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**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

DROIPEN 9

NOTE

from : Presidency
to : Article 36 Committee

No. prev. doc. : 15490/1/02 DROIPEN 92 REV 1
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

During its meeting on 5 February 2003, the Working Party on Substantive Criminal Law examined the Draft Framework Decision on combating racism and xenophobia on the basis of 15490/1/02 DROIPEN 92 REV 1.

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

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 15490/1/02 DROIPEN 92 REV 1. Comments and reservations by the delegations are set out in footnotes to the text.

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.

(5 bis) "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, discrimination or violence. "Descent" does not refer to social origin.¹

- (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.

¹ This new recital is proposed by the Presidency according to the comments made by the IT and IRL delegations concerning the word "descent" in Article 1 (a).

- (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 respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and does not require a Member State to adopt measures in breach of its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression.

¹ OJ L 180, 19.7.2000, p. 22.

(16 bis) Considerations relating to respect for the freedom of association, freedom of the press and freedom of expression in other media may have led to special rules in national law as to the determination or limitation of liability, without, however, having as a result that no one can be held criminally responsible for offences committed through the intermediary of the press, public media or professional organisations.¹

(17) 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 New recital as proposed in footnote 1 to Article 7 in document 15490/1/02 DROIEN 92 REV.

HAS DECIDED AS FOLLOWS:

Article 1¹

Offences concerning racism and xenophobia

Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable :

- (a) public incitement to discrimination², violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religious conviction³, descent⁴ 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 Reservation by the Irish delegation on the transfer of the reference to "threatening, abusive or insulting" to Article 8.

² Reservation by COM on the reference in Article 1(a) to "discrimination" which, in the view of the Commission, should be dealt with in the first pillar. The Commission announced that it would make a declaration on the subject.

³ Scrutiny reservation by the NL delegation who favoured the reference to "religion or other convictions" in Article 1(a), (c) and (d) and Article 8(1)(a). Several delegations entered reservations or scrutiny reservations on these terms, as they are not used in any other international legal instrument.

⁴ See the proposal for a new recital 5 bis.

- (c) public condoning, denial or gross trivialisation 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, directed against a group of persons or a member of such a group defined by reference to race, colour, religious conviction, descent or national or ethnic origin;¹
- (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, directed against a group of persons or a member of such a group defined by reference to race, colour, religious conviction, descent or national or ethnic origin.²

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.

¹ Reservation by the Irish delegation on Article 1(c) and (d) in relation to fundamental principles. This delegation thought that the last part of the statement in recital (16) ("This Framework Decision...does not require a Member State to adopt measures in breach of its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression") should be turned into an Article of the instrument. Some other delegations reacted negatively regarding this proposal.

² See footnote to Article 1 (c).

The B delegation proposed to restructure paragraphs c) and d) as follows:

"(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, directed against a group of persons or a member of such a group defined by reference to race, colour, religious conviction, 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;

- 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, religious conviction, descent or national or ethnic origin."

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.¹

¹ Scrutiny reservation by the UK delegation and COM.

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 7¹

Constitutional rules and fundamental principles

This Framework Decision shall be without prejudice to constitutional rules and fundamental principles relating to freedom of association, freedom of the press and the freedom of expression in other media or rules governing the rights and responsibilities of the press² where these rules relate to the determination or limitation of liability.

¹ Scrutiny reservation by the UK delegation.
See recital 16 bis.

² The NL delegation proposed to add the words "or other media". The FR delegation was against.

Article 8¹

Scope of criminal liability

1. A Member State may exclude from criminal liability conduct referred to in:
 - (a) Article 1, where the conduct is directed against a group of persons or a member of such a group defined by reference to religious conviction and this is not 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.
 - (b) Article 1(a), where the conduct relates to discrimination which is not carried out in a manner likely to incite 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 not carried out in a manner likely to incite to violence or hatred directed against a group of persons or a member of such a group as referred to in Article 1.²
 - (d) Article 1, where the conduct is not threatening, abusive or insulting.
2. In due time before the expiry of two years after the deadline referred to in Article 11(1) for implementation of this Framework Decision, the Council shall review this Article with a view to considering whether paragraph 1(a), (b) and (c) should be retained.

¹ Scrutiny reservation by the UK delegation.

² The F delegation was opposed to this derogation.

[3. Any Member State which excludes certain conduct from criminal liability pursuant to paragraph 1 shall take the necessary measures to derogate from the principle of double criminality for such conduct.]"¹

Article 9

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 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:

¹ The F, B and ES delegations and COM were in favour of including this paragraph. There was no support from the other delegations.

- (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.
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.
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 11

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

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.

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 Communities*.

Done at Brussels,

For the Council

The President

Declaration by the United Kingdom for entry in the minutes of the council at the adoption of the Framework Decision

"The UK stresses the importance of preventing violence, hatred and intimidation due to hostility towards a person's religious convictions. The UK Government has stated that it supports in principle a proposal to make incitement to religious hatred an offence, which is currently being examined by a parliamentary Select Committee of the House of Lords. Meanwhile, offences motivated by hostility towards membership of a religious group are liable to increased penalties which were introduced by the Anti-terrorism, Crime and Security Act 2001. Religiously aggravated offences for which a higher maximum level of penalties is provided include assaults, criminal damage, intimidation and harassment. The courts must also consider religious hostility as an aggravating factor when determining penalties for any offence."
