# Combating certain forms and expressions of racism and xenophobia by means of criminal law. Framework Decision

2001/0270(CNS) - 28/11/2008 - Final act

PURPOSE: to combat particularly serious forms of racism and xenophobia through a common minimum set of criminal law penalties European level.

LEGISLATIVE ACT: Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.

CONTENT: according to the evaluation of Council Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia, and work carried out by the Council of Europe, some difficulties have still been experienced regarding judicial cooperation aimed at combating racist offences. There is, therefore, 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.

Moreover, given that 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 -, it has become necessary to define a common criminal law approach in the European Union to this phenomenon.

The overall objective is 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. In particular, the Framework Decision aims at combating particularly serious forms of racism and xenophobia by means of criminal law but, 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.

Scope and objectives of the Framework Decision: the Framework Decision has the following objectives:

(1) to ensure that offences concerning racism and xenophobia are punishable: to this end, each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

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;

the commission of such an act by public dissemination or distribution of tracts, pictures or other material;

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 or those 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.

Note that 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.

(2) to ensure that instigating offences related to publicly condoning or denying genocide, as well as aiding and betting in the commission of such conduct, is punishable.

Criminal penalties: to make the provision more effective, it is provided that each Member State shall take the necessary measures to ensure that such conduct is punishable by effective, proportionate and dissuasive criminal penalties, by providing for criminal penalties of a maximum of at least between one and three years of imprisonment.

Aggravating circumstance: Member States shall also take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance.

Liability of legal persons: there are also provisions to punish legal persons deemed liable for racist or xenophobic offences referred to in the Framework Decision. Legal persons shall also be held liable for racist offences simply for a lack of supervision or control. Liability of a legal person shall not exclude criminal proceedings against natural persons who are perpetrators or accessories in the conduct of a racist offence.

Penalties for legal persons: the Framework Decision provides for penalties for natural persons deemed liable for racist acts referred to in the Framework Decision. Likewise, provisions are made to ensure that offences committed by legal person are punishable by criminal law. Such penalties shall be effective, proportionate and dissuasive (including criminal or non-criminal fines) and may include other penalties, such as:

exclusion from entitlement to public benefits or aid;

temporary or permanent disqualification from the practice of commercial activities;

placing under judicial supervision;

a judicial winding-up order.

Initiation of investigation or prosecution: each Member State shall take the necessary measures to ensure that investigations into or prosecution of offences involving racism and xenophobia shall not be dependent on a report or an accusation made by a victim of the conduct (who is often vulnerable and reluctant to initiate legal proceedings), at least in the most serious cases where the conduct has been committed in its territory.

Extraterritorial jurisdiction: the Framework Decision provides for the principle of extraterritorial jurisdiction to bring proceedings against those who commit offences involving racism and xenophobia. In particular, this means covering cases where offences involving racism are committed through an information system (for example, on the Internet). In this case, the material used does not have to be present in the territory of the Member State where the offence is committed and the offender does not have to be physically present in that Member State, if the material used is hosted in that Member State. However, the provision on extraterritorial jurisdiction is optional.

Constitutional rules and fundamental principles: specific provisions are made to clarify that the Framework Decision shall not be incompatible with the principles of freedom of expression and association, as enshrined in the Treaty on European Union. Moreover, it 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).

Report and review clause: the Council shall, by 28 November 2013, assess the extent to which Member States have complied with the provisions of this Framework Decision. Before that date, it shall review this Framework Decision, based on information provided by Member States on difficulties encountered with regard to its implementation.

Territorial application: this Framework Decision shall apply to Gibraltar.

ENTRY INTO FORCE: 06/12/2008. Joint Action 96/443/JHA is repealed.

TRANSPOSITION: Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 28/11/2010.