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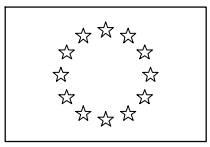

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28.11.2001
COM(2001) 664 final

2001/0270 (CNS)

Proposal for a

COUNCIL FRAMEWORK DECISION

on combating racism and xenophobia

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

European societies are multicultural and multi-ethnic, and their diversity is a positive and enriching factor. Unfortunately, racist and xenophobic forms of conduct persist around the world. Events in different parts of Europe show the continuing existence of racist and xenophobic attitudes.

Racism and xenophobia are a direct violation 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 as stated in Article 6 of the TEU. The Union is bound to respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The most recent reinforcement of fundamental rights in the EU came with the proclamation of the Charter of Fundamental Rights of the European Union[1] at the Nice European Council on 7 December 2000.

The objective of this proposal for a Framework Decision is both to reinforce criminal law measures aimed at approximation of the laws and regulations of the Member States regarding racist and xenophobic offences and to facilitate and stimulate cooperation among Member States to combat these offences.

2. SOME FIGURES

According to the 1999 Annual Report of the European Monitoring Centre on Racism and Xenophobia (EUMC),[2] the various reports on racism in Europe in 1999 produced by the national media, the official authorities or NGOs reveal that no country of the European Union is immune from this phenomenon. However, it must be noted that there are no uniform criteria for data collection relating to racist incidents. The European Union has started to address this issue. The EUMC's information network, Raxen, has been entrusted with the task of defining these common criteria and making proposals in this respect.

The European Commission against Racism and Intolerance (ECRI), the Council of Europe's expert body on combating racism, has published a series of country reports as part of a second cycle of monitoring laws, policies and practices to combat racism. The reports on Austria, Belgium, Denmark, France, Germany, Greece and the United Kingdom note that although positive developments have occurred, there are still grounds for concern.

The most common racial incidents are not violent acts covered by the mass media. The official statistics from Germany show that out of a total of 10,037 registered criminal offences with racist/xenophobic motives, 66% fell within the category of propaganda offences. The total number of racially aggravated circumstances in the UK, from April to September 1999, was 10,982 of which half were harassment-related. In Sweden, the number of reported crimes with racial/xenophobic incentives was in total 2,363 in 1999. Of these, unlawful threats, assaults and harassment were the most common forms.

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1 OJ C 364 of 18.12.2000, p. 1.

2 http://www.eumc.eu.int/publications/ar99/AR99-EN.pdf.

Serious acts of racial violence are widely known to the public because, as with other serious crimes, they become headlines in the mass media. In 1999, murder and attempted murder on racial, ethnic, religious or cultural grounds were reported in the national mass media of Austria, France, Germany, Spain, Sweden and the UK. In the same year, there was an increase in the number of recorded racial crimes associated with neo-Nazi groups in Germany and Sweden. In Germany, there was a decrease in the total number of criminal offences, but an increase in violent attacks. Racial violence associated with neo-Nazis and so-called skinheads has also been reported in Spain and Portugal, where these groups have been identified as being responsible for much of this form of violence. It can be concluded that racist acts, in particular violent attacks (murders, injuries, assaults) or damage to property (fires, attacks involving explosives) are very often committed by groups of youths of neo-Nazi ideology or skinheads.

Such a phenomenon is easy to explain since racism is often a manifestation of the sense of belonging to a group, which is perceived as being reinforced by a negative and contemptuous attitude towards other groups. The very fact of mutual incitement and support within the group encourages emulation and produces a chain reaction. The views held by perpetrators are often shared by the wider communities to which they belong, which is seen by perpetrators as a legitimising factor of their actions. Such a trend is extremely worrying and must be vigorously fought against. Reaction to such crimes, even where they have not been committed within a structured organisation, is essential in the creation of an effective preventive strategy against the development of the phenomenon.

With regard to the victims, the 1999 reports show that there are ethnic/racial minorities, immigrants and refugees in all Member States, who are vulnerable to racial crime and discrimination. The crimes committed by neo-Nazi organisations are first of all directed towards immigrants, people of foreign descent and the Jewish community. There has also been an increase in attacks against homosexuals and political opposition figures, journalists and police officers. The reports also showed that only a minority of the victims report the crimes to the authorities. They often think that their report will not be taken seriously or have fear of retaliation by the offenders.

