E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX
(*CFR-CDF*)

COMBATING RACISM AND XENOPHOBIA THROUGH CRIMINAL LEGISLATION : THE SITUATION IN THE EU MEMBER STATES

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Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice et affaires intérieures), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (supléant Birgitte Kofod Olsen) (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyse (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ilvija Puce (Lettonie), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. tchèque), Edita Ziobiene (Lithuanie). Le Réseau est coordonné par O. De Schutter, assisté par V. Van Goethem.
Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice and Home Affairs), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (substitute Birgitte Kofod Olsen) (Denmark), Henri Labayle (France), Rick Lawson (The Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxemburg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.
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Introduction

The Joint Action concerning action to combat racism and xenophobia was adopted on the basis of Article K.3 of the Treaty on the European Union (Article 31 EU) on 15 July 1996[1]. Its main objective was to achieve effective legal cooperation by ensuring that the Member States either provide that certain types of racist and xenophobic conduct as listed in the Joint Action shall be punishable as criminal offences or to derogate from the principle of double criminality in respect of such conducts. Implementation of the Joint Action was assessed in 1998. That assessment concluded that Member States had implemented its provisions 'to a very significant degree'. In November 2001, the Commission presented a proposal for a Council Framework Decision on combating Racism and Xenophobia[2]. The objective of this proposal is to realise the approximation of laws and regulations of the Member States and the closer co-operation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia (Article 1 of the Proposal). The Decision shall apply to offences involving racism and xenophobia committed within the territory of the Member States or by nationals of a Member State where the act affects individuals or groups of that State or for the benefit of a legal person established in a Member State (Article 2 of the Proposal). The main difference from the Joint Action is that instead of allowing for a choice between criminalising certain forms of conduct listed or derogating from the principle of dual criminality, an obligation was imposed on Member States to punish the conduct listed as criminal offences. Article 29 of the Treaty on the European Union sets out the development of common action among the Member States in the fields of police and judicial cooperation in criminal matters and the prevention and fight against racism and xenophobia as a means of achieving the Union's objective of providing citizens with a high level of safety within an area of freedom, security and justice. That objective has to be achieved through the approximation, where necessary, of rules on criminal matters in the Member States in accordance with the provisions of Article 31(e). The principles of subsidiarity and proportionality apply to such an initiative by the Union.[3]

This proposal has to be understood in a context where recent instances of 'cross-border racism' in particular, the participation of German neo-nazis in demonstrations in the Netherlands or the publications on the Internet of the Belgian author Verbeke in which he denied the Holocaust, illustrate how the prosecution of racism and xenophobia would be facilitated if comparable legislation existed in the Member States of the European Union[4]. The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Article 2 (2) of which provides i.a. that if racism and xenophobia are punishable in the issuing Member State by a custodial

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[1] Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia (96/443/JHA), OJ L 185 of 24.07.1996.

[2] Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia, COM(2001) 664 final.

[3] Art. 2 EU, referring to Article 5 EC.

[4] On August 2005 the Belgian right-wing extremist Siegfried Verbeke has been taken into custody on Schiphol Amsterdam airport. Verbeke is one of the leading disseminators of publications denying the Holocaust. On his website, he publishes theories to deny the Holocaust in four languages. In 1997 the Dutch Supreme Court convicted him to six month suspended imprisonment and a penalty of 2.200 euros because of violating Dutch anti-discrimination law by posting unsolicited leaflets to Dutch Jews. The publicist, who denies the holocaust by publication of infamous texts like 'the Rudolf expertise' and 'the Leuchter report' continues to disseminate discriminatory content on his website Free Historical Research: www.vho.org. On April 2005 the Belgian Court of Appeal of Antwerp convicted Verbeke to one year imprisonment and ten years deprivation of electoral rights because of violating the Act against Holocaust Denial and the Non-Discrimination Act. The court took into account his activities, both in public settings and on the Internet during the period 1996-2002. The prosecutor's office in the Netherlands can also sue Verbeke on the basis of a charge against him in 2003 for his persistent publication of his right-extremist views on the Internet. The Dutch antiracism organisations Magenta Foundation, Anne Frank House, the National Bureau against Racial Discrimination and the Centre for Documentation and Information on Israel filed a criminal complaint against Verbeke in the summer of 2003. The Dutch Public Prosecutor has to decide if he will suspend the prosecution proceedings commenced in the Netherlands and extradite Verbeke to Germany who has issued a European arrest warrant for him. In December 2004 a Belgian court denied a similar request of the German because Verbeke is a Belgian citizen and his extradition would be in breach of the criminal principle of *ne bis in idem* : one may not be prosecuted twice for the same criminal act. The Dutch court will have a hearing on the German request at September 27, 2005. The penalty in Germany for holocaust denial can be to a maximum of five years imprisonment.

sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, it shall without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant[5] – constitutes a first answer to the risk of impunity resulting from such instances of cross-border racism and xenophobia. However, this solution still remains dependent on the particular content of each Member State's criminal legislation, and more specifically, where the offence has not been committed on the territory of the issuing Member State, on the extra-territorial reach of that State's criminal legislation relating to racism and xenophobia.

The Council was unable to agree on the text of the draft Framework Decision on combating racism and xenophobia. The main obstacle resided in defining a balance between repression of racist conduct and freedom of expression which would be acceptable to all. It is in this context that the European Commission requested the EU Network of Independent Experts on Fundamental Rights to submit an opinion on existing legislation on racism and xenophobia and in particular, on the issues surrounding the borderline between freedom of expression and the repression of racism and xenophobia. One should note however that these issues have been already partially addressed both by the Thematic Comment No. 3 of 25 April 2005 of the EU Network of Independent Experts on Fundamental Rights regarding the protection of minorities in the European Union and by its Opinion 3-2005 of 23 August 2005 regarding the requirements of fundamental rights in the framework of the measures of prevention of violent radicalisation and recruitment of potential terrorists[6]. These issues are also addressed in the country reports of the European Commission against Racism and Intolerance (ECRI) of the Council of Europe and in the ECRI Reports regarding the legal measures to combat racism and intolerance in the Member States of the Council of Europe[7], as well as in the studies provided by the 25 National Focal Points that constitute the entrance points of the European Racism and Xenophobia Network (RAXEN) coordinated by the European Monitoring Centre on Racism and Xenophobia (EUMC) based in Vienna[8].

As requested by the European Commission, the present opinion deals only with the criminal aspects of racism and xenophobia. Criminal law measures targeting speech or conduct inspired by racism or xenophobia can however obviously only be part of the solution to an improved protection of racial and ethnic minorities. An overall framework ensuring such protection should include both legislative and non-legislative measures addressing both direct and indirect discrimination on the basis of the race or

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[5] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190 of 18.7.2002, p. 1.

[6] See the website of the EU Network of Independent experts on Fundamental Rights : http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm#

[7] The country reports provide useful tables summarising the state of constitutional, criminal, civil and administrative legislation for each of the State Parties to the Council of Europe (please note that these reports are not always up to date). These documents are available on the following website: http://www.coe.int/T/e/human_rights/ecri/4-Publications/

[8] http://eumc.eu.int/eumc/index.php

These National Focal Points are the following (this information is provided by the website of the EUMC : **Belgium** : Centre for Equal Opportunities and Opposition to Racism (CEOOR) ; **Czech Republic** : People in Need ; **Denmark** : Documentation and Advisory Centre on Racial Discrimination (DACoRD) ; **Germany** : European Forum for Migration Studies (EFMS) ; **Estonia** : Legal Information Centre for Human Rights (LICHR) ; **Greece** : ANTIGONE - Information & Documentation Centre on Racism, Ecology, Peace and Non Violence ; **Spain** : Movement for Peace and Liberty (MPDL) ; **France** : Centre d'Etudes des Discriminations, du Racisme et de l'Antisémitisme (CEDRA) ; **Ireland** : National Consultative Commission on Racism and Interculturalism (NCCRI) + Equality Authority (EA) ; **Italy** : Co-operation for the Development of Emerging Countries (COSPE) ; **Cyprus** : Cyprus Labour Institute (INEK/PEO) ; **Latvia** : Latvian Centre for Human Rights and Ethnic Studies (LCHRES) ; **Lithuania** : Institute for Social Research (ISR) ; **Luxembourg** :Centre d'Etudes de Populations, de Pauvreté et de Politiques Socio-économiques / International Network for Studies in Technology, Environment, Alternatives, Development (CEPS/INSTEAD) ; **Hungary** : Centre of Migration and Refugee Studies, Institute of Ethnic and Minority Studies of the Hungarian Academy of Sciences (CMRS) ; **Malta** : Jesuit Centre for Faith and Justice (JCFJ) ; **The Netherlands** : Dutch Monitoring Centre on Racism and Xenophobia (DUMC) ; **Austria** : Ludwig Boltzmann Institute of Human Rights + Department of Linguistics at the University of Vienna + Institute of Conflict Research ; **Portugal** :Númena - Research center on human and social sciences ; **Poland** : Helsinki Foundation for Human Rights (HFHR) ; **Slovenia** : Peace Institute - Institute for Contemporary Social and Political Studies ; **Slovakia** : People Against Racism (PAR) + Institute for Public Affairs ; **Finland** : Finnish League for Human Rights ; **Sweden** : Expo Foundation ; **United Kingdom** : The University of Warwick.

the national or ethnic origin. This is recalled in particular by the Committee on the Elimination of Racial Discrimination in its Draft General Recommendation on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System. In that Draft General Recommendation, the Committee on the Elimination of Racial Discrimination recommends to the States parties to the 1965 Convention on the Elimination of all Forms of Racial Discrimination to take into account, amongst the indicators of potential causes of racial discrimination, 'the potential indirect discriminatory effects of certain domestic legislation, particularly legislation on terrorism, immigration, nationality, banning or deporting of non-citizens from a country, as well as legislation that has the effect of penalizing certain groups or membership of certain communities without legitimate grounds'[9].

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 21 December 1965, on the basis of which the CERD Committee grounds its General Recommendation, constitutes the cornerstone of the fight against racism at the global level. All the Member States of the European Union are parties to this instrument.[10] Article 4 ICERD provides that :

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The reference in this provision to the Universal Declaration on Human Rights indicates that, in the view of the drafters of the Convention, this provision was fully compatible with the requirement of freedom of expression, stipulated under Article 19 of the Declaration, and, after the ICERD was adopted, in Article 19 of the International Covenant on Civil and Political Rights. Indeed, the European Court of Human Rights has considered that the States parties to the European Convention on Human Rights could fully comply with Article 10 ECHR, which guarantees freedom of expression, while implementing their obligations under Article 4 ICERD.[11] Nevertheless, certain States have considered it necessary when ratifying the ICERD to enter reservations on Article 4 of this instrument,

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[9] Committee on the Elimination of Racial Discrimination, Draft General Recommendation on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, U.N. Doc. CERD/C/GC/31/Rev.4 (2005).

[10] Dates of ratification of the ICERD by the Member States: Austria (9 May 1972), Belgium (7 August 1975), Cyprus (21 April 1967), Czech Republic (22 February 1993), Denmark (9 December 1971), Estonia (21 October 1991), Finland (14 July 1970), France (28 July 1971), Germany (16 May 1969), Greece (18 June 1970), Hungary (4 May 1967), Ireland (29 December 2000), Italy (5 January 1976), Latvia (14 April 1992), Lithuania (10 December 1998), Luxembourg (1 May 1978), Malta (27 May 1971), the Netherlands (10 December 1971), Poland (5 December 1968), Portugal (24 August 1982), Slovakia (28 May 1993), Slovenia (6 July 1992), Spain (13 September 1968) and Sweden (6 December 1971).

[11] Eur. Ct. HR, *Jersild v. Denmark* judgment of 23 September 1994, at § 30 (the Court takes the view that 'the opinion that its interpretation of Article 10 of the European Convention in the present case is compatible with Denmark's obligations under the UN Convention').

which refer to the conciliation of the obligations imposed by this Article with the right to freedom of expression and association[12]. At the level of the Council of Europe, the Convention on Cybercrime of 23 November 2001 and its Additional Protocol of 28 January 2003 concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems as well as the General Policy Recommendation No. 7 by the European Commission against Racism and Intolerance (ECRI) of the Council of Europe[13] constitute key instruments which shall contribute to framing the discussion launched by the Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia. The ECRI General Policy Recommendation No. 7 in particular recalls the essential minimal requirements of national legislation for combating racism and racial discrimination. It addresses not only racial discrimination, but also other legal aspects of measures to combat racism such as, for instance, the public expression of racism and incitement to racism, racist organisations and racially-motivated offences.

[12] See in particular the reservations or declarations made by **Austria**, **Belgium**, **Ireland** and **Italy** when ratifying the Convention on the Elimination of All Forms or Racial Discrimination. These statements emphasize the importance attached to the fact that Article 4 of the ICERD provides that the measures laid down in subparagraphs (a), (b), and (c) should be adopted with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention and which therefore consider that the obligations imposed by Article 4 CERD must be reconciled with the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association. See also the United Kingdom's restrictive interpretation which is discussed later on in the opinion.

[13] European Commission against Racism and Intolerance (ECRI) – General Policy Recommendation No. 7 of 13 December 2002 on National Legislation to Combat Racism and Discrimination, CRI (2003) 8. This document is available on the website of the ECRI. The European Commission against Racism and Intolerance has been created by the Resolution Res(2002)8 of the Committee of Ministers of the Council of Europe on the statute of the European Commission against Racism and Intolerance (Adopted by the Committee of Ministers on 13 June 2002 at the 799th meeting of the Ministers' Deputies).

Preliminary remark

The questions to be answered by each of the experts of the EU Network of Independent Experts on Fundamental Rights were phrased as follows:

1. How is the issue of racism and xenophobia addressed at the national level? Is there any systematic and structured approach to this problem?
2. Is there any definition of racism and xenophobia available at the national level?
3. Is there any domestic legislation or draft bill concerning racism and xenophobia?
4. Is there any legislation punishing the following conducts:

- Publicly inciting discrimination, 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?
- Publicly inciting discrimination, 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 committed 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?
- Instigating, aiding, abetting and attempting the conduct mentioned above?

5. Is there any legislation on specific manifestations of racism such as anti-Semitism, Islamophobia or towards other groups, such as Roma? Please describe and analyse the legislation and draft bills.
6. Is there any legislation aiming to criminalize 'institutional racism' including when committed by police forces? Are there specific procedural arrangements such as, for instance, the reversal of proof? Please describe and analyse legislation and draft bills.
7. Is there any legislation on incitement to hatred through the giving of speeches or other forms of expression, notably when through the media, the press and Internet? Please describe and analyse legislation and draft bills.
8. How does domestic legislation strike the balance between freedom of expression and repression or racist behaviours? Is there a common trend? Please describe and analyse legislation and draft bills.
9. Is there any domestic legislation concerning the ban of racist symbols as such? Please describe and analyse legislation and draft bills.

1. Member States' approaches to the issues of racism and xenophobia

1.1. Overview

Although all the Member States' legal frameworks provide several legal provisions and other measures applying to racism and xenophobia, there is rarely a systematic and structured approach to these issues. In general, legal provisions are scattered in different acts and activities aimed at preventing racism and xenophobia often lie in the hands of various institutions. This dispersal of measures and legislations – which does not facilitate their accessibility and visibility – has been questioned by the Committee on the Elimination of all forms of Racial Discrimination, notably in its 2002 Conclusions and Recommendations on **Austria** where, while noting the existence of provisions in criminal legislation aimed at combating racism, as well as recognizing racist or xenophobia motivations as aggravating circumstances for crimes, the Committee reiterates its recommendation to introduce general legislation prohibiting racial discrimination in all its forms[14]. Similarly in its 2005 Conclusions on **France,** the Committee expresses its concern towards 'the proliferation of machinery and the risk of watering down the State party's efforts to combat racial discrimination and xenophobia' and encourages the State party to ensure greater coordination of the activities of the competent authorities in this area[15]. As will be seen throughout the present study, such recommendations could certainly be addressed to other Member States too.

Thus, the issues of racism and xenophobia are often touched upon only in a partial and indirect way in the Member States, mainly via the criminalization of certain forms of conduct, the prohibition of discrimination in civil and administrative law and by making racist motives a ground for increasing the punishment. Although the adoption of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[16] led a number of Member States to adopt legislation, sometimes of a criminal nature, to combat discrimination in a number of areas mentioned in Article 3(1) of the Directive, the Member States have generally not seen this as an opportunity to improve the protection of victims of incitement to racial hatred or discrimination, except insofar as this may be construed as a form of harassment as provided under Article 2(3) of the Directive. Nevertheless, attempts are made in certain Member States to improve the coherence of their approach to the issues of racism and xenophobia. This is particularly true for the Member States that have launched National Action Plans against Racism and Xenophobia.

The Durban Declaration and Programme of Action, which resulted from the World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance of 31 August – 7 September 2001 urges States to 'establish and implement without delay national policies and action plans to combat racism, racial discrimination, xenophobia and related intolerance, including their gender-based manifestations' (paragraph 66) and to 'develop and implement policies and action plans, and to reinforce and implement preventive measures, in order to foster greater harmony and tolerance between migrants and host societies, with the aim of eliminating manifestations of racism, racial discrimination, xenophobia and related intolerance, including acts of violence, perpetrated in many

[14] Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Austria, U.N. Doc. CERD/C/60/CO/1 (2002)

[15] While noting the reactivation of the inter-ministerial committee on integration since April 2003 and the recent establishment of the High Authority against Discrimination and for Equality (Haute Autorité de Lutte contre les Discriminations et pour l'Egalité – HALDE), the Committee is concerned at the proliferation of machinery and the risk of watering down the State party's efforts to combat racial discrimination and xenophobia. The Committee encourages the State party to ensure greater coordination of the activities of the competent authorities in this area; to specify the role and resources of the High Council on Integration; to clearly define the functions of the High Authority, in particular vis-à-vis the Ombudsman and the National Consultative Commission on Human Rights, and to provide this new body with all necessary resources to enable it to perform its task effectively. (Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, France, U.N. Doc. CERD/C/FRA/CO/16 (2005).)

[16] OJ L 180 of 19.7.2000, p. 22.

societies by individuals or groups' (paragraph 30 of the Declaration and Programme of Action). The ICERD Committee also regularly reaffirms the need for the States Parties to implement such plans. Recently again it recommended to States Parties to 'implement national stategies or plans of action aimed at the structural elimination of racial discrimination. These long-term strategies should include specific objectives and actions as well as indicators against which progress can be measured. They should include, in particular, guidelines for prevention, recording, investigation and prosecution of racist or xenophobic incidents, assessment of the level of satisfaction among all communities concerning their relations with the police and the system of justice, and recruitment and promotion in the judicial system of persons belonging to various racial or ethnic groups; [States Parties are also encouraged] to entrust an independent national institution with the task of tracking, monitoring and measuring progress made under the national plans of action and guidelines against racial discrimination, identifying undetected manifestations of racial discrimination and submitting recommendations and proposals for improvement'[17]. In **Ireland**, whereas up until relatively recently the Irish Government's response to the issue of racism and xenophobia has been quite *ad hoc* and disparate, the publication in January 2005 of the National Action Plan Against Racism (NPAR)[18] seems to inaugurate a more coherent and 'joined up' approach to the problem of racism. The NPAR is intended to 'provide strategic direction to combat racism and to develop a more inclusive, intercultural society in Ireland based on a commitment to inclusion by design'.[19] It seeks to realise this objective through ensuring for ethnic, religious and cultural minorities: (i) effective protection and redress against racism, including hate speech, (ii) economic inclusion, (iii) equality and diversity in service provision, (iv) recognition and awareness of diversity, (v) and full participation in Irish society.[20] In addition, under the auspices of this NPAR the Irish Government has undertaken to complete a review of the effectiveness of the legislation – in particular of the Prohibition of Incitement to Hatred Act, 1989 – , taking into account, among other things, the implications for domestic policy of the proposal for a Council Framework Decision on combating Racism and xenophobia.[21] In **Belgium**, as a consequence of the World Conference against Racism, the Center for Equal Opportunities and Opposition to Racism proposed a National Action Plan against Racism in September 2003 ; in 2004, a Ten Points Federal Plan against Racism was adopted by the Minister of Equal Opportunities[22]. Such a

[17] Committee on the Elimination of Racial Discrimination, Draft General Recommendation on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, U.N. Doc. CERD/C/GC/31/Rev.4 (2005), point I-2.

[18] See Department of Justice, Equality and Law Reform, *Planning for Diversity: The National Action Plan Against Racism 2005-2008* (January, 2005) [hereinafter: NPAR].

[19] *Ibid* at p.27.

[20] *Ibid* at pp.30-35.

[21] NPAR, *op. cit.* at p.77.

[22] The ten challenges of the plan as well as the report on the intermediate results of the implementation of the plan could be briefly summarised as follows :

Implementation of the anti-discrimination legislation

- an Interministerial Conference on the transposition of the EU-directives 2000/43/EC and 2000/78/EC has been organised ;
- the Centre for Equal Opportunities and Opposition to Racism (CEOOR) and the police services are discussing a new convention with the police services on the improvement of the CEOOR training to future police officers on anti-discrimination legislation ;
- improvement of the training offered by the CEOOR to magistrates ;
- an advocacy campaign on the changes in the anti-discrimination legislation due to the ruling of the Court of Arbitration is planned ;

Improved follow-up on racial complaints by the office of the public prosecutor

- a circular on definitional issues regarding racial complaints is planned
- a reference magistrate, responsible for complaints on discrimination, will be appointed in every judicial district

Racism and discrimination on the internet

- circular on the adequate and effective implementation of the anti-discrimination legislation is planned
- concluding protocol agreements between CEOOR and the International Service Providers Association to create a racism-button for safe Internet sites
- first attempts for developing a training course and a manual on the issue are prepared

Dissemination of racist pamphlets

- evaluation of the protocol agreement between CEOOR and the Belgian postal services on the dissemination of printed materials. The agreement stipulates that the postal services obtain the CEOOR's advice whenever they fear that the content of a brochure might entail a violation of the anti-discrimination or anti-racism Law

national action plan is also prepared in the **Czech Republic**[23]**.** In **Finland**, the Plan of Action to combat ethnic discrimination and racism aims to support and develop measures enhancing good inter-ethnic relations and preventing ethnic discrimination and racism in Finnish society[24]. In **Latvia,** in August 2004, the National Programme for Tolerance[25] was adopted by the Cabinet of Ministers for a five year period. The programme was elaborated by an official working group of representatives of ministries, experts and non-governmental organisations under the auspices of the Secretariat of the Special Assignments Minister for Social Integration. Although the programme is mostly declarative in character, it does set a precedent in officially acknowledging, albeit carefully, the existence of prejudice, intolerance and discrimination in the country. Many grounds of possible discrimination are mentioned, but ethnic and religious minorities are singled out as especially relevant groups to include in the plan to promote tolerance. The plan includes various activities like public awareness-raising events, seminars, brochures, travelling exhibitions, work with media and stresses the need to involve civil society and NGOs. In **Poland**, an attempt to systematise activities in support of counteracting racism and xenophobia is also exemplified by the National Action Plan for Counteracting Racial Discrimination, Xenophobia and Related Intolerance, approved by the Council of Ministers in 2004. This plan is to be implemented in the years 2004 – 2009 and its strategic objective is to prepare methods of counteracting occurrences of racism and xenophobia, in particular by means of educational and preventive activities intended to increase the level of social awareness, as well as carrying out studies, including statistical ones[26]. This is also the path followed by the **Netherlands** where, on 19 December 2003, after extensive consultations with civil society, the *Nationaal Actieplan tegen Racisme* [National Action Plan against Racism] was presented by the Government, as a follow-up to the World Conference Against Racism (Durban, South Africa, 2001). Three themes are central in the plans to fight racism: the living environment of citizens, awareness raising, and equal treatment in the workplace. An extensive 'progress report' was submitted to Parliament in March 2005[27]. Similar objectives are set out in the Governmental Action Plan adopted in **Denmark** to Promote Equal Treatment and Diversity and Combat Racism[28] or, in **Germany**, in the 'Four-Pillar-Strategy'[29] and the action program 'Youth for Tolerance and Democracy – against Right-wing Extremism, Xenophobia and Anti-Semitism' [*Aktionsprogramm 'Jugend für Toleranz und Demokratie – gegen Rechtsextremismus, Fremdenfeindlichkeit und Antisemitismus'*][30] and the 'Alliance for Democracy and Tolerance – against Extremism and Violence' [*Bündnis für Demokratie und Toleranz – gegen Extremismus und Gewalt]*[31].

