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LIMITE

DROIPEN 24

NOTE

from: Presidency
to: Coreper/Council

No. prev. doc.: 8405/05 DROIPEN 20
No. Cion prop.: 14904/01 DROIPEN 105 (COM(2001) 664 final)

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

I. INTRODUCTION

The original proposal for the Framework Decision on combating racism and xenophobia was presented by the European Commission on 29 November 2001. Despite the extensive examination the agreement was however not reached on the proposal during the JHA Council in February 2003.

The Italian delegation has, in March 2003, presented an alternative version of the draft Framework Decision. This proposal did not however gain the support of the delegations.

The European Parliament gave its opinion on the draft on 4 July 2002. The opinion has not yet been examined.

The JHA Council on 24 February 2005 gave a mandate to the Working Party on Substantive Criminal Law to resume the examination of the draft Council Framework Decision. Accordingly, the Working Party opened the discussions on the draft on the basis of the state of affairs achieved in 2003. The Framework Decision was further examined by the Article 36 Committee on 4 April 2005 and on 10 May 2005, on the basis of document 8405/05 DROIPEN 20.

II. OUTSTANDING QUESTIONS

1. General observations

The compromise package presented by the Presidency to the delegations at the meeting of the Article 36 Committee on the 10.05.2005 was the basis for the discussion. The discussions have shown a real commitment of the delegations to reach an agreement on the text. In view of the foregoing the Presidency is presenting to the Coreper/Council a new text, amended to take account of the observations made by the delegations.

The Presidency believes that the text strikes the right balance between different opinions expressed by the delegations in the course of the discussions. The present text of Article 8 refers back to the wording set in doc. 7280/03 DROIPEN 14. The Presidency proposes that it is accompanied by the declaration of the Council, set out in Annex III, which sets the present Framework Decision in a context of a step by step process whose successive elements are the 1996 Joint Action¹, the present Framework Decision (2005) and the Framework Decision on the European Evidence Warrant (2006)².

The examination of the Preamble to the Council Framework Decision was not concluded yet, however in the opinion of the Presidency and several delegations this may be best achieved once the agreement is found on the text of the articles.

¹ Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia, OJ L 185, P. 0005-0007.

² 2004/0813 (CNS).

2. General reservations

The Framework Decision is subject to the general scrutiny reservations entered by the Italian and Polish delegations, and to parliamentary scrutiny reservations entered by the Danish, German, Irish, Netherlands, Swedish, Lithuanian, Estonian and United Kingdom delegations.

III. CONCLUSIONS

The text of the proposal for the Council Framework Decision on combating racism and xenophobia is set out in the Annex to this document. The Presidency proposes that Articles 1–12 as set out in the Annex should be the basis for an agreement on general approach by the Council meeting on 2–3 June 2005.

The Coreper/Council is invited to agree on this approach.

The Presidency suggests, that the Preamble is further discussed by the Article 36 Committee.

The Coreper/Council is invited to agree on this approach.

Proposal for a
COUNCIL FRAMEWORK DECISION¹

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 ²,

Having regard to the Opinion of the European Parliament ³,

Whereas:

- (1) Racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States.

¹ EST parliamentary scrutiny reservation on entire text, IT general scrutiny reservation on entire text.

² OJ C ...

³ OJ C ...

- (2) The Action Plan of the Council and the Commission on how to best implement the provisions of the Treaty of Amsterdam on an area of freedom, security and 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. **In the Hague Programme of 4/5 November 2004, the European Council recalls its firm commitment to oppose any form of racism, anti-Semitism and xenophobia as already expressed in December 2003.**
- (3) Joint Action 96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European 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.

¹ OJ C 19, 23.1.1999, p. 1.

² <http://ue.eu.int/en/Info/eurocouncil/index.htm>.

³ OJ C 146, 17.5.2001, p. 110.

⁴ COM(2000) 782 final.

⁵ OJ L 185, 24.7.1996, p. 5.

(5) **Racism and xenophobia constitute a threat against groups of persons which are target of such behaviour.** It is necessary to define a common criminal law approach in the European Union to this phenomenon of racism and xenophobia in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties and sanctions are provided for natural and legal persons having committed or being liable for such offences.

(5a) "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.

(5b) "Religion" broadly refers to persons defined by reference to their religious convictions or beliefs.

(5c) “Hatred” refers to hatred based on race, colour, religion, descent or national or ethnic origin.

(6) Racist or xenophobic motivation should be taken into account as an aggravating factor when imposing penalties for ordinary offences. This would constitute a direct response to perpetrators of such offences and have a deterrent effect.