3. INTERNATIONAL AND EU ACTIVITIES

A number of international instruments have been adopted to protect human rights in general and to address the issue of discrimination and racism in particular. Among these instruments, the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966, which is the cornerstone of the fight against racism at the global level, is expressly devoted to protection against racial discrimination. Article 4 (a) of this Convention states that States Parties "shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as actions of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof". Paragraph (b) of the same article states that States Parties "shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law". The Convention has been ratified by all EU Member States. Some Member States have entered reservations on Article 4, which refer to the conciliation of obligations imposed by this Article with the right to freedom of expression and association.

Furthermore, the conclusions and the plan of action adopted by the Extraordinary European Council meeting held on 21 September 2001 to analyse the international situation following the

terrorist attacks in the United States, expresses the European Union's commitment with the international community to pursue the dialogue and negotiation with a view to building at home and elsewhere a world of peace, the rule of law and tolerance. In this respect, the EU emphasises the need to combat any nationalist, racist and xenophobic drift.

Since 1977,[3] the European institutions have on numerous occasions reaffirmed their determination to defend human rights and basic freedoms and have condemned all forms of intolerance, racism and xenophobia.

The first major step to combat racism at European Union level was taken when the Council and the Representatives of the Member States adopted a Resolution proclaiming 1997 as the European Year against Racism.[4] Building on this, the European Monitoring Centre on Racism and Xenophobia in Vienna was set up.

In the enlargement process, great importance is attached to progress in policies to combat racism and to protect minorities in the applicant countries. The Copenhagen European Council in 1993 defined the following political criteria which countries applying to be members of the European Union must satisfy: "stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities". Each year, the Commission reviews the progress of each candidate country in view of the Copenhagen criteria, including the rate at which it is adopting Community laws. For Central European candidate countries, the main issue underlined in the progress reports has been the situation of the Roma population.

The Treaty of Amsterdam introduced a new Article 13 in the EC Treaty, which gave the Community for the first time the power to take legislative action to combat discrimination.[5]

The Vienna Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice[6] refers to racism and xenophobia as one of the specific forms of crime to identify how could it be best combated by a EU approach. The conclusions[7] of the European Council held in Tampere on 15 and 16 October 1999, in the context of fair treatment of third country nationals, state that building on the Commission Communication on an Action Plan against Racism, the fight against racism and xenophobia has to be stepped up. The update of the Commission's Scoreboard to review progress on the creation of an area of "freedom, security and justice" of 30 November 2000[8] states that the Commission would evaluate whether a new initiative was needed in this field and its possible scope.

Furthermore, the European Parliament requested in its resolution of 21 September 2000[9] that a Framework Decision to replace the Joint Action be adopted.

Adequate criminal law measures also form an important tool for combating racism and xenophobia. Apart from their punitive aspect, criminal law measures have a significant dissuasive force.

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3 Joint Declaration by the Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the protection of human rights and fundamental freedoms, 5.4.1977 (OJ C 103, 27.4.1977, p.1).

4 OJ C 237, 15.8.1996, p. 1.

5 Council Directive 2000/43/EC of 29 June 2000, OJ L 180, 19.7.2000, p.22.
Council Directive 2000/78/EC of 27 November 2000, OJ L 303, 2.12.2000, p.16.

6 OJ C 19, 23.1.1999, p. 1 (point 51a).

7 http://ue.eu.int/en/Info/eurocouncil/index.htm.

8 COM(2000) 782 final, 30.11.2000.

9 OJ C 146 of 17.5.2001, p.110.

At EU level, the Council adopted on 15 July 1996 a Joint Action concerning action to combat racism and xenophobia[10] on the basis of article K.3 of the Treaty on European Union. Its main objective was to ensure effective legal cooperation between Member States in combating racism and xenophobia. The Joint Action stressed the need to prevent the perpetrators of such offences from benefiting from the fact that they are treated differently in the Member States by moving from one country to another to avoid prosecution. Member States were asked to ensure that a number of racist and xenophobic behaviours listed in the Joint Action be punishable as criminal offences or, failing that, and pending the adoption of any necessary provisions, to derogate from the principle of double criminality for such behaviours. Other provisions contained in the Joint Action referred to seizure and confiscation of racist and xenophobic material and exchange of information.