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[23] See Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, Czech Republic, U.N. Doc. CERD/C/63/CO/4 (2003), point 19.

[24]Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Finland, U.N. Doc. CERD/C/63/CO/5 (2003).

[25] The National Programme for Tolerance is available on the website of the Secretariat of the Special Assignments Minister for Social Integration of Republic of Latvia: http://www.integracija.gov.lv/?id=415&sadala=167&setl=1

[26] National Action Plan for Counteracting Racial Discrimination, Xenophobia and Related Intolerance 2004 – 2009, published on the website of the Government Plenipotentiary for Equal Status for Women and Men, http://www.rownystatus.gov.pl p. 4

[27] *Kamerstukken II,* 2004–2005, 29 800 VI, no. 154.
Since it is an extremely informative overview of Dutch policies in this area, an English translation of this report – made by the responsible Ministry itself – is attached to the present study (see the Annex to the present Opinion).

[28] In February 2004 the Ministry of Refugee, Immigration and Integration Affairs published an action plan, which is the follow-up of the World Conference against Racism in Durban, South Africa in 2001. In this Action Plan, the Government sets out initiatives intended to help secure equality of treatment for everyone, regardless of race, ethnic origin and similar grounds of discrimination. This Action Plan is available on the website of the Ministry of Refugee, Immigration and Integration Affairs of Denmark: http://www.inm.dk/publikationer/Handlingsplan_ligebeh_GB/index.htm (25.9.2005).

[29] The 'Four-Pillar-Strategy' includes the following elements: human rights policy/human rights education, strengthening of civil society/courage of one's convictions, encouragement of the integration of foreigners and measures which aim at the offenders and their environment (See *Siebter Bericht der Bundesregierung über ihre Menschenrechtspolitik in den auswärtigen Beziehungen und in anderen Politikbereichen* of 17 June 2005, Bundestags-Drucksache 15/5800, A 4, 4.4 (page 54).

[30] See for further information www.bmfsfj.de/Politikbereiche/kinder-und-jugend,did=4732.html

[31] This Alliance was founded by the Federal Government in 2000, under the overall responsibility of the Federal Ministry of Interior and the Federal Ministry of Justice. It organizes actions against racism and xenophobia and brings together and supports engagement of the civil society. (for further information, www.buendnis-toleranz.de)

In the **United Kingdom**, responsibility for driving forward the Government's policies on race equality lies with the Home Office, through its Race Equality Unit which has been responsible for developing a race equality strategy for the Government and monitoring its impact; promoting race equality across the Government; developing race equality indicators to measure improvement in race equality strategy; convening a regular interdepartmental officials' meeting to promote cross-departmental race equality policies; implementing race relations legislation; representing the United Kingdom in EU, Council of Europe and United Nations negotiations on race issues; taking forward policies on faith communities; and providing the secretariat for the Home Secretary's Race Relations Forum. The Unit is also leading the United Kingdom's follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and in particular the drafting of a national action plan against racism, as called for by the Durban Programme of Action. This work is being undertaken in close consultation with non-governmental and community-based organizations. In addition there is a Community Cohesion Unit – also based in the Home Office – which is tasked with carrying forward the Government's programme to encourage the building and strengthening of cohesive communities, as set out in the report *Building Cohesive Communities: A Report of the Ministerial Group on Public Order and Community Cohesion* (2001). This report was in turn informed by the findings of the independent Community Cohesion Review Team, which was set up in response to community disturbances in a number of northern English cities in the spring and summer of 2001 and whose report, *Community Cohesion: A Report of the Independent Review Team* was published in December 2001. The Scottish Executive also has its own Equality Strategy, which sets out a framework of action for taking forward the Executive's commitment to equality, including the mainstreaming of equality into policy development/service delivery, etc. In addition the Social Exclusion Unit (SEU) ensures that exclusion among ethnic minority communities is an integral part of its work in developing strategies to combat social exclusion[32]. However, there are considerable concerns that all these measures have not done enough to tackle racism[33]. More fundamentally there is concern about the adequacy of integration, with recent suggestions by the Chair of the Commission for Racial Equality that there is effective segregation in housing and schooling[34].

Similarly the Government of the **Slovak Republic** by its resolution No. 446/2004 has approved the National Action Plan for the Prevention of All Forms of Discrimination, Racism, Xenophobia, Anti-Semitism and other Forms of Intolerance for the period of years 2004 – 2005. It is already the third governmental document concerning this area[35]. The purpose of this plan is to put into practice a systematic process of education of those professional groups (e. g. police officials and public prosecutors) that might contribute to the prevention of all forms of intolerance in the society. Furthermore the Minister of Interior of the Slovak Republic by its order no. 30/2004 of 18 June 2004 set up commissions on coordination of proceeding concerning the elimination of racially motivated criminal activities and extremism on central and regional levels. The commissions are empowered to gather and exchange information concerning any form of intolerance, xenophobia, demonstrations of extremism and racism, and provide information to competent state authorities. The commissions are entitled to initiate examination of suspicions of racially motivated criminal offences and extremism

[32] For example, the SEU and Policy Action Team reports, together with the National Strategy for Neighbourhood Renewal framework, have put forward recommendations aimed specifically at tackling the social exclusion of ethnic minorities.

[33] It has, for instance, been noted that no anti-racist teaching is provided for in the National Curriculum and a recent report by the Commission for Racial Equality has shown that, despite the large number of black players in top football clubs, those who run the game are still almost exclusively white. This is also true of coaching, training and other aspects of the administration and management – as well as on the terraces. Moreover there are hardly any Asian or Chinese players at any level or in any age group and the majority of professional football league clubs do not give their staff equal opportunities training.

[34] The latter may to some extent be being supported by the commitment of the Government to assist the establishment of 'faith schools'. At the same time a debate has been opened up as to how to embrace the multiple identities of British citizens who, or whose families, came from former colonies but this has also been a matter of concern since it may have the effect of separating such persons out and thus sustain racist tendencies on the parts of others. Furthermore as Scotland and Wales become more autonomous parts of the United Kingdom there is some concern about the differential treatment of persons who come from England but who have settled there and about this developing into a new form of racism.

[35] The government of the Slovak Republic had already approved the National Action Plans for the Prevention of All Forms of Discrimination, Racism, Xenophobia, Anti-Semitism and other Forms of Intolerance for the period of years 2000 – 2001 and 2002 – 2003.

and inform state authorities about their findings. Remarkably also in **Sweden**, where beyond the National Action Plan against Racism, Xenophobia, Homophobia and Discrimination adopted by the Government in 2001[36], the 2002-2004 National Human Rights Action Plan addressed racism, xenophobia and racial discrimination as one of the priority issues.[37] The Plan has been evaluated[38] and currently a new Human Rights Action Plan (2006-2009) is being drawn up. It is expected that the Plan will be presented at the beginning of 2006.

These examples of national action plans launched in the field of racism and xenophobia – the list of which does not seek to be exhaustive – are likely to constitute a first step towards a relatively systematic and structured approach of the issues of racism and xenophobia. Another encouraging development consists in the establishment or the reinforcement of the various specialized bodies or instances aimed at contributing to combating racism and xenophobia at the national level, especially in compliance with Article 13 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. This provision imposes on the Member States an obligation to 'designate a body or bodies for promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin'. This is likely to contribute to the improvement of the adoption of a structured approach to the issues of racism and xenophobia in the Member States, insofar as these bodies shall be, in particular, in charge of 'conducting independent surveys concerning discrimination, publishing independent reports and making recommendations on any issue relating to such discrimination'.

The potential of this development for a more systematic and structured approach to the objective of combating racism and xenophobia cannot be doubted, insofar as such equal treatment bodies are often entrusted with improving the fight against racism and xenophobia. For instance, in the **Czech Republic**, the Commission for Combating Extremism, Racism and Xenophobia is the advisory body to the Ministry of Interior. In **Belgium**, the Centre for Equal Opportunities and Opposition to Racism (CEOOR) created by the Law of 15 February 1993[39] is in charge of promoting 'the equality of opportunities and to oppose any and all forms of distinction, exclusion, restriction or preference', in particular based on 'so-called race, skin colour, heritage, background or nationality'. The CEOOR is an autonomous and public institution, linked to the Prime Minister's Office. A meeting of the Council of Ministers of 17 March 2000 decided on the basis of Article 13 of the Treaty of Amsterdam to expand the competencies of the centre also to non-racial discriminations[40]. In **France**, the *Commission nationale consultative des droits de l'homme* (CNCDH)[41] is in charge of drafting an annual report pursuant to Article 2 of Law 90-615 of 13 July 1990. Given the increased number of racist and anti-Semitic acts in the year 2000, the *Comité interministériel de lutte contre le racisme et l'antisémitisme* (CILRA) has been created pursuant to the presidential Decree of 8 December 2003. This committee is composed by the ministers of home affairs, justice, foreign affairs, social affairs, national education, youth and the Minister of the city. Other ministers interested in the issues discussed by this committee

[36] www.sverigemotrasism.nu
[37] www.regeringen.se En nationell handlingsplan ör de mänskliga rättigheterna, 14 June 2005.
[38] T.Hammarberg & A.Nilsson, Bra början, men bara en början, 19 January 2005, Justitiedepartementet Ju2004/6673/D.
[39] *BS, 19.II.1993, 25 IV 95, 12 II 03* and *xx.xx.03*
[40] On this issue, the RAXEN Analytical Report on Legislation, Belgium, 2004.
As regards its competences, the Centre is entrusted with the task of overseeing the respect of the fundamental rights of foreign nationals and to inform the government of the nature and scope of migration flows. It has the task of developing consultation and dialogue between all governmental and private actors who are involved in the reception and integration policy of the immigrants. Furthermore, the Centre is entrusted with the task of stimulating the fight against human trafficking. The CEOOR is also qualified to conduct any studies and research necessary for the completion of its task, address advices and recommendations to the government as to improve the regulations, receive, and process complaints and take legal action in any disputes that falls, in particular, under the application of both the Law of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia and the Law of 23 March 1995 pertaining to punishment for denying, minimising, justifying or approving the genocide perpetrated during World War II by the Germany National-Socialist regime.
[41] Réactivée le 30 janvier 1984, la CNCDH est rattachée depuis le 31 janvier 1989 au Premier ministre. Elle se voit attribuer la faculté d'autosaisine pour toutes les questions nationales et internationales relatives aux droits de l'homme. Depuis le 9 février 1993, le statut de la Commission, expressément reconnue comme 'indépendante', est mis en conformité avec les principes directeurs concernant le statut et le rôle des Institutions nationales de protection et de promotion des Droits de l'homme adoptés par les Nations unies.

are invited to attend the meetings. The Committee defines the policies' orientations for the fight against racism and anti-Semitism and it is in charge of supervising the coherence and the efficiency of the actions launched in this field by the different ministers. Furthermore, in 2004 the *Haute autorité de lutte contre les discriminations et pour l'égalité* (HALDE) was created by the Law n° 2004-1486 of 30 December 2004, the status of this bidy has been recently complemented by the Decree of 8 March 2005. In **Ireland**, the National Consultative Committee on Racism and Interculturalism (NCCRI) was established in 1998 as an independent expert body focusing on racism and interculturalism. The NCCRI's main functions are, *inter alia*, (a) to develop an inclusive and strategic approach to combat racism by focusing on its prevention and promoting an intercultural society, (b) contribute to policy and legislative developments and seek to encourage dialogue and progress in all areas relating to racism and interculturalism, (c) encourage integrated actions towards acknowledging, celebrating and accommodating cultural diversity and (d) establish and maintain links with organisations or individuals involved in addressing racism and promoting interculturalism at national, European and international level[42]. In **Latvia** in the framework of the process of implementation of Article 13 of the Council Directive 2000/43/EC, Saeima (the Parliament of Republic of Latvia) in the second reading[43] has adopted the draft amendments to the Law on the National Human Rights Office[44]. The amendments foresee the responsibility of the Office for the implementing of principle of equal treatment in Republic of Latvia but do not mark out race and ethnic origin as particular grounds of possible discrimination. The Office has created a new Unit for Elimination of Discrimination[45] for investigation of cases of discrimination, legislative analysis, public awareness raising etc. The draft amendments also foresee a right (not a duty) of the Office to represent victims of discrimination under civil and administrative proceedings. In **Portugal**, activities in the field of the fight against racism and xenophobia are undertaken and coordinated on an ongoing basis by the High Commissioner for Immigration and Ethnic,[46] the role of which is to promote and coordinate such policies at the national level.[47] The Ombudsman also plays an important role in protecting and promoting the fight against racial discrimination and xenophobia. In **Poland**, Article 23 of the Act of 6 January 2005 on national and ethnic minorities in the Republic of Poland and on regional languages[48] establishes a Joint Commission of the Government and National and Ethnic Minorities has which is an opinion-making and advisory organ for the President of the Council of Ministers. In the **Netherlands**, in an effort to enhance the effectiveness of the criminal law-provisions, the *College van Procureurs-Generaal* (the governing body of the Public Prosecution Service) adopted revised Guidelines on Discrimination in 2003. The new Guidelines seek to reflect the outcome of an evaluation of practice since 1999 (when the previous guidelines were adopted) and follow on consultation with the non-governmental *Landelijke Vereniging van Anti-discriminatiebureaus en -meldpunten* [National Federation of Anti-Discrimination Agencies] and the *Landelijk Bureau ter bestrijding van Rassendiscriminatie (LBR)* [National Bureau against Racial Discrimination]. The new Guidelines state that the police must register each and every discrimination case, whereas the Public Prosecution Service must, in principle, give priority to prosecuting the suspect. The Public Prosecutors are instructed to ask the courts for an increase of the sentence with 25% in cases of common crimes with a discriminatory background. In addition the Dutch police established a *Landelijk Bureau Discriminatiezaken* [National Bureau

[42] For further information see: http://www.nccri.ie/about.html
[43] On the 10th of November, 2005
[44] Groz_jumi Likum_ par Valsts Cilv_kties_bu biroju
[45] Since the 16th of November, 2005
[46] Eleventh Periodic Report submitted by Portugal to the Committee on the Elimination of Racial Discrimination, February 2004, CERD/C/447/Add.1. (hereinafter CERD Report 2004), para. 8). The Office of the High Commissioner comprises the High Commissioner, the Consultative Council on Immigration Affairs, and the Commission on Equality and Racial Discrimination. It is currently regulated by Decree Law No. 251/2002, of 22 November 2002.
[47] The office promotes the integration of immigrants and ethnic minorities into Portuguese society, and ensures participation and collaboration by associations representative of immigrants, the social partners and social solidarity institutions in defining policies to promote social integration and combat exclusion. It monitors the implementation of legislation designed to prevent and prohibit discrimination in the exercise of rights on the grounds of race, colour, nationality or ethnic origin. Substantially, in terms of information, a national information network for immigrants has been established with an information bulletin on web site www.acime.gov.pt ; brochures were produced on the various pieces of legislation; and the SOS Immigrant helpline has been set up. A local support offices network to emigrants was set up.
[48] The Official Journal of 2005, No 17, item 141.

Discrimination Issues] in 2002. This specialist bureau is to play an important role in retrieving all relevant data on racism and discrimination from the police files, particularly on racial violence. The staff of this bureau are experts in the field of discrimination and police work. This staff has access to specialists within the police force who will be able to retrieve data from all police districts in the country. It will play a central role in the collection of data of racist/discriminatory incidents and thereby improve the reliability of data considerably. In **Spain**, the Council for the Promotion of the Equality of Treatment and Non-Discrimination of Persons Irrespective of Racial or Ethnic Origin similarly makes recommendations in this field ; moreover, several observatories have been created by the autonomous communities,[49] and special committees on the issues of racism and xenophobia have been created within the context of the European year against racism.[50] In **Sweden**, the Swedish Integration Board has a strategic role in this field since it is the central administrative authority for integration issues with overall responsibility for integration policy goals which permeate different sectors of society. The Board has during the last years increasingly focused on discrimination issues, including measures to prevent the upcoming of racism and xenophobia, as part of its work on integration. In the **Slovak Republic,** in June 2004, the Minister of Interior issued an internal regulatory instruction on the process concerning the fight against extremism and on tasks of the Centre for Monitoring of Racism and Xenophobia[51] which might constitute a good basis for the introduction of systematic and structured approach of Slovak authorities to racism and xenophobia.[52]

The legal orders of the EU Member States present strong similarities on the issues which are the subject of this Opinion. This is due, in particular, to the fact that they are bound by the same international instruments which exist in this field, although certain variations may be noted between their respective international commitments. The most relevant international human rights instruments relating to combating racism and xenophobia are the International Convention on the Elimination of All forms of Racial Discrimination of 21 December 1965 (ICERD), the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (ICESCR), the European Convention on Human Rights and Fundamental Freedoms (ECHR), the Council of Europe Framework Convention for the Protection of National Minorities of 1st February 1995, the Rome Statute of the International Criminal Court of 17 July 1998, the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedom of 4 November 2000; they also are obviously related to the Council of Europe Convention on Cybercrime of 23 November 2001 and its Additional Protocol of 28 January 2003 concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Whereas all the Member States are parties to the ICERD, the ECHR, the ICCPR, the ICESCR and the Rome Statute of the International Criminal Court, not all of them are parties to the Protocol No. 12 to the ECHR and to the Framework Convention for the Protection of National Minorities of 1st February 1995. However **Estonia, Greece, Latvia, Lithuania** and the **United Kingdom** still have not made a declaration recognizing the competence of the Committee on the Elimination of Racial Discrimination to receive individual communications in accordance with Article 14 of the ICERD. As regards Protocol No. 12 to the ECHR, only **Cyprus**, **Finland** and the **Netherlands** have ratified it ; **Denmark, France, Lithuania, Malta, Poland, Spain, Sweden and the United Kingdom** have not signed it. As to the Framework Convention for the Protection of National Minorities, all the Member States have ratified it except **Belgium, Greece** and **Luxembourg** that have not ratified it, and **France** that has not even signed it. Furthermore only **Cyprus**, **Denmark**, **Estonia**, **Hungary**, **Lithuania** and **Slovenia** have ratified the Convention on Cybercrime (all the Member States have signed it). And all the Member States except **Czech Republic, Hungary, Ireland, Italy, Slovak**

[49] The Observatory for the Community of Madrid, which has been created by Decree 136/1998 of 16 July 1998 and the Observatory for the Community of Galicia on Immigration and the Fight against Racism and Xenophobia created by Decree 78/2004 of April 2004.

[50] The Spanish Committee against racism was created by the Royal Decree 137/1997 of 31 January 1997. Other committees were created for almost each of regions.

[51] Published in the Ministry of Interior's Bulletin no. 45/2004 of 15 June 2004 [*Vestník Ministerstva vnútra Slovenskej republiky _. 45/2004 z 15. júna 2004*],

[52] However, the Minister's instructions do not have a legally binding character and therefore additional legislation shall be adopted to fulfil this objective.

Republic, Spain and the **United Kingdom** have signed the Additional Protocol to the Convention on Cybercrime but only **Cyprus**, **Denmark** and **Slovenia** have ratified it.

As mentioned above, this Opinion focuses exclusively on the criminal provisions contained in the national laws of the Member States, which criminalise different types of conduct expressing racist or xenophobic attitudes. In a number of Member States however, constitutional provisions may also be relevant to the issues discussed in the Opinion. Such constitutional provisions relate to the right to freedom of expression and opinion, to the principle of equal treatment, and to the prohibition of any form of discrimination (on grounds such as race, colour, language, religion, nationality or national or ethnic origins)[53]. Moreover, the issue of racism and xenophobia may be addressed from a perspective other than the criminal law perspective. A number of civil and administrative provisions may contribute to addressing racism and xenopobia. Indeed, regulations concerning the media as well as most national legislations implementing Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[54] and Council Directive 2000/78/EC of 27 November 2000 establishing a General Framework for Equal Treatment in Employment and Occupation, would be relevant in this regard. Such provisions will not be examined in the present study, however. Administrative and civil law provisions will be sometimes cited but, as mentioned above, the general focus is on criminal law.

1.2. Definition of racism and xenophobia

1.2.1. The framework

According to Article 3 of the Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia, 'racism and xenophobia' shall mean 'the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups'. The notion of racism as such is not defined in the Convention on the Elimination of All Forms of Racial Discrimination, which only provides a definition of 'racial discrimination' in its Article 1, paragraph 1[55]. Certain elements of a definition of the notion of racism could however be found in Article 4 (a) CERD which imposes to States Parties to

> 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof'.

The European Commission against Racism and Intolerance (ECRI) of the Council of Europe, in its General Policy Recommendation No. 7 of 13 December 2002 on National Legislation to Combat Racism and Discrimination defines 'racism' as 'the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons'. The Explanatory Memorandum of

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[53] According to ECRI General Policy Recommendation No. 7 (Paragraphs 2 and 3) :

' The constitution should enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality or national or ethnic origin. The constitution may provide that exceptions to the principle of equal treatment may be established by law, provided that they do not constitute discrimination'.

