Evaluation

of the

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

on the basis of the

Manifesto for a European Criminal Policy

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1. On the requirement of a fundamental legal interest worthy of protection

a) What interest does the legal instrument in question aspire to protect?

The legal interest protected by the framework decision are the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, which can all be considered fundamental principles of the Member States. In the preamble (point 13) is it pointed out that the objective of the framework decision is 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. This cannot be sufficiently achieved by the Member States as such rules have to be common and compatible and this objective can therefore be better achieved at the level of the European Union. Also, former article 29(1) TEU stated that the objective of the Union as to provide its citizens with a high level of safety within an AFSJ by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. Today, article 67(3) TFEU states that The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, especially racism and xenophobia.

b) Is the protected interest fundamental in terms of its nature?

The principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law can be considered fundamental principles upon which the European Union is founded and which are common to the Member States.

c) Is the protected interest anchored in the primary law of the EU?

See answer under d).

d) Is the protected interest fundamental in terms of its nature and is it anchored in the primary law of the EU?

As already mentioned, the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law are considered common to the Member States. Racism and xenophobia are considered violations of these. These are also mentioned in the preamble of the Charter of fundamental rights and can be considered fundamental interests being anchored in primary EU law.

e) Is the protected interest possible to reconcile with the constitutional traditions of the Member States and the EU Charter on Fundamental Rights?

Yes, as already mentioned under d) these interests are embedded in the constitutional traditions of the Member States and are also part of the Charter.

f) In what way is the impact of the proscribed conduct on the protected interest especially harmful to the society?

As the principles that are to be protected by the framework decision are fundamental, offences of racism and xenophobia can be considered endangering these principles. The framework decision does not include further information about the extent of these offences being especially harmful to the society. It merely states (point 4 of the preamble) that difficulties have still been experienced in relation to judicial cooperation and therefore there is a need to further approximate the criminal laws of the Member States to ensure effective implementation of comprehensive and clear legislation to combat racism and xenophobia.

g) Does the EU legislator deal with the question of a legal interest worthy of protection, and is there any explicit and detailed justification as to whether a legitimate interest of this kind actually exists?

In the framework decision, the EU legislator does not as such comment on the legal interest worthy of protection, but the framework decision refers precisely to the deficits of previous legislation.

2. On the ultima ratio principle

a) Are there for the protection of the legitimate interest (according to 1) alternative protection mechanisms –unrelated to the imposition of criminal sanctions- available to the EU?

The framework decision can be considered part of the European criminal policy and the building up of the area of freedom, security and justice. As the framework decision concerns offences, there does not seem to be any previous other mechanisms, although it is stated (point 6 in the preamble) that the measures to combat racism and xenophobia might not need to be limited only to criminal matters.

The common European history makes it difficult to fight racism with other means than criminal ones. It is evident that racism and xenophobia present big problems in all Member States.

b) Can the European legislator demonstrate the inadequate effectiveness of alternative, non-penal/criminal measures in practice?

It is not demonstrated, at least in the framework decision, why criminal measures are chosen. However, as this framework decision explicitly concerns combatting racism and xenophobia by means of criminal law, perhaps this is not considered important to contemplate on.

See the answer to question 2.a.

c) Does the EU legislator deal with the question of alternative protective measures, and is there an explicit and detailed explanation as to whether resort to criminal law (of Member States, where appropriate) is necessary?

There is no explanation of why criminal law is chosen, but as the offences that the framework decision is intended to combat are of such nature that other means than criminal would seem inadequate.

See the answer to question 2.a.

d) Do the proscribed types of conduct indeed call for criminal sanctions as a last resort?

This is, again, not contemplated on, as the framework decision has combatting racism and xenophobia by means of criminal law as its aim.

See the answer to question 2.a.

3. On the principle of guilt

a) Does the punishment provided for the instrument relate in a proper way to the actual responsibility of the individual?

Yes.

b) Do these sanctions correspond to individual guilt in terms of their type and gravity?