A first report on the implementation of the Joint Action of 1996 was produced in 1998. The conclusions of the report indicated that Member States had, to a very significant degree, implemented the provisions of the Joint Action. However, it appeared that additional steps could be undertaken. This assessment is confirmed by the information provided by the Member States after the first evaluation report, which shows that there is scope for further improvement of Members States' criminal law provisions to combat racism and xenophobia. For example, some difficulties have still been experienced regarding extradition and mutual legal assistance even after the adoption of the Joint Action. Another issue addressed in the ECRI's country reports is the consideration of the racist motivation in the determination of the penalty for ordinary offences, such as murder, injuries or damage to property. Some Member States already have provisions in this respect. This would give a clear signal of the EU's willingness to fight against this form of crime. A comprehensive and clear legislation in all Member States in this field would also ensure that higher priority is given to the identification of the racial or xenophobic element in the gathering of evidence, which have been repeated in various reports as one of the difficulties for effective prosecution.

Another identified area where further progress could be achieved is the fight against racist and xenophobic content on the Internet. As referred to in the Commission's Communication on Cyber-crime,[11] a worrying issue is the dissemination of racist and xenophobic contents on the Internet. While it is a medium for communication, entertainment and commerce, the Internet is also a relatively cheap and highly effective tool for racist individuals or groups to spread hateful ideas to an audience of thousands if not millions. Moreover, the Internet provides a great degree of impunity to authors. At the same time, the Internet is also a practical means of recruiting new activists. A US report[12] in 1997 identified around 600 websites inciting to racial hatred. In January 1999 the number had risen to 1426 known Internet sites promoting racism, anti-Semitism, hate music or neo-Nazis ideas. As of 15 July 1999 the number had increased further, to over 2100 sites. But in reality, researchers consider this figure to be considerably underestimated. Racist sites are very often located in non-EU countries, in particular in the US. This fact leads to difficulties in prosecution as the US does not punish the dissemination of racist material on the Internet as a criminal offence, on the grounds of freedom of speech. The European Union's determination to implement common penal provisions also in this field would contribute to provide Internet-users with a safe and crimeless environment. This issue has been discussed in the framework of the draft Council of Europe Cyber-Crime Convention. However, it was left out from the mother Convention and it was decided to drawn up an additional protocol. A EU common approach on this issue would reinforce the EU position in

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10 OJ L 185, 24.7.1996, p.5.

11 Communication "Creating a safer information society by improving the security of information infrastructures and combating computer-related crime" COM(2000) 890 final.

12 Source: Simon Wiesenthal Center, http://www.wiesenthal.com.

the negotiation of such an instrument.

The Commission's approach on this issue is to ensure that racist and xenophobic content on the Internet is criminalised in all Member States. The basic idea would be contained in the principle, "what is illegal off-line is illegal on-line". Moreover, the proposal also establishes some minimum criteria as regards to jurisdiction for this type of offences.

All Member States have passed legislation outlawing racist conduct or incitement to racial hatred. However, the scope, content and enforcement still differ considerably. The Commission is therefore of the opinion that it is time to achieve further progress in this area. Perpetrators of racist and xenophobic offences need to be brought to justice, and the courts need to have appropriate and proportionate penalties at their disposal. In particular, severe penalties should be provided for cases where racist attacks are committed by groups of neo-Nazi or extremist ideology. At the same time, this will send a strong deterrent message to those contemplating the commission of this type of offences.

Moreover, the laws have to be enforced by the courts, which is not always the case where these offences are concerned. Convictions are few and far between. This is due, among other reasons, to difficulties in some cases in proving racist motivation, hesitation, or even fear, on the part of victims to go to the police or the courts and sometimes to a lack of awareness on the part of the law enforcement and the judiciary. Ensuring that the initiation of investigations and prosecutions is not dependent on the accusation of the victim would contribute to improvement of the situation, as well as a more systematic use of contact points and clearer rules in jurisdiction.

4. A PROPOSAL FOR A FRAMEWORK DECISION

Against this background the Commission is presenting a proposal for a Framework Decision, aimed at approximating the laws and regulations of the Member States regarding racist and xenophobic offences.

The purpose of this Framework Decision is twofold: first, to ensure that racism and xenophobia are punishable in all Member States by effective, proportionate and dissuasive criminal penalties, which can give rise to extradition or surrender, and second, to improve and encourage judicial cooperation by removing potential obstacles.

