



**COUNCIL OF
THE EUROPEAN UNION**

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DROIPEN 94

"A" ITEM NOTE

from: Permanent Representatives Committee

to: Council

No. Cion prop. : 14904/01 DROIPEN 105 COM(2001) 664 final

Subject : Proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law

I. INTRODUCTION

The original proposal for a Council Framework Decision on combating racism and xenophobia was presented by the European Commission on 29 November 2001¹.

On 19 April 2007 the Justice and Home Affairs Council agreed a general approach on the text of the abovementioned proposal for a Council Framework Decision², subject to parliamentary scrutiny reservations and examination of the Preamble at a later stage.

¹ OJ C 75 E, 26.3.2002, p. 269.

² 8544/07 DROIPEN 34.

The Preamble of the proposed Framework Decision was examined on 25 June 2007.

The European Parliament gave its opinion on the initial draft proposal on 4 July 2002¹ and, after a renewed consultation, on 29.11.2007².

At the meeting of COREPER on 26 November 2008 , delegations were in a position to lift their reservations.

The text of the Framework Decision as it emerged from legal-linguistic scrutiny is set out in documents 16771/07 DROIPEN 127 + CORRIGENDA and 16771/1/08 REV 1 DROIPEN 127 (LV) (to be issued).

Statements to be entered in the minutes of the Council are set out in the Annex to this Note.

II. CONCLUSION

The Council is invited to:

- adopt the text of the Framework Decision as set out in documents 16771/07 DROIPEN 127 + CORRIGENDA and 16771/1/08 REV 1 DROIPEN 127 (LV) (to be issued).
- order the publication of the aforementioned instrument in the Official Journal of the European Union.
- take note of the statements set out in the Annex.

¹ OJ C 271 E, 12.11. 2003 p. 558.

² Opinion not yet published in the OJ.

Statements to be entered in the minutes of the Council

Statement by the Council

"On 28.11.2008 the Council of Ministers of the European Union adopted a Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. The aim of the Framework Decision is to approximate criminal law provisions and to combat racist and xenophobic offences more effectively by promoting full and effective judicial cooperation between Member States.

The Framework Decision deals with such crimes as incitement to hatred and violence and publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes. The Framework Decision is limited to crimes committed on the grounds of race, colour, religion, descent and national or ethnic origin. It does not cover crimes committed on other grounds for example by totalitarian regimes. However, the Council deplores all of these crimes.

The Council invites the Commission to examine and to report to the Council within two years after the entry into force of the Framework Decision, whether an additional instrument is needed, to cover publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes directed against a group of persons defined by reference to criteria other than race, colour, religion, descent or national or ethnic origin, such as social status or political convictions.

The Berlin declaration adopted on 25 March 2007 stated that "European integration shows that we have learnt the painful lessons of a history marked by bloody conflict." In that light, the Commission will organize a public European hearing on crimes of genocide, crimes against humanity and war crimes committed by totalitarian regimes as well as those who publicly condone, deny, grossly distort or trivialize them, and emphasizes the need for appropriate redress of injustice and – if appropriate – submit a proposal for a Framework Decision on these crimes."

Statement by the Commission

"The Commission congratulates the Council on making every effort to reach agreement on such an important subject. It was time for the European Union to adopt a firm stand against racism and xenophobia.

However, the Commission considers that Article 7(2) might be interpreted as allowing national law to prevail over Union law. In this connection, the Commission draws attention to the primacy of Union law."

Statement by Germany

Germany wishes to declare the following concerning its interpretation of the term "public order" as contained in Article 1 paragraph 2 of the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, having had the opportunity to share its views with the Legal Service of the Council:

"Pursuant to recital 6, this Framework Decision is limited to combating particularly serious forms of racism and xenophobia by means of criminal law. Accordingly, Article 1 paragraph 2 of the Framework Decision permits the Member States to choose to punish only such conduct that is carried out in a manner likely to exceed a certain threshold of significance. The legal systems of the Member States contain different concepts and approaches for describing such a threshold. In a number of Member States, the decisive factor is whether *individual* legal interests have been affected to a particularly severe degree by the conduct described in Article 1 paragraph 1 of the Framework Decision. In those Member States, such conduct may be punished if it is threatening, abusive or insulting to individuals or groups of individuals. In other Member States, the conduct may be punished if certain *collective* legal interests have been harmed. In these Member States, such conduct may be punished if the conduct described in Article 1 paragraph 1 of the Framework Decision is carried out in a manner likely to disturb "public order" or, in terms of some legislations, "public peace".

The Framework Decision leaves room for both concepts in Article 1 paragraph 2 and must be understood so as to allow Member States to maintain their national traditions and approaches in this respect. The reference in recital no. 6 to the fact that the cultural and legal traditions of the Member States are, to some extent, different, and that, particularly in this field, full harmonisation of criminal laws is currently not possible supports that interpretation. Germany therefore assumes that the term "public order" as employed in Article 1 paragraph 2 of the Framework Decision constitutes an expression of the required threshold, which may be further refined in various manners by the Member States when implementing the Framework Decision. Germany assumes in particular that, for the purposes of implementation, the term "öffentliche Friede" as used in the relevant corresponding provisions of German criminal law is covered by the term "public order" as employed in Article 1 paragraph 2 of the Framework Decision."