In article 1(1), it is stated that intentional conduct shall be made punishable. The criminal penalties are to be of a maximum of at least between 1 and 3 years of imprisonment. The framework decision does not further contemplate on the relation between the punishment and the responsibility of the individual.

c) Does the legislator explicitly deal with the question whether these sanctions are appropriate having regard to the guilt of the individual?

The framework decision comments on this in relation to offences other than those harmonised by the framework decision. Article 4 lays down a requirement for the Member States to take racist and xenophobia motivation in account as aggravating circumstances, or alternatively into consideration when determining the penalties.

4. On the principle of legality

a) If the proposed legislative act aims at the introduction of a supranational criminal offense:

aa) Do the elements of crimes (objective and subjective) clearly emanate from the text of the framework decision itself?

The content of the description of the offence in the framework decision is quite clear. The definition starts with laying down that intentional conduct shall be made punishable and after that lists the different forms of behaviour (article 1(1) points a) to d)) that are to be made punishable. In points c) and d) however a reference is included, the first one to offences defined in the statute of the ICC and the second one referring to offences defined in the international military tribunal charter. It would have been preferable, if the conducts would have been defined more precisely in the framework decision.

The framework decision further states (in article 2) that also instigation in relation to those offences mentioned in article 1(1) c) and d), which are those referring to other legal instruments, is to be made punishable. Furthermore, aiding and abetting of the conduct described in the whole article 1(1) should be made punishable by the Member States. There is no further explanation as to why instigation is only to be made punishable in relation to part of the offences that the Member States are to criminalise. As usual, the framework decision does not attempt to define instigation, aiding or abetting.

The framework decision further states (in article 4) that for offences other than those referred to previously, the Member States shall ensure that racist and xenophobic motivation is considered as aggravating circumstances or alternatively is taken into consideration when determining penalties in the courts. This leaves it up to the Member States to decide how racist and xenophobic motivation is taken into account, but nevertheless places the requirement of this on the Member States.

bb) Are the sanctions provided for foreseeable?

The criminal penalties are given as maximum minimum, the Member States are to ensure that the conducts described are punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment.

The framework decision also contains a requirement for the Member States to ensure that legal persons are liable for conduct defined in the framework decision and that these are punishable by effective, proportionate and dissuasive penalties (article 6). The framework decision however leaves it up to the Member States to decide whether these penalties are to be criminal or non-criminal and lists up examples of such non-criminal penalties that can be included.

b) If the legislative act aims at harmonising national criminal law provisions:

aa) To the extent that the obligation to adjust national criminal law does not give any leeway for the implementation (and thus exhaustively defines the criminal offence): Are the objective and subjective prerequisites for criminal liability as well as the sanctions which could be imposed foreseeable (as supra a)?

Articles 1(2) and 1(4) of the framework decision allow that Member States impose further prerequisites for a criminalized offence. This means that Member States are allowed leeway when implementing the framework decision and when constructing the criminalisation.

bb) Do the national legislators have the possibility to implement each single prescription imposed by the European legislative act in such a concrete manner that this results in a strict and unambiguous provision of national criminal law (please give reasons for the answer using possible examples on how to formulate the implementing law)?

The criminalisation of racism and xenophobia necessarily leads to imposing wide and ambiguous criminalisations. Those values protected through these criminalisations are however of such importance that this ambiguity and wideness must be accepted.

c) Does the framework decision introduce retroactive rules, or does it compel member States to introduce such rules?

No.

d) Is any potential retroactivity justified with reference to the principle of lex mitior?

See above under 4.d.

e) Have national Parliaments, organizations, and citizens been informed of the framework decision in a timely and comprehensive manner, and have they been given a reasonable possibility to voice their own opinion?

As the framework decision was agreed pre-Lisbon, and the decision making then was unanimity, one can assume that these institutions have been given opportunity to voice their opinion. There are also several previous instruments combatting these forms of crime. As combatting racism and xenophobia can be considered rather fundamental within the EU and the AFSJ, there is no further information on this?

5. On the principle of subsidiarity

a) Why is it not enough with criminal law measures at Member State level?

