EUROPEAN
COMMISSION

Brussels, 27.1.2014
COM(2014) 27 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law

{SWD(2014) 27 final}

1. INTRODUCTION

All forms and manifestations of racism and xenophobia are incompatible with the values upon which the EU is founded. The Lisbon Treaty provides that the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia[1].

Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law[2] (hereinafter 'the Framework Decision') was adopted unanimously on 28 November 2008, after seven years of negotiations. The complicated nature of these negotiations was mainly due to the disparity of the Member States' legal systems and traditions as regards protection of the right to freedom of expression and its limits, and yet there was enough common ground to define a Union-wide criminal-law approach to the 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 are provided for natural and legal persons having committed or being liable for such offences.

The fight against racism and xenophobia must be framed within a fundamental rights context: the Framework Decision is based on the need to protect the rights of individuals, groups and society at large by penalising particularly serious forms of racism and xenophobia while respecting the fundamental rights of freedom of expression and association. It thereby embodies 'the vital importance of combating racial discrimination in all its forms and manifestations', as underlined by the European Court of Human Rights, which has upheld that it may be necessary in 'democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance'[3]. The Framework Decision must be applied in conformity with fundamental rights, in particular freedom of expression and association, as enshrined in the Charter of Fundamental Rights.

In accordance with Article 10(1) of Protocol No 36 to the Treaties, prior to the end of the transitional period expiring on 1 December 2014, the Commission does not have the powers to launch infringement proceedings under Article 258 TFEU with regard to Framework Decisions adopted prior to the entry into force of the Treaty of Lisbon.

The Framework Decision now requires the Commission to draw up a written report assessing the extent to which Member States have implemented all provisions of this legislation. This report is based on the transposition measures notified by Member States (see Annex) and technical information requested from them by the Commission during its analysis (including national case law, preparatory work, guidelines, etc.), as well as on information gathered from five governmental expert group meetings and a study contracted by the Commission[4].

Member States were obliged to transmit the text of the provisions transposing into their national law the obligations imposed on them under the Framework Decision by 28 November 2010. All Member States have notified the national measures taken to comply with the Framework Decision.

---

1 Article 67(3) of the Treaty on the Functioning of the European Union (TFEU).

2 OJ L 328/55 of 6.12.2008.

3 ECtHR judgments of 23.9.1994 (*Jersild v. Denmark*) and 6.7.2006 (*Erbakan v. Turkey*). See also the judgment of 9.7.2013 (*Vona v Hungary*), specifically on freedom of assembly and association.

4 Study on the legal framework applicable to racist or xenophobic hate speech and hate crime in the EU Member States (JUST/2011/EVAL/FW/0146/A4).

2. MAIN ELEMENTS OF THE FRAMEWORK DECISION

The Framework Decision defines a common criminal-law approach to certain forms of racism and xenophobia, namely with regard to two types of offences, commonly known as racist and xenophobic hate speech and hate crime[5].

As regards 'hate speech', Member States must ensure that the following intentional conduct is punishable when 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:

– publicly inciting to violence or hatred, including 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 (hereinafter 'ICC'); or

  – the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945,

  when the conduct is carried out in a manner likely to incite violence or hatred against such a group or one or more of its members.

Under Article 1(2) of the Framework Decision, Member States may choose to punish *only* conduct which is either (i) carried out in a manner likely to disturb public order or (ii) which is threatening, abusive or insulting. Under Article 1(4), any Member State may make punishable the act of denying or grossly trivialising the above-mentioned crimes *only* if these crimes 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. This possibility is not provided for the act of condoning the above-mentioned crimes.

With regard to 'hate crime', Member States must ensure that racist and xenophobic motivation is considered as an aggravating circumstance, or alternatively that such motivation may be taken into account by the courts in determining the applicable penalties.

