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REPORT

on the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law
(11522/2007 – C6-0246/2007 – 2001/0270(CNS))

(Renewed consultation)

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Martine Roure

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission.)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law
(11522/2007 – C6-0246/2007 – 2001/0270(CNS))**

(Consultation procedure - Renewed consultation)

The European Parliament,

- having regard to the Council proposal (11522/2007),
 - having regard to the Commission proposal to the Council (COM(2001)0664)¹,
 - having regard to its position of 4 July 2002²,
 - having regard to Article 34(2)(b) of the EU Treaty,
 - having regard to Article 39(1) of the EU Treaty, pursuant to which the Council consulted Parliament again (C6-0246/2007),
 - having regard to Articles 93, 51 and 55(3) of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A6-0444/2007),
1. Approves the Council proposal as amended;
 2. Calls on the Council to alter its proposal accordingly;
 3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
 4. Calls on the Council to consult Parliament again if it intends to amend the draft substantially or replace it with another text;
 5. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Council

Amendments by Parliament

Amendment 1
Recital 6

(6) Member States acknowledge that combating racism and xenophobia require

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¹ OJ C 75 E, 26.3.2002, p. 269.

² OJ C 271 E, 12.11.2003, p. 558.

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.

various kinds of measures in a comprehensive framework and may not be limited to criminal matters. ***It is necessary to ensure a culture of tolerance embracing both State and society.*** 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.

Amendment 2
Recital 6 a (new)

(6a) This Framework Decision establishes a minimum level of harmonisation and its effectiveness is limited by the derogations which it provides, including those in Article 1(2).

Amendment 3
Recital 6 b (new)

(6b) Legislative policy should reflect the fact that in a democratic society the criminal law is always a last resort, and should take into account all the values at stake, including the right to free expression and the right of all individuals to equal consideration and respect.

Justification

The definition of the criminal offences of racism and xenophobia requires very careful consideration of what the limits on freedom of expression should be. In addition, the criminal law should always play a subsidiary role.

Amendment 4
Recital 9 a (new)

(9a) The commission of a racist or

xenophobic offence by an office holder should be treated as an aggravating circumstance.

Justification

It is often difficult for the victims of racism and xenophobia to affirm their rights, particularly in a workplace situation. Abuse of an employment situation must be treated as an aggravating circumstance. The fact of holding office should be emphasised.

Amendment 5

Article 1, paragraph 1, point (b)

(b) the ***commission of an act referred to in point a)*** by public dissemination or distribution of tracts, pictures or other material;

(b) the public dissemination or distribution of tracts, pictures or other material ***whose content constitutes an act within the meaning of points (a), (c) or (d);***

Amendment 6

Article 1, paragraph 1, point (e)

(e) 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.

(e) For the purpose of paragraph 1 Member States may choose to punish only conduct which is either carried out in a manner which is threatening, abusive or insulting.

Justification

The concept of something 'likely to disturb public order' is too vague and should be removed.

Amendment 7

Article 1, paragraph 1, point (f)

(f) 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.

(f) For the purpose of *this paragraph*, 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. ***A Member State shall not, however, exempt from criminal liability speeches or behaviour liable to stir up hatred. Respect for freedom of religion shall not hinder the effectiveness of this***

Framework Decision.

Amendment 8
Article 1, paragraph 2

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 punishable denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d), 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.***

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 punishable denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d), 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.

Amendment 9
Article 2, paragraph 2

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.

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

Amendment 10
Article 5, paragraph 1

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. 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 by any 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.

and who has acted in that capacity.

Amendment 11
Article 5, paragraph 2

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.

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 by a person under its authority ***for whose actions the legal person may be held liable under national law.***

Amendment 12
Article 5, paragraph 3

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.

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

Amendment 13
Article 7 a (new)

Article 7a

Minimum provisions

1. Member States may adopt or maintain a higher level of protection in the fight against racism and xenophobia than that arising from the provisions of this Framework Decision.

2. Implementation of this Framework Decision shall in no circumstances constitute grounds for lowering the level of protection already ensured by the Member States in the areas governed by this Framework Decision.

3. Nothing in this Framework Decision may be interpreted as affecting any obligations incumbent on the Member States under the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966. The Member States shall implement this Framework Decision in line with those obligations.

Justification

The framework decision should include a non-regression clause, so as to ensure that its implementation does not lead to a weakening of the existing level of protection under Article 6 of Directive 2000/43/EC (paragraphs 1 and 2). It should also include a provision to the effect that its implementation will not affect any obligation arising from the International Convention on the Elimination of All Forms of Racial Discrimination (paragraph 3).