The framework decision takes the principle of subsidiarity into account, this is mentioned in the preamble (point 13). It is stated that common and compatible rules on racism and xenophobia are better achieved at the level of the EU. The framework decision also takes the principle of proportionality into account and does not go beyond what is necessary in order to achieve the objective of the framework decision.

The principle of subsidiarity is furthermore considered fulfilled, as previous instruments and efforts have not been enough. In the preamble it is stated that the Council Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia 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.

It also states that according to evaluation, some difficulties are still present, which the framework decision is intended to help. It furthermore states that it is necessary to define a common criminal-law approach in the EU. It is not further motivated in the framework decision why an EU instrument is considered the best alternative.

b) Why is the objective of each measure –whether in terms of its scope or its impact – better served on a European level?

Here there are several arguments which are used in order to justify a higher level of harmonization:

- Combatting racism and xenophobia is of utter importance for the EU and the AFSJ. The principles protected are common to all Member States and it is only with a further approximation to ensure that the same behaviour constitutes the same offence in all Member States and that effective, proportionate and dissuasive penalties are provided for.
- Approximation is said needed for overcoming obstacles for efficient judicial cooperation.
- Efficient judicial cooperation is essential for combatting racism and xenophobia.
- Common and compatible rules on racism and xenophobia are better achieved at the level of the EU.

c) Does the EU legislator deal with the question of subsidiarity and is there an explicit and detailed evaluation of the fulfilment of this requirement in Union acts – taking into account all the alternatives and weighing all circumstances?

It is briefly stated in the preamble, but there are no further comments on this.

d) Have national Parliaments expressed their views as to the preservation of the subsidiarity principle and, if so, what was their opinion? Has the EU legislator explicitly considered these arguments?

Until now, national Parliaments have not expressed their opinion?

6. On the coherence of domestic criminal justice systems

a) Do the criminal law provisions of the framework decision undermine the coherence of the criminal justice system of one or more member States?

Most of Member States have already criminalized offences of racism and xenophobia. The framework decision is therefore not generally considered problematic. As the Member States can choose what form of penalties they are to impose on legal persons, this cannot be considered undermining the coherence of national criminal justice systems. Potentially the criminalisations in the framework decision could in some situations infringe on freedom of expression, but this situation has been acknowledged in the preamble (point 15) and should therefore not be problematic.

b) In terms of systematicity and substantive content, is the framework decision in line with other EU legislative acts related to criminal law?

The framework decision is consistent with the previous instruments in the field, and as the fundamental principles protected with the framework decision are common to all Member States, consistency can be assumed also in relation to Member States legislative acts in criminal law.

c) Does the EU legislator deal with the question of horizontal and vertical coherence, and is there an explicit and detailed explanation as to whether the framework decision does not undermine the coherence of domestic criminal justice systems or at least whether any such undermining is inevitable – particularly in view of the obligation to respect the national identity of each member State?

In the framework decision it is acknowledged that full harmonisation of criminal laws is not possible due to the different cultural and legal traditions of the Member States (point 6 preamble). In this respect national coherence is respected. §

OVERALL EVALUATION

☒ The legislative act **fully complies with** the requirements of the Manifesto on European Criminal Policy.

❒ The legislative act **satisfies essentially** the requirements of the Manifesto on European Criminal Policy. Alterations or improvements are required only on certain points (see recommendations).

❒ The legislative act meets **only partially** the requirements of the Manifesto on European Criminal Policy. Significant alterations or improvements are required (see recommendations).

❒ The legislative act **does not substantially meet** the requirements of the Manifesto on European Criminal Policy. Extensive and structural alterations are required (see recommendations)**.**

❒ The legislative act **does not meet at all** the requirements of the Manifesto on European Criminal Policy. The proposal/enactment of such a legal instrument must be wholly reexamined (see recommendations).

RECOMMENDATIONS FOR THE AMENDMENT OF SPECIFIC PROVISIONS OF THE PROPOSED DIRECTIVE:
