ADDENDUM to DRAFT MINUTES¹

Subject: 2908th meeting of the Council of the European Union (JUSTICE and HOME AFFAIRS), held in Brussels on 27 and 28 November 2008

¹ The information from the Council minutes which is contained in this addendum is not confidential and may be released to the public.
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"A" ITEMS

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Agenda items released to the public concerning the final adoption of Council acts

"A" items: (list: 16059/08 PTS A 58)

When finally adopting the "A" items relating to legislative acts, the Council agreed to enter the following in these minutes:

15. Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters
   9260/08 CRIMORG 71 DROIPEN 43 ENFOPOL 89
   DATAPROTECT 23 ENFOCUSTOM 55 COMIX 370
   + REV 1 (hu)
   + REV 3 (fi)
   + REV 4 (pt)

   The Council adopted the above Framework Decision. (Legal basis: Articles 30, 31 and 34(2)(b) of the Treaty on European Union).

32. Council Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions
   6836/08 COPEN 35
   + COR 1 (hu)
   + COR 2 (da)
   + REV 1 (fi)
   + REV 2 (de)
   + REV 3 (nl)

   The Council adopted the above Framework Decision. (Legal basis: Articles 31(1)(a) and (c) and 34(2)(b) of the Treaty on European Union).
33. Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union

5602/08 COPEN 12
+ COR 1 (de)
+ REV 1 (nl)
+ REV 3 (fi)

The Council adopted the above Framework Decision. (Legal basis: Articles 30(1)(e) and 34(2)(b) of the Treaty on European Union).

1. **Statement by the Council regarding the rehabilitation purpose of this Framework Decision**

"Bearing in mind that the successful rehabilitation of the sentenced person in a State with which he or she has the closest links is the fundamental purpose of this Framework Decision, as indicated expressly in its Article 3 and confirmed in the Preamble thereof, and agreeing that the mutual trust between the Member States does not necessitate the introduction of the additional ground for refusal based on the inconsistency of the recognition of the judgment with the rehabilitation purpose, the Council underlines that this purpose should be a factor of primary importance for the issuing State each time the decision on the need of the forwarding of the judgment and the certificate to the executing state is being made."

2. **Statement by Poland regarding Article 7(4) of the Framework Decision**

"Pursuant to Article 7(4) of the EU Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, the Republic of Poland declares that its competent authorities will not apply Article 7(1) of the above Framework Decision."
3. **Statement by Latvia regarding Article 28 of the Framework Decision**

"Latvia in accordance with Article 28(2) declares that in cases where the final judgment is issued before the date, when three years after the date of the entry into force of the Framework Decision have passed, Latvia will continue, as an issuing and an executing State, to apply the existing legal instruments on the transfer of sentenced persons applicable before this Framework Decision."

4. **Statement by Lithuania regarding Article 28 of the Framework Decision**

"Lithuania in accordance with Article 28(2) declares that in cases where the final judgment is issued before the period of three years after the date of entry into force of the Framework Decision have passed, Lithuania will continue, as an issuing and an executing State, to apply the existing legal instruments on the transfer of the sentenced persons applicable before this Framework Decision."

44. **Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism**

8807/08 CATS 35 DROIPEN 40

The Council adopted the above Framework Decision. (Legal basis: Articles 29, 31(1)(e) and 34(2)(b) of the Treaty on European Union).
45. **Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law**

   16771/07 DROIPEN 127
   + COR 1 (es)
   + COR 2 (pt)
   + COR 3 (lv)
   + COR 4
   + COR 5 (sl)
   + COR 6 (hu)
   + REV 1

The Council adopted the above Framework Decision. (Legal basis: Articles 29, 31(1)(e) and 34(2)(b) of the Treaty on European Union).

5. **Statement by the Council**

"On 28.11.2008 the Council of Ministers 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.

The Framework Decision deals with such crimes as incitement to hatred and violence and publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes. The Framework Decision is limited to crimes committed on the grounds of race, colour, religion, descent and national or ethnic origin. It does not cover crimes committed on other grounds for example by totalitarian regimes. However, the Council deplores all of these crimes.

The Council invites the Commission to examine and to report to the Council, within two years after the entry into force of the Framework Decision, whether an additional instrument is needed, to cover publicly condoning, denying or grossly trivialising 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 Berlin declaration adopted on 25 March 2007 stated that "European integration shows that we have learnt the painful lessons of a history marked by bloody conflict." In that light, the Commission will organise a public European hearing on crimes of genocide, crimes against humanity and war crimes committed by totalitarian regimes as well as those who publicly condone, deny, grossly distort or trivialise them, and emphasises the need for appropriate redress of injustice and – if appropriate – submit a proposal for a Framework Decision on these crimes."

6. **Statement by the Commission**

"The Commission congratulates the Council on making every effort to reach agreement on such an important subject. It was time for the European Union to adopt a firm stand against racism and xenophobia.

However, the Commission considers that Article 7(2) might be interpreted as allowing national law to prevail over Union law. In this connection, the Commission draws attention to the primacy of Union law."

7. **Statement by Germany**

"Germany wishes to declare the following concerning its interpretation of the term 'public order' as contained in Article 1 paragraph 2 of the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, having had the opportunity to share its views with the Legal Service of the Council:

Pursuant to recital 6, this Framework Decision is limited to combating particularly serious forms of racism and xenophobia by means of criminal law. Accordingly, Article 1 paragraph 2 of the Framework Decision permits the Member States to choose to punish only such conduct that is carried out in a manner likely to exceed a certain threshold of significance. The legal systems of the Member States contain different concepts and approaches for describing such a threshold. In a number of Member States, the decisive factor is whether *individual* legal interests have been affected to a particularly severe degree by the conduct described in Article 1 paragraph 1 of the Framework Decision. In those Member States, such conduct may be punished if it is threatening, abusive or insulting to individuals or groups of individuals. In other Member States, the conduct may be punished if certain *collective* legal interests have been harmed. In these Member States, such conduct may be punished if the conduct described in Article 1 paragraph 1 of the Framework Decision is carried out in a manner likely to disturb "public order" or, in terms of some legislations, "public peace"."
The Framework Decision leaves room for both concepts in Article 1 paragraph 2 and must be understood so as to allow Member States to maintain their national traditions and approaches in this respect. The reference in recital 6 to the fact that the cultural and legal traditions of the Member States are, to some extent, different, and that, particularly in this field, full harmonisation of criminal laws is currently not possible supports that interpretation. Germany therefore assumes that the term "public order" as employed in Article 1 paragraph 2 of the Framework Decision constitutes an expression of the required threshold, which may be further refined in various manners by the Member States when implementing the Framework Decision. Germany assumes in particular that, for the purposes of implementation, the term "öffentliche Friede" as used in the relevant corresponding provisions of German criminal law is covered by the term "public order" as employed in Article 1 paragraph 2 of the Framework Decision."

8. **Statement by the Netherlands**

"The Netherlands wishes to express that it already complies with the obligation of criminalisation pursuant to Articles 1 and 2 of the Framework Decision. Articles 137c, 137d and 137e of the Dutch Criminal Code give a broad criminalisation of inciting to hate or violence, of insulting or discriminating because of amongst others race and religion. The term "race" includes also the characteristics skin colour, origin and national or ethnic decent. Under the scope of these Articles also fall condoning, denying or grossly trivialising of the international crimes, referred to in Article 1 subparagraphs c and d, as far as such a conduct incites to hate or violence, insults or discriminates because of race or religion."

9. **Statement by Latvia**

regarding the crimes of the Totalitarian Communist regime in addition to the statement by the Council

"Latvia welcomes the adoption of the Framework Decision which constitutes a significant step in fighting the racism and xenophobia in the EU, as well as the Statement adopted by the Council, and considers that further discussions and evaluations are necessary in this field in order to obtain a complete solution to this question."
The Framework Decision provides for the criminal liability throughout the EU inter alia for the public condoning, denying or gross trivialising of the crimes committed by the Nazi regime. The scope of application is limited only to the crimes committed by the Nazi regime, but does not cover the crimes committed by the Totalitarian Communist regime, although, while having particular social groups as the main target, these crimes were also committed on the grounds of the ethnic and the national origin, which constitutes an integral part of the content of *Racism* as defined by the UN Convention on the Elimination of All Forms of Racial Discrimination adopted in 1966.