Amendment 14
Article 7 b (new)

Article 7b

None of the provisions of this Framework Decision may be interpreted as affecting any obligations incumbent on the Member States under the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966. Member States shall implement this Framework Decision in conformity with those obligations.

Justification

Proposal for elimination - 1 and 2 - rapporteur's proposal: punishment of a given act under the criminal law should always be replaced when a less severe punishment emerges for the same act. This is a basic principle of criminal law.

Amendment 15
Article 7, paragraph 2

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

2. This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction **with the common** fundamental principles **of the Member States** relating to freedom of association and

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.

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.

Amendment 16

Article 9, paragraph 1, point (c)

(c) *for the benefit of a* legal person that *has its head office* in the territory of that Member State.

(c) *the head office of the* legal person that *may be held liable is situated* in the territory of that Member State.

Amendment 17

Article 10, paragraph 3

3. Before the expiry of three years after the deadline referred to in Article 10(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.

3. Before the expiry of three years after the deadline referred to in Article 10(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 ***and shall consult the European Parliament. When conducting the review, the Council shall take account of the opinion of the European Agency for Fundamental Rights and of the NGOs active in the field.*** 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.

Justification

Parliament should be consulted over the review of the framework decision, and the opinions of the NGOs and of the European Agency for Fundamental Rights should also be examined.

Amendment 18
Article 12

12. This Framework Decision shall apply to Gibraltar.

12. This Framework Decision shall *also* apply to Gibraltar.

EXPLANATORY STATEMENT

Introduction

The first report of the European Agency for Fundamental Rights of August 2007 shows that racist crimes are on the rise in at least eight EU Member States. The report states that 'racist violence and crime remains a serious social ill across the EU'. This highlights once again the urgent need for action to combat, at European level, the evils of racism, intolerance and xenophobia.

All the EU Member States have, at least to some extent, legislation against racism and xenophobia, but divergences exist. These variations point up the need for harmonisation at European level, in the interests of effective action to fight racism and xenophobia in the crossborder context and in Europe in general.

Background

In 1996, the Council adopted joint action 96/443/JAI on the fight against racism and xenophobia. This instrument sets out provisions aimed at harmonising Member States' criminal law and improving mutual assistance in the fight against racism and xenophobia.

In November 2001, the Commission submitted a proposal for a framework decision on the fight against racism and xenophobia¹, with a two-pronged objective, namely: to ensure that the same racist and xenophobic acts are subject to the same penalties in all Member States; and to improve judicial cooperation in the matter. This proposal marked an advance on the joint action insofar as it no longer allows Member States to choose between criminalising such behaviour and derogating on the grounds of avoiding double jeopardy, but, instead, obliges them to take measures to punish such behaviour as a criminal offence.

Despite numerous discussions in Council, it had proved impossible to reach agreement on this text. In 2006, the Italian delegation, which had until then consistently opposed the proposal (putting forward an alternative text in March 2003), withdrew its reservations. This made it possible to relaunch the debate on the basis of a compromise formula proposed by the Luxembourg presidency in 2005. Thanks to the efforts of the German presidency, on 19 April 2007 the Council reached a political agreement².

The European Parliament adopted an initial opinion on 4 July 2002 (Ceyhun report - T5-363/2002³). This opinion, however, was based on the Commission's initial proposal of 2001. The Council text is the fruit of several years' negotiations, and hence introduces substantial changes; it follows that Parliament should be reconsulted.

Rapporteur's position

Your rapporteur welcomes the fact that the Council has finally reached agreement on a

¹ COM(2001)664, OJ C 75 E, 26.3.2002, p 269.

² Document 5118/07 DROIPEN 1.

³ OJ C 271 E, 12.11.2003, p 379.

proposal for a framework decision on the fight against racism and xenophobia. The protection and promotion of the fundamental rights of European citizens, and the fight against racism and xenophobia in particular, constitute, indeed, one of the EU's major priorities. It was therefore extremely worrying that the Council had not managed to reach an agreement on such a proposal. The Union needs to send out a firm political message on behalf of fundamental rights and to adopt this text.

Nonetheless, your rapporteur regrets the failure of the Council's text to move strongly forward and rise to the political challenge posed by the fight against racism and xenophobia. Unfortunately, only a few elements remain of the Commission's 2001 proposal, which Parliament's aim was to strengthen in its first report. Your rapporteur is aware of both the need and the difficulty of finding a compromise, but regrets that such a compromise has been reached to the detriment of the legal quality of the proposal for a framework decision. In particular, she is concerned at what is a substantial restriction of its scope. It is also regrettable that the list of offences does not, by contrast with the Commission's proposal, include insults or being a leader of a racist group.