Statement by the Netherlands

"The Netherlands wishes to express that it already complies with the obligation of criminalization pursuant to the Articles 1 and 2 of the Framework Decision. Articles 137c, 137d and 137e of the Dutch Criminal Code give a broad criminalization of inciting to hate or violence, of insulting or discriminating because of amongst others race and religion. The term "race" includes also the characteristics skin colour, origin and national or ethnic decent. Under the scope of these Articles also fall condoning, denying or grossly trivialising of the international crimes, referred to in Article 1 subparagraphs c and d, as far as such a conduct incites to hate or violence, insults or discriminates because of race or religion."

Statement by Latvia regarding the crimes of the Totalitarian Communist regime in addition to the statement by the Council

"Latvia welcomes the adoption of the Framework Decision which constitutes a significant step in fighting the racism and xenophobia in the EU, as well as the Statement adopted by the Council, and considers that further discussions and evaluations are necessary in this field in order to obtain a complete solution to this question.

The Framework Decision provides for the criminal liability throughout the EU inter alia for the public condoning, denying or gross trivialising of the crimes committed by the Nazi regime. The scope of application is limited only to the crimes committed by the Nazi regime, but does not cover the crimes committed by the Totalitarian Communist regime, although, while having particular social groups as the main target, these crimes were also committed on the grounds of the ethnic and the national origin, which constitutes an integral part of the content of *Racism* as defined by the UN Convention on the Elimination of All Forms of Racial Discrimination adopted in 1966.

Any violence or threat has to be condemned irrespectively of what was the curtain of the objectives or the ideology these crimes were committed for. People of the EU have experienced the crimes against humanity from the both totalitarian regimes and they both demanded enormous human costs. Therefore Latvia considers that it is necessary that EU applies similar criteria to the crimes committed by both totalitarian regimes and provide for an equal treatment regarding the public condoning, denying or gross trivialising of these crimes.

The fact that there are always some people in the society justifying or denying the crimes committed by the Nazis or the Totalitarian Communists not only endangers the basic values of the democracy, but also insults personally the victims and their families, who suffered both these regimes.

Preservation of historic memory, assessment of the crimes of totalitarian regimes and their ideologies as well as respect for the victims and freedom fighters is very important for historical justice and for the prevention of the crimes against humanity in the future. Accordingly a similar approach has to be made and all necessary actions have to be done at EU level in order to prevent the revival of any of totalitarian regimes, including Totalitarian Communist regime.

Without exploration and recognition of these crimes at the international level, one cannot talk about the irreversibility of these crimes and the reconciliation. The EU has to have a common understanding and similar criteria when treating these crimes. This understanding and treatment has to be based on the criteria, that the human life is the highest value. The motivation or the ideology behind the crime cannot be brought to the forefront.

In this respect Latvia appreciates the invitation by Council to the European Commission to examine within two years after the entry into force of the Framework Decision, whether an additional instrument is needed.

Latvia considers that the adoption of such an instrument in the future would provide for an application of similar criteria towards these crimes and put on equal footing their victims all around the EU, as well as eliminate the denial and the distortion of the historical truth. At the same time it is essential to promote a common understanding of all these questions at EU level to all the EU Member States. Therefore the document, which was delivered during the 1st European hearing on "Crimes Committed by totalitarian regimes" in Brussels on 8 April 2008 and which was supported by the majority of the participants, should become as an inspiration for the future actions at the EU level."

Statement by Hungary

Hungary wishes to declare the following concerning its interpretation of the term "*public order*" as contained in Article 1 paragraph 2 of the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.

"According to the settled case law of the Constitutional Court of the Republic of Hungary, the only way for the freedom of expression to be restricted by means of criminal law is if the conduct endangers the rights of identified persons in a direct and obvious way and the conduct is likely to disturb public peace at the same time.

In order to support this narrow interpretation, in Hungary the term "*public order*" as contained in Article 1 paragraph 2 of the Framework Decision is covered by the term "*public peace*"."

Statement by France under Article 1(4) of the Framework Decision

"France declares, in accordance with Article 1(4), that it will make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of an international court".

Statement by Poland with regard to grossly distorting crimes of genocide, crimes against humanity and war crimes committed for racist and xenophobic reasons

"Poland emphasises that public gross distortion of genocide, crimes against humanity and war crimes committed for racist and xenophobic reasons constitutes a serious threat to the values protected under this Framework Decision and is comparable to the threats resulting from public condoning, denial or trivialisation of such crimes.

Poland understands that, for the sake of precision typical for the nature of criminal law, conduct of public gross distortion was not included in the provisions of the Framework Decision. However, this issue was reflected in the declaration of the Council.

Consequently, Poland wants to emphasise that grossly distorting the facts consisting in shifting the responsibility for crimes committed for racist and xenophobic reasons set forth in the Framework Decision from the actual perpetrators thereof, deserves condemnation and adequate reaction from the Member States. One of the examples of such actions is a use of a manifestly false term: "Polish concentration camps."