The constitution should provide that the exercise of freedom of expression, assembly and association may be restricted with a view to combating racism. Any such restrictions should be in conformity with the European Convention on Human Rights.

[54] OJ L 180 of 19.07.2000, p. 22.

[55] Article 1 of the CERD: 'In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'

ECRI General Policy Recommendation No. 7 underlines that the term 'racism' should be understood in a broad sense, 'including phenomena such as xenophobia, antisemitism and intolerance' and the use of the expression 'grounds such as' in the definition of racism aims at establishing an open-ended list of grounds, 'thereby allowing it to evolve with society'[56]. However, the ECRI Explanatory Memorandum expressly provides that unlike the definition of racial discrimination – which should be included in the law – States Parties may or may not decide to define racism within their criminal legislation. The Explanatory Memorandum adds that, if they do choose to resort to such a definition, an exhaustive list of grounds – rather than an open-ended list of grounds – could be established 'in order to respect the principle of forseeability which governs this branch of the law'.

1.2.2. The national legislations of the Member States

Although most of the Member States' criminal legislations regularly deal with notions related to racism and xenophobia (e.g. the notions of 'racist' behaviours, 'racist' speeches or consider 'racist' motives as an aggravating factor for sentencing), they rarely encompass a definition of the very notion of 'racism'. The term 'xenophobia' is even less used or defined. For instance, whereas e.g. in **Luxembourg** the notion of xenophobia is not defined and is only used, together with the word racism or racial hatred in very few legislative documents, in the **Netherlands** the concept of 'xenophobia' as such is not used at all (let alone defined) in criminal law. This is also the case in **Austria**, with regard to the notion of racism: although Section 33 § 5 of the Austrian Penal Code[57] directly applies to racially or xenophobically motivated crimes it does not contain any definition of either concept. Similarly in **Finland,** these concepts of racism or xenophobia are not defined or even used as such by the legislation ; nor have they been clarified through case law. Not even Chapter 6 Section 5 of the Penal Code, which deals with racist motives as an aggravating factor for sentencing, defines or even mentions the notion of 'racism'. The said provision only states that if a crime was directed at a member of a national, racial, ethnic or other such group because of her/his membership in that group, this constitutes a ground for increasing the punishment.

The legislation in **Cyprus** however provides certain elements of the definitions of the above-mentioned notions. For the purposes of its Law Ratifying the Additional Protocol to the Convention on Cybercrime concerning the Criminalisation of Acts of Racist or Xenophobic Nature committed through Computer Systems,[58] 'racist and xenophobic material' shall mean, in accordance with Article 2 of the Additional Protocol :

> 'any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors'.

In **Malta**, it is through Section 82 A of the Criminal Code – which provides a definition of 'incitement to racial hatred' – that the meaning of racism is understood. 'Racial hatred' is defined by the Maltese law as 'hatred against a group of persons in Malta defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins'[59].

A number of Member States contain the notion of 'hate crime' in their criminal law, by providing that

[56] This Explanatory Memorandum is attached to the General Policy Recommendation No. 7.
[57] Federal Law Gazette [BGBL]60/1974 as last amended by BGBL 762/1996
[58] L 26(III)/2004
[59] Section 82A of the Criminal Code provides as follows:
'(1) Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up racial hatred or whereby racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months.
(2) For the purposes of the foregoing subsection 'racial hatred' means hatred against a group of persons in Malta defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins'.

certain offences or crimes – or even any offence or crime –, when motivated by hate or discrimination, will be punished more severely. In **Denmark**, section 81(1) no. 6 of the Criminal Code provides that constitutes an aggravating circumstance, for all offences and crimes of the Criminal Code, the fact that the offence was motivated by others' race, colour, national or ethnic origin, religion, or sexual inclination. In **Italy**, a similar aggravating circumstance, generally applicable, was introducted by the Law N° 205 of 25 June 1993, which provides urgent measures to combat racism, ethnic and religious discrimination. In **Spain**, Article 22 (4) of the Penal Code contains a provision to that effect. In other Member States, the identification of the 'hate motive' in the criminal law is limited to certain well-defined offences or crimes. In the **United Kingdom**, Sections 28-33 of the Crime and Disorder Act 1998 introduced the concept of a 'racially aggravated offence', resulting in enhanced penalties where racial hostility was an element in the offence committed, for certain specific offences.[60] An offence will be racially aggravated where 'the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial group' or the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.[61] A 'racial group' means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins. Such aggravating circumstances are also provided in **Belgium** : the Federal Law of 25 February 2003, the main purpose of which was to implement Directives 2000/43/EC and 2000/78/EC in the national legal order, with regard to the competences of the Federal State,[62] also contains a chapter on criminal provisions (chapter III), which in particular provides for more severe sentences where certain offences or crimes contained in the Criminal Code are committed with an 'abject motive', i.e., motivated by hostility towards a person because of a particular characteristic suspected as being held by the victim ('lorsqu'un des mobiles du crime ou du délit est la haine, le mépris ou l'hostilité à l'égard d'une personne en raison de sa prétendue race, de sa couleur, de son sexe, de son ascendance, de son origine nationale ou ethnique, de son orientation sexuelle, de son état civil, de sa naissance, de sa fortune, de sa convition religieuse ou philosophique ou d'une caractérisque physique').[63] It will be noted however that the Belgian Constitutional Court (Court of Arbitration) considered that the introduction of such personal aggravating circumstances was proportionate to the aim pursued by the legislator, insofar as the criminal judge retained the possibility to include the consideration of mitigating circumstances in the adoption of the criminal sentence, and retained, thus, a certain margin of appreciation in the definition of the sanction in convicting a person.[64]

In **Luxembourg**, the Penal Code has introduced the notion of racism by the Law of 19 July 1997 in the title of Chapter IV called 'Du racisme, du révisionnisme et d'autres discriminations' (see Article 454 of the Penal Code)[65]. Law of 19 July 1997 considers 'racism' as being a form of discriminatory

[60] The offences concerned are assaults, criminal damage, public order offences concerned with fear or provocation of violence and harassment, alarm or distress, certain offences under the Protection from Harassment Act 1997 (harassment and putting people in fear of violence).

[61] Membership for this purpose can include 'association with members of that group' and 'presumed' means presumed by the offender.

[62] Law of 25 February 2003 on combating discrimination and amending the Act of 15 February 1993 setting up the Centre for Equal Opportunities and the Fight against Racism **(**Loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme, *Moniteur belge*, 17 March 2003).

[63] These offences which may thus lead to stronger convictions if driven by such an 'abject motives' are: sexual assaults (*attentats à la pudeur ou viols:* Art. 372 to 375 Code pénal); homicide (Art. 393 to 405bis Code pénal); refusal to assist a person in danger (Art. 422bis and 422ter Code pénal); deprivation of liberty (Art. 434 to 438 Code pénal); harassment (Art. 442bis Code pénal); attacks against the honor or the reputation of an individual (Art. 443-453 Code pénal); putting a property on fire (Art. 510-514 Code pénal); destruction or deterioration of goods or property (Art. 528-532 Code pénal).

[64] Court of Arbitration, judgment n° 157/04 of 6 October 2004, B.67 to B.69. Available on www.arbitrage.be

[65] Article 454 of the Penal Code reads :

'Constitue une discrimination toute distinction opérée entre les personnes physiques à raison de leur origine, de leur couleur de peau, de leur sexe, de leur orientation sexuelle, de leur situation de famille, de leur état de santé, de leur handicap, de leurs mœurs, de leurs opinions politiques ou philosophiques, de leurs activités syndicales, de leur appartenance ou de leur non-appartenance, vrai ou supposée, à une ethnie, une nation, une race ou une religion déterminée.

Constitue également une discrimination opérée entre les personnes morales, les groupes ou communautés de personnes, à raison de leur origine, de la couleur de peau, du sexe, de l'orientation sexuelle, de la situation de famille, de l'état de santé, du handicap, des mœurs, des opinions politiques ou philosophiques, des activités syndicales, de

behaviour based e.g. on race, origin, colour of skin or belonging to an ethnic group, to a nation or to a particular religious group. The approach is similar in **France** and in **Spain**. In France, Law No. 90-615 of 13 July 1990 aiming at sanctioning any act of racism, anti-Semitism or xenophobia defines racism and xenophobia as being 'any discrimination based on the fact of belonging or of not belonging to a certain ethnic group, nation, race or religion (…)'. In Spain, Article 510 of the Penal Code in particular penalises those conducts likely to incite discrimination, hatred or violence for racist, anti-semitic or other motives, (e.g. ideology, the religion or beliefs, the family situation, the membership of an ethnic group, national origin, sex, sexual orientation, illness or disability of the victim). In this context 'racism' is understood as a behaviour that arouses hatred, violence or discrimination against a group on the basis of criteria such as those mentioned before. In **Poland**, the national legislation offers no definition of racism or xenophobia. However the Polish Constitutional Tribunal included a definition of racism and xenophobia in its verdicts. According to the Constitutional Tribunal's ruling 'any departure from the order to equally treat similar entities must be justified by sufficiently convincing criteria. Justification for the diversity must in particular satisfy the requirements of relevance and proportionality, and remain in direct relation with other constitutional values, principles or norms. If, however, the differentiation of the legal situation of similar entities does not find such justification, then it begins to take the form of discrimination, and thereby violates the constitutional principle of equality'[66]. Similarly there is no definition of the term racism in **Slovenian** legislation even though the notion can be found in Article 300 of the Penal Code as well as in Article 11 of the European Arrest Warrant Act. However, a definition of racial discrimination may be read into Article 141 of the Slovenian Penal Code :

> 'Whoever, due to differences in respect of nationality, race, colour of skin, religion, ethnic roots, gender, language, political or other beliefs, birth status, education, social position or any other circumstance, deprives or restrains another person of any human right or liberty recognised by the international community or laid down by the Constitution or the statute, or grants another person a special privilege or advantage on the basis of such discrimination shall be punished by a fine or sentenced to imprisonment for not more than one year'.

If certain Member States provide elements of the definitions of the notions of racism and xenophobia in the national legislations prohibiting racial discrimination or other forms of hostility towards persons of a certain 'race' or ethnic origin, the existing national action plans against racism and xenophobia sometimes address these concepts in a more detailed manner. In **Poland** for instance, the definitions of racism and xenophobia were developed by the National Action Plan for Counteracting Racial Discrimination, Xenophobia and Related Intolerance[67]. According to these definitions, 'racism' is to be understood as 'a theory saying that there is causality between physical traits (somatic, e.g. body structure, skin color, head shape) and certain psychological traits (e.g. IQ level and personality), which means that certain races dominate others and, as more valuable, are predestined to govern over others'. As to definition of 'xenophobia' the Polish NAP provides that it is 'a groundless fear of and hostility towards others'. 'Intolerance' is 'a lack of respect for the practice and beliefs of others. It is manifested by forbidding all type of behaviour or beliefs different to oneself. It is a basis for racial discrimination and xenophobia'. The Polish National Action Plan further provides a definition of direct and indirect racial discrimination and harassment[68]. In **Ireland**, the definition of 'racism' contained in the National

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l'appartenance ou de la non appartenance, vraie ou supposée, à une ethnie, une nation, une race, ou une religion déterminée, des membres ou de certains membres de ces personnes morales, groupes ou communautés'.

[66] The Constitutional Court's ruling of 28 March 2000 – catalogue number K 27/28.

[67] National Action Plan for Counteracting Racial Discrimination, Xenophobia and Related Intolerance 2004 – 2009, Published on the website of the Government Plenipotentiary for Equal Status for Women and Men, http://www.rownystatus.gov.pl p. 8-9

[68] 'Racial discrimination' may either be indirect or direct:

Direct discrimination relates to a situation where one person is treated less favourably than another is or would be treated in a comparable situation on grounds of racial or ethnic origin

Indirect discrimination relates to a situation where an apparently neutral provision, criterion or practice would put persons of a given racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Action Plan Against Racism (NPAR)[69] represents the most authoritative statement on the matter within the domestic order : 'Racism is a specific form of discrimination and exclusion faced by cultural and ethnic minorities. It is based on the false belief that some 'races' are inherently superior to others because of their cultural or ethnic background, different skin colour and nationality. Racism denies people their basic human rights, dignity and respect'.[70] The Irish NPAR then goes on to approve of and adopt the definition of 'racial discrimination' provided for in Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination. Furthermore, the Irish NPAR recognises the variety of ways in which racism can be manifested, including (i) discrimination, (ii) assaults, threatening behaviour and incitement to hatred, (iii) institutional/systemic forms of racism and (iv) labelling.[71] In **Denmark**, according to the National Action Plan to Promote Equal Treatment and Diversity and Combat Racism, the notion of 'racism' 'refers generally to the view that 'racial differences' should translate into differences in social or political rights'[72]. In this context, mention should also be made of the fact that, in June 2004, the Minister of Interior of the **Slovak Republic** issued an internal regulatory instruction on the process concerning the fight against extremism and on tasks of the Centre for Monitoring of Racism and Xenophobia[73]. These instructions could constitute a first basis for the introduction of systematic and structured approach of Slovak authorities to the issues of racism and xenophobia, even though they do not have any legally binding character and should therefore be complemented by legal measures. In this instrument 'racism' is defined **'**as a belief that some people are superior to others on the ground of their affiliation to a certain race' and xenophobia means 'as intolerance towards people from other countries or other ethnic groups as well as an absence of the respect for their traditions and culture'[74].

As mentioned above, the principal way by which the Member States address the issues of racism and xenophobia remains through their legislation combating 'racial discrimination' (which covers i.a. discrimination based on race, colour, nationality, ethnic or national origins). Whereas many Member States do not provide a definition of 'racism' or 'xenophobia' in their criminal law or in national action plans against racism and xenophobia, generally the national legislations enshrine a definition of the offence of racial discrimination, based either on the definition provided by Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Discrimination or on Article 2 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[75]. The definition of Art.icle 1(1) of the ICERD has been

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Harassment' shall also be deemed as discrimination when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person or human rights, and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

[69] See Department of Justice, Equality and Law Reform, *Planning for Diversity: The National Action Plan Against Racism 2005-2008* (January, 2005) [hereinafter: NPAR].

[70] *Ibid* at p.38.

[71] NPAR, *op. cit.* at p.29.

[72] According to the Action Plan this definition is not exhaustive, but summarize the content of the individual concepts as generally interpreted or expressed.

[73] Published in the Ministry of Interior's Bulletin no. 45/2004 of 15 June 2004 [*Vestník Ministerstva vnútra Slovenskej republiky _. 45/2004 z 15. júna 2004*].

[74] On this isuue of definition it shall be noted also that the notions 'racism' and 'xenophobia' were discussed on several Swedish websites such as www.sverigemotrasism.nu

[75] Article 2 of Directive 2000/43/EC - Concept of discrimination

'1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

particularly influential in the adoption of instruments, often for the very purpose of complying with the requirements of the ICERD, which contain a criminal prohibition of racial discrimination. As mentioned above, under the ICERD, 'racial discrimination' is defined as :

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

An exhaustive list of the national definitions of 'racial discrimination' cannot be made out in the present study, since this is not the purpose. Certain examples could however be mentioned. In **Belgium,** Article 1(1) of the Law of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia,[76] although it does not enshrine any definition of racism or xenophobia, defines discrimination as 'any form of distinction, exclusion, restriction or preference, whose purpose or whose result is or could be to destroy, compromise or limit the equal recognition, enjoyment or exercise of human rights and the fundamental freedoms on a political, economic, social or cultural level, or in any other area of social life',[77] and it bases its prohibition of discrimination based on an alleged race, colour, descent, or national or ethnic origin ('en raison de sa prétendue race, de sa couleur, de son ascendance ou de son origine nationale ou ethnique') in certain fields on that definition of discrimination. The definition is closely inspired by Article 1(1) of the ICERD, but slightly broader in scope, as it includes the potential discriminatory impact of certain differences in treatment ('…toute distinction, exclusion, restriction ou préférence ayant *ou pouvant avoir* pour but ou pour effet…'), and not only the effective impact as envisaged in the ICERD. The approach of the **Netherlands** is identical. There, racial discrimination is prohibited in Article 1 of the Dutch Constitution, Articles 137c-137g and 429 quater of the *Wetboek van Strafrecht* [Criminal Code] as well as in the *Algemene wet gelijke behandeling* [*Awgb*, General Equal Treatment Act]. These provisions do not contain a definition of racial discrimination, but another provision – Article 90 quater of the Criminal Code – defines discrimination. Although it is not confined to *racial* discrimination, again the definition provided closely follows the definition of Article 1 (1) ICERD even though it is slightly broader than that of ICERD, since potential effects ('any distinction ... which ... *may have* the effect') are covered as well :

> 'Discrimination' or 'to discriminate' shall mean any distinction, exclusion, restriction or preference which has the purpose or may have the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life[78].

In the **United Kingdom,** the Race Relations Act 1976 outlawed discrimination (direct and indirect) and victimization in employment and training, the provision of goods, facilities and services, education, housing and certain other activities. Individuals can bring proceedings and claim damages under this Act. The Race Relations (Amendment) Act 2000 has strengthened the 1976 Act by outlawing discrimination in all public authority functions not already covered by the original 1976 Act with only a few exceptions. In Northern Ireland, where the principal focus had been on *religious*

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4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1'.

[76] Moniteur belge, 8 August 1981, and the later amendments to that legislation by the Law of 12 April 1994 (Moniteur belge, 14 May 1994), of Law of 7 May 1999 (Moniteur belge, 25 June 1999) and by the Law of 20 January 2003 (Moniteur belge, 12 February 2003).

[77] Art. 1 al. 1 of the Law of 30 July 1981 defines discrimination for the purposes of that Law as '…toute distinction, exclusion, restriction ou préférence ayant ou pouvant avoir pour but ou pour effet de détruire, de compromettre ou de limiter la reconnaissance, la jouissance ou l'exercice, dans des conditions d'égalité, des droits de l'homme et des libertés fondamentales dans les domaines politique, économique, social ou culturel ou dans tout autre domaine de la vie sociale'.

[78] The Dutch text reads : 'Onder discriminatie of discrimineren wordt verstaan elke vorm van onderscheid, elke uitsluiting, beperking of voorkeur, die ten doel heeft of ten gevolge kan hebben dat de erkenning, het genot of de uitoefening op voet van gelijkheid van de rechten van de mens en de fundamentele vrijheden op politiek, economisch, sociaal of cultureel terrein of op andere terreinen van het maatschappelijk leven, wordt te niet gedaan of aangetast'.

discrimination until the extension of the 1976 Act by the Race Relations (Northern Ireland) Order 1997, there is also a statutory equality duty imposed by Section 75 of the Northern Ireland Act, which means that all public authorities must have due regard to the need to promote equality of opportunity for nine separate categories, including racial groups. Under Section 75 (2), public authorities are required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. In **Austria**, the legislation does not contain any definition of racism and xenophobia as provided by the Proposal for the Council Framework Decision. Equally, the wording of the definition of 'racial discrimination' of Article 1(1) ICERD has not been implemented into Austrian law. However with the implementation of Council Directive 2000/43/EC in July 2004, the definition of racial and ethnic discrimination established by Article 2 of the Directive was transposed into the Austrian legal system almost literally[79]. Even though the Austrian Constitutional Act implementing the International Convention on the Elimination of all Forms of Racial Discrimination does not contain a definition of racism and xenophobia it decisively narrows down the scope of the prohibition of racist and xenophobic actions. Article 1 of the same act establishes that legislation and administration must refrain from making distinctions on the *sole* basis of race, skin, colour, descent, or national or ethnic origin. Considering the fact that discriminatory actions are rarely based on the sole basis of race, colour, national or ethnic origin but are usually combined with other reasons, the wording of Article 1 has been criticised notably by the Committee on the Elimination of Racial Discrimination as being too narrow.[80] In **Portugal,** Law No.134/99 of 28 August 1999 prohibits discrimination in the exercise of rights on the grounds of race, colour, nationality or ethnic origin. 'Racial discrimination' is defined in Article 3 as 'a distinction, exclusion, restriction or preference based on race, colour, ancestry or ethnic or national origin with the intention or the result of preventing or restricting the equal recognition, enjoyment or exercise of rights, freedoms and guarantees or economic, social and cultural rights'. Article 4 of the Law provides a detailed list of discriminatory practices[81]. In **Italy**, this general definition of discrimination – which covers i.a. racial discrimination – is enshrined in the Consolidated Act on the status of foreigners (Legislative decree. 286/1998; Article 43)[82].

2. Prohibition of certain conducts expressing racism and xenophobia

2.1. Introduction

It is not the purpose of this Opinion to address all the different kinds of offences Member States should sanction in the field of racism and xenophobia. This has been done already elsewhere[83]. In the

[79] See e.g. sec 19 Equal Treatment Act, Federal Law Gazette [BGBL] 66/2004 as amended by BGBL 82/2005.

[80] ECRI, Second report on Austria adopted on 16 June 2000, p. 6. CERD Committee, Concluding Observations on Austria. 21/05/2002 CERD/C/60/CO/1, para 9.
In its 2002 Conclusions and Recommendations on Austria, the CERD-Committee notes :
'The Committee is concerned at the wording of article 1, paragraph 1, of the Federal Constitutional Act implementing the Convention, which stipulates that the legislature and the executive shall refrain from any distinction on the 'sole' ground of race, colour, or national or ethnic origin. In the Committee's view, this may be regarded as representing a narrower prohibition of discrimination than is provided in the Convention. The Committee recalls that multiple discrimination, for example discrimination based simultaneously on race and sex, falls within the scope of the Convention, and that such phenomena are addressed in the final documents of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Therefore, while noting that an amendment to this provision is currently under consideration, the Committee reiterates its previous invitation to the State party (CERD/C/304/Add.64, para. 11) to consider the possibility of deleting the word 'sole' from article 1, paragraph 1, of the Federal Constitutional Act, taking into consideration general recommendation XXV of the Committee'. (Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Austria, U.N. Doc. CERD/C/60/CO/1 (2002).

[81] Second report on Portugal by the European Commission against Racism and Intolerance, CRI (2002) 33, adopted on 20 March 2002, para.14-15.

[82] In this instrument, 'discrimination' is defined in general terms as any 'behaviour which directly or indirectly causes distinction, exclusion, restriction or preference based on race, colour, ancestry, national or ethnic origin, religious belief or practice, having the aim or effect of destroying or hindering the recognition or exercise - under equal conditions – of fundamental human rights in the political, economic, social and cultural fields as well as in any other public sector'.