Further, the additional limit placed on the scope of Article 1(1) - i.e. the removal of certain elements of racism based on religious belief - is, in your rapporteur's view, excessive, and requires modification so as to ensure that this form of racism is subject to prosecution as the others are. The same applies to the added requirement that the behaviour criminalised in Article 1(1)(c) and (d) should be 'likely to incite to violence or hatred'. Trivialisation of the crime of genocide is a form of racism, and Member States should be able to punish it even where incitement to hatred or violence is not involved.

Nonetheless, your rapporteur feels that this framework decision marks a significant first move towards stepping up the fight against racism and xenophobia at European level and achieving a minimum of harmonisation on the matter. It remains vital to adopt it. Your rapporteur, despite this, insists that the Union will need to go further when the framework decision is reviewed after three years. She also proposes adding a paragraph (new Article 7a) providing for a non-regression clause to ensure that the framework directive does not reduce existing levels of protection under Article 6 of the 'race directive' (Directive 2000/43/EC) and a guarantee that it will not permit lower levels of protection than that ensured by the International Convention on the Elimination of All Forms of Racial Discrimination.

Your rapporteur recalls that, in order to ensure the effectiveness of the fight against racism, the framework decision needs to be part of an overall system of European instruments for combating all forms of discrimination. The most recent report of the Agency for Fundamental Rights has shown that racial discrimination persists, in particular, in the areas of employment, education and housing. It follows that this framework decision on racism will need to be complemented by the adoption of a general directive on the fight against all the forms of discrimination referred to in Article 13 of the Treaty.

Finally, your rapporteur regrets the circumstance that the scope of this framework decision on the fight against racism and xenophobia has been limited by the fact of its being subject to unanimity in Council and the mere consultation of Parliament. She stresses the need to move towards qualified majority voting and codecision for all third-pillar matters.

12.11.2007

MINORITY OPINION

pursuant to Rule 48(3) of the Rules of Procedure
by Koenraad Dillen

It is perfectly possible for the Member States to provide protection against racist acts by means of their laws, so action by the EU contravenes the subsidiarity principle.

This framework directive is an attack on freedom of expression. While it is acceptable to combat racism on the basis of specific use of violence or incitement to it, it is not acceptable that the concept of 'racism' should be confused with legitimate public discourse, for example opposition to mass immigration or to Islamisation, or defence of national identity.

This confusion does exist, as is apparent from the statement by the European Monitoring Centre on Racism, which asserted that 'Islamophobia' is a new form of discrimination and that the furore about the Danish cartoons should be dealt with by adopting legislation against blasphemy.

This framework directive prohibits 'incitement to hatred' in connection with religion, which means that it will be possible to interpret any public political discourse which is critical of Islam and Islamisation as 'incitement to hatred' of Muslims. This framework directive renders any debate on immigration and Islam impossible and will result in arbitrary complaints and prosecutions of leading politicians in this debate.

PROCEDURE

Title	Combating certain forms and expressions of racism and xenophobia by means of criminal law
References	11522/2007 - C6-0246/2007 - COM(2001)0664 - C5-0689/2001 - 2001/0270(CNS)
Date of consulting Parliament	21.12.2001
Committee responsible Date announced in plenary	LIBE 3.9.2007
Committee(s) asked for opinion(s) Date announced in plenary	JURI 3.9.2007
Not delivering opinions Date of decision	JURI 3.10.2007
Rapporteur(s) Date appointed	Martine Roure 21.2.2005
Discussed in committee	2.10.2007 12.11.2007
Date adopted	12.11.2007
Result of final vote	+: 34 -: 4 0: 0
Members present for the final vote	Carlos Coelho, Esther De Lange, Panayiotis Demetriou, Agustín Díaz de Mera García Consuegra, Bárbara Dührkop Dührkop, Kinga Gál, Patrick Gaubert, Lilli Gruber, Ewa Klamt, Magda Kósáné Kovács, Barbara Kudrycka, Stavros Lambrinidis, Henrik Lax, Roselyne Lefrançois, Claude Moraes, Javier Moreno Sánchez, Martine Roure, Luciana Sbarbati, Inger Segelström, Károly Ferenc Szabó, Søren Bo Søndergaard, Vladimir Urutchev, Ioannis Varvitsiotis, Manfred Weber, Tatjana Ždanoka
Substitute(s) present for the final vote	Adamos Adamou, Simon Busuttil, Marco Cappato, Koenraad Dillen, Maria da Assunção Esteves, Ignasi Guardans Cambó, Luis Herrero-Tejedor, Sophia in 't Veld, Carlos José Iturgaiz Angulo, Sylvia-Yvonne Kaufmann, Eva-Britt Svensson
Substitute(s) under Rule 178(2) present for the final vote	Carmen Fraga Estévez, Fernando Fernández Martín