3. TRANSPOSITION BY THE MEMBER STATES

3.1. Racist and xenophobic hate speech (Article 1)

3.1.1. Public incitement to violence or hatred

While the criminal codes of most Member States contain provisions that deal with conduct falling under 'incitement to violence or hatred', the terminology used ('provoking', 'stirring up', 'propagation', 'promoting', 'instigating', 'urging', etc.) and the criteria applied vary. DK, FI and SE do not have specific provisions for the conduct of incitement and use provisions which incriminate threatening, insulting, abusive, defamatory or contemptuous language on the basis of race, colour, religion or belief, national or ethnic origin.

The majority of Member States make specific reference to both violence and hatred (BE, BG, DE, EE, ES, EL, FR, HR, IT, CY, LV, LT, LU, MT, NL, AT, PT, SI, SK). The incrimination of public incitement to both violence and hatred is relevant for the effectiveness of this instrument. Whereas EE, EL and PT make reference to both terms, EE requires a resulting danger to the life, health and property of a person, EL incriminates inciting *to acts or actions likely to lead to hatred or violence* and PT requires an additional organisational element on

[5] These terms are not, however, used by the Framework Decision.

the part of alleged perpetrators, neither of which is provided for by the Framework Decision. While CZ, IE, HU, PL, RO and UK legislation expressly mentions only hatred, IE and UK consider the concept of violence to be effectively covered by the term hatred, CZ considers it to be covered in certain circumstances, and HU considers it to be covered through national case law.

Under the Framework Decision, the victims of incitement comprise a group of persons or a member of such group. Twelve Member States (BE, DE, EL, FR, HR, CY, LT, LU, MT, AT, PT and SK) expressly mention groups and individual members in accordance with the Framework Decision; in NL incitement to hatred is directed *against persons* while incitement to violence is directed against *a person*. Eight Member States (CZ, DK, IE, ES, HU, RO, FI and SE) only make express reference to a group of people. Seven Member States make no express reference to groups or individuals. According to BG, LV, PL and SI, their respective offences cover acts against both groups and individuals; EE, IT and UK have provided no detailed information. In EE incitement is incriminated if it results in danger of a person.

The Framework Decision comes into play when the victims of incitement are defined by reference to race, colour, religion, descent or national or ethnic origin. The list of grounds has not been transposed in all Member States but the objective appears to be generally met. BE, HR, CY and SK make express mention of all the grounds and LU appears to have done so with family status corresponding to the term descent. DK, IE, AT, PT, SE and UK mention all the grounds apart from descent, while BG, DE, ES, FR, IT, LV and HU omit references to both colour and descent. MT and SI omit references to descent and national origin, while LT makes no mention of colour and ethnic origin. CZ, EL, NL, PL and RO omit references to colour, descent and national origin. The term origin (EE, FR, SI and FI) and ethnic origin (RO) can be considered to be of equal meaning to the term descent. The term nationality (BG and LT) appears not to reflect the broader meaning of the term national origin.

3.1.2. Public dissemination or distribution of tracts, pictures or other material inciting to violence or hatred

The Framework Decision stipulates that acts of public incitement to violence or hatred by public dissemination or distribution of tracts, pictures or other material shall also be criminalised, indicating that not only oral communication should be covered. As required, the majority of Member States mention the specific means of dissemination in the provisions dealing with the offence itself (BE, BG, DE, EL, IE, FR, HR, CY, LT, LU, MT, NL, PL, PT and UK). However, other Member States refer to general interpretation sections of the Criminal Code (CZ, HU and SK) or point to official reports (FI) or preparatory works (SE) on the matter. LV refers to case law in which online communication is penalised. ES uses the expression *disseminates offensive information* and IT the term *propagates ideas*. EE, AT and SI stipulate only that the act must be committed publicly and DK publicly or with the intention of wider dissemination.

3.1.3. Public condoning, denial or gross trivialisation of genocide, crimes against humanity and war crimes

The Framework Decision stipulates that Member States must criminalise the public condoning, denial and gross trivialisation of the crimes defined in Articles 6, 7 and 8 of the Statute of the ICC (crimes of genocide, crimes against humanity and war crimes), 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.