The proposed instrument provides that the same racist and xenophobic conducts would be punishable in all Member States, which would define a common EU criminal law approach to this phenomenon. Of course, Member States are free to go further. The Framework Decision establishes the minimum approximation necessary to ensure that national legislation is sufficiently comprehensive and that effective judicial cooperation can be developed.

The list of offences contained in the Joint Action of 1996 is expanded to other forms of conduct which should be made criminal offences in all the Member States. Furthermore, the novelty in relation to the Joint Action is that instead of the choice to incriminate these forms of conduct or to derogate from the principle of dual criminality, an obligation is imposed on Member States to take steps to punish those forms of conduct as criminal offences. An expert meeting took place on 7 June 2001 to discuss some concepts to be addressed in the Commission's proposal. The approach of imposing an obligation to criminalise racist and xenophobic conducts was supported by the experts.

Common definitions and penalties would also facilitate judicial cooperation and mutual legal assistance in criminal matters. In addition, the proposal contains measures which would improve compatibility in rules applicable in the Member States, such as provisions on

jurisdiction, extradition and exchange of information, which would also favour coordination where appropriate.

As it was the case with the Joint Action of 1996, the proposed Framework Decision cannot be interpreted as affecting any obligations which Member States might have under other international instruments. In particular, the respect of human rights and fundamental freedoms, such as the freedom of expression and the freedom of assembly and association as secured by Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, must be ensured. The exercise of these freedoms has to be balanced with the prevention of disorder or crime and the protection of the reputation or rights of others.

5. LEGAL BASIS

Article 29 of the TEU sets out the development of common action among the Member States in the fields of police and judicial cooperation in criminal matters and the prevention and fight against racism and xenophobia as a means of achieving the Union's objective of providing citizens with a high level of safety within an area of freedom, security and justice. That objective has to be achieved through approximation, where necessary, of rules on criminal matters in the Member States in accordance with the provisions of Article 31(e).

Closer cooperation between judicial and other competent authorities is another way of contributing to the mentioned objective. Article 31(a), (b), (c) and (d) lists several aspects which are to be included in common action with regard to judicial cooperation in criminal matters. The proposal also meets these objectives. In particular, a common definition of the constituent elements of the offences is a way to overcome the double criminality requirement in the context of mutual legal assistance and extradition and contributes to improving judicial cooperation. The obligation to establish jurisdiction in cases where Member States do not extradite their nationals is a way to ensure compatibility in rules applicable in Member States as required in Article 31(c). The provision abolishing political offences as a ground for refusing requests for mutual legal assistance or extradition contributes to the achievement of the objective of facilitating extradition set up in Article 31 (b). . Finally, the establishment of contact points for exchange of information facilitates and accelerates cooperation between competent authorities and is a way of ensuring compatibility in rules applicable in the Member States as required in Article 31 (a) and (c).

Article 34(2)(b) of the TEU refers to framework decisions as the instruments to be used for the purpose of approximation of the laws and regulations of the Member States. Framework decisions are to be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of the form and methods.

6. COMMENTS ON ARTICLES

Article 1 (Subject-matter)

Article 1 contains the objective pursued by the Framework Decision, i.e. approximation of laws and regulations of the Member States and closer co-operation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia.

This would contribute to achieve the Union's objective, expressed in Article 29 TEU, to provide citizens with a high level of safety within an area of freedom, security and justice.

Article 2 (Scope)

Article 2 refers to the situations and persons to which the Framework Decision applies, i.e. offences involving racism and xenophobia committed in whole or in part within a Member State (territoriality principle), by a national of a Member State where the act affects individuals or groups of that State (active and passive personality principle) or for the benefit of a legal person established in a Member State.

Article 3 (Definitions)

Article 3 contains definitions of terms used in the Framework Decision.

Paragraph (a) defines *"racism and xenophobia*" as the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups

Paragraph (b) defines "racist or xenophobic group" 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).

Paragraph (c) defines *"legal person"*. The definition of legal person is used in other instruments concluded at European Union level, such as the Second Protocol to the Convention on the protection of the European Communities' financial interests.

Article 4 (Offences concerning racism and xenophobia)

The list of behaviours contained in the Joint Action of 1996 has been taken as a basis and expanded to cover insults or threats made in public, when they are made towards individuals or groups concerned for a racist or xenophobic purpose. An obligation to incriminate any other racist behaviour, apart from public incitement to violence or hatred, which may cause substantial damage to individuals or groups concerned is also established.

