

III

(Acts adopted under the EU Treaty)

ACTS ADOPTED UNDER TITLE VI OF THE EU TREATY

COUNCIL FRAMEWORK DECISION 2008/913/JHA

of 28 November 2008

on combating certain forms and expressions of racism and xenophobia by means of criminal law

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,

Having regard to the Opinion of the European Parliament ⁽¹⁾,

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 best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice ⁽²⁾, the Conclusions of the Tampere European Council of 15 and 16 October 1999, the Resolution of the European Parliament of 20 September 2000 on the European Union's position at the World Conference Against Racism and the current situation in the Union ⁽³⁾ and the Communication from the Commission to the Council and the European Parliament on the biannual update of the Scoreboard 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 and 5 November 2004, the Council recalls its firm commitment to oppose any form of racism, anti-Semitism and xenophobia as already expressed by the European Council in December 2003.

(3) Council Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia ⁽⁴⁾ should 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 Joint Action 96/443/JHA 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 approximation of Member States' criminal laws in order to ensure the effective implementation of comprehensive and clear legislation to combat racism and xenophobia.

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

(6) Member States acknowledge that combating racism and xenophobia requires various kinds of measures in a comprehensive framework and may not be limited to criminal matters. This Framework Decision is limited to combating particularly serious forms of racism and xenophobia by means of criminal law. Since the Member States' cultural and legal traditions are, to some extent, different, particularly in this field, full harmonisation of criminal laws is currently not possible.

⁽¹⁾ Opinion of 29 November 2007 (not yet published in the Official Journal).

⁽²⁾ OJ C 19, 23.1.1999, p. 1.

⁽³⁾ OJ C 146, 17.5.2001, p. 110.

⁽⁴⁾ OJ L 185, 24.7.1996, p. 5.

- (7) In this Framework Decision 'descent' should be understood as referring 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 or violence.
- (8) 'Religion' should be understood as broadly referring to persons defined by reference to their religious convictions or beliefs.
- (9) 'Hatred' should be understood as referring to hatred based on race, colour, religion, descent or national or ethnic origin.
- (10) This Framework Decision does not prevent a Member State from adopting provisions in national law which extend Article 1(1)(c) and (d) to crimes directed against a group of persons defined by other criteria than race, colour, religion, descent or national or ethnic origin, such as social status or political convictions.
- (11) It should be ensured that investigations and prosecutions of offences involving racism and xenophobia are not dependent on reports or accusations made by victims, who are often particularly vulnerable and reluctant to initiate legal proceedings.
- (12) Approximation of criminal law should lead to combating racist and xenophobic offences more effectively, by promoting a full and effective judicial cooperation between Member States. The difficulties which may exist in this field should be taken into account by the Council when reviewing this Framework Decision with a view to considering whether further steps in this area are necessary.
- (13) Since the objective of this Framework Decision, namely ensuring that racist and xenophobic offences are sanctioned in all Member States by at least a minimum level of effective, proportionate and dissuasive criminal penalties, cannot be sufficiently achieved by the Member States individually, since such rules have to be common and compatible and since this objective can therefore be better achieved at the level of the European Union, the Union may adopt measures, in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and as set out in Article 5 of the Treaty establishing the European Community. 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 that objective.
- (14) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Articles 10 and 11 thereof, and reflected in the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof.
- (15) Considerations relating to freedom of association and freedom of expression, in particular 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.
- (16) Joint Action 96/443/JHA should be repealed since, with the entry into force of the Treaty of Amsterdam, 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 this Framework Decision, it becomes obsolete,

HAS ADOPTED THIS FRAMEWORK DECISION:

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 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 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 when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;
- (d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 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 when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

⁽¹⁾ OJ L 180, 19.7.2000, p. 22.

2. For the purpose of paragraph 1, Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

3. For the purpose of paragraph 1, the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.

4. Any Member State may, on adoption of this Framework Decision or later, make a statement 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 a national court of this Member State and/or an international court, or by a final decision of an international court only.

Article 2

Instigation, aiding and abetting

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

2. 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.

Article 3

Criminal penalties

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 circumstance, 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 a legal person can be held liable for the conduct referred to in Articles 1 and 2, committed for its 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;
- (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 of this Article, 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 of this Article 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 of this Article 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, with the exception of States or other public bodies in the exercise of State authority and public international organisations.

Article 6

Penalties 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 penalties, which shall include criminal or non-criminal fines and may include other penalties, 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 penalties 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, including freedom of expression and association, as enshrined in Article 6 of the Treaty on European Union.

2. This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

Article 8

Initiation of investigation or prosecution

Each Member State shall take the necessary measures to ensure that investigations into or prosecution of the conduct referred to in Articles 1 and 2 shall not be dependent on a report or an 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 9

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;
- (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 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).

Article 10

Implementation and review

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 28 November 2010.

2. By the same date Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report established using this information by the Council and a written report from the Commission, the Council shall, by 28 November 2013, assess the extent to which Member States have complied with the provisions of this Framework Decision.

3. Before 28 November 2013, the Council shall review this Framework Decision. For the preparation of this review, the Council shall ask Member States whether they have experienced difficulties in judicial cooperation with regard to the conduct under Article 1(1). In addition, the Council may request Eurojust to submit a report, on whether differences between national legislations have resulted in any problems regarding judicial cooperation between the Member States in this area.

Article 11

Repeal of Joint Action 96/443/JHA

Joint Action 96/443/JHA is hereby repealed.

Article 12

Territorial application

This Framework Decision shall apply to Gibraltar.

Article 13

Entry into force

This Framework Decision shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Done at Brussels, 28 November 2008.

For the Council
The President
M. ALLIOT-MARIE