Council of the European Union: Framework Decision on Racism Adopted

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In November 2008, the Council 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".

Article 1 of the Framework Decision requires Member States to take the measures necessary to ensure that the following types of intentional conduct are 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 any of the above acts "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 by the Statute of the International Criminal Court or the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945).

In respect of the foregoing, Member States may opt, inter alia, "to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting" (Article 1(2)).

Member States are also required to make instigating, aiding and abetting the commission of the acts specified above punishable (Article 2). Member States must take the necessary measures to ensure that the types of conduct set out in Articles 1 and 2 are punishable "by effective, proportionate and dissuasive criminal penalties" (Article 3(1)). They are obliged to make the acts specified in Article 1 punishable by "criminal penalties of a period of at least between 1 and 3 years of imprisonment" (Article 3(2)).

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Article 4 provides: “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 envisages liability for legal persons in relevant circumstances and Article 6, in turn, envisages penalties for legal persons.

Also noteworthy is the fact that the Council of the European Union has invited the European Commission to examine and report to it on “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 history of the Framework Decision has been protracted, with the European Commission having presented its original proposal in 2001. The stalled progress can largely be explained by the concerns of certain Member States about the likely impact of the Framework Decision on the protection of the right to freedom of expression. On this specific point, Article 7 makes it clear that the Framework Decision shall not have a negative effect on, inter alia, the rights to freedom of expression (including of the media) and association, as vouchsafed by Article 6 of the Treaty on European Union or the constitutional traditions or rules of Member States.

Proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, Council of the European Union, Interinstitutional File 2001/0270(CNS), Doc. No. 16351/1/08 REV 1, 26 November 2008

http://register.consilium.europa.eu/pdf/en/08/st16/st16351-re01.en08.pdf

Press Release 2908th meeting of the Council - Justice and Home Affairs, Council of the European Union, Doc. No. 16325/08, 27 & 28 November 2008

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/104584.pdf

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

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:EN:PDF

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