[83] See, e.g., ECRI country reports which provide useful tables summarising the state of constitutional, criminal, civil and administrative legislation for each of the State Parties to the Council of Europe (these reports, however, are not always up to date). These documents are available on the following website: http://www.coe.int/T/e/human_rights/ecri/4-Publications/

request of the Commission, the EU Network of Independent Experts on Fundamental Rights has been asked, rather, to examine the way in which a certain number of limited offences are addressed by the Member States.

This Opinion starts by examining the way in which the conduct of 'Publicly inciting discrimination, 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' is addressed by the Member States (point 2.2.). It then examines the way in which this same conduct is addressed when the incitement is committed by public dissemination or distribution of tracts, pictures or other material, which raises the issue of the balance between freedom of expression and the repression of racist behaviours (point 2.3.). It provides an overview of the way in which Member States tackle the incrimination of the conduct of 'Publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes' (point 2.4.) and of the conduct of 'Instigating, aiding, abetting and attempting the conduct mentioned above' (point 2.5.). Finally it addresses the ban of racist symbols (point 3.) and the incrimination of forms of 'institutional racism' (point 4.).

See also the study by the European Network against Racism (ENAR) of June 2001 entitled *From Principle to Practice - Evaluation of legislation dealing with racial and ethnic discrimination in certain EU Member States.* This report is available on http://www.enar-eu.org/

See also ENAR final amendments of 25 June 2002 regarding the report of the Rapporteur Ozan Ceyhun on the Proposal for a Council Framework Decision on combating racism and xenophobia COM (2001) 664 – C5-0689/2001 – 2001/0270(CNS). This document is available on http://www.enar-eu.org/

International Convention on the Elimination of All forms of Racism and Xenophobia of 21 December 1965

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia, COM(2001) 664 final

Article 4 - Offences concerning racism and xenophobia

Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence:

(a) public incitement to violence or hatred for a racist or xenophobic purpose or to any other racist or xenophobic behaviour which may cause substantial damage to individuals or groups concerned;

(b) public insults or threats towards individuals or groups for a racist or xenophobic purpose;

(c) public condoning for a racist or xenophobic purpose of 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;

(d) public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 in a manner liable to disturb the public peace;

(e) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;

(f) directing, supporting of or participating in the activities of a racist or xenophobic group, with the intention of contributing to the organisation's criminal activities.

Article 5 - Instigation, aiding, abetting and attempt

Member States shall ensure that instigating, aiding, abetting or attempting to commit an offence referred to in Article 4 is punishable.

ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination (paragraph 18)

Paragraph 18

Criminal law should penalise the following acts when committed intentionally:

a) public incitement to violence, hatred or discrimination,

b) public insults and defamation or

c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;

f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d) and e);

g) the creation or the leadership of a group which promotes racism ; support for such a group ; and participation in its activities with the intention of contributing to the offences covered by paragraph 18 a), b), c), d), e) and f);

h) racial discrimination in the exercise of one's public office or occupation.

The law should also penalise genocide[84] and should provide that intentionally instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraphs 18 and 19 of ECRI General Policy Recommendation No. 7 is punishable[85]. Moreover for all criminal offences not specified in paragraphs 18 and 19, racist motivation shall constitute an aggravating circumstance.

[84] Point 19 of ECRI General Policy Recommendation No. 7 regarding national legislation to combat racism and racial discrimination

[85] Point 20 of ECRI General Policy Recommendation No. 7 regarding national legislation to combat racism and racial discrimination

Additional Protocol of 28 January 2001 to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems

Article 3 – Dissemination of racist and xenophobic material through computer systems

1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:distributing, or otherwise making available, racist and xenophobic material to the public through a computer system.

2 A Party may reserve the right not to attach criminal liability to conduct as defined by paragraph 1 of this article, where the material, as defined in Article 2, paragraph 1, advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available.

3 Notwithstanding paragraph 2 of this article, a Party may reserve the right not to apply paragraph 1 to those cases of discrimination for which, due to established principles in its national legal system concerning freedom of expression, it cannot provide for effective remedies as referred to in the said paragraph 2.

2.2. The incrimination of the conduct of 'Publicly inciting discrimination, 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'.

2.2.1. The framework in international law.

The incitement to hate, to discrimination, or to violence, constitutes an offence classicly recognized in the national laws of the Member States. Indeed, it is well established in the international law of human rights that such conduct requires to be combated through the adoption of criminal legislation. Article 20(2) of the 1966 International Covenant on Civil and Political Rights, which all the Member States have ratified, provides that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. Article 4 ICERD provides, inter alia, that States Parties (a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination (emphasis added). General Recommendation XV of the Committee on the Elimination of Racial Discrimination set up according to Article 8 of the ICERD recalls that the provisions of Article 4 ICERD are of mandatory character : 'to satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced'[86].

[86] Committee on the Elimination of Racial Discrimination, General Recommendation 15, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 204 (2003).

Voy. à propos des obligations que cette disposition impose aux Etats parties à la Convention pour l'élimination de toutes les formes de discrimination raciale, Comité pour l'élimination de la discrimination raciale, Recommandation générale n°15 :

This latter requirement – that the legislation enacted in order to comply with Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination be 'effectively enforced' – deserves to be emphasized. As noted by the Committee on the Elimination of Racial Discrimination, Article 4 (a) in particular requires States parties to 'penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts'.[87] The Committee insists that 'To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response'.[88] In the examination of individual communications submitted to the Committee, it also could not accept the claim by a State party that 'the enactment of law making racial discrimination a criminal act in itself represents full compliance with the obligations of States parties under the Convention'[89] ; indeed, this implies that the freedom to prosecute criminal offences (expediency principle, principe d'opportunité), while in principle acceptable, 'should be applied in each case of alleged racial discrimination in the light of the guarantees laid down in the Convention'[90]. Indeed, this requirement also may be imposed under Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, according to which :

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Thus, a State will be considered in violation of its obligations under this provision if the investigation into alleged instances of racial discrimination (including all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, as defined in Article 4(a) of the Convention) is found to be lacking or ineffective.[91]

At the level of the Council of Europe, the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems provides that each State Party shall adopt such legislative and other measures as may be

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Violence organisée fondée sur l'origine ethnique (adoptée à la 42ième session du Comité, 1993) (UN Doc. A/48/18) : 'To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response.'

[87] Committee on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention, adopted by the Committee at its forty-second session (1993)(doc. A/48/18), in : Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 207, at para. 3.

[88] Committee on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention, adopted by the Committee at its forty-second session (1993)(doc. A/48/18), in : Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 207, at para. 2.

[89] Committee on the Elimination of Racial Discrimination, *L.K. v. the Netherlands*, communication n°4/91, para. 6.4. (insuffient investigation and prosecution of a case of alleged incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin).

[90] Committee on the Elimination of Racial Discrimination, *Yilmaz-Dogan v. the Netherlands*, communication n° 1/1984, views of 10 August 1987 ; and Committee on the Elimination of Racial Discrimination, *L.K. v. the Netherlands*, communication n°4/91, para. 6.5.

[91] See Committee on the Elimination of Racial Discrimination, *Ahmad v. Denmark*, communication n° 16/99 (failure by Denmark to investigate and prosecute effectively an alleged instance of racial discrimination – the author had been insulted on the grounds of his national or ethnic origin – under sec. 266b of the Criminal Code : the Committee notes that 'if the police involved in the case had not discontinued their investigations, it might have been established whether the author had indeed been insulted on racial grounds' (para. 6.2.)).

necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the conduct of 'distributing, or otherwise making available, racist and xenophobic material to the public through a computer system' (Article 3 (1)) as well as the conduct of 'threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics' (Article 4). Article 2 (1) of the Additional Protocol to the Convention on Cybercrime defines 'racist and xenophobic material' as meaning 'any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors'.

2.2.2. National criminal law provisions on the incitement to racism and xenophobia

The Criminal law provisions reported hereunder provide the general framework within which the issue of the incitement to racism and xenophobia is addressed by the Member States. These provisions will be examined in detail in the forthcoming sections of the present opinion.

Austria

Section 283 of the Criminal Code :

> (1) Whoever provokes or incites to hostile actions against an existing domestic church or religious community or against a group of people who are members of such a church or religious community, of a race, of a people, of an ethnic group or a state in a way that is suitable to endanger the public order, shall be sentenced to a maximum of two years of imprisonment.
>
> (2) Whoever publicly stirs up hatred against a group of people referred to in paragraph (1) or tries to insult or run somebody down by violating her/his human dignity shall be punished in the same way.

The crime of incitement to hatred is only a punishable action if it endangers the public order. One important criterion, which has to be fulfilled in order to qualify an action as inciting, is that it takes place in public. This means that the action must directly, but not simultaneously, be perceived by a bigger group of at least ten persons. Section 283 is applied to public commitment of incitement, which is targeted at the protected group as a whole and not at an individual member of such a group.

Belgium

The Law of 30 July 1981 criminalizing certain acts inspired by racism and xenophobia[92], which is a criminal law, makes it an offence to commit or encourage the commission of certain acts motivated by racism or xenophobia. The Law of 30 July 1981 was amended on a number of occasions, in particular by the Law of 12 April 1994, which laid down a definition of discrimination and added provisions prohibiting racial discrimination in the offer and provision of goods and services and in employment.

Act of 23 March, 1995 on punishing the denial, minimisation justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War[93] punishes

[92] Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, *M.B.*, 8 August 1981. This law has been amended by the Law of 15 February 1993, *M.B.,* 19 February 1993 ; Law of 12 April 1994 (*M.B.*, 14 May 1994) ; Law of 7 May 1999 (*M.B.*, 25 June 1999) ; Law of 20 January 2003 (*M.B.*, 12 February 2003) and Law of 23 January 2003 (*M.B.*, 13 March 03).

[93] Loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale, *M.B., 30 mars 1995).* This law was amended by a law of 7 May 1999 (Loi du 7 mai 1999 modifiant la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le

whoever who, 'in the circumstances given in Article 444 of the Penal Code denies, grossly minimises, attempts to justify, or approves the genocide committed by the German National Socialist Regime during the Second World War'.

Paragraph 3 of Article 1 of the Law of 30 July 1981 criminalizing certain acts motivated by racism or xenophobia reads :

> (…) The following shall be punished by a prison sentence of one month to one year and by a fine of fifty francs to one thousand francs, or by one of these punishments alone:
>
> 1° Whoever incites discrimination, hatred, or violence against a person on account of his so-called race, colour, descent, origin, or nationality in the circumstances given in article 444 of the Penal Code[94]
>
> 2° Whoever incites discrimination, segregation, hatred, or violence against a group, community, or the members of it on account of the so-called race, colour, descent, origin, or nationality of its members, or some of them, in the circumstances given in article 444 of the Penal Code.
>
> 3° Whoever announces his intention towards discrimination, hatred or violence, against a person on account of his so-called race, colour, descent, origin, or nationality in the circumstances given in article 444 of the Penal Code.
>
> 4° Whoever announces his intention towards discrimination, hatred, violence, or segregation against a group, community, or the members of it on account of the so-called race, colour, descent, origin, or nationality of its members, or some of them, in the circumstances given in article 444 of the Penal Code.

Article 444 of the Penal Code, which imposes a condition of publicity, reads :

> The guilty party shall be punished by a prison sentence of eight days to one year and by a fine of twenty six francs to two hundred francs, when the charges have been committed: either in

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racisme ou la xénophobie, ainsi que la loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale, *M.B.,* 25 juin 1999).

[94] It is not required that the offence be committed with the intent to lead a group of persons or an individual to commit precise acts of a racist or xenophobic nature. The Belgian Court of Cassation in a judgment of 19 May 1993 quashes a judgment of 3 December 1992 of the Court of Appeal of Brussels (chambre des mises en accusations), which declared that the claimants shall not be prosecuted since 'l'incitation à la discrimination, à la ségrégation, à la haine ou à la violence, telle qu'entendue par la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, est punissable dans le chef de ses auteurs lorsqu'elle traduit leur volonté manifeste d'amener un public ou un tel individu à commettre des actes précis de racisme ou de xénophobie. Cette acception du texte légal est confirmée par la référence expresse qu'il comporte par la mention aux conditions de l'article 444 du Code pénal'. The Court of Cassation quashes this decision on the basis of the fact that it adds a condition to the Law of 30 July 1981, which is not enshrined in the instrument. The Court of Cassation grounds its decision on the following arguments : 'que les articles 1er et 3 de la loi du 30 juillet 1981 n'exigent pas une volonté manifeste d'amener un public ou tel individu à commettre des actes précis de racisme ou de xénophobie ou des actes concrets déterminés ou déterminables; que l'article 444 du Code pénal se borne à énoncer les conditions du publicité ayant pour conséquence d'ériger certains faits en infraction; qu'il ne s'agit pas uniquement de l'imputation méchante à une personne d'un fait précis de nature à porter atteinte à l'honneur de cette personne ou à l'exposer au mépris public, éventuellement constitutif d'une calomnie ou d'une diffamation (article 443 du Code pénal), mais également de l'injure (article 448 du Code pénal); que le fait que cette dernière ne consiste pas en l'imputation d'un fait précis constitue précisément l'une des distinctions principales devant être faites entre la calomnie et la diffamation d'une part, l'injure de l'autre; que les travaux préparatoires de la loi du 30 juillet 1981 et la Convention internationale sur l'élimination de toutes les formes de discrimination raciale signée à New York le 7 mars 1966, qui, quoique dépourvue d'effets directs en Belgique, a inspiré le législateur, ne permettent pas de donner aux articles 1 et 3 de ladite loi l'interprétation énoncée par l'arrêt attaqué; que la loi érige notamment en infraction l'incitation à la haine; que cette dernière consiste non pas en un acte précis ou concret, mais en un sentiment; qu'enfin l'article 14 de la Constitution réserve expressément au législateur le droit de réprimer les délits commis à l'occasion de l'usage des libertés d'opinion et des cultes qu'il consacre; que le nécessaire équilibre entre la liberté de manifester son opinion en toute matière et la répression de certains actes inspirés par le racisme ou la xénophobie a été établi par le législateur de 1981 (…)'.

public meetings or places; or in the presence of several people, in a place that is not public but accessible to a number of people who are entitled to meet or visit there; or in any place in the presence of the offended person and in front of witnesses; or through documents, printed or otherwise, illustrations or symbols that have been displayed, distributed, sold, offered for sale, or publicly exhibited; or finally by documents that have not been made public but which have been sent or communicated to several people.

Law of 10 April 1995 limits the financial support to the political parties[95] that have included in their statutes or programs a provision by which they oblige themselves to respect the rights as guaranteed by the European Convention on Human Rights.

Cyprus

Section 47 of the Penal Code provides that a person who takes publicly any action, with the intention of promoting hostility between the communities, religious groups, due to their race, religion, colour or sex is guilty of an offence.

Section 51A of the Penal Code states: 'any person who publicly in any matter and in any way procures the inhabitants to acts of violence against each other or to mutual discord or foments the creation of a spirit of intolerance, is guilty of an offence and is liable to imprisonment for twelve months or to a fine of one thousand pounds or to both such penalties, and if it is a legal person to a fine of three thousand pounds.'

Section 2A § 1 of the Law Ratifying the Convention on the Elimination of all Forms of Racial Discrimination of 1967 as amended, criminalises the incitement of acts that are likely to cause discrimination, hatred or violence against any persons or group of persons on account or their racial and ethnic origin or religion. The person who commits this offence is liable to imprisonment of up to two years and/or a fine of up to £1000 CYP.

Moreover, Section 142 of the Penal Code addresses blasphemy, thus protecting religious beliefs. It provides that that any person who publishes a book, or pamphlet or any article, or letter in a newspaper or magazine which is perceived by a group of people as a public insult to their religion, with intent to ridicule such religion or to shock or insult its followers, is guilty of an offence. Prosecution based on this section takes place only by the Attorney-General or with his/her consent.

Czech Republic

In the Criminal Code, the incitement to hatred to a group of people or to restricting their rights and freedoms is provided under Section 198a. The incitement to committ a criminal offence itself is criminalized a special criminal offence (Section 164).
Section 198s reads :

> Sec. 198a – *Incitement of National and Racial Hatred*
> Sec. 198a/1: A person who publicly incites hatred of another nation, ethnic group, race, religion, class or another group of persons or publicly incites the restriction of their rights and freedoms shall be sentenced to a term of imprisonment of up to two years.
> Sec. 198a/2: The same sentence shall apply to a person who conspires or mobs to commit an act pursuant to subsection (1).

[95] Loi du 10 avril 1995 modifiant la loi du 4 juillet 1989 relative à la limitation et au contrôle des dépenses électorales engagées pour les élections des chambres fédérales, ainsi qu'au financement et à la comptabilité ouverte des partis politiques, *M.B.,* 15 April 1995.
See also : Loi de 12 février 1999 insérant un article 15ter dans la loi du 4 juillet 1989 relative à la limitation et au contrôle des dépenses électorales engagées pour les élections des Chambres fédérales, ainsi qu'au financement et à la comptabilité ouverte des partis politiques et un article 16bis dans les lois sur le Conseil d'Etat, coordonnées le 12 janvier 1973, *M.B.*, 17 mars 1999.

> Sec. 198a/3 An offender shall be sentenced to a term of imprisonment of between six months and three years (a) if he commits an act pursuant to subsection (1) by (using) press, film, radio or TV broadcasting, a publicly accessible computer network or a similarly effective method; or (b) if he actively participates in activities of groups, organizations or associations promoting discrimination, violence or racial, ethnic or religious hatred.

Defamation of a nation, ethnical group, race or creed is prohibited under Section 198 of the Criminal Code :

> Sec. 198 – *Defamation of a Nation, Race or Conviction*
> Sec.198/1: A person who publicly defames (a) a nation, its language or a race; or (b) a group of inhabitants of the Republic, because of their political opinion, religion or because he is an atheist, shall be sentenced to a term of imprisonment of up to two years.
> Sec. 198/2: An offender who commits an act pursuant to subsection (1) together with at least two other persons shall be sentenced to a term of imprisonment of up to three years.

Promotion of movement that aims at suppression of human rights and freedoms are prohibited under Section 260 of the Criminal Code :

> Sec. 260 – *Support and Propaganda of Movements Aimed at Suppressing Man´s Rights and Freedoms*
> Sec. 260/1: A person who supports or propagates a movement which aims at suppressing the rights and freedoms of a man (human being), or which promotes national, racial, class or religious hatred, or hatred against another group of persons shall be sentenced to a term of imprisonment of from one to five years.
> 260/2: An offender shall be sentenced to a term of imprisonment from three to eight years if: (a) he commits an act pursuant to subsection (1) by using the press (print), film, radio or TV broadcasting, or some other similarly efficient means; or (b) he commits such act as a member of an organized group; or (c) he commits such act during a state of emergency or a state of war.

Denmark

Section 266b of the Criminal Code provides that :

> Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding 2 years.

It is an aggravating circumstance, when the courts are metering out a certain sanction prohibited in the Danish Criminal Code, that the criminal act was motivated by others' race, colour, national or ethnic origin, religion, or sexual inclination (section 81(1) no. 6 of the Criminal Code). This section covers all criminal acts (violence, threats, homicide etc.). This aggravating circumstance is mentioned in the same provision as other aggravating circumstances.

Estonia

Article 151 of the Criminal Code concerns 'Instigation of Social Hatred' and foresees a pecuniary punishment or imprisonment for up until three years for 'activities that openly call to hatred or violence in connection with ethnicity, race, color of skin, sex, language, heritage, religion, political convictions, wealth or social status'.

Finland

Chapter 11, Section 8 of the Penal Code (as amended by Act No. 578 of 1995) criminalises as ethnic agitation the spreading of statements or other information among the public where a certain race, a national, ethnic or religious group or a comparable group is threatened, defamed or insulted.

France

The Act of 1 July 1972 forms the basis of the body of law relevant in this field[96]. This Act is contained both within the Criminal Law (repression of discriminatory acts: Article 416) and in the Act of 29 July 1881 on the freedom of the press.

The new Criminal Code, which came into force on 1 March 1994, amends, supplements and even creates a number of provisions on racism. On the whole, more stringent penalties for racist offences have been introduced. The new Criminal Code redefines discrimination based on origin or the real or presumed membership (or non-membership) of a particular ethnic group, nation, race or religion.

Article 225-1 of the Penal Code

> 'Any distinction made between natural persons because of their origin, sex, family situation, state of health, disability, customs, political opinions, trade union activities, or real or presumed membership or non-membership of a particular ethnic group, nation, race or religion, shall constitute discrimination. Any distinction made between legal persons because of the origin, sex, family situation, state of health, disability, customs, political opinions, trade union activities or real or presumed membership or non-membership of a particular ethnic group, nation, race or religion of the members or some of the members of these legal persons, shall likewise constitute discrimination.'

Discriminatory behaviour is punishable under Article 225-2 when it consists in:

- refusing to supply goods and service;
- hindering the normal exercise of an economic activity;
- penalising, dismissing or refusing to take on a person;
- making the supply of goods and services subject to a discriminatory condition;
- making the offer of employment subject to a discriminatory condition.

Heavier penalties are attached to these acts, compared with earlier legislation: two years' imprisonment and a maximum fine of FF 200,000. The additional penalties of earlier legislation - deprivation of rights, displaying of the decision and publication of the latter - have been retained and the convicted person is also liable to have their firm or establishment closed (Article 225-19).

Act of 29 July 1881 on the freedom of the press

> Section 24(6) of the Act of 29 July 1881 on the freedom of the press, as amended by the Act of 1 July 1972 prohibits incitement to racial discrimination, hatred or violence because of origin or membership of a race or religion.
>
> Section 32 (2) of the Act of 29 July 1881 punishes racial defamation meaning defamation that arises from any precise, false allegation or insinuation casting a slur on the honour or

[96] This summary of French legislation is excerpted from ECRI's Report on the national legal measures in France to combating racism and xenophobia. This report is available on the following website: http://www.coe.int/T/e/human_rights/ecri/1-ECRI/3-General_themes/3-Legal_Research/1-National_legal_measures/France/France%20SR.asp#P339_22612

reputation of a person or group of persons because of their race, religion, nationality or membership of an ethnic group.

Germany

Section 130 para. 1 and 2 of the Criminal Code

(1) Whoever, in a manner that is capable of disturbing the public peace

1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or

2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be punished with imprisonment from three months to five years.

(2) Whoever:

1. with respect to writings (Section 11 subsection (3)), which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group:

a) disseminates them;
b) publicly displays, posts, presents, or otherwise makes them accessible;
c) offers, gives or makes accessible to a person under eighteen years; or
d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of numbers a) through c) or facilitate such use by another; or

1. disseminates a presentation of the content indicated in number 1 by radio, media or teleservices.

(…)

shall be punished with imprisonment for not more than three years or a fine.