This provision can be transposed without an express reference to the ICC Statute if the relevant national legislation provides for definitions of genocide, crimes against humanity and war crimes which mirror the Statute. Eight Member States (BG, HR, CY, LU, LT, MT, SI and SK) criminalise the three types of conduct (i.e. publicly condoning, denying and grossly trivialising). CY, LU, MT, SI and SK make express reference to, or very closely reproduce, the aforementioned articles of the Statute. SK requires that the conduct must vilify or threaten the group or individual.

Seven Member States do not expressly refer to all three types of conduct, with ES, FR, IT and PL referring only to condoning, PT to denying and LV and RO to condoning or denying (RO incriminates *minimisation* only through distribution of materials). LV and PT refer to all international crimes while RO refers to genocide and crimes against humanity, and ES and IT only to genocide.

In terms of the requisite effect of the conduct being likely to incite to violence or hatred, FR, IT, LV, LU and RO do not require that the conduct be carried out in a manner likely to incite to violence and hatred, while BG, ES, PT and SI require more than a mere likelihood of incitement.

Thirteen Member States (BE, CZ, DK, DE, EE, EL, IE, HU, NL, AT, FI, SE and UK) have no criminal-law provisions governing this conduct. DE and NL state that national case law applicable to Holocaust denial and/or trivialisation would also apply to the conduct covered by this article.

3.1.4. Public condoning, denial or gross trivialisation of the crimes defined in the Charter of the International Military Tribunal

The Framework Decision obliges Member States to criminalise the public condoning, denial and gross trivialisation of crimes against peace, war crimes and crimes against humanity committed by major war criminals of the European Axis countries. Such conduct can be considered as a specific manifestation of antisemitism when it takes place in a way that is likely to incite to violence or hatred. It is therefore essential that this conduct be incriminated under national penal codes.[6]

This provision can be transposed without a specific reference to the Charter of the International Military Tribunal, as long as it is evident that it refers to specific historical crimes committed by the European Axis countries. FR, CY, LU and SK make explicit reference to the Charter of the International Military Tribunal, but FR law is currently limited to *contesting* crimes and LU law does not refer to crimes against peace.

Six Member States (BE, CZ, DE, LT, HU and AT) make reference to the *National Socialist regime* or *Nazi Germany* as the relevant perpetrators of these crimes. Of these 6, BE makes specific reference to genocide only, while CZ and HU refer to genocide and other crimes against humanity. RO makes reference to denial and condoning of the Holocaust, referring to *minimisation* only in relation to the distribution of materials. SI refers to denial, condoning and trivialisation of the Holocaust. LT and PL limit the incrimination by referring to crimes committed by the National Socialist regime *against the Lithuanian or Polish nation or citizens*, respectively, with PL making reference only to denial in this respect.

---

[6] The ECtHR has stated that '*denying crimes against humanity constitutes one of the most serious forms of racial defamation of Jews and of incitement to hatred of them*' (*Garaudy v. France*, judgment of 24.6.2003). Moreover, the denial or revision of '*clearly established historical facts — such as the Holocaust — […] would be removed from the protection of Article 10* [freedom of expression] *by Article 17*' [prohibition of abuse of rights] of the ECHR (*Lehideux and Isorni v. France*, judgment of 23.9.1998).

The remaining 15 Member States (BG, DK, EE, EL, IE, ES, HR, IT, LV, MT, NL, PT, FI, SE and UK) have no specific provisions criminalising this form of conduct. NL, FI and UK have submitted sentencing rulings for trivialisation, condoning and denial of the Holocaust, based on criminal-law provisions punishing respectively incitement, ethnic agitation or stirring up of hatred.