Article 4 puts an obligation on the Member States to ensure that those forms of racist and xenophobic conducts are punishable as criminal offences. The choice offered by the Joint Action, either to incriminate these forms of conduct or to derogate from the principle of dual criminality is abolished.

As concerns the conduct mentioned in Article 4 (d) the changes to the wording of the Joint Action of 1996 are largely inspired by the German law, which incriminates not only the denial but also the trivialisation of the crimes mentioned, if that is liable to disturb the public peace. This should be interpreted as regards to the potencial of the conduct of disturbing the public peace.

The Article covers situations where the conduct is committed by any means, including an information system. There is a need to ensure that criminal law provisions in Member States apply to racist and xenophobic contents on the Internet. The approach taken is based on the principle, "what is illegal off-line remains illegal on-line".

Article 5 (Instigation, aiding, abetting and attempt)

Article 5 puts an obligation on Member States to ensure that instigating, aiding, abetting and attempting to commit racist and xenophobic crimes are punishable.

Article 6 (Penalties and sanctions)

Article 6 concerns penalties and sanctions. Paragraph 1 indicates that the offences referred to in Articles 4 and 5 shall be punishable by effective, proportionate and dissuasive penalties., Paragraph 2 states that for offences referred to in Articles 4 (b) to (e), at least in serious cases, custodial sentences which can give rise to extradition or surrender must be available. This meets the requirement for punishability under the law of both States by a custodial sentence of a maximum of at least six months for admissibility of requests for search and seizure referred to in Article 51 (a) of the Convention applying the Schengen Agreement.

With regard to public incitement to violence or hatred for racist and xenophobic purposes or to any other racist or xenophobic behaviour which can cause substantial dammage to individuals or groups concerned, terms of deprivation of liberty with a maximum penalty that is not less than two years is proposed. The same approach is adopted as regard to the conduct referred to in Article 4(f), i.e. 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.

This would mean that these offences would fall within the scope of Article 1(b) of the Council Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime,[13] i.e. laundering of the proceeds of such offence would be criminalised.

The possibility of imposing ancillary or alternative sanctions such as community service or participation in training courses, deprivation of certain civil or political rights or publication of all or part of a sentence with regard to offences referred to in Articles 4 and 5 is also made available. The adoption of these measures would be left to the discretion of judicial authorities. Fines and payment for charitable purposes could also be imposed.

Paragraph 6 also provides for measures for seizure and confiscation of any material or instruments used to commit these offences and proceeds obtained from offences covered by Articles 4 and 5.

Article 7 (Aggravating circumstance for racist offences)

This Article regards the situation of the offender as an aggravating circumstance, i.e. if the person is acting in the exercise of a professional activity, public or private, the sentence can be aggravated.

Article 8 (Racist and xenophobic motivation)

The fight against racism and xenophobia is reinforced by taking into account racist or xenophobic motivation as an aggravating factor when imposing the penalty for an "ordinary" offence. This can have a deterrent effect in respect of those contemplating the commission of offences motivated by racism and xenophobia. Therefore, Article 8 refers to the racist intention of the offender as an aggravating circumstance, which could be taken into account in the determination of the gravity for ordinary offences such as murder, injuries, etc.

Both possibilities referred to in Articles 7 and 8 already exist in some Member States' legislation.

Article 9 (Liability of legal persons)

In line with the approach taken in a number of legal instruments adopted at EU level to combat

[13] OJ L 182, 5.7.2001, p.1.

different types of criminality, it is necessary also to cover the situation in which legal persons are involved in racist and xenophobic offences. Article 9 therefore contains provisions for holding a legal person liable for the offences envisaged by Articles 4 and 5, committed for their benefit by any person with certain leading positions, acting either individually or as a part of the organ of the legal person. The term liability should be constructed so as to include either criminal or civil liability.

Regarding the criminal offences committed by means of an information system, Article 9 does not affect the provisions of Directive 2000/31/EC[14] on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), which deals with the liability of intermediary service providers.

In addition, according to standard practice, paragraph 2 provides that a legal person can also be held liable when the lack of supervision or control by a person in a position to exercise control, has rendered possible the commission of the offences for its benefit. Paragraph 3 indicates that legal proceedings against a legal person do not preclude parallel legal proceedings against a natural person.

