

Proposal for a Council Framework Decision on combating racism and xenophobia

(2002/C 75 E/17)

COM(2001) 664 final — 2001/0270(CNS)

(Submitted by the Commission on 29 November 2001)

THE COUNCIL OF THE EUROPEAN UNION,

comprehensive and clear legislation to combat racism and xenophobia effectively.

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,

Having regard to the opinion of the European Parliament,

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 ⁽¹⁾, the Conclusions of the Tampere European Council of 15 and 16 October 1999 ⁽²⁾, the European Parliament in its resolution of 20 September 2000 ⁽³⁾ and the Commission's Communication to the Council and the European Parliament on the biannual update of the Scoreboard ⁽⁴⁾ to review progress on the creation of an area of 'freedom, security and justice' in the European Union (second half of 2000) call for action in this field.
- (3) Joint Action 96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia ⁽⁵⁾ 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
- (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.

⁽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.

- (12) Since the objectives of ensuring that racism and xenophobia be sanctioned in all Member States by effective, proportionate and dissuasive criminal penalties and improving and encouraging judicial cooperation by removing potential obstacles, cannot be sufficiently achieved by the Member States individually, as rules have to be common and compatible, and can therefore better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as referred to in Article 2 of the EU Treaty and as set out in Article 5 of the EC Treaty. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.
- (13) This Framework Decision is without prejudice to the powers of the European Community.
- (14) Joint Action 96/443/JHA should be repealed since with the adoption of the Treaty of Amsterdam, of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin⁽¹⁾ and of this Framework Decision, it has become obsolete.
- (15) This Framework Decision respects the fundamental rights and observes the principles recognised in particular by the European Convention on Human Rights, in particular Articles 10 and 11 thereof, and by the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof,

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;

⁽¹⁾ OJ L 180, 19.7.2000, p. 22.

- (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*.