(7) An offence concerning racism and xenophobia committed in the exercise of a professional activity, should be considered as an aggravating circumstance since it entails an abuse and is particularly reprehensible.

- (8) It should be ensured that investigations and prosecutions of offences involving racism and xenophobia are not dependent on reports or accusation made by victims, who are often particularly vulnerable and reluctant to initiate legal proceedings.
- (9) Judicial cooperation in criminal matters should be promoted to combat more effectively racist and xenophobic offences [...]
- (10) [...]
- (11) [...]
- (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 origin¹ and of this Framework Decision, it has become obsolete.

¹ 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.
- (16) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union.
- (16 bis) Considerations relating to respect for the freedom of association, freedom of the press and freedom of expression in other media [...] have led **in many Member States** to procedural guarantees and to special rules in national law as to the determination or limitation of liability.
[...]
- (17) [...]

HAS DECIDED AS FOLLOWS:

Article 1

Offences concerning racism and xenophobia

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:
 - (a) publicly inciting to **discrimination**, violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;

- (b) the commission of an act referred to in point a) by public dissemination or distribution of tracts, pictures or other material;
- (c) publicly condoning, denying or grossly trivialising 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, religion, descent or national or ethnic origin [...];
- (d) publicly condoning, denying or grossly trivialising 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, religion, descent or national or ethnic origin. [...]

2. Any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement that it will make denying or grossly trivialising of the crimes referred to in paragraph 1 (c) and/or (d) punishable only if the crimes referred to in these paragraphs have been established as historical facts by a final decision of the international court.

3. 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 paragraph 2 of this Article.

Article 2

Instigation, aiding and abetting

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

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

Article 3

Sanctions

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 1 and 2 is punishable by effective, proportionate and dissuasive criminal penalties.

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

Article 4

Racist and xenophobic motivation

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

Article 5

Liability of legal persons

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

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

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

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

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

Article 6

Sanctions for legal persons

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

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;

(c) placing under judicial supervision;

(d) a judicial winding-up order.

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

Article 7

Constitutional rules and fundamental principles

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

2. This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to their 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, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

Article 8

Scope of criminal liability

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 religion 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 carried out in a manner unlikely [...] 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 [...] carried out in a manner unlikely [...] 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.
- (d) Article 1[...], where the conduct is not threatening, abusive or insulting.
2. **Where** a Member State under applicable legal instruments on mutual legal assistance in criminal matters has the possibility to refuse to provide mutual assistance on the basis of the principle of double criminality, it may, regarding conduct it has excluded from criminal liability pursuant to paragraph 1 [...], only use that possibility where¹:
- (a) at least a significant part of the offence **concerned** has been committed in the territory of that State or in a place treated as such; or
- (b) the offence concerned has been committed outside the territory of the requesting State and the law of the requested State does not allow prosecution for the same offences where committed outside its territory
3. 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.

¹ IT, IE, DK, LT, NL, SE, UK delegations opted for the deletion of this paragraph of Article 8 and they have reservation on this point. The COM stated that deletion of this paragraph would be a step back in respect to the Joint Action of 1996.

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:

- (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 2007].

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 2008] 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 for entry in the minutes of the Council at the adoption of the Framework Decision**Declaration by the Commission**

"The Commission takes the view that the Framework Decision is not the appropriate legal instrument by which to require Member States to introduce sanctions of a criminal nature at national level in the case of public incitement to discrimination.

As the Commission has pointed out on several occasions within Council bodies, it considers that in the context of the competences conferred on it for the purpose of attaining the objectives set out in Article 2 of the Treaty establishing the European Community, the Community is competent to require the Member States to impose sanctions at national level – including criminal sanctions if appropriate – where that proves necessary in order to attain a Community objective.

This is the case for matters relating to combating discrimination which are the subject of Article 13 of the Treaty establishing the European Community.

If the Council adopts the Framework Decision despite this Community competence, the Commission reserves all the rights conferred on it by the Treaty."

Declaration for entry in the minutes of the Council at the adoption of the Framework Decision**Declaration by the Council**

"The Council, recalling that already the 1996 Joint Action called for the derogation to the principle of dual criminality with regard to mutual assistance states:

- **that the review foreseen in Article 1 paragraph 3 should consider whether the declarations foreseen in Article 1 paragraph 2 should be retained;**
 - that the review foreseen in Article 8 paragraph 3 should consider whether paragraph 1 [...] should be retained in Article 8;
 - and that with regard to Article 8 paragraph 2 the review shall take place as soon as the Framework decision on the European Evidence Warrant is approved in order to consider if Article 8 paragraph 2 would have to be redrafted in this respect in order to take account of the specificities related to racism and xenophobia."
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