Article 10 (Sanctions for legal persons)

Article 10 sets out a requirement for sanctions for legal persons held liable for the offences referred to in Articles 4 and 5. It requires effective, proportionate and dissuasive sanctions, where the minimum obligation is to impose criminal or non-criminal fines. Other sanctions that could typically apply to legal persons are also indicated.

Article 11 (Initiation of prosecutions)

In the European Union's approach against crime special importance has been attached to the protection of and assistance to the victims. A framework decision was adopted by the Council on 15 March 2001 on the standing of victims in criminal proceedings. In addition, the Commission has presented a Green Paper concerning compensation to crime victims[15].

Victims of racist and xenophobic offences are very often particularly vulnerable. Many of them are reluctant to initiate legal proceedings. They often think that that their report will not be taken seriously or have fear of retaliation by the offenders. Therefore, it is appropriate that each Member State ensures that investigation or prosecution not be dependent on the report or accusation made by a person subjected to the offence, at least in cases of serious racist offences such as public incitement to violence or hatred for racist and xenophobic purposes or to any other racist or xenophobic behaviour which can cause substantial damage to individuals or groups concerned; public dissemination or distribution of racist material or 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.

Article 12 (Jurisdiction)

Article 12 contains procedural provisions on jurisdiction.

Paragraph 1 establishes a series of criteria conferring jurisdiction to prosecute and investigate cases involving the offences referred to in this Framework Decision. A Member State shall establish its jurisdiction in three situations:

a) where the offence is committed in whole or in part on its territory, irrespective of the

[14] OJ L178, 17.7.2000, p.1.
[15] COM(2001)536final.

status or the nationality of the person involved (territoriality principle), or

b) where the offender is a national of that Member State and the act affects individuals or groups of that State (active and passive personality principle). This paragraph would not prejudice the interpretation of paragraph (a) with regard to an act partially committed within its territory; or

c) where the offence is committed for the benefit of a legal person established in the territory of that Member State.

Paragraph 2 addresses the issue of jurisdiction with regard to offences committed by means of an information system. Some minimum criteria are identified to avoid that perpetrators of racist offences take advantage of the different criteria for jurisdiction in Member States in order to escape criminal proceedings. Therefore, it is intended that when establishing its jurisdiction over the offences based on the territoriality principle in paragraph 1(a), each Member State ensures that its jurisdiction included cases where:

a) the offender commits the offence when physically present on its territory, whether or not the offence involves racist material hosted on an information system on its territory. For example, a person in a Member State placing racist material on a website located on the territory of a third country.

b) the offence involves racist material hosted on an information system in its territory, whether or not the offender commits the offence when physically present on its territory. For example, a person placing racist or xenophobic material on a website hosted on the territory of a Member State from the territory of a third country.

Given that not all Member States' legal traditions recognise extraterritorial jurisdiction for all types of criminal offences, paragraph 3 allows them not to apply the rules on jurisdiction set out in paragraph 1 as regards the situations covered by paragraphs 1(b) and (c).

Paragraph 4 states that the Member States shall inform the General Secretariat of the Council and the Commission where they decide to apply paragraph 3.

Article 13 (Extradition and prosecution)

This article shall no longer be applicable as soon as the Commission's proposal for a European arrest warrant is adopted, which will replace extradition within the EU. In particular, the European arrest warrant proposal does not foresee that nationality be a ground for refusal.

Article 13 takes account of the fact that some Member States do not extradite their own nationals and seeks to ensure that persons suspected of having committed racist and xenophobic offences do not evade prosecution because extradition is refused on the grounds that they are nationals of that State.

A Member State which does not extradite its own nationals must take the necessary measures to establish its jurisdiction over and, where appropriate, prosecute the offences concerned when committed by its own nationals on the territory of another Member State.

Article 14 (Political offences)

The Joint Action of 1996 asked Member States to acknowledge that the type of behaviours listed in the Joint Action should not be regarded as political offences justifying refusal to comply with request for mutual legal assistance. The first report on the implementation of the

Joint Action stated that in Member States' legal systems those forms of conduct would not be considered as political offences for the purpose of international cooperation. However, it is appropriate to include this provision in the framework decision as the scope of the framework decision has been extended. Moreover, it is also established that the forms of conduct listed in the Joint Action should not be regarded as political offences justifying refusal to comply with extradition requests.