3.1.5. Optional qualifiers

Certain Member States have made use of the option provided by Article 1(2) allowing Member States to punish only hate speech which is either (i) carried out in a manner likely to disturb public order or ii) which is threatening, abusive or insulting. CY and SI mirror this provision by providing for both alternatives mentioned. AT makes the crime of incitement to violence (not to hatred) dependent on it being likely to disturb public order. DE makes all conduct mentioned above dependent on being capable of disturbing the public peace. Similarly, HU case law points to such conduct being dependent on a likely disturbance of public peace. MT appears to make the crime of incitement to violence or hatred dependent on it being threatening, abusive or insulting while, like LT, the crime of condoning, denial or trivialisation is dependent on either of the two options. IE and the UK make the conduct of stirring up hatred dependent on it being threatening, abusive or insulting.

As regards the option provided by Article 1(4), FR, CY, LT, LU, MT, RO and SK have chosen to use it in relation to the conduct of publicly denying or grossly trivialising the crimes defined in the ICC Statute. CY, LT, LU, RO and SK use this possibility in relation to the conduct of publicly denying or grossly trivialising the crimes defined in the Charter of International Military Tribunal[7].

3.2. Instigation, aiding and abetting (Article 2)

With regard to Article 2, which deals with the instigation and aiding and abetting of the crimes listed in Article 1, practically all Member States apply the general, horizontal rules regulating such behaviour[8].

3.3. Criminal penalties (Article 3)

The large majority of Member States have implemented the requirement that conduct involving hate speech is punishable by criminal penalties of *a maximum* of at least between 1 and 3 years of imprisonment. The maximum penalty in relation to hate speech ranges from 1 year (BE) to 7 years (UK, in the case of a conviction on indictment), and several Member States (BE, EL, IE, FR, CY, LV, LT, LU, NL, PL, RO, FI, SE and UK) afford the courts the option of imposing a fine as an alternative to imprisonment. The maximum penalty in relation to public condoning, denial or gross trivialisation of crimes ranges from 1 year and a fine (BE) to 20 years (AT), with DE, FR, CY, LV, LT and RO giving the courts the alternative of imposing a fine or other penalty.

3.4. Racist and xenophobic hate crime (Article 4)

The Framework Decision requires Member States to specifically address racist and xenophobic motivation in their criminal codes or, alternatively, ensure that their courts take such motivation into consideration in the determination of penalties. Due to the discriminatory nature of racist and xenophobic motives and their impact on individuals, groups and society at large, Member States must ensure that racist and xenophobic motives are properly unmasked and adequately addressed.

---

7 This option cannot be used for the act of condoning these crimes.

8 It appears that only MT dedicates a specific provision to instigation, aiding and abetting of these crimes.

Fifteen Member States (CZ, DK, EL, ES, HR, IT, CY, LV, LT, MT, AT, RO, FI, SE and SK) have made use of the first option provided for in Article 4 by stipulating in their criminal codes that racist and xenophobic motivation *shall* be considered an aggravating circumstance with regard to *all crimes*. Eight Member States (BE, BG, DE, FR, HU, PL, PT and UK) stipulate that a racist or xenophobic motivation shall be considered an aggravating circumstance with regard to certain (often violent) crimes such as murder, serious bodily harm and other violence against persons or property. Three Member States out of the latter group also use the second option provided for in Article 4, as they have criminal-law provisions stating that racist motivation *may* be taken into account by the courts (BE) or have provided case law and detailed statistics which demonstrate that racist and xenophobic motivation is taken into consideration (DE and UK).

PL, PT and SI refer to general criminal-law provisions which stipulate that the general motivation of the perpetrator shall be considered and EE refers to the aggravating circumstance of other base motives. HU refers to a considerable amount of registered hate crimes and convictions but has not yet provided the relevant case law. NL refers to an official guidance document which states that racist or xenophobic motivation should be taken into account, while IE and LU simply state that motivation can always be considered by the courts.

