Framework Decision, on the basis of 5118/07 DROIPEN 1. The Justice and Home Affairs Council held a general debate on the draft Framework Decision at its meeting on 15 February 2007. The Framework Decision was then considered by Coreper at its meeting on 28 March 2007 on the basis of 7742/07 DROIPEN 24 , on the 3 April 2007 on the basis of 8180/1/07 REV 1 DROIPEN 29 and on 17 April 2007 on the basis of document 8180/2/07 DROIPEN 29.

II. ISSUES STILL TO BE RESOLVED

Discussions in COREPER on 17 April 2007 have shown that the Presidency compromise proposal set out in document 8180/2/07 REV 2 DROIPEN 29 was generally supported by all Member States. However, following issues need to be still discussed:

1. Article 7 (2)

The Commission reiterated its legal reservations concerning Article 7 (2). However, the current wording was proposed by the Legal Service of the Council especially to accommodate these concerns of the Commission. In addition, some Member States indicated that Art. 7 (2) is of vital importance for them. Having this in mind, the Presidency proposes a compromise text which takes the view of the Commission into account but which should at the same time be still acceptable to all Member States (deletion of the word “their” in line four before “constitutional traditions”).

2. Article 1 (1) (c) and (d) (Extension to crimes not motivated by racism or xenophobia)

Some delegations reiterated their request to extend criminal liability for publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity or war crimes to cases not motivated by racism or xenophobia. From the discussions during the COREPER meeting on 17 April 2007, it arose that a Statement by the Council to be included in the minutes of the session of the Council during which the Framework Decision will be adopted and a text for a new recital 5e) set out in Annex II to the present document, would be an acceptable basis for a consensus.

2. General Reservations

The Framework Decision is subject to parliamentary scrutiny reservations by the UK, IE, NL, SE, LT, HU and DK.

III. CONCLUSION

The Presidency compromise proposal for a Council Framework Decision on combating certain forms and manifestations of racism and xenophobia under criminal law is set out in the Annex I. Comments by Member States are set out in footnotes.

The **JHA Council** is invited, after resolution of the above mentioned outstanding issues, to agree on a general approach on the text of Articles 1-12 and recitals 5a and 9 as set out in Annex I, subject to parliamentary scrutiny reservations and the examination of the rest of the recitals.

Council Framework Decision on combating certain forms and expressions of racism and
xenophobia by means of criminal law

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 Commission¹,

Having regard to the Opinion of the European Parliament²,

Whereas:

- (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

- (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 justice¹, the Conclusions of the Tampere European Council of 15 and 16 October 1999², the European Parliament in its resolution of 20 September 2000³ and the Commission's Communication to the Council and the European Parliament on the biannual update of the Scoreboard⁴ 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. In the Hague Programme of 4/5 November 2004, the European Council recalls its firm commitment to oppose any form of racism, anti-Semitism and xenophobia as already expressed in December 2003.
- (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 Union⁵, 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 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) Racism and xenophobia constitute a threat against groups of persons which are target of such behaviour. 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.
- (5a) Member States acknowledge that combating racism and xenophobia require various kinds of measures in a comprehensive framework and may not be limited to criminal matters. This Framework Decision is limited to combating particularly serious forms of racism and xenophobia by means of criminal law. Since the Member States' cultural and legal traditions are, to some extent, different, particularly in this field, full harmonisation of criminal laws is currently not possible.
- (5b) "Descent" refers mainly to persons or groups of persons who descend from persons who could be identified by certain characteristics (such as race or colour), but not necessarily all of these characteristics still exist. In spite of that, because of their descent, such persons or groups of persons may be subject to hatred or violence.
- (5c) "Religion" broadly refers to persons defined by reference to their religious convictions or beliefs.
- (5d) "Hatred" refers to hatred based on race, colour, religion, descent or national or ethnic origin.
- (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) Approximation of criminal law should lead to combat racist and xenophobic offences more effectively, by promoting a full and effective judicial cooperation between Member States. The difficulties which may exist in this field should be taken into account by the Council when reviewing this Framework Decision with a view to considering whether further steps in this area are necessary.
- (10) Since the objective of ensuring that racism and xenophobia be sanctioned in all Member States by at least a minimum level of effective, proportionate and dissuasive criminal penalties cannot be sufficiently achieved by the Member States individually, as rules have to be common and compatible, and can therefore be 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.
- (11) [...]
- (12) 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 origin¹ and of this Framework Decision, it has become obsolete.

¹ OJ L 180, 19.7.2000, p. 22.

- (13) 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.
- (14) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union.
- (15) Considerations relating to respect for the freedom of association, freedom of the press and freedom of expression in other media have led in many Member States to procedural guarantees and to special rules in national law as to the determination or limitation of liability,

HAS DECIDED AS FOLLOWS:

Article 1

Offences concerning racism and xenophobia

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:
- (a) publicly inciting to violence or hatred 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;
 - (b) the commission of an act referred to in point a) by public dissemination or distribution of tracts, pictures or other material;

- (c) publicly condoning, denying or grossly trivialising 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, 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 when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;
 - (d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, 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 when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.
- 1a. **For the purpose of paragraph 1** Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.
 - 1b. For the purpose of paragraph 1, the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.
- 2. Any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement that it will make denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) punishable only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court or by a final decision of an international court only.

Article 2

Instigation, aiding and abetting

1. 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.
2. Each Member State shall take the measures necessary to ensure that instigating the conduct referred to in Article 1(c) and (d) is punishable.

Article 3

Sanctions

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 1 and 2 is punishable by effective, proportionate and dissuasive criminal penalties.
2. Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1 is punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment.

Article 4

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 taken 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.

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.

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.

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.

Article 7
Constitutional rules and fundamental principles

1. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, including freedom of expression and association, as enshrined in Article 6 of the Treaty establishing the European Union.

2. This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to [...] fundamental principles relating to freedom of association and freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from [...] constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

Article 8

Scope of criminal liability

[...]

Article 9

Initiation of prosecutions

Each Member State shall take the necessary measures to ensure that investigations into or prosecution of conduct 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 10

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 territory.

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).

Article 11

Implementation

1. Member States shall take the necessary measures to comply with this Framework Decision by [...]¹.

¹ Two years after adoption of this Framework Decision.

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 [...] ¹ 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 States have taken the necessary measures in order to comply with this Framework Decision.

3. Before the expiry of three years after the deadline referred to in Article 11(1), the Council shall review this Framework Decision. For the preparation of this review, the Council shall ask Member States whether they have experienced difficulties in judicial cooperation with regard to the offences under Article 1 paragraph 1. In addition, the Council may request Eurojust to submit a report, on whether differences between national legislations have resulted in any problems regarding judicial cooperation between the Member States in this area.

Article 12

Repeal of Joint Action 96/443/JHA

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

Article 13

Territorial application

This Framework Decision shall apply to Gibraltar.

¹ Five years after adoption of this Framework Decision.

Article 14
Entry into force

This Framework Decision shall enter into force on the date of its publication in the *Official Journal of the European Union*.

Done at Brussels,

For the Council
The President

Declaration to be inserted in the minutes of the Council at the adoption of the Framework Decision

Declaration by the Council

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