Article 15 (Exchange of information)

This Article seeks to facilitate the exchange of information. The 1996 Joint Action stated that each Member State should take appropriate measures for establishing contact points, which would be responsible for collecting and exchanging any information useful for investigations and proceedings against offences covered in the Joint Action. The first report on the implementation of the Joint Action stated that additional steps could be undertaken in the area of contact points. Paragraph 1 therefore states that Member States should ensure that operational contact points for the purposes of facilitating exchange of information on offences covered by the Framework Decision are set up. Member States could make use of existing cooperation mechanisms for that purpose.

Paragraph 2 states that the Member States are to inform the General Secretariat and the Commission and of the Council of the contact points they designate.

The 1996 Joint Action stated that Member States should take appropriate measures for providing information to another Member State to enable that Member State to initiate proceedings in cases where appears that racist or xenophobic material is being stored in a Member State for the purposed of distribution or dissemination in another Member State. The operational contact points referred to in paragraph 1 could be used for that purpose. This would be without prejudice of Article 21 of the European Convention on Mutual Legal Assistance in criminal matters, which refers to transmission of information in connection with proceedings.

Article 16 (Implementation)

Article 16 concerns the implementation and follow-up of this Framework Decision.

Paragraph 1 requires the Member States to take the necessary measures to comply with this Framework Decision not later than 30 June 2004.

Paragraph 2 states that the Member States shall communicate to the General Secretariat of the Council and to the Commission the provisions transposing the obligations imposed on them under this Framework Decision into national law.

On that basis, the Commission shall produce a report on the extent to which Member States have taken the necessary measures to comply with the Framework Decision, accompanied where necessary by legislative proposals. Finally, the Council shall assess the extent to which Member States have complied with the obligations imposed by this Framework Decision.

Article 17 (Repeal of Joint Action 96/443/JHA)

Article 17 repeals the Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia.

Article 18 (Entry into force)

Article 18 indicates that this Framework Decision will enter into force on the third day following that of its publication in the Official Journal of the European Communities.

2001/0270 (CNS)

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[16],

Having regard to the opinion of the European Parliament[17],

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;

(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,[18] the Conclusions of the Tampere European Council of 15 and 16 October 1999[19], the European Parliament in its resolution of 20 September 2000[20] and the Commission's Communication to the Council and the European Parliament on the biannual update of the Scoreboard[21] 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, concerning action to combat racism and xenophobia[22] 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

16 OJ C …
17 OJ C …
18 OJ C 19, 23.1.1999, p.1.
19 http://ue.eu.int/en/Info/eurocouncil/index.htm.
20 OJ C 146, 17.5.2001, p. 110.
21 COM (2000)782 final.
22 OJ L 185, 24.7.1996, p. 5.

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;

(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[23] and of this Framework Decision, it has become obsolete;

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[23] 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;

HAS DECIDED AS FOLLOWS:

Article 1 - Subject-matter

This Framework Decision lays down provisions for approximation of laws and regulations of the Member States and for closer co-operation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia.

Article 2 - Scope

This Framework Decision applies to offences involving racism and xenophobia committed:

(a) within the territory of the Member States, or

(b) by nationals of a Member State where the act affects individuals or groups of that State, or

(c) for the benefit of a legal person established in a Member State.

Article 3 - Definitions

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

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

(b) "racist or xenophobic group" shall mean 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).

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

Article 4 - Offences concerning racism and xenophobia

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;

(d) 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.

Article 5 - Instigation, aiding, abetting and attempt

Member States shall ensure that instigating, aiding, abetting or attempting to commit an offence referred to in Article 4 is punishable.

Article 6 – Penalties and sanctions

1. Member State shall ensure that the offences referred to in Articles 4 and 5 are punishable by effective, proportionate and dissuasive penalties.

2. Each Member State shall take the necessary measures to ensure that the offences referred to in Article 4 (b) to (e) are punishable at least in serious cases, by custodial sentences which can give rise to extradition or surrender.

3. Each Member State shall take the necessary measures to ensure that the offences referred to in Article 4 (a) and (f) are punishable by terms of deprivation of liberty with a maximum penalty that is not less than 2 years.

4. Member States shall ensure that ancillary or alternative sanctions such as community service or participation in training courses, deprivation of certain civil or political rights or publication of all or part of a sentence may be imposed or foreseen for the offences referred to in Articles 4 and 5.