Any violence or threat has to be condemned irrespectively of what was the curtain of the objectives or the ideology these crimes were committed for. People of the EU have experienced the crimes against humanity from the both totalitarian regimes and they both demanded enormous human costs. Therefore Latvia considers that it is necessary that EU applies similar criteria to the crimes committed by both totalitarian regimes and provide for an equal treatment regarding the public condoning, denying or gross trivialising of these crimes.

The fact that there are always some people in the society justifying or denying the crimes committed by the Nazis or the Totalitarian Communists not only endangers the basic values of the democracy, but also insults personally the victims and their families, who suffered both these regimes.

Preservation of historic memory, assessment of the crimes of totalitarian regimes and their ideologies as well as respect for the victims and freedom fighters is very important for historical justice and for the prevention of the crimes against humanity in the future. Accordingly a similar approach has to be made and all necessary actions have to be done at EU level in order to prevent the revival of any of totalitarian regimes, including Totalitarian Communist regime.

Without exploration and recognition of these crimes at the international level, one cannot talk about the irreversibility of these crimes and the reconciliation. The EU has to have a common understanding and similar criteria when treating these crimes. This understanding and treatment has to be based on the criteria, that the human life is the highest value. The motivation or the ideology behind the crime cannot be brought to the forefront.

In this respect Latvia appreciates the invitation by Council to the European Commission to examine within two years after the entry into force of the Framework Decision, whether an additional instrument is needed.
Latvia considers that the adoption of such an instrument in the future would provide for an application of similar criteria towards these crimes and put on equal footing their victims all around the EU, as well as eliminate the denial and the distortion of the historical truth. At the same time it is essential to promote a common understanding of all these questions at EU level to all the EU Member States. Therefore the document, which was delivered during the 1st European hearing on 'Crimes Committed by totalitarian regimes' in Brussels on 8 April 2008 and which was supported by the majority of the participants, should become as an inspiration for the future actions at the EU level.

10. **Statement by Hungary**

"Hungary wishes to declare the following concerning its interpretation of the term "public orde" as contained in Article 1 paragraph 2 of the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.

According to the settled case law of the Constitutional Court of the Republic of Hungary, the only way for the freedom of expression to be restricted by means of criminal law is if the conduct endangers the rights of identified persons in a direct and obvious way and the conduct is likely to disturb public peace at the same time.

In order to support this narrow interpretation, in Hungary the term "public orde" as contained in Article 1 paragraph 2 of the Framework Decision is covered by the term "public peace".

11. **Statement by France**

under Article 1(4) of the Framework Decision

"France declares, in accordance with Article 1(4), 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 an international court."
12. **Statement by Poland**
   with regard to grossly distorting crimes of genocide, crimes against humanity and war crimes committed for racist and xenophobic reasons

"Poland emphasises that public gross distortion of genocide, crimes against humanity and war crimes committed for racist and xenophobic reasons constitutes a serious threat to the values protected under this Framework Decision and is comparable to the threats resulting from public condoning, denial or trivialisation of such crimes.

Poland understands that, for the sake of precision typical for the nature of criminal law, conduct of public gross distortion was not included in the provisions of the Framework Decision. However, this issue was reflected in the declaration of the Council.

Consequently, Poland wants to emphasise that grossly distorting the facts consisting in shifting the responsibility for crimes committed for racist and xenophobic reasons set forth in the Framework Decision from the actual perpetrators thereof, deserves condemnation and adequate reaction from the Member States. One of the examples of such actions is a use of a manifestly false term: "Polish concentration camps".


   The Council approved the amendment set out in the European Parliament's opinion and adopted the proposed act thus amended. (Legal basis: Article 62(2)(a) of the Treaty establishing the European Community).
13. **Statement by the Council and the Commission**

"With reference to the Regulation amending the Schengen Borders Code as regards the use of the Visa Information System (VIS), the Council and the Commission stress that the derogation mentioned in Article 1(ab) should not be applied for a total period of more than 5 days or 120 hours per year at any border crossing point.

The evaluation carried out by the Commission as laid down in Article 1(ae) will consider the infrastructure of the border crossing points, including recent and planned developments, as well as any factor that may have an influence on passenger flows, and may contain suggestions for improvements accordingly."