3.5. Liability of legal persons and applicable penalties (Articles 5 and 6)

Legal persons must be held liable for hate speech committed by a person who has a *leading position* within the legal person or where lack of supervision by such a person has enabled the hate speech to be carried out by a person under its authority. While the Framework Decision does not oblige Member States to impose criminal sanctions, penalties must, in all cases, be *effective, proportionate and dissuasive*.

The legislation of most Member States (apart from EL, ES, IT and SK[9]) addresses the liability of legal persons in the case of hate speech, the majority regulating the matter by means of horizontal criminal code provisions[10] and the imposition of criminal fines.

Article 5 must be transposed with regard to *all* persons acting for the benefit of the legal person. Some national laws are not clear on this point (BE, DK and LU). Others seem to add conditions, such as the effect that the legal person must have *enriched itself* (BG), the requirement that *the crime violates any duty of the legal person* (HR) and the rule that action may only be taken against a legal person if the court had *previously* imposed punishment on a natural person (HU).

3.6. Constitutional rules and fundamental principles (Article 7)

FR, HU, SE and UK have referred to Article 7 of the Framework Decision in their notifications.

The Commission pays particular attention to ensuring that the transposition of the Framework Decision fully respects all fundamental rights as enshrined in the Charter of Fundamental Rights, which result also from the constitutional traditions common to the Member States.

As established by the Charter of Fundamental Rights and the European Convention on Human Rights, any limitation on the exercise of fundamental rights and freedoms must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may only be made if they are necessary and genuinely meet

[9] SK provides for a form of indirect liability by allowing for the 'seizure of a monetary sum'.

[10] FR has a specific system for certain crimes committed via the press which excludes liability of legal persons.

objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others[11].

The European Court of Human Rights has recognised that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. Furthermore it has held that remarks directed against the Convention's underlying values could not be allowed to enjoy the protection afforded under Article 10 (freedom of expression)[12].

3.7. Initiation of investigation or prosecution (Article 8)

Member States must ensure that investigations into or prosecution of hate speech are not dependent on a report or an accusation made by the victim, at least in the most serious cases. While the majority of Member States have specific, often horizontal criminal-law provisions which ensure *ex officio* investigation and/or prosecution in the case of the majority of crimes, including hate speech, certain Member States have provided case law, official statements and other information to show that this provision is implemented in practice.

3.8. Jurisdiction (Article 9)

The legislation of every Member State includes the territoriality principle under which jurisdiction for hate speech offences is established with regard to conduct committed *in whole or in part within its territory*. All Member States apart from IE and UK have also notified criminal-law rules which specifically extend their jurisdiction to conduct committed *by one of (their) nationals*. IT, PT and RO appear to exclude hate speech from this latter jurisdictional rule.

Concerning legal persons, 21 Member States have provided no conclusive information as regards the transposition of the rule that jurisdiction must be established when the conduct has been committed *for the benefit of a legal person that has its head office in the territory of that Member State.*

Online hate speech is one of the most prevalent ways of manifesting racist and xenophobic attitudes. Consequently, Member States should have the means to intervene in cases of online hate speech. When establishing jurisdiction over conduct committed within their territory, Member States must ensure that their jurisdiction extends to cases where the conduct is committed through an information system, and the offender or materials hosted in that system are in its territory. It appears that only CY fully transposes these jurisdictional rules into its legislation. The legislation of DK, MT and SI makes specific reference to information systems, and HR refers to the offence being committed through electronic press. CZ, LU, HU, AT, PT, RO, SK and SE say that their general jurisdictional rules cover online hate speech situations but have provided no detailed information. On the other hand, BE, BG, DE, FR and UK have provided case law to show that their courts have taken cognizance of cases involving information systems, the majority of which appear to establish jurisdiction when the offender is physically present/resident in the relevant jurisdiction or when the material was accessible in that jurisdiction or clearly addressed to that country's public.

[11] Provided by Article 52(1) of the Charter of Fundamental Rights, and similarly by Article 10(2) of the European Convention on Human Rights specifically in relation to freedom of expression.

[12] Judgments of 4.12.2003 (*Gündüz v. Turkey)* and of 24.6.2003 (*Garaudy v. France).*

4. SUGGESTED PRACTICES TO STRENGTHEN THE IMPLEMENTATION OF THE FRAMEWORK DECISION

The information obtained from Member States has shown that the authorities responsible for investigation and prosecution need practical tools and skills to be able to identify and deal with the offences covered by the Framework Decision, and to interact and communicate with victims.[13] They should have sufficient knowledge of relevant legislation and clear guidelines.

The existence of special police hate crime units, special prosecutors' offices for hate speech and crime, detailed guidelines, as well as specific training for police, prosecutors and judges are good practices which may support the implementation of this legislation.

The exchange of information and good practices by bringing together law enforcement officials, prosecutors and judges, civil society organisations and other stakeholders can also contribute to better implementation.

Due to its special character, including the difficulty of identifying the authors of illegal online content and removing such content, hate speech on the internet creates special demands on law enforcement and judicial authorities in terms of expertise, resources and the need for cross-border cooperation.

Underreporting is common for hate speech and hate crime[14]. Due to the nature of these crimes, victims often resort to victim-support services, rather than reporting the crime to the police. Speedy implementation of the Victims' Directive is thus essential in order to protect victims of hate speech and crime.

The existence of reliable, comparable and systematically collected data can contribute to more effective implementation of the Framework Decision. Reported incidents of hate speech and hate crime should always be registered, as well as their case history, in order to assess the level of prosecutions and sentences. Data collection on hate speech and hate crime is not uniform across the EU and consequently does not allow for reliable cross-country comparisons[15]. The Commission has asked all Member States to provide it with figures about the incidence and the criminal response to hate speech and hate crime. Data submitted by 17 Member States are presented in the Annex to this Report.

Racist and xenophobic attitudes expressed by opinion leaders may contribute to a social climate that condones racism and xenophobia and may therefore propagate more serious forms of conduct, such as racist violence. Public condemnation of racism and xenophobia by authorities, political parties and civil society contributes to acknowledging the seriousness of these phenomena and to actively fighting against racist and xenophobic speech and behaviour[16].

5. CONCLUSION

At present it appears that a number of Member States have not transposed fully and/or correctly all the provisions of the Framework Decision, namely in relation to the offences of denying, condoning and grossly trivialising certain crimes. The majority of Member States have provisions on incitement to racist and xenophobic violence and hatred but these do not

---

13 The investigation of racist or xenophobic acts and the application of appropriate sanctions is necessary in order to comply with fundamental rights as confirmed by ECtHR, judgments of 6.7.2005 (*Nachova and Others v. Bulgaria*), 10.3.2010 (*Cakir v. Belgium*), 27.1.2011 (*Dimitrova and Others v. Bulgaria*).

14 See, in particular, the report from the European Union Agency for Fundamental Rights (FRA) *Making hate crime visible in the European Union: acknowledging victims' rights* 2012.

15 *Ibidem*.

16 See ECtHR judgments of 6.7.2006 (*Erbakan v Turkey*) and 16.7.2009 (*Féret v. Belgium*).

always seem to fully transpose the offences covered by the Framework Decision. Some gaps have also been observed in relation to the racist and xenophobic motivation of crimes, the liability of legal persons and jurisdiction.

The Commission therefore considers that the full and correct legal transposition of the existing Framework Decision constitutes a first step towards effectively combating racism and xenophobia by means of criminal law in a coherent manner across the EU.

The Commission will engage in bilateral dialogues with Member States during 2014 with a view to ensuring full and correct transposition of the Framework Decision, giving due consideration to the Charter of Fundamental Rights and, in particular, to freedom of expression and association[17].

[17] Ref. Article 10 of Protocol No 36 of the Treaty of Lisbon. Infringement procedures for Framework Decisions are not possible before 1 December 2014.