5. Member States shall ensure that fines can be imposed or payment for charitable purposes accepted in respect of the offences referred to in Articles 4 and 5.

6. Member States shall ensure seizure and confiscation of any material or instruments to commit and proceeds obtained from offences referred to in Articles 4 and 5.

Article 7 - Aggravating circumstance for racist offences

Member States shall ensure that in cases where the perpetrator of the offences referred to in Articles 4 and 5 is acting in the exercise of a professional activity and the victim is depending on this activity , the sentence can be aggravated.

Article 8 - Racist and xenophobic motivation

Member States shall ensure that racist and xenophobic motivation may be regarded as aggravating circumstances in the determination of the penalty for offences other than those referred to in Articles 4 and 5.

Article 9 - Liability of legal persons

1. Member States shall ensure that legal persons can be held liable for the forms of conduct referred to in Articles 4 and 5, 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 provided for in paragraph 1, Member States shall 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 offences referred to in Articles 4 and 5 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 commit offences or engage in the conduct referred to in Articles 4 and 5.

Article 10 - Sanctions for legal persons

1. Member States shall ensure that a legal person held liable pursuant to Article 9(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;

   e) temporary or permanent closure of establishments which have been used for committing the offence.

2. Member States shall ensure that a legal person held liable pursuant to Article 9(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 11 - Initiation of prosecutions

Each Member State shall ensure that investigations into or prosecution of offences referred to in Articles 4 and 5 shall not be dependent on the report or accusation made by a victim of the offence, at least in cases where offences referred to in Article 4, paragraphs (a), (e) and (f) have been committed in its territory.

Article 12 - Jurisdiction

1. Each Member State shall establish its jurisdiction with regard to the offences referred to in Articles 4 and 5 where the offence has been committed:

   (a) in whole or in part within its territory; or

   (b) by one of its nationals and the act affects individuals or groups of that State; 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 ensure that its jurisdiction extends to cases where the offence is committed through an information system and:

   a) the offender commits the offence when physically present in its territory, whether or not the offence involves racist material hosted on an information system in its territory;

   b) the offence involves racist material hosted on an information system in its territory, whether or not the offender commits the offence when physically present in its territory.

3. 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).

4. 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 13 - Extradition and prosecution

1. A Member State which, under its law, does not extradite its own nationals shall establish its jurisdiction over the offences referred to in Articles 4 and 5 when committed by its own nationals on the territory of another Member State.

2. Each Member State shall, when one of its nationals is alleged to have committed, in another Member State, an offence referred to in Articles 4 and 5, and it does not extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate.

   In order to enable prosecution to take place, the Member State in which the offence was committed shall forward to the competent authorities of the other State all the relevant the files, information and exhibits relating to the offence in accordance with

the procedures laid down in Article 6(2) of the European Convention on Extradition of 13 December 1957. The requesting Member State shall be informed of the initiation and outcome of any prosecution.

3. For the purpose of this Article, a "national" of a Member State shall be constructed in accordance with any declaration made by that State under Article 6(1)(b) and (c) of the European Convention on Extradition.

Article 14 - Political offences

Member States shall ensure that the offences referred to in Articles 4 and 5 are not regarded as political offences justifying refusal to comply with requests for mutual legal assistance or extradition.

Article 15 - Exchange of information

1. Member States shall designate operational contact points or may use existing operational structures for the exchange of information and for other contacts between Member States for the purposes of applying this Framework Decision.

2. Each Member State shall inform the General Secretariat of the Council and the Commission of its operational contact points or operational structure for the purposes of paragraph 1. The General Secretariat shall notify that information to the other Member States.

3. Where a Member State has information relating to the storage in its territory of material containing expressions of racism and xenophobia for the purposes of distribution or dissemination in another Member State it shall provide that information to the other Member State to enable the latter to initiate, in accordance with its law, legal proceedings or proceedings for confiscation. For that purpose, the operational contact points referred to in paragraph 1 may be used.

Article 16 –Implementation

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

2. They shall communicate to the General Secretariat of the Council and to the Commission the text of any provisions they adopt and information on any other measures they take to comply with this Framework Decision.

3. On that basis, the Commission shall, by 30 June 2005, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied where necessary by legislative proposals.

4. The Council shall assess the extent to which Member States have complied with this Framework Decision.

Article 17 - Repeal of Joint Action 96/443/JHA

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

Article 18 - 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