Greece

Law 927/25.6.1979, complemented by Article 24 of Law 1419/8.3.1984 and modified by Article 72 of Law 2910/2001, penalises certain conducts inspired by racism or xenophobia. Pursuant to Article 1 (1) of this law, any person who publicly, either orally or through the press or in a written form, through the image or through some other means, deliberately incites to acts or activities likely to cause discriminations, hatred or violence towards a person or a group of persons, for the only reason of their racial or national origin or of their religious membership shall be liable to imprisonment for any term not exceeding 2 years and/or to a fine[97]. Article 1 (2) of this law punishes anyone who constitutes or takes part in organizations the objective of which is to devote itself to organized propaganda or to any other form of activity tending to racial discrimination.

Article 2 of this law punishes any person who publicly, either orally or through the press or in a written form, through the image or through some other means, expresses offensive ideas with regard to a person or to a group of persons on the ground of their racial or national origin or of their religious

[97] 'toute personne qui publiquement, soit oralement soit par la presse ou par écrit, par l'image ou par quelque autre moyen incite délibérément à des actes ou des activités susceptibles de provoquer des discriminations, la haine ou la violence envers une personne ou un groupe de personnes sous le seul motif de leur origine raciale ou nationale ou de leur appartenance religieuse est passible d'emprisonnement de deux ans au plus et/ou une amende'. Selon l'art. 1, paragraphe 2, de la même loi, est passible des sanctions susmentionnées quiconque constitue ou participe à des organisations dont le but est de se livrer à une propagande organisées ou à toute autre forme d'activité tendant à la discrimination raciale. Selon l'article 2 de ladite loi, toute personne qui publiquement soit oralement soit par la presse ou par écrit, par l'image ou par quelque autre moyen exprime des idées offensantes à l'égard d'une personne ou d'un groupe de personnes au motif de leur origine raciale ou nationale ou de leur appartenance religieuse est passible d'emprisonnement d'un an au plus et/ou une amende.

membership.

In addition, Article 186 of the Penal Code enshrines a penalty for anyone who causes or incites the commission of a crime.

Hungary

Article 269 of the Criminal Code, Act No. IV of 1978 [1978. évi IV. törvény a Büntetõ Törvénykönyv] on the offence called Incitement Against Community[98] :

A person who incites to hatred before the general public against
a) the Hungarian nation,
b) any national, ethnic, racial group or certain groups of the population

shall be punishable for a felony offence with imprisonment up to three years.

In December 2003 the Government initiated the modification of the hate-speech provision of the Criminal Code. The new Article 269 reads as follows:

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[98] Albeit unintentionally, the new element introduced in the new Artoicle 269 of the Criminal Code was clearly also applicable to such cases as persons whose writing is not necessarily intended to incite but who call into doubt the facts of the Holocaust from sheer ignorance. This new wording of the offense of incitement against the community prompted the question as to whether it would stand up to the test set by the Constitutional Court in its 1992 decision. Although the petition was submitted directly after the amendment was passed, the Constitutional Court took three years to reach its decision, number 12/1999. (V.21.). By this time, only three of the constitutional court judges elected in 1989-90 remained in place. The decision, formally applying the 'defamation' test and supplementing it with the argument that indeterminate drafting violated legal security, declared the inserted text void, and restored the state of 1992. The grounds for the decision are somewhat eclectic, the tests applied in the 1992 decision being quoted but not used in the derivation, which gives only the trivial argument that punishability of other acts likely to elicit hatred is unconstitutional because it is indeterminate and brings down the threshold of restriction.

In December 2003 the Government initiated the modification of the hate-speech provision of the Criminal Code for three reasons. First, the modification of the hate speech provision was partly a reaction to the acquittal of priest Loránt Heged_s, the Vice President of the Hungarian Truth and Justice Party (MIÉP) and member of Parliament, who published an article in ÉBRESZT_, journal of the party's 16th Capital District organization, under the title 'Christian Hungarian State'. Appearing on the front page of the journal, which was delivered to letterboxes throughout the district, the article included statements such as, 'SHUT THEM OUT! IF YOU DON'T DO IT TO THEM, THEY'LL DO IT TO YOU! This we know from a thousand years of torture, from the remaining legacy 'on high' of our stolen and thousand-time looted country, and not least from the stone-throwing sons of Ramallah.' Second, according to the Government's reasoning, the application of Section 269 of the Criminal Court by the ordinary courts is so divergent that it raises legal certainty concerns.[98] Third, the Government also referred to the constitutional duty of Hungary to harmonize its domestic laws with its international obligations.[98] It was the Government's view that the Parliament have not yet fulfilled its obligation in the area of hate speech.
On 8 December 2003 the Hungarian Parliament voted with a slight majority (184:180) for the modification of the Criminal Code. According to the Bill No. T/5179 hate speech criminalization would have become stricter. Anyone who would have incited to hatred against any nation, national, ethnic, racial or religious minority, or called for violent acts before the general public should have been punishable for a felony offense with imprisonment up to three years. A person who would have violated other people's human dignity by disparaging or humiliating them because of their national, ethnic, racial or religious origin should have been punishable for a misdemeanor with imprisonment of up to two years.
The adopted bill prescribed publicity for incitement to hatred. A new element was the word 'nation', since before the amendment one could commit this crime against the Hungarian nation, while, according to the bill, it could have been any nation. The lawmaker argued, in order to avoid the trap of being restrictive on content-based consideration, it is not the speech itself that is to be punished, but the degree of fierceness created by it is the decisive factor.

On 22 December 2003 the President of the Republic submitted the already adopted but not yet signed Act on amending the hate speech provisions of the Criminal Code to the Constitutional Court for ex ante constitutional review since he considered it unconstitutional.
In its decision 18/2004. (V. 25.) AB határozat The Constitutional Court ruled that adopted but not yet promulgated amendment to the Criminal Code is unconstitutional. The Constitutional Court applied its 1992 precedent for deciding the constitutionality of the amendment. The Court emphasized again, that it would not accept content-based restriction of communication. According to the Constitutional Court, communication can only be punished if it directly and foreseeable threatens individual (constitutional) rights. Since the amendment would have punished certain communications that's effect on the audience fall below this threshold, the amendment would restrict free speech unnecessarily and disproportionately, thus unconstitutionally.

'A person who, in front of a large public gathering, incites hatred against
a) the Hungarian nation,
b) any national, ethnic, racial or religious group, further against certain groups among the population, *or commits another act suitable for the arousal of hatred* commits a felony and is to be punished by imprisonment for a period of up to three years.'

Irlande

The Prohibition of Incitement to Hatred Act, 1989[99], provides in Section 2(1) that:

It shall be an offence for a person—

(a) to publish or distribute written material,
(b) to use words, behave or display written material—
(i) in any place other than inside a private residence, or
(ii) inside a private residence so that the words, behaviour or material are heard or seen by persons outside the residence,
or
(c) to distribute, show or play a recording of visual images or sounds,

if the written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.

Italy

Italian criminal law provisions to combat racism and racial discrimination are not contained in the Criminal Code but are dispersed among special legislation; nevertheless, many provisions of the Criminal Code which have a more general scope can be used to counteract manifestations of intolerance or racism. There are three laws in Italy which outlaw racial, ethnic or religious discrimination.

The first two laws (654/1975; 205/1993) were enacted with the view of addressing 'naziskins and hooligans'. They sanction those who devote themselves to propaganda and violence based on race. They however punish only violent ideological racism. Article 3 of Law 205/1993 enshrines the recognition of an aggravating circumstances for the crimes motivated by racism or discrimination. The issue remains to prove the intentionality. Law 654/1975, art. 3 (as amended by art. 1 of law decree 26 April 1993, n. 122, converted in law 25 June 1993, n. 205) punishes as criminal offences not only every act of discrimination based on racial grounds, but also all kind of incitement to any act of discrimination or to violence based on racial, ethnic, national or religious grounds. Given the increasing number of violent manifestations of racism and intolerance, in 1993, the Government amended the criminal law by adopting Law N° 205, which provides urgent measures to combat racism, ethnic and religious discrimination. Law N° 205 enshrines the racist motive as a general aggravating. It also bans the establishment of organisations, associations and movements aiming at instigating racial violence or discrimination.

The third law 40/98 Articles 41 and 42 (Testo Unico art. 43/44) extends the significance of racism, introducing for the first time in the Italian legislation sanctions regarding direct and indirect discrimination based on race, colour, ancestry, origins or religious convictions, perpetrated within institutions, places of work and in the access to goods and services.

[99] For the complete text of the Act see: http://www.irishstatutebook.ie/ZZA19Y1989.html

Latvia

Section 78 of the Criminal Law (Violation of National or Racial Equality and Restriction of Human Rights) provides that[100] :

> (1) For a person who commits acts knowingly directed towards instigating national or racial hatred or enmity, or knowingly commits the restricting, directly or indirectly, of economic, political, or social rights of individuals or the creating, directly or indirectly, of privileges for individuals based on their racial or national origin, the applicable sentence is deprivation of liberty for a term not exceeding three years or a fine not exceeding sixty times the minimum monthly wage.
>
> (2) For a person who commits the same acts, if they are associated with violence, fraud or threats, or where they are committed by a group of persons, a State official, or a responsible employee of an undertaking (company) or organisation, the applicable sentence is deprivation of liberty for a term not exceeding ten years.

Lithuania

Article 170 of the Criminal Code states :

> A person who by making public statements orally, in writing or by using the public media ridiculed, expressed contempt of, urged hatred of or encouraged discrimination against a group of residents or against a specific person, on account of their belonging to a specific national, racial, ethnic, religious or other group, shall be punished with a fine or restriction of liberty or detention or imprisonment for up to 9 years. Legal persons shall also be held liable for committing the above act.

Article 169 of the Criminal Code provides for criminal liability for committing acts aimed at a certain group of people or a member thereof on account of their ethnic background, race, sex, sexual orientation, origin or religion with a view to interfering with their right to participate as equals in political, economic, social, cultural or labour activity or to restrict the human rights or freedoms of such a group of people or of its member.

Luxembourg

Article 457-1 of the Penal Code reads :

> Punishable by a term of imprisonment of from eight days to two years and by a fine of from 251 to 25.000 euros, or by one of these penalties alone are:
>
> whoever, whether by speech, shouts or threats uttered in a public place or at a public gathering, whether by written or printed material, drawings, engravings, paintings, symbols, images or any other written, spoken or visual medium sold or distributed, offered for sale or displayed in public places or at public gatherings, whether in the form of placards or posters displayed to the public view, whether by any audio-visual communication medium, incites others to acts,

[100] A simlar provision relates to incitement to hatred on the basis of religion. Section 150 – Violation of Equality Rights of Persons on the Basis of their Attitudes Towards Religion : 'For a person who commits direct or indirect restriction of the rights of persons or creation of whatsoever preferences for persons, on the basis of the attitudes of such persons towards religion, excepting activities in the institutions of a religious denomination, or commits violation of religious sensibilities of persons or incitement of hatred in connection with the attitudes of such persons towards religion or atheism, the applicable sentence is deprivation of liberty for a term not exceeding two years, or community service, or a fine not exceeding forty times the minimum monthly wage.'

provided for in Article 455, of hatred or violence towards a natural person or legal entity, group or community on grounds of any of the elements specified in Article 454;

whoever belongs to an organisation whose objectives and activities consist in the commission of any of the acts provided for in paragraph 1 of this Article;

whoever prints or causes to be printed, makes, has in their possession, transports, imports, exports, causes to be made, imported, exported or transported, puts into circulation on the territory of Luxembourg, sends from the territory of Luxembourg, gives into the hands of the postal service or any other body responsible for the distribution of mail on the territory of Luxembourg written or printed material, drawings, engravings, paintings, posters, photographs, cinematographic films, symbols any other written, spoken or visual medium of a kind which is an incitement to acts provided for in Article 455, to hate or violence against a natural or legal person, a group or communities on grounds of any of the elements specified in Article 454.

Confiscation of the objects listed above shall be ordered in all cases.

Malta

According to Section 82A of the Criminal Code :

(1) Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up racial hatred or whereby racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months.

(2) For the purposes of the foregoing subsection 'racial hatred' means hatred against a group of persons in Malta defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

Moreover Chapter 71 of the Laws of Malta [*The Seditious Propaganda (Prohibition) Ordinance*] makes prosecutable the very act of publishing or broadcasting (by means of tape) any declaration, which directly or indirectly '*promotes feelings of ill will and hostility between different classes or races of such inhabitants* [of Malta].' The law provides an exception for those situations where people are incited to attempt to modify a law, by lawful means. It will be noted, however, that this Law, the language of which is clearly outdated, has fallen practically out of use in recent years.

The Netherlands

Article 137d Criminal Code:

A person who publicly, either orally or in writing or by image, incites hatred of or discrimination against persons or violence against their person or property, on the grounds of their race, religion or personal beliefs, their sex or their hetero-or homosexual orientation is liable to a term of imprisonment of not more than one year, or a fine of the third category.

Poland

Polish law lacks a comprehensive legal act concerning racism and xenophobia and no draft of such act has been proposed[101]. However, Art. 257 of the Polish Penal Code of 6 June 1997[102] provides anyone

[101] In its 2004 Report on Poland, ECRI considered that the implementation of legislation covering racial hatred and contempt should be improved. ECRI encourages Poland to examine the current implementation of legislation more closely, for example, by monitoring the number of cases reported, action taken by the authorities and outcome (ECRI Third Report on

who publicly insults a group of persons or a particular individual due to his/her national, ethnic, racial or religious origin or due to the lack of denomination, or for these reasons violates the personal inviolability of another individual, shall be subject to the penalty of imprisonment for up to three years.

Other provisions may be mentioned, although they are less directly related to the question of public incitement to the public incitement to discrimination, 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, which this section of the Opinion addresses.

Thus, according to Article 118 of the Penal Code, actions taken with the intent to entirely or partly destroy any ethnic, racial, political or religious group, or a group with a different perspective on life, by committing homicide or causing serious bodily harm to the detriment of the health of a person belonging to such a group shall be subject to the penalty of imprisonment for a minimum term of 12 years, the penalty of imprisonment for 25 years or the penalty of life imprisonment. The use of violence or an unlawful threat towards a group of persons or a particular individual due to their national, ethnic, political or religious affiliation, or due to their lack of religious denomination (art. 119 of the Penal Code), shall be subject to the penalty of imprisonment for a term of between three months and five years. The restriction of another person's liberty to exercise the rights vested in him, due to this person's religious denomination, or the lack of one (art. 194 of the Penal Code), shall be subject to a fine, the penalty of restriction of liberty or the penalty of imprisonment for up to two years.

The Polish Penal Code moreover includes a series of guarantees on protection against discrimination[103]. Article 256 introduces punishment by fine, restriction of liberty or imprisonment for up to two years for publicly propagating a fascist or other totalitarian political system or inciting hatred on grounds of differences in nationality, ethnicity, race or denomination or due to lack of denomination[104].

Finally, the Constitution of the Republic of Poland, in Article 13, prohibits the existence of political parties and other organisations whose programmes refer to totalitarian methods and practices of activity of Nazism, fascism and communism, as well as those whose programmes or activities assume or sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership.

Portugal

Article 240 of the Criminal Code[105] – Racial and Religious Discrimination

1. Whoever:
    a) Founds or establishes organisations or engages in organised propaganda activities which incite or encourage racial or religious discrimination, hatred or violence; or
    b) Participates in or assists, including financial assistance, to such organisations or such organised propaganda activities,

shall be punished with imprisonment between 1 and 8 years.

Poland adopted on 17 December 2004, (CRI (2005) 25). This report is available on the website of the European Commission against Racism and Intolerance, http://www.coe.int/T/e/human_rights/ecri/4-Publications/)

[102] The Official Journal of 1997, No. 88, item 553, with further amendments

[103] The Act of 6 June 1997, the Official Journal of 1997, No. 88, Item 553.

[104] In accordance with the Supreme Court's verdict of 28 March 2002 No. I KPZ 5/2002, the term 'propagation', in the sense of Article 256 of the Penal Code, relates to any behaviour consisting in public presentation, with the intention to convince others of a fascist or other totalitarian political system'.

[105] Free translation

2. Whoever, in a public meeting, in writing intended for dissemination, or by any other means of social communication:

a) provokes acts of violence against an individual or group of individuals on grounds of their race, colour, or ethnic, national or religious origin with the intention of inciting to or encouraging racial or religious discrimination; or

b) defames or insults an individual or group of individuals on grounds of their race, colour, or ethnic, national or religious origin, particularly by denying war crimes and crimes against peace or humanity,

with the intention of inciting to or encouraging racial or religious discrimination, or to encourage it,

shall be punished with imprisonment between 6 months and 5 years."

Art. 46/4 of the Constitution provides that 'Armed associations, military, militarised or paramilitary-type associations or organisations that are racist or display a fascist ideology shall not be permitted'.

Slovak Republic

The National Council approved the New Criminal Code – Act no. 300/2005 Coll. [*zákon _. 300/2005 Z. z. Trestn_ zákon*] which will come into force on 1 January 2006. Section 424 of the New Criminal Code regulates the elements of crime of 'Incitement of national, race and ethnic hatred' :

Section 424/1
Any person who publicly threatens any individual or group of persons with restriction of their rights and freedoms because of their affiliation with a nation, nationality, race or ethnic group or because of the colour of their skin or who commits such restriction or who publicly incites to restriction of the rights and freedoms of any nation, nationality, race or ethnic group shall be sentenced to a term of imprisonment of up to three years.

Section 424/2
The same punishment shall be imposed on any person who associates or assembles with others to commit an offence referred to in subsection (1).

Section 424/3
The offender shall be sentenced to a term of imprisonment of from one year to five years if he commits the offence referred to in subsection (1) in connection together with a foreign power or a foreign official, in the position of a public official, or in the crisis situation.

Section 421 of the New Criminal Code regulates the elements of crime of 'Support for and propagation of movements leading to the suppression of civil rights and freedoms' :

Section 421/1
A person who supports and propagates a group of persons which by using violence, the threat of violence or threat of other aggravated harm aims at suppressing citizen's rights and freedoms shall be sentenced to a term of imprisonment of from one to five years.

Section 421/2
An offender shall be sentenced to a term of imprisonment from four to eight years if he commits an act pursuant to subsection (1) publicly, by serious manner of behaviour, or in the crisis situation.

Section 423 of the New Criminal Code regulates the elements of crime of 'Defamation of a Nation, Race or Conviction' :

Section 423/1

Any person who publicly defames any nation, its language, any race or any ethnic group or an group of persons because of their religion or because they have no religion, shall be sentenced to a term of imprisonment of up to one year.

Section 423/2
The offender shall be sentenced to a term of imprisonment of up to three years if he commits the offence referred to in subsection (1) in association with at least two persons, in connection with a foreign power or a foreign official, or in the crisis situation.

Slovenia

Article 300 of the Penal Code criminalizes the act of 'stirring up ethnic, racial or religious hatred, strife or intolerance' in the following terms[106]:

(1) Whoever provokes or stirs up ethnic, racial or religious hatred, strife or intolerance or disseminates ideas on the supremacy of one race over another or provides for any kind of aid for racist activity, or denies, trivialises, condones or advocates genocide, shall be sentenced to imprisonment for not more than two years.

(2) If the offence under the preceding paragraph has been committed by coercion, maltreatment, endangering of security, desecration of national, ethnic or religious symbols, damaging of the movable property of another, desecration of monuments or memorial stones or graves, the perpetrator shall be sentenced to imprisonment for not more than five years.

(3) The material or objects, carrying the messages under the first paragraph of this article as well as instruments intended for their manufacture, distribution and dissemination are confiscated or is their use correspondingly disabled.

Article 141 of the Penal Code ('Violation of Right to Equality') criminalizes discrimination :

(1) Whoever, due to differences in respect of nationality, race, colour of skin, religion, ethnic roots, gender, language, political or other beliefs, birth status, education, social position or any other circumstance, deprives or restrains another person of any human right or liberty recognised by the international community or laid down by the Constitution or the statute, or grants another person a special privilege or advantage on the basis of such discrimination shall be punished by a fine or sentenced to imprisonment for not more than one year.

(2) Whoever prosecutes an individual or an organisation due to his or its advocacy of the equality of people shall be punished under the provision of the preceding paragraph.

(3) In the event of the offence under the first or the second paragraph of the present article being committed by an official through the abuse of office or of official authority, such an official shall be sentenced to imprisonment for not more than three years.

Spain

A number of provisions of the Penal Code relate to racism and xenophobia. Article 510 (1) of the Penal Code provides for the offence of provocation to discrimination, hate or violence against groups or associations for racist or anti-Semitic motives. Article 510 (2) of the Penal Code punishes the

[106] Article 300 of the Penal Code was amended in 2004 in order to meet the requirements, determined in the Convention of the Council of Europe on cybercrime (signed in Budapest on 23 November 2001) and the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Thus, denial, gross minimisation, approval or justification of genocide or crimes against humanity were added to the elements of crime, and Paragraph 3 was amended since confiscation is almost impossible in an information system.

dissemination of offensive false information with respect, inter alia, to the ideology, religion or beliefs, racial or ethnic grounds or national origin of groups or associations. These provisions are the most closely related to the question of public incitement to the public incitement to discrimination, 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, which this section of the Opinion addresses.

Articles 511 and 512 of the Penal Code penalise the individual responsible for a public service, or those people who in the course of their commercial or professional activities, deny a person access to a benefit or service to which they are entitled where that denial is based on the grounds of their ideology, religion or beliefs, their membership of a particular ethnic, racial, or national group, their sex, sexual orientation, family situation, illness or disability

Article 22 (4) of the Penal Code enshrines an aggravating circumstance for the commission of a crime, inter alia, for racist or anti-Semitic motives or because of the ideology, religion or beliefs of the victims, the victim's ethnic, racial or national affiliation.

Article 4, 515 and 517 of the Penal Code outlaw associations inciting people to discrimination. According to a judgment of the Supreme Court of 11 May 1970, the mere existence of such an organisation attracts criminal sanctions, even if it does not carry out its aims.

Article 314 of the Penal Code punishes discrimination in employment, both in the public and the private sectors, based, inter alia, on grounds of ideology, ethnic, race, religion or beliefs.

Sweden

Chapter 16, Section 8 of the Penal Code (*Brottsbalken*) stipulates that a person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious belief or sexual orientation shall be sentenced for agitation against a national or ethnic group to imprisonment of between six months to four years. Chapter 29 Section 2 (7) of the Penal Code provides that racist motivation (i.e. if the motive for the crime was to aggrieve a person, ethnic group or other similar group of people on the basis of race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstances) constitutes an aggravating circumstance in sentencing.

There are two constitutional laws regulating the exercise of freedom of expression in the media: the Fundamental Law on Freedom of Expression (Y*ttrandefrihetsgrundlagen*) (Chapter 5 § 1), which applies to media such as radio, television and recordings of sounds, pictures and text and the Freedom of the Press Act (*Tryckfrihetsförordningen*) (Chapter 7 §4 (11)) which applies to printed material. Both laws contain provisions prohibiting agitation against a national or ethnic group.

United Kingdom

In the United Kingdom there is no offence of publicly inciting discrimination – this remains essentially a civil wrong – but incitement of violence 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 could lead to a conviction under the Crime and Disorder Act 1998 (as amended), which introduces the concept of 'racially aggravated offence'. Indeed, as already mentioned in the introduction to this Opinion, Sections 28-33 of the Crime and Disorder Act 1998 introduced the concept of a 'racially aggravated offence', resulting in enhanced penalties where racial hostility was an element in the offence committed. An offence will be racially aggravated where 'the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial group'[107] or the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group. Membership for this purpose can include 'association with members of that group'. The offences concerned are assaults, criminal damage, public order offences

[107] A 'racial group' means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

concerned with fear or provocation of violence and harassment, alarm or distress, certain offences under the Protection from Harassment Act 1997 (harassment and putting people in fear of violence). The Anti-terrorism, Crime and Security Act 2001 amended this Act so that 'religiously aggravated' offences were similarly treated. For the purpose of this amendment, a religious group is defined as a 'group of persons defined by reference to religious belief or lack of religious belief'. The creation of racially and religiously aggravated offences in the case of Northern Ireland was effected by the Criminal Justice (Northern Ireland) Order 2004. It should be noted that in the United Kingdom there have been many calls in recent years for offences dealing with incitement to religious hatred but the government, after meeting resistance, abandoned its proposal to include them in the Anti-terrorism, Crime and Security Act 2001. In its latest concluding observations of the Committee on the Elimination of Racial Discrimination recommended that there be an 'early consideration to the extension of the crime of incitement to racial hatred to cover offences motivated by religious hatred against immigrant communities'[108]. In the case of incitement to 'racial' hatred – defined for the purpose of the law of the United Kingdom as hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins – the Public Order Act 1986 establishes a number of relevant offences. Thus, for instance, under s 18 a person who uses threatening, abusive or insulting words or behaviour or displays any written material which is threatening, abusive or insulting is guilty of an offence if he intends thereby to stir up racial hatred or having regard to all the circumstances such hatred is likely to be stirred up thereby. This offence can be committed in public or private but no offence will be committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that dwelling. The Public Order Act 1986 only applies to Great Britain but similar provisions exist in respect of Northern Ireland by virtue of the Public Order (Northern Ireland) Order 1987.

Incitement to 'religious' hatred is currently only a specific offence in Northern Ireland – under the Prevention of Incitement to Hatred Act (Northern Ireland) 1970. However, incitement to hatred against certain religions (notably Judaism and Sikhism) would be covered by the racial hatred offence under the public order legislation discussed above because of the close identification of the religion with ethnic origin.

2.2.3. Comparison of the national criminal law provisions on the incitement to racism and xenophobia

As one can draw from the list of criminal law provisions on the incitement to racism and xenophobia cited above, public incitement to discrimination, 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 is generally prohibited by the criminal law of the Member States. In general, such incitement would have to be intentional in order for the offence to be committed. Indeed, Article 4 of the Proposal for a Council Framework Decision on combating racism and xenophobia expressly provides that Member States shall ensure that the conducts listed in this provision are by any means punishable as criminal offence, when *intentionally* committed. However, this condition of intention seems to be questioned by the Committee on the Elimination of Racial Discrimination, under the International Convention on the Elimination of All Forms of Racial Discrimination. In its 2001 Conclusions on **Cyprus**, the Committee indeed expressed satisfaction at the amendment (Law 28 III of 1999) of Law 11 (III) of 1992 which criminalizes acts mentioned in Article 4 of the ICERD and accordingly notes that 'as a result of the amendment it is no longer necessary that incitement to racial hatred be intentional in order for the offence to be committed'[109].

Although they generally prohibit public incitement to discrimination, 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 relevant national provisions rely on more or less strict

[108] (CERD/C/63/CO/11, para 21, 10 December 2003)
[109] Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Cyprus, U.N. Doc. A/56/18, paras. 256-277 (2001).

definitions of this behavior. The main differences appear, in particular, with regard to (1) the publicity of the offence ; (2) the types of acts concerned ; and (3) the personal scope of the protection against incitement to violence or hatred.

(1) Publicity of the offence

Article 4 of the Proposal for a Council Framework Decision on combating racism and xenophobia provides that Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence: '(a) public incitement to violence or hatred for a racist or xenophobic purpose or to any other racist or xenophobic behaviour which may cause substantial damage to individuals or groups concerned; (b) public insults or threats towards individuals or groups for a racist or xenophobic purpose; (c) public condoning for a racist or xenophobic purpose of 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; (d) public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 in a manner liable to disturb the public peace; (e) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia; (…)' (emphasis added).

Similarly ECRI's General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination limits the scope of certain criminal offences set out in paragraph 18 to the condition that they are committed in 'public' (see above the text of paragraph 18 of ECRI's General Policy Recommendation No. 7). However according to the Explanatory Memorandum to ECRI General Policy Recommendation No. 7 current practice 'shows that, in certain cases, racist conducts escapes prosecution because it is not considered as being of a public nature'. Accordingly, provides the Explanatory Memorandum – even though the condition of publicity is enshrined in almost all the Member States' legislations – 'States should ensure that it should not be too difficult to meet the condition of being committed in 'public''[110].

In **Austria**, Section 283 of the Penal Code penalizes public incitement to hostile action. Section 283 however only applies if such incitement is likely to endanger public order. ECRI as well as the Committee on the Elimination of Racial Discrimination under the ICERD expressed their concern regarding this restricting criterion[111]. In **Belgium**, the Law of 30 July 1981 regarding the punishment of certain acts motivated by racism or xenophobia[112] criminalises the *public* incitement to discrimination, hatred and violence as well as the *public* announcement of an intention towards discrimination, hatred, violence, or segregation against a person or against a group, community, or the members of it on account of the so-called race, colour, descent, origin, or nationality of its members, or some of them (Article 1(3))[113]. Moreover Article 444 of the Penal Code increases the penalties for

[110] The Memorandum provides e.g. that 'this condition should be met in cases of words pronounced during meetings of neo-Nazi organisations or words exchanged in a discussion forum on the Internet'. (Paragraph 38 of the Explanatory Memorandum).

[111] ECRI, Third report on Austria, adopted on 25 June 2004, p. 10. CERD, CERD, Concluding Observations on Austria. 07/04/99, CERD/C/304/Add.64, para 8.

[112] Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, *M.B.*, 8 August 1981. This law has been amended by the Law of 15 February 1993, *M.B.,* 19 February 1993 ; Law of 12 April 1994 (*M.B.*, 14 May 1994) ; Law of 7 May 1999 (*M.B.*, 25 June 1999) ; Law of 20 January 2003 (*M.B.*, 12 February 2003) and Law of 23 January 2003 (*M.B.*, 13 March 03).

[113] The Act understands by 'discrimination' 'any form of distinction, exclusion, restriction or preference, whose purpose or whose result is or could be to destroy, compromise or limit the equal recognition, enjoyment or exercise of human rights and the fundamental freedoms on a political, economic, social or cultural level, or in any other area of social life' (Article 1 of Law of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia). Article 1 (2) adds that any conduct which enjoins to someone to discriminate against another person, a community or a group or any of their members, shall also be considered as constituting a discrimination.
The case law cited under this provision in the ECRI Report on the national legal measures for combating racism and Intolerance in Belgium (situation as of 31 December 2002, http://www.coe.int/T/e/human%5Frights/ecri/1%2DECRI/3%2DGeneral%5Fthemes/3%2DLegal%5FResearch/1%2DNational%5Flegal%5Fmeasures/Belgium/Belgium%20SR.asp#TopOfPage) refers to : Nivelle Criminal Court, 25 June 2001
A young man had an altercation with a family of foreign origin, during which he struck a member of this family. The next

the offences committed in public[114]. The Law of 30 July 1981 however does not allow for any sanction against 'racist insults'. Accordingly, a specific intention, i.e. that expresses the wish to incite third parties to commit racist or xenophobic acts, is required for the insult to be punished[115]. In **Cyprus**, the condition of publicity is not mentioned explicitly in Section 2 A, para. 1 of the Penal Code which criminalizes incitement of acts that are likely to cause discrimination, hatred or violence but it stands in Section 47 of the Penal Code which penalizes public action intended to promote hostility. In the **Czech Republic**, Article 198a of the Criminal Code condemns public incitement of national or racial hatred and Article 260 of the Criminal Code criminalizes the public defamation of a nation, race or conviction. In **Denmark,** Section 266b of the Criminal Code concerns public statements or statements that are adopted 'with the intention of wider dissemination'. It should be noted however that in Denmark the incitement to discrimination, violence or hatred is not addressed as such. Section 266b of the Danish Criminal Code tackles the expression and spreading of racial hatred. In **Estonia**, Article 151 of the Criminal Code, which deals with the 'instigation of social hatred', tackles activities that 'openly call to hatred or violence'. In **Finland**, Chapter 11 Section 8 of the Penal Code condemns public spreading of statements or other information. The criteria that the statement or information has to have been spread *among the public* is fulfilled unless the statement or information is spread strictly within the 'private sphere', that is, among a limited number of people who are known beforehand to the person making the statement or giving information. The statements or information concerned may be spread via any type of media, including radio, television, movies, Internet (including public chat forums), email, books, leaflets, newspapers, journals, email, telefax and so on. Printing offending texts into t-shirts and subsequently selling them has been considered to fulfil the criteria of ethnic agitation.[116] In another case, the criterion of spreading was fulfilled when a van, on the side of which a provocative text had been written, was driven in the streets of a neighbourhood populated by immigrants[117]. In **France**, the Act of 29 July 1881 on the freedom of the press contains measures which make it an offence to defend or dispute crimes against humanity, instigate discrimination, hatred or violence or engage in the defamation or abuse of a race, ethnic group, nation or religion. People who write racist graffiti and inscriptions on public or private buildings are liable to prosecution not only for wilful damage or desecration of graves, but also for racist offences, when these are proven[118]. In order for one of the above-mentioned offences to exist, the acts must have been *brought to the attention of the public* by one of the means of publicity referred to in Section 23 of the 1881 Act: printed matter, drawings, engravings, paintings, emblems, images or any other written, oral or visual medium, sold or distributed, placed on sale or exposed to public view, as well as any audiovisual means of communication. The new Criminal Code does not amend the offences defined by the Act of 29 July 1881 on the freedom of the press, which therefore remains in force. Remarkably however, a summary offence has been created (Article 625-7 on non-public incitement to discrimination, hatred or racial violence) to counter non-public incitement to racial discrimination, hatred or violence, which was not punished by Section 24 of the 1881 Act. In **Germany**, Section 130 paragraph 1 of the German Criminal Code does not punish public incitement to hatred but sanctions 'whoever, in a manner that is capable of disturbing the public peace, incites hatred against segments of

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day he wrote on a wall in the neighbourhood '*Je chie sur ta sous-race. Retourne dans ton pays, fils de pute de Marocain*' (an extremely abusive racist obscenity). Three days later he struck his first victim's brother.
The Court held that such expressions of hatred did not necessarily constitute incitement to discrimination, hatred or violence but that, on the other hand, it was a clear case of an intention to resort to violence within the meaning of Article 1 (4) of the Law.

[114] Article 444 of the Penal Code: 'The guilty party shall be punished by a prison sentence of eight days to one year and by a fine of twenty six francs to two hundred francs, when the charges have been committed: either in public meetings or places; or in the presence of several people, in a place that is not public but accessible to a number of people who are entitled to meet or visit there; or in any place in the presence of the offended person and in front of witnesses; or through documents, printed or otherwise, illustrations or symbols that have been displayed, distributed, sold, offered for sale, or publicly exhibited; or finally by documents that have not been made public but which have been sent or communicated to several people'.

[115] RAXEN Analytical Report on Legislation, Belgium, 2004, p. 23. This Report, which is drafted by the Centre for Equal opportunities and Opposition to Racism is available on http://eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&catid=418ea9767affb

[116] Vaasa Court of Appeals 1991:6.

[117] Helsinki Court of Appeals 1999:1200.

[118] ECRI Second Report on France. This Report is available on http://www.coe.int/T/e/human_rights/ecri/1-ECRI/3-General_themes/3-Legal_Research/1-National_legal_measures/France/France%20SR.asp#P339_22612

the population or calls for violent or arbitrary measures against them (…)'. This provision has the aim to protect peaceful living together of groups of the population in the country. Protected types of legal interest therewith are not only public security and public peace, but also the protection of the individual rights of persons who are affected by inciting comments. In **Greece,** Article 1, para. 1 Law 927/25.6.1979, complemented by Article 24 of Law 1419/8.3.1984 and modified by Article 72 of Law 2910/2001 penalises public activities or acts inciting to discrimination, hatred or violence. In **Hungary**, the new Article 269 of the Criminal Code addresses incitement to hatred made by a person 'before a large public'. In **Ireland**, Section 2 of the Prohibition of Incitement to Hatred Act, 1989 addresses incitements to hatred which take place in 'public places'. In **Lithuania**, Article 170 of the Criminal Code provides criminal liability for 'public statements [which] orally, in writing or by using the public media ridiculed, expressed contempt of, urged hatred of or encouraged discrimination against a group of residents or against a specific person, on account of their belonging to a specific national, racial, ethnic, religious or other group'. In **Luxembourg,** Article 457-1 of the Penal Code also contains a condition of publicity for the conducts at stake. In the **Netherlands**, Article 137d of the Criminal Code condemns public incitement to hatred, discrimination or violence. In **Poland**, Article 256 of the Penal Code punishes public propagating of a fascist or of other totalitarian political system or public incitement to hatred. In accordance with the Supreme Court's verdict of 28 March 2002 No. I KPZ 5/2002, the term 'propagation', in the sense of Article 256 of the Penal Code, relates to 'any behaviour consisting in public presentation, with the intention to convince others of a fascist or other totalitarian political system'. In **Portugal**, paragraph 2 of Article 240 of the Criminal Code punishes 'anyone who, in a public meeting, in writing intended for dissemination, or by any other means of social communication, defames or insults an individual or group of individuals (…) with the intention of inciting to or encouraging racial or religious discrimination'.[119] Article 239 of the Criminal Code prohibits i.a. direct public incitement to commit genocide. In the **Slovak Republic**, Section 423 of the New Criminal Code regulates the elements of crime of Defamation of a Nation, Race or Conviction (Article 198 of the current Criminal Code) and Section 424 of the New Criminal Code regulates the elements of crime of Incitement of national, race and ethnic hatred (Article 198a of the current Criminal Code). Both provisions contain a condition of publicity for the offences at stake. In **Sweden**, Chapter 16, Section 8 of the Penal Code addresses 'disseminated statement or communication' that threatens or express contempt for certain groups. In the **United Kingdom**, as mentioned above, there is no offence of publicly inciting discrimination – this remains essentially a civil wrong – but incitement of violence 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 would be punishable under one of the racially or religiously aggravated provided for by the Crime and Disorder Act 1998. In the case of incitement to *racial* hatred – defined for the purpose of the law of the United Kingdom as hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins – the Public Order Act 1986 establishes a number of relevant offences. Thus under Section 18 a person who uses threatening, abusive or insulting words or behaviour or displays any written material which is threatening, abusive or insulting is guilty of an offence if he intends thereby to stir up racial hatred or having regard to all the circumstances such hatred is likely to be stirred up thereby. This offence can be committed in public or private but no offence will be committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that dwelling.

Certain Member States however do not expressly provide that the incitement to hatred, violence and discrimination shall be made 'public' in order to be punished. This is the case in **Italy** and in **Malta** for instance. The condition of publicity neither appears in Article 510 of the Penal Code in **Spain**. Similarly in **Slovenia,** the offence of 'stirring up ethnic, racial or religious hatred, strife or intolerance'

[119] Second report on Portugal by the European Commission Against Racism And Intolerance, CRI (2002) 33, adopted on 20 March 2002, noticed: 'Since 2000, ten cases have been brought on the basis of this provision, but to date only three have been judged. However, ECRI believes that, partly because of the difficulty of proving that an act was racially motivated, this figure does not reflect the real number of racist acts committed. In some cases, although the public prosecutor's department called for a conviction based on Article 240, judges have preferred to convict offenders on other legal grounds than Article 240.'

(Article 300 of the Penal Code) does not include explicitly a condition of publicity and in **Latvia,** Section 78 and Section 150 of the Criminal Law do neither enshrine a condition of publicity.

(2) Types of action covered

The second difference between national criminal legislations regarding the conduct of publicly inciting discrimination, 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 relates to the types of actions covered by the national offences. Most of the Member States' criminal legislations expressly address the incitement to *discrimination*, *violence* or *hatred*. In some cases however, the provisions are more limited.

In **Austria**, public incitement to discrimination, violence or hatred within the context of National-Socialist ideology is prohibited by Section 3 lit d Prohibition Statute (this provision is a catch clause applying to any form of publication which is appropriate to reach the general public or at least several people), whilst Section 283 Penal Code penalises 'public incitement to hostile action' (*Verhetzung)*. In **Belgium**, Paragraph 3 of Article 1 of the Act of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia[120] criminalises 'the incitement to discrimination, hatred or violence' against a person (paragraph 3 (1)) and against a group, community, or the members of it on account of the so-called race, colour, descent, origin, or nationality of its members, or some of them, in the circumstances given in article 444 of the Penal Code (paragraph 3 (2)). In **Cyprus,** Section 2A § 1 of the Law Ratifying the Convention on the Elimination of all Forms of Racial Discrimination of 1967 as amended, criminalises the incitement 'of acts that are likely to cause discrimination, hatred or violence'. In the **Czech Republic,** the Criminal Code only addresses 'incitement of national and racial hatred' (Article 198a of the Criminal Code). In **Denmark,** the incitement to discrimination, violence or hatred is not addressed as such; as mentioned above, Section 266b of the Danish Criminal Code tackles 'the expression and spreading of racial hatred'. Similarly in **Estonia**, Article 151 of the Criminal Code concerns 'the instigation of social hatred and violence'. In **Finland**, Chapter 11, Section 8 of the Penal Code deals with the spreading of 'statements or other information' which threatens, defames or insults certain groups of persons. The notions of 'statement' and 'other information' include not just verbal (oral or written) statements, but also for instance pictures and probably also offensive gestures, although the latter interpretation has not been confirmed by case law.[121] The essential criterion is whether the act concerned can be held to convey a message that threatens, defames or insults a group[122]. In **Germany** Section 130 para.1 of the Criminal Code concerns the incitement to hatred and the calls for violent or arbitrary measures or assaults the human dignity of others. In **Hungary,** the new Article 269 of the Criminal Code addresses the incitement of hatred and other acts 'suitable for the arousal of hatred'. In **Ireland** Section 2(1) of the 1989 Prohibition of Incitement to Hatred Act makes it a criminal offence for anyone to, inter alia, use words in a public place which are 'threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred'. The 'stirring up of hatred' is also the notion used in Section 82A of the **Maltese** Criminal Code. It is also used in **Slovenia** where Article 300 of the Penal Code deals with the fact of stirring up ethnic, racial or religious hatred, strife or intolerance or dissemination of ideas on the supremacy of one race over another. In **Italy,** the notion used is the incitement to any act of discrimination or to violence based on racial, ethnic, national or religious

[120] Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, *M.B.*, 8 August 1981. This law has been amended by the Law of 15 February 1993, *M.B.,* 19 February 1993 ; Law of 12 April 1994 (*M.B.*, 14 May 1994) ; Law of 7 May 1999 (*M.B.*, 25 June 1999) ; Law of 20 January 2003 (*M.B.*, 12 February 2003) and Law of 23 January 2003 (*M.B.*, 13 March 03).

[121] Mika Illman, *Hets mot folkgrupp*. Suomalainen lakimiesyhdistys, 2005, p. 247 ff. Ari-Matti Nuutila, 'RL 11: Sotarikokset ja rikokset ihmisyyttä vastaan'. In Olavi Heinonen & al, *Rikosoikeus*. WSOY, 2002, p. 570. Timo Makkonen*, Syrjinnän vastainen käsikirja*. IOM Helsinki, 2003, 216.

[122] It is likely that the burning of crosses or shouting 'Sieg Heil' in public would be considered 'a statement or other information' within the meaning of the law (Mika Illman, *Hets mot folkgrupp*. Suomalainen lakimiesyhdistys, 2005, p. 247 ff. Ari-Matti Nuutila, 'RL 11: Sotarikokset ja rikokset ihmisyyttä vastaan'. In Olavi Heinonen & al, *Rikosoikeus*. WSOY, 2002, p. 570. Timo Makkonen*, Syrjinnän vastainen käsikirja*. IOM Helsinki, 2003, 217, 261).

grounds. In **Latvia**, Section 78 of the Criminal Law punishes 'acts knowingly directed towards instigating national or racial hatred or enmity, or knowingly [..] restricting, directly or indirectly, of economic, political, or social rights of individuals or the creating, directly or indirectly, of privileges for individuals based on their racial or national origin'. Section 150 punishes 'direct or indirect restriction of the rights of persons or creation of whatsoever preferences for persons on the basis of the attitudes of such persons towards religion, excepting activities in the institutions of a religious denomination, or [..] violation of religious sensibilities of persons or incitement of hatred in connection with the attitudes of such persons towards religion or atheism' whilst in **Lithuania**, Article 170 of the Criminal Code only provides criminal liability for publicly inciting discrimination based on different grounds including race, ethnic origin and religious belief. In **Luxembourg**, Article 457-I of the Penal Code addresses acts of hatred or violence. In **Spain** (Article 510 of the Penal Code) and in the **Netherlands,** Article 137d of the Criminal Code, expressly deal with the notion of incitement to hatred, discrimination or violence. In **Poland** Article 256 of the Penal Code deals with the offence 'publicly propagating a fascist or other totalitarian political system or inciting hatred'. In the **Slovak Republic,** Section 424 of the New Criminal Code, which regulates the elements of crime of incitement of national, race and ethnic hatred, deals with the offence of publicly 'threatening' any individual or group of persons with restriction of their rights and freedoms because of their affiliation with a nation, nationality, race or ethnic group or because of the colour of their skin or who commits such restriction or who publicly incites to restriction of the rights and freedoms of any nation, nationality, race or ethnic group. Eventually, in **Sweden**, the Penal Code deals with the notion of 'statement or communication [which] threatens or expresses contempt for a national, ethnic or other such group of persons' (Chapter 16, Section 8 of the Penal Code).

(3) Personal scope of the protection against incitement to violence or hatred

Overview

According to Article 4 of the Proposal for a Council Framework Decision on combating racism and xenophobia, Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence: '(a) public incitement to violence or hatred for a racist or xenophobic purpose or to any other racist or xenophobic behaviour which may cause substantial damage to individuals or groups concerned; (b) public insults or threats towards individuals or groups for a racist or xenophobic purpose; (…)' (emphasis added).

This scope of the protection may still be considered as limited. Paragraph 18 of ECRI General Policy Recommendation No. 7 of 13 December 2002 on National Legislation to Combat Racism and Discrimination[123] provides that criminal law should penalise the following acts when committed intentionally: '(a) public incitement to violence, hatred or discrimination; (b) public insults and defamation or (c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; (d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin (…)'[124] (emphasis added). The Explanatory Memorandum clarifies why ECRI General Policy Recommendation No. 7 uses the notion of 'grouping of persons':

Some of the offences set out in paragraph 18 of the Recommendation concern conduct aimed at a 'grouping of persons'. Current practice shows that legal provisions aimed at sanctioning racist conduct frequently do not cover such conduct unless it is directed against a specific person or group of persons. As a result, expressions aimed at larger groupings of persons, as in the case of references to asylum seekers or foreigners in general, are often not covered by these provisions. For this reason, paragraph 18 a), b), c), and d) of the Recommendation does not speak of 'group' but of 'grouping' of persons.

[123] This instrument is available on http://www.coe.int/T/e/human_rights/ecri/1-ECRI/3-General_themes/1-Policy_Recommendations/Recommendation_N%b07/3-Recommendation_7.asp#TopOfPage
[124] Underlined by the author.

In certain Member States, the list of grounds which define these groups or the persons belonging to these groups is left open in order to allow it to evolve with society (e.g. by using the expression 'grounds such as' in the definition). Other Member States on the contrary have taken the view that, in order to respect the principle of forseeability which governs criminal law, the law should contain an exhaustive list of grouds defining the groups at stake. Criminal provisions use, for instance, the wording 'religious community, ethnic group, nation, State' (**Austria**, Section 283 of the Penal Code), 'persons or group of persons [considered on the basis of] their racial and ethnic origin or religion' (Section 2A §1 of the **Cyprus** Law Ratifying the Convention on the Elimination of all Forms of Racial Discrimination of 1967), 'segments of the population' (**Germany**, Section 130 paragraph 1 of the Criminal Code) or 'a group of persons in the State or elsewhere on account their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation' (**Ireland,** Prohibition of Incitement to Hatred Act, 1989), 'nation, ethnic group, race, religion, class or another group' (**Czech Republic** Section 198a of the Criminal Code). In the **Slovak Republic**, the wording of Article 198a of the Criminal Code is very similar to the wording of Article 198a of the Czech Republic. However it does not include the words 'or another group'[125]. Section 424 of the new Criminal Code regulates the elements of crime of Incitement of national, race and ethnic hatred punishes any person who publicly threatens 'any individual or group of persons with a restriction of their rights and freedoms because of their affiliation with a nation, nationality, race or ethnic group or because of the colour of their skin (…)'. In **Belgium**, Paragraph 3 of Article 1 of the Law of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia[126] criminalises the incitement to discrimination, hatred or violence against 'a person' (paragraph 3 (1))[127] and against 'a group, community, or the members of it on account of the so-called race, colour, descent, origin, or nationality of its members, or some of them, in the circumstances given in Article 444 of the Penal Code' (paragraph 3 (2))[128]. It also criminalises the act of publicly stating one's

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[125] Section 198a/1 of the **Slovakian** Criminal Code reads :
'A person who publicly incites hatred of another nation, ethnic group, race, religion, class or publicly incites the restriction of their rights and freedoms shall be sentenced to a term of imprisonment of up to one year or a pecuniary punishment'**.**
Sec. 198a of the **Czech** Criminal Code reads :
'A person who publicly incites hatred of another nation, ethnic group, race, religion, class or another group of persons or publicly incites the restriction of their rights and freedoms shall be sentenced to a term of imprisonment of up to two years'.

[126] Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, *M.B.*, 8 August 1981. This law has been amended by the Law of 15 February 1993, *M.B.,* 19 February 1993 ; Law of 12 April 1994 (*M.B.*, 14 May 1994) ; Law of 7 May 1999 (*M.B.*, 25 June 1999) ; Law of 20 January 2003 (*M.B.*, 12 February 2003) and Law of 23 January 2003 (*M.B.*, 13 March 03).

[127]By 'discrimination' in this Act is meant any form of distinction, exclusion, restriction or preference, whose purpose or whose result is or could be to destroy, compromise or limit the equal recognition, enjoyment or exercise of human rights and the fundamental freedoms on a political, economic, social or cultural level, or in any other area of social life (Article 1 of Law of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia). Article 1 (2) adds that any conduct which enjoins to someone to discriminate against another person, a community or a group or any of their members, shall also be considered as constituting a discrimination.
The case law cited under this provision in the ECRI Report on the national legal measures for combating racism and intolerance in Belgium (situation as of 31 December 2002, http://www.coe.int/T/e/human%5Frights/ecri/1%2DECRI/3%2DGeneral%5Fthemes/3%2DLegal%5FResearch/1%2DNational%5Flegal%5Fmeasures/Belgium/Belgium%20SR.asp#TopOfPage) refers to :
Judgment of 20 April 1983 by the Correctional Court of Brussels: Calling someone, in this case a political opponent, a 'dirty Jew' constitutes the offence of incitement to racial discrimination or provocation to racist hatred or violence. The fact that the offence was committed in circumstances which were ideal for publicity (an official political meeting) is a particularly serious and dangerous element as the defendant tried to exploit xenophobia and racism for demagogic purposes.
Court of Cassation judgment of 19 May 1993: for the offence to exist, the acts in question do not necessarily have to reflect the obvious wish of the offender to induce someone to commit specific acts of racism or xenophobia.
Judgement of 15 July 1996 by Brussels Criminal Court: Two National Front councillors were given a suspended sentence of four months' imprisonment and fined 100,000 BEF for giving the Hitler salute while taking an oath and for making racist and discriminatory remarks.

[128] The case law cited under this provision in the ECRI Report on the national legal measures for combating racism and intolerance in Belgium (situation as of 31 December 2002, http://www.coe.int/T/e/human%5Frights/ecri/1%2DECRI/3%2DGeneral%5Fthemes/3%2DLegal%5FResearch/1%2DNational%5Flegal%5Fmeasures/Belgium/Belgium%20SR.asp#TopOfPage) refers to : Bruges Criminal Court, 23 April 2002
The members of the Ostende Civic Initiative (Burgerinitiatief Oostende) were sentenced by Bruges Criminal Court to fines of 495,79 Euro for distributing of racist pamphlets. These pamphlets accused residents of a transit centre of certain crimes. They

intention to discriminate against the same persons, groups, communities or members thereof. Interestingly in **Spain**, Article 510 of the Penal Code provides for the offence of provocation to discrimination, hate or violence 'against groups or associations' and punishes the dissemination of offensive false information with respect i.a. to the ideology, religion or beliefs, racial or ethnic grounds of 'groups or associations'. In **Finland**, the crime of 'ethnic agitation'[129] is fulfilled only if a group or some part of it, and not some identifiable individuals, are being targeted. Indeed, if individual, identifiable members of these groups are targeted rather than a group as such, then the matter may be dealt with as 'defamation', 'instigation to a crime', or as an 'unlawful threat'[130].

In any case, as reminded by the Committee on the Elimination of Racial Discrimination when addressing the ways in which individuals shall be identified as being members of a particular racial or ethnic groups or groups, 'such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned'[131].

Specific groups

The national legislations criminalizing public incitement to discrimination, 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, in principle also protects asylum-seekers or foreigners insofar as they are members of groups thus defined. However, a distinct but important question is whether foreigners as such, or asylum-seekers as such, should be protected from public incitement to discrimination, violence or hatred directed against them as a group. Extending to the group of foreigners the protection from public incitement to discrimination, violence or hatred directed against them as a group, or against the members of that group as such, has been recommended at the international level. Under the ICERD, the Committee on the Elimination of Racial Discrimination recommends the States Parties to 'ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens; [to] pay greater attention to the issue of multiple discrimination faced by non-citizens, in particular concerning the children and spouses of non-citizen workers, to refrain from applying different standards of treatment to female non-citizen spouses of citizens and male non-citizen spouses of citizens, to report on any such practices and to take all necessary steps to address them; [to] take steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens (…)'[132].

A similar question arises, to some extent, with respect to the Roma community, although the Roma will generally be considered to constitute a group defined by the ethnic origin of its members and,

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claimed that these foreigners were involved in crime, drug trafficking and prostitution. In its decision, the court argued that this was a case not of exercising freedom of expression but of clear incitement to hatred of foreigners, an offence punishable by law.

[129] Chapter 11, section 8 of the Penal Code deals with ethnic agitation (could also be translated literally as 'incitement against a population group').

[130] Under chapter 24 section 9 a person who 1) spreads false information or a false insinuation of another person so that the act is conducive to causing damage or suffering to that person, or subjecting that person to contempt, or 2) makes another type of derogatory comment on another, is to be sentenced for 'defamation'. Section 10 defines the conditions for aggravated forms of defamation. Basically these provisions aim to penalize the violation of an individual's integrity and dignity. In case a person purposefully incites one or more other persons to commit a crime, whatever the nature of the crime (e.g. violence or discrimination), against another person, on whatever grounds, including the latter's ethnic origin, and the crime is subsequently carried out, the instigator shall be sentenced in accordance with chapter 5 section 5 of the Penal Code for 'instigation'.

[131] Committee on the Elimination of Racial Discrimination, General Recommendation 8, Membership of racial or ethnic groups based on self-identification (Thirty-eighth session, 1990), U.N. Doc. A/45/18 at 79 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 200 (2003).

[132] Committee on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination against Non-citizens (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

thus, to be protected as such.[133] Indeed, such appears to be the presumption of the ECRI where it recommends to the Member States of the Council of Europe to bear in mind 'the manifestations of racism and intolerance of which Roma/Gypsies are victims, to give a high priority to the effective implementation of the provisions contained in ECRI's General Policy Recommendation No. 1, which requests that the necessary measures should be taken to ensure that national criminal, civil and administrative law expressly and specifically counter racism, xenophobia, anti-semitism and intolerance'.[134]

Despite these provisions, in most of the Member States' criminal legislation, no explicit mention is made of the incitement to hatred, discrimination or violence towards foreigners and/or asylum-seekers or towards Roma, as such. This is not to say that the existing provisions do not cover such forms of incitement to hatred, discrimination or violence. In **Austria**, Section 283 of the Penal Code, which penalises public incitement to hostile action (*Verhetzung)* against a church or religious community, an ethnic group, a nation or a state, does not provide any remedy against incitement that is directed against asylum seekers or foreigners as such, because they do not form a 'group' protected under Section 283 Penal Code[135]. On the contrary, it is well-established in the doctrine in **Finland** that the concepts of race and ethnicity cover groups defined by reference to colour, descent and origin as well. The provision regarding the offence of 'ethnic agitation' (578/1995) has an open-ended list of protected groups, and it is clear that refugees, immigrants, asylum seekers, atheists, freethinkers, and various linguistic and cultural groups are to be considered 'comparable groups' within the meaning of the provision.[136] Similarly in **Belgium**, the definitions of the Law of 30 July 1981 criminalizing certain acts inspired by racism and xenophobia[137] protect foreigners as such, as they constitute a group defined by their 'national origin',[138] an expression which is synonymous to that of 'nationality' which the law contained before it was last amended in 2003. The Roma, being defined by their ethnic origin, are also protected from the forms of public incitement to hatred or discrimination which the law targets. In **Germany**, the use of the term 'segments of the population' referred to in Section 130 of the Criminal Code shall be understood as including public racial expression relating e.g. to anti-Semitism, Islamophobia or other groups as for instance Sinti and Roma. In **Ireland**, although the definition of hatred in Section 1 of the 1989 Prohibition of Incitement to Hatred Act specifically mentions members of the Traveller Community as being a group within society against whom the legislation seeks to prevent incitement of hatred, there is no specific legislation in this sense. In the **Netherlands**, even though there is no specific legislation on anti-Semitism, islamophobia and the like[139], in the case-law

[133] On the issue of the rights of the Roma community, see in particular General Recommendation 27 by the Committee on the Elimination of Racial Discrimination regarding discrimination against Roma (Committee on the Elimination of Racial Discrimination, General Recommendation 27, Discrimination against Roma (Fifty-seventh session, 2000), U.N. Doc. A/55/18, annex V at 154 (2000), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 216 (2003)) as well as the Thematic Comment No. 3 of the EU Network of Independent Experts on Fundamental Rights of 25 April 2005 on the protection of minorities in the European Union.
The third Thematic Comment is available on the website of the EU Network of Independent experts on Fundamental Rights : http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm#

[134] ECRI General Policy Recommendation No. 3 on Combating Racism and Intolerance against Roma / Gypsies of 6 March 1998.

[135] H. Steininger, *Kommentar zum Strafgesetzbuch*, Eisenstadt, Prugg, 1992, p. 48.

[136] Mika Illman, *Hets mot folkgrupp*. Suomalainen lakimiesyhdistys, 2005, p. 247 ff. Ari-Matti Nuutila, 'RL 11: Sotarikokset ja rikokset ihmisyyttä vastaan'. In Olavi Heinonen & al, *Rikosoikeus*. WSOY, 2002, p. 570. Timo Makkonen*, Syrjinnän vastainen käsikirja*. IOM Helsinki, 2003, p. 128.

[137] Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, *M.B.*, 8 August 1981. This law has been amended by the Law of 15 February 1993, *M.B.,* 19 February 1993 ; Law of 12 April 1994 (*M.B.*, 14 May 1994) ; Law of 7 May 1999 (*M.B.*, 25 June 1999) ; Law of 20 January 2003 (*M.B.*, 12 February 2003) and Law of 23 January 2003 (*M.B.*, 13 March 03).

[138] Indeed, the law prohibits discrimination against a person or group of persons 'en raison de sa prétendue race, de sa couleur, de son ascendance ou de son origine nationale ou ethnique'.

[139] It may be noted that in 2004 the Minister of Justice Mr Donner – speaking against a background of widespread islamophobic violence and vehement newspaper publications commenting on the assassination of Theo Van Gogh – proposed to apply the prohibition of blasphemy more vigorously. The Minister – who had already stressed in the past that the exercise of the freedom of expression carries with it responsibilities – asserted that some went too far in criticising the religious feelings of others. The relevant provision, Article 147 of the Criminal Code, has been dormant since its introduction. Mr Donner's proposal was immediately criticised by the Minister for Integration, Ms Verdonk, who stated that

an extensive interpretation of the concept 'race' is being applied. Already in 1976 the Supreme Court determined that the concept of 'race' should be interpreted in line with Article 1 ICERD, which means that it may refer to colour, background and national or ethnic origin. Thus, the Supreme Court considered in 2002 that a shop-owner who limited the access of asylum-seekers to his shop, thereby committed racial discrimination.[140] A Court of Appeal found in 2004 that stickers with texts addressed against *gastarbeiders* [migrant workers], combined with Celtic crosses, incited discrimination based on race. [141] In **Slovenia**, although Article 65 of the Constitution determines that the status and special rights of the Roma community living in Slovenia shall be regulated by law, to this date, the Roma Act has not yet been adopted, but a draft is currently under negotiations between the Government and the representatives of the Roma Community and the Act is expected to come into force in 2007. In the **United Kingdom** as a whole, there is no specific legislation in this regard but the Race Relations (Northern Ireland) Order 1997 does specifically identify Irish travelers as a racial group.

The Committee on the Elimination of Racial Discrimination also recommends to Member States to recognise that some forms of racial discrimination have a unique and specific impact on women and encourages them to develop, in conjunction with the Committee, 'a more systematic and consistent approach to evaluating and monitoring racial discrimination against women, as well as the disadvantages, obstacles and difficulties women face in the full exercise and enjoyment of their civil, political, economic, social and cultural rights on grounds of race, colour, descent, or national or ethnic origin'[142]. If and when the Commission presents the Council with a new proposal for combating racism and xenophobia, it would be advisable to draw the attention of the Member States to this dimension of the implementation of the instrument which would be adopted to that effect.

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one should not give in to the lower level of tolerance which, in her eyes, characterises the Muslim community in the Netherlands. Others believed that Mr Donner's proposal effectively meant that Mr Van Gogh and Ms Hirsi Ali, an outspoken MP, had gone too far in criticising Islam, which in the present circumstances would be a completely wrong signal. Others attempted to seize the opportunity to abolish the prohibition of blasphemy, arguing that *any* type of defamation – be it on religious grounds, or on sexual orientation, or race, or gender – should be treated likewise, and that there is no need to single out one particular type. Again others said that the abolition of the prohibition of blasphemy would *also* send the wrong message: it might create the impression that, at a time that attacks against mosques were occurring almost on a daily basis, the authorities give less priority to the protection of religious feelings of others. In the end a motion calling for abolition was not adopted in Parliament.

[140] Hoge Raad, 17 September 2002, *NJ* 2002, No. 548, and prior to that Hoge Raad, 13 June 2000, *NJ* 2000, No. 513.

[141] Gerechtshof 's Hertogenbosch, 11 October 2004, LJN AR3683.

[142] Committee on the Elimination of Racial Discrimination, General Recommendation 25, Gender Related Dimensions of Racial Discrimination (Fifty-sixth session, 2000), U.N. Doc. A/55/18, annex V at 152 (2000), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 214 (2003). Therefore the CERD Committee proposes to States Parties, amongst the strategies to be developed to prevent racial discrimination in the administration and functioning of the criminal justice system 'to eliminate laws that have an impact interms of racial discrimination, particularly those which target certain groups indirectly by penalizing acts which can be committed only by persons belonging to such groups, or laws that apply only to non-nationals without legitimate grounds or which do not respect the principle of proportionality' (Committee on the Elimination of Racial Discrimination, Draft General Recommendation on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, U.N. Doc. CERD/C/GC/31/Rev.4 (2005), point I-2.).

2.3. The incrimination of the conduct of 'publicly inciting discrimination, 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 *committed by public dissemination or distribution of tracts, pictures or other material*'.

2.3.1. Overview of national provisions on incitement to hatred through the giving of speeches or other forms of expression.

Article 4 (e) of the Proposal for a Council Framework Decision on racism and xenophobia submitted by the Commission in November 2001 requests the Member States to ensure that the public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia committed by any means is punishable as a criminal offence[143]. Article 3 of the Additional Protocol of 28 January 2001 to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems requests each State Party to adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the fact of distributing, or otherwise making available, racist and xenophobic material to the public through a computer system. A Party may reserve the right not to attach criminal liability to conduct as defined by paragraph 1 of Article 3 of the Additional Protocol, where the material, as defined in Article 2, paragraph 1 of the Additional Protocol, advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available. In the opinion of the Committee on the Elimination of Racial Discrimination[144], the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression, which is embodied in particular in Article 19 of the Universal Declaration of Human Rights, in Article 19 of the International Covenant on Civil and Political Rights, in Article 5 (d) (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and within the Council of Europe, in Article 10 of the European Convention on Human Rights and Fundamental Freedoms. As noted above in the introduction to this Opinion, Article 4 ICERD itself states that it is compatible with the requirements of freedom of expression. Nevertheless, a certain number of reservation and declarations have been entered by the States Parties to the ICERD precisely on this need to ensure the conciliation of the obligations imposed by this provision with the right to freedom of expression and association[145].

All the EU Member States have signed the Convention on Cybercrime. In its 2003 Conclusions on Finland, the Committee on the Elimination of All Forms of Racial Discrimination recalls that Article 4 of the Convention is applicable to the phenomenon of racism on the Internet and that the fundamental principle of respect for human dignity requires all States to combat dissemination of racial hatred and incitement to racial hatred[146]. However, as mentioned above, only **Cyprus**, **Denmark**, **Estonia**, **Hungary**, **Lithuania** and **Slovenia** have ratified it. And although all the Member States except the

[143] On the specific issue of combatting racism on the Internet, see the Report prepared by the Swiss Institute of Comparative Law on the Legal Instruments To Combat Racism On The Internet, Lausanne, Strasbourg, August 2000 (CRI (2000) 27). This Report is available on the website of the European Commission against Racism and Intolerance (ECRI) of the Council of Europe.

[144] Committee on the Elimination of Racial Discrimination, General Recommendation 15, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 204 (2003).

[145] See in particular the reservations or declarations made by **Austria**, **Belgium**, **Ireland**, **Italy** the **United Kingdom** when signing or ratifying the Convention on the Elimination of All Forms or Racial Discrimination which emphasize the importance attached to the fact that Article 4 of the ICERD provides that the measures laid down in subparagraphs (a), (b), and (c) should be adopted with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention and which therefore consider that the obligations imposed by Article 4 CERD must be reconciled with the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association.

[146] Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Finland, U.N. Doc. CERD/C/63/CO/5 (2003).

Czech Republic, Hungary, Ireland, Italy, Slovak Republic, Spain and the **United Kingdom** have signed the Additional Protocol to the Convention on Cybercrime, only **Cyprus**, **Denmark** and **Slovenia** have ratified it.

With respect to television broadcasting, however, the level of convergence between the Member States is comparatively high.[147] Indeed, Article 22b of Directive 89/552/EC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities,[148] as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997,[149] obliges the member states to ensure that "broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality" (Article 22).

The main provisions of Member States' legislation on incitement to hatred through the giving of speeches or other forms of expression, in particular when through the media, the press and the Internet can be summarized as follows. The listed provisions will be developed and explained hereunder.

Austria

Section 3d of the Prohibition Statute prohibits the public dissemination or distribution of printed material and pictures, inciting, agitating or inducing to prohibited acts motivated by National-Socialist ideology. Section 282 para 1 Penal Code makes it a criminal offence to use the print media in order to publicly incite to commit acts prohibited by law. Section 283 Penal Code criminalises incitement to hostile action (*Verhetzung)*.

Racist discrimination in television and radio is prohibited by the Broadcasting Act[150] (*ORF-Gesetz*), the Private Television Act[151] and the Private Radio Act[152]. Any broadcasting organisation (*Rundfunkveranstalter*) emitting discriminatory contents can be held responsible before the Federal Communication Senate (*Bundeskommunikationssenat*).

Pursuant to Section 1 paragraph 1 No. 1 Media Act, the Internet qualifies as a public medium. Therefore, anyone who publishes texts, mp3 files or pictures on the Internet which incite to hatred and which are prohibited by the Prohibition Statute or the Sec 283 Penal Code can be held responsible. Internet providers can be held responsible if they knew about such contents and did not become active to remove them[153].

Legislation prohibiting the public dissemination of National Socialist ideology is rather extensive. However, when it comes to other racist contents the provisions provided by the Penal Code seem to be too restrictive.

Belgium

See also the provisions of the Law of 30 July 1981 (mentioned under point 2.2.2.).

Mention should be here made of a procedural aspect that is significant with regard to racism[154]: under

[147] For further details, see EU Network of Independent Experts on Fundamental Rights, *Thematic Comment n°3 : The Rights of Minorities in the EU*, March 2005, at 4.2.
[148] *O.J.* L 298, 27 November 1989, pp.0023-0030.
[149] *O.J.* L 202, 30 July 1997, pp.0060-0070.
[150] Sec 10 para 2, Sec 14 para 1 no 2, Federal Law Gazette [BGBL] 379/1984 as amended by BGBL I Nr. 83/2001.
[151] Sec 31 para 2, Sec 37 para 2, Federal Law Gazette [BGBL] I 84/2001 as amended by BGBL I 169/2004.
[152] Sec 16 para 4, Federal Law Gazette [BGBL] I 20/2001 as amended by BGBL I 169/2004.
[153] Ebensperger, S (2002), Die Verbreitung von NS-Gedankengut im Internet und ihre strafrechtlichen Auswirkungen, ÖJZ, p. 132 ff.
[154] This information is excerpted from the RAXEN Analytical Report on Legislation, Belgium, 2004. This Report, which is drafted by the Centre for Equal opportunities and Opposition to Racism is available on http://eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&catid=418ea9767affb

Belgian law, according to the previous version of Article 150 of the Constitution, press offences fell within the sole jurisdiction of the assize courts, i.e., the popular jury. Established case law interprets 'press offences' as covering any text which is printed, reproduced and circulated and which conveys a malicious idea. It appears, however, that for several years press offences were not prosecuted before assize courts because of the cumbersome nature of that procedure and the adverse effects of the publicity surrounding such proceedings. It is evident therefore that the impunity enjoyed by authors of racist tracts was due to the responsibility of assize juries for press offences, together with the wide interpretation of the concept of press offence in case-law. Law No. 1999-05-07/32 amended Article 150 of the Constitution, which now provides that 'the jury is established for all criminal matters, in addition to issues of political and press offences, except for press offences inspired by racism and xenophobia'. Such offences, as well as that of Holocaust denial, will be tried by the criminal courts.

Article 20(2) of the Flemish Council Decree of 4 May 1994 concerning Radio and Television Broadcasting Networks, prohibits broadcasting programmes containing incitement to hatred based on race, sex, religion or nationality. In the event of repeated serious breaches, the Flemish government may suspend broadcasting[155].

Article 9 of the Decree of 27 February 2003 of the French Community on Radio Broadcasting[156] provides that the RTBF ('Radio Télévision Belges Francophones) as well as any other services' provider ('éditeurs de services') cannot produce any programme which incites to hatred, discrimination or violence, in particular on the basis of race or nationality or which would tend to deny, minimise, justify or approve the genocide committed by the Nazi regime during World War II or any other genocide[157]. Under certain conditions, the programmes violating Article 9 may be suspended. Article 11 of the Decree of 27 February 2003 of the French Community on Broadcasting prohibits any advertising, which enshrines discrimination on the basis of race, sex or nationality.

Article 4 of the Decree of 27 June 2005 of the German Community on Radio Broadcasting and Cinematic Performances[158] prohibits the broadcasting of programmes which incite to hatred on the grounds of race, sex, religion or nationality[159]. Article 8 of the Decree of 27 June 2005 of the German Community on Broadcasting and Cinematic Performances provides that advertising and TV shopping ('télé achat') cannot enshrine any discrimination on the grounds of race, sex or nationality[160]. The Decree of 26 April 1999 of the German Community regarding the media provides similar provisions[161].

The Law of 30 July 1981 criminalizing certain acts motivated by racism or xenophobia[162] has also

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[155] ECRI Report on the national legal measures for combating racism and Intolerance in Belgium (situation as of 31 December 2002, http://www.coe.int/T/e/human%5Frights/ecri/1%2DECRI/3%2DGeneral%5Fthemes/3%2DLegal%5FResearch/1%2DNational%5Flegal%5Fmeasures/Belgium/Belgium%20SR.asp#TopOfPage)

[156] Décret de la Communauté française du 27 février 2003 sur la radiodiffusion, *M.B.,* 17 April 2003.

[157] Article 9 du Décret de la Communauté française du 27 février 2003 sur la radiodiffusion stipule : La RTBF et les éditeurs de services soumis au présent décret ne peuvent éditer :
1° des programmes contraires aux lois ou à l'intérêt général, portant atteinte au respect de la dignité humaine ou contenant des incitations à la discrimination, à la haine ou à la violence, en particulier pour des raisons de race, de sexe, de nationalité, de religion ou de conception philosophique, ou tendant à la négation, la minimisation, la justification, l'approbation du génocide commis par le régime nazi pendant la seconde guerre mondiale ainsi que toute autre forme de génocide.

[158] Décret de la Communauté germanophone du 27 juin 2005 sur la radiodiffusion et les représentations cinématographiques, *M.B.,* 6 September 2005.

[159] It reads : 'Il est interdit aux organismes de radiodiffusion télévisuelle, à la chaîne ouverte, aux organismes de radiodiffusion sonore et aux fournisseurs d'autres services que des programmes télévisés et sonores de diffuser les émissions suivantes : (…) 3° celles qui incitent à la haine pour des raisons de race, de sexe, de religion ou de nationalité'.

[160] 'La publicité et le télé-achat ne peuvent porter atteinte à la dignité humaine. Ils ne peuvent contenir aucune discrimination quant à la race, au sexe ou à la nationalité (…)'.

[161] Décret de la Communauté germanophone du 26 avril 1999 sur les médias, *M. B.,* 17 July 1999.

[162] Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, *M.B.*, 8 August 1981. This law has been amended by the Law of 15 February 1993, *M.B.,* 19 February 1993 ; Law of 12 April 1994 (*M.B.*, 14 May 1994) ; Law of 7 May 1999 (*M.B.*, 25 June 1999) ; Law of 20 January 2003 (*M.B.*, 12 February 2003) and Law of 23 January 2003 (*M.B.*, 13 March 03).

indirect consequences for the media, in particular as regards its provisions regulating the right to reply ('droit de réponse')[163]. Pursuant to Article 3 (2) of the Law of 23 June 1961, the press may refuse to publish a 'droit de réponse' if it violates 'the laws', including the Law of 30 July 1981[164].

Cyprus

Section 2A paragraph 1 of the Law Ratifying the Convention on the Elimination of all Forms of Racial Discrimination, Law No. 12/1976 should be construed to cover the incitement of hatred through the giving of speeches or other forms of expression. Indeed, Paragraph 1 of Section 2A provides that 'any person who in public, either orally or through the press, or by means of any document or picture or by any other means, incites acts which are likely to cause discrimination, hatred or violence against any person or group or groups of persons, on account of their racial or ethnic origin or their religion is guilty of a criminal offence.'

As mentioned above, additionally, Section 142 of the Penal Code provides that any person who publishes a book, or pamphlet or any article, or letter in a newspaper or magazine which is perceived by a group of people as a public insult to their religion, with intent to ridicule such religion or to shock or insult its followers, is guilty of an offence. Prosecution based on this section takes place only by the Attorney-General or after his consent.

Czech Republic

As mentioned above, incitement to hatred through the giving of speeches or other forms of expression will be punishable due to Section 198a/3, possibly also Section 260 of the Criminal Code[165].

Denmark

Section 266b of the Criminal Code provides that :

> Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding 2 years.

As mentioned above, according to paragraph 2, it is an aggravating circumstance if the expression takes form as 'propaganda'.

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[163] Report of the Centre for Equal opportunities and Opposition to Racism on the Law of 30 July 1981. This Report is available on http://www.antiracisme.be/fr/jurisprudence/jp_intro.htm

[164] See : Trib. corr. Bruxelles, 20 April 1993, *T.V.R.*, 1994, n° 2, 101, note. The appeal against this decision was rejected by : Bruxelles, 7 December 1993, not published. - Similarly: Trib. corr. Bruxelles, 11 April 1991, *J.L.M.B.*, 1991, 804; *Rev.trim.dr.H.*, 1991, n° 7, 415.

[165] Sec. 198a – *Incitement of National and Racial Hatred*
Sec. 198a/3: An offender shall be sentenced to a term of imprisonment of between six months and three years (a) if he commits an act pursuant to subsection (1) by (using) press, film, radio or TV broadcasting, a publicly accessible computer network or a similarly effective method; or (b) if he actively participates in activities of groups, organizations or associations promotin discrimination, violence or racial, ethnic or religious hatred.
Sec. 260 – *Support and Propaganda of Movements Aimed at Suppressing Man´s Rights and Freedoms*
Sec. 260/1: A person who supports or propagates a movement which aims at suppressing the rights and freedoms of a man (human being), or which promotes national, racial, class or religious hatred, or hatred against another group of persons shall be sentenced to a term of imprisonment of from one to five years.
260/2: An offender shall be sentenced to a term of imprisonment from three to eight years if: (a) he commits an act pursuant to subsection (1) by using the press (print), film, radio or TV broadcasting, or some other similarly efficient means; or (b) he commits such act as a member of an organized group; or (c) he commits such act during a state of emergency or a state of war.

Estonia

Article 151 of the Criminal Code regarding the instigation of social hatred foresees a pecuniary punishment or imprisonment for up until three years for 'activities that openly call to hatred or violence in connection with ethnicity, race, color of skin, sex, language, heritage, religion, political convictions, wealth or social status'.

Article 151 of the Criminal Code does not explicitly mention the specific cases of public dissemination or distribution of tracts, pictures or other material. However, it follows from the wording of the provision that this can be counted as an 'activity' in the sense of this stipulation.

Finland

Chapter 11, Section 8 of the Penal Code (for the text of this provision, see above) deals with 'ethnic agitation' which could also be translated as 'incitement against a population group'.[166] However only the spreading of statements and other information that 'threaten', 'defame' or 'insult' a group come under Chapter 11 Section 8. A 'threat' involves a declaration implying or suggesting that members of a group will be or should be subject to violence, destruction of their property, discrimination or some other harm. References to past acts of violence, such as what happened during the National Socialist regime in Germany, may be deemed threatening especially if these acts are portrayed in a positive light.[167] A 'defamation' refers to abusive attacks on a group's character, and may include e.g. assertions that members of a group are in some way inferior or of less worth, or that they are, or have been, involved in criminal or other such suspicious activity. The notion of 'insult' refers to expressions or acts that intend to offend or hurt.

France

According to Article 227-24 of Penal Code :

> The manufacture, transport, distribution by whatever means and whatever its support, of a message bearing a pornographic or violent character or a character seriously violating human dignity, or the trafficking in such a message, is punished by three years' imprisonment and a fine of € 75,000, where the message may be seen or perceived by a minor.
>
> Where the offences under the present article are committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.

Moreover, the Act of 29 July 1881 on the freedom of the press contains provisions which prohibit the apology of war crimes or crimes against humanity, and provoke others to discrimination, hatred or vioalence on the basis of ethnic or national origin, of race or of religion ('provoque à la discrimination, à la haine ou à la violence à l'égard d'une personne ou d'un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée').[168]

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[166] The Act on the use of freedom of speech in mass communication [*Laki sananvapauden käyttämisestä joukkoviestinnässä* (460/2003)] deals with questions of division of legal responsibility; it does not address the specific issue of incitement to hatred.

[167] Mika Illman, *Hets mot folkgrupp*. Suomalainen lakimiesyhdistys, 2005, p. 247 ff. Ari-Matti Nuutila, 'RL 11: Sotarikokset ja rikokset ihmisyyttä vastaan'. In Olavi Heinonen & al, *Rikosoikeus*. WSOY, 2002, p. 570. Timo Makkonen, *Syrjinnän vastainen käsikirja*. IOM Helsinki, 2003, 260.

[168] The applicable provisions are Articles 23 and 24 of the Law of 29 July 1881.
Article 23 of the Law of 29 July 1881 reads:"Where a crime or major offence is committed, anyone who, by uttering speeches, shouts or threats in a public place or meeting, or by means of a written or printed matter, drawing, engraving, painting, emblem, image, or any other written, spoken or pictorial item sold or distributed, offered for sale or exhibited in a public place or meeting, or by means of a placard or poster on public display, has directly and successfully incited another or others to commit the said crime or major offence shall be punished as an accomplice thereto." This provision shall also apply

Germany

Section 130 paragraph 2 no. 1 (in connection with Section 11 paragraph 3) of the Criminal Code punishes the dissemination of writings, audio or visual recording media, data storage media, illustrations and other images that incite to hatred against segments of the population or against specific groups which can be differentiated from the rest of the population.

Calling for violent or arbitrary measures or insulting, maliciously maligning or defaming the groups concerned is also punishable.

Greece

The Presidential Decree 100/2000 (which implements Directive 89/552/EC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, mentioned hereabove) aims at prohibiting the broadcasting of programmes the content of which constitutes an appeal to hatred between citizens on the basis of grounds linked to differences of race, religion, citizenship or sex, as well as television advertisements introducing discriminations based on race, sex, religion or citizenship. These provisions also apply to radios (Article 8, par. 4, of Law 2328/95) as well as to radios or television channels reserved to subscribers.

In the framework of the selfregulation of the media, especially electronic media, Article 4, paragraph 1 of the Code of Ethics of the National Council for the Audio-Visual, which applies to newspapers as well as to other programmes such as documentary or political programmes (ratified by the Presidential Decree 77/2003), prohibits presenting an individual in a manner which, in certain circumstances, could

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where the incitement is followed only by an attempt to commit a crime, as defined in Article 2 of the Criminal Code."

Article 24 of the Law of 29 July 1881 continues: Anyone who, by one of the means set forth in the preceding section, has directly but unsuccessfully incited another to commit one of the following offences shall be liable to a prison sentence of five years and a fine of 45000 euros:

1° intentional homicide, intentional bodily harm or sexual assault as defined in Book II of the Criminal Code;

2° theft, extortion or wilful destruction, damage or vandalism constituting a danger to persons as defined in Chapter III of the Criminal Code.

Those who, by the same means, have directly incited another to commit a crime or major offence against the fundamental interests of the nation as defined by Title I of Book IV of the Criminal Code shall be liable to the same penalties.

Anyone who, by one of the means set out in Article 23, has made a public defence of the crimes referred to in Article 23(1), a war crime, a crime against humanity or a crime or major offence of collaboration with the enemy shall be liable to the same penalty.

Anyone who, by the same means, has directly incited another to commit a terrorist act as defined in Title II of Chapter IV of the Criminal Code or has made a public defence of such an act shall be liable to the penalty set forth in Article 24(1).

Anyone who engages in seditious shouting or chanting in a public place or assembly shall be liable to the fine prescribed for class 5 offences.

Anyone who, by one of the means set forth in Article 23, incites another to discrimination, hatred or violence against a person or group of people on grounds of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion shall incur a term of imprisonment of one year and a fine of 45000 euros or one of those penalties only.

Anyone who, by one of these means, incites another to hatred or violence against a person or group of people on grounds of their sex, sexual orientation or disability or incites, against the same persons, to the discriminations set out in Articles 225-2 et 432-7 of the Criminal Code, shall incur a term of imprisonment of one year and a fine of 45000 euros or one of those penalties only.

Where a conviction is secured for one of the offences set forth in the preceding sub-section, the court may also order

1° the offender to be stripped of the rights listed in paragraphs 2 and 3 of Article 131-26 of the Criminal Code for a maximum of five years, save where the offender's responsibility is engaged under section 42 and section 43(1) of this Act or under sub-sections 1-3 of section 93(3) of the Audiovisual Communication Act of 29 July 1982 (no. 82-652);

2° the decision to be posted up or displayed pursuant to Article 131-35 of the Criminal Code."

lead to him or her humiliated, socially excluded, or subjected to discrimination on the ground, in particular, of sex, race, nationality, language, religion, ideology, age, disease or incapacity, sexual orientation or profession. The second paragraph of this provision prohibits the circulation of degrading, racist, xenophobic or sexist messages or remarks, as well as of intolerant opinions[169].

Similar provisions have been included in the Code of Ethics and Social responsibility of the Union of the Journalists of the daily newspapers of Athens, as well as in the Code for Advertising and in the Code for Advertising and Communication. In its 2001 Conclusions on Greece, the ICERD Committee notes the important role of the National Radio and Television Council, the Code of Journalistic Ethics and the draft Code of Ethics for Information and Other Journalistic and Political Programmes in preventing racial discrimination, racist and xenophobic behaviour and stereotyping in the mass media[170].

Hungary

There exists no specific provision for the public dissemination of distribution of material inciting discrimination. However, the new Article 269 of the Criminal Code may apply. It reads:

> 'A person who, in a large public gathering, incites to hatred against
> a) the Hungarian nation,
> b) any national, ethnic, racial or religious group, further against certain groups among the population, or commits another act suitable for the arousal of hatred commits a felony and is to be punished by imprisonment for a period of up to three years'.

Act I of 1996 on Radio and Television Broadcasting [1996. évi I. törvény a rádiózásról és televíziózásról] mentions the prohibition of hate speech as one of the primary principles[171]. According to Article 3 paragraph (2): 'The broadcaster shall respect the constitutional order of the Republic of Hungary, its activity may not violate human rights and may not be suitable for inciting hatred against individuals, sexes, peoples, nations, national, ethnic, linguistic and other minorities, and church or religious groups.' Paragraph (3) of the same article expressly refers to minorities: 'Broadcasting may not aim, openly or concealingly, at insulting or excluding against any minority or majority, or at presenting these and discriminating against them on the basis of racial considerations.' Article 5 of the Act declares that prior to broadcasting the attention of the public has to be drawn to the fact, that the image or the sound effects are violating religious convictions or beliefs or that some images and sound effects are capable of disturbing public order in a violent or other manner.

The burden on public broadcasters is higher, as Article 23 paragraph (1) provides. The public broadcasters are obliged to respect the dignity and basic interests of the nation, the national, ethnic, linguistic and other minorities, and may not offend the dignity of other nations.

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[169] Dans le cadre de l'autorégulation des médias, surtout électroniques, l'article 4, par. 1, du Code d'éthique du Conseil national de l'audiovisuel applicable aux journaux d'actualité et autres émissions de type documentaire ou politique, ratifié en vertu du décret présidentiel no 77/2003, interdit la présentation d'un individu d'une manière qui, dans certaines circonstances, pourrait conduire à son humiliation, à son exclusion sociale ou à une discrimination à son encontre fondées notamment sur le sexe, la race, la nationalité, la langue, la religion, l'idéologie, l'âge, la maladie ou l'incapacité, l'orientation sexuelle ou la profession. Le paragraphe 2 du même article interdit la diffusion de messages ou de propos dégradants, racistes, xénophobes ou sexistes, ainsi que d'opinions intolérantes.

[170] Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Greece, U.N. Doc. CERD/C/304/Add.119 (2001).

[171] The above provisions of the Act on Radio and Television Broadcasting are to be enforced by the National Radio and Television Commission [Országos Rádió és Televízió Testület]. The sanctions that can be applied are listed in Article 112 paragraph (1). The National Radio and Television Board may call upon the broadcaster to terminate the injurious conduct; establish the violation of the law in a written warning, and may call upon the broadcaster to terminate the violation of the law, and to abstain from the violation of the law in future; suspend the exercise of the broadcasting rights for a set period of time but for a maximum period of thirty days; enforce the penalty defined in the contract; impose a fine in the case of a public service broadcaster or a public service broadcaster operating on the basis of notification, or at the initiative of the Complaint Committee; or terminate the contract with immediate effect.

Ireland

Section 3(1) of the 1989 Prohibition of Incitement to Hatred Act makes it a criminal offence to broadcast any material that is abusive, threatening or insulting or is intended or likely to stir up hatred. Where such a broadcast does occur a wide variety of people will, pursuant to Section 3(2) of the Act, be liable for prosecution in relation to it, including the broadcast service provider, any person involved in the production or direction of the broadcast and the person or persons whose words or behaviour in the broadcast are threatening, abusive or insulting.

Pursuant to Section1 of the Act the word 'broadcast' means 'the transmission, relaying or distribution by wireless telegraphy or by any other means … sounds, signs, visual images or signals intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not'. The expansive definition of the term broadcast provided for in Section 1 of the Act, taken together with the prohibition in Section 3(1), would appear to cover the broadcast media – television and radio – while the print media or press would appear to be covered by Section 2(1) of the Act discussed above[172]. As regards the Internet, the definition of broadcast contained in Section 1 of the Act would appear to be broad enough to encompass the technology of the Internet, however the NCCRI have expressed some doubt in this regard and have called for an explicit extension of the legislation to the Internet in the context of the current Government review of the legislation[173].

Italy

As mentioned above[174], the Law-Decree n.122/1993, enacted on 2 April 1993 and converted into law No. 205 of 25 June 1993 regarding 'urgent measures on the subject of racial, national, ethnic and religious discrimination', provides that any one 'who disseminates, in any form, ideas based on racial or ethnic superiority or hatred, or incites to commit or commits acts of racial, ethnic and religious discrimination' can be punished by law.

Latvia

The Criminal law does not explicitly include the dissemination and distribution of tracts, pictures and other material. Sections 78 and 150 of the Criminal Law (for the text of these provisions see above) could apply to such activities. However with regard to Section 78 of the Criminal Code, it should be noted that the intention to incite to hatred has to be proven.

The Law on the Press and Other Mass Media[175] prohibits the publishing of information which is an official secret or secret protected by law, promotes violence or calls to overthrow the state power, propagates war, cruelty, racial, national or religious superiority and intolerance, or incites to commit other crimes (Section 7). The law also provides that operations of newspapers, magazines, newsletters and other periodicals, as well as television and radio broadcasts, newsreels, information agency announcements, audio-visual recordings, and programmes intended for public dissemination can be terminated if they have published calls to use violent or any other unlawful methods; have published a call to not comply with laws of the Republic of Latvia; or have published information which in a criminal case has been found by court judgment to be slanderous and defamatory, a disclosure of official secrets, war propaganda, or violation of racial and national equality (Section 12). These clauses have hitherto not been applied in practice.

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[172] See the paragraph 1.3.2.2. of the present opinion on the national criminal provisions on the incitement to racism and xenophobia.
[173] NCCRI, *op. cit.* at pp. 6 and 21.
[174] See the paragraph 1.3.2.2. of the present opinion on the national criminal provisions on the incitement to racism and xenophobia
[175] Likums par presi un citiem masu inform_cijas l_dzek_iem. Adopted on 20.12.1990, in force since 01.01.1991, including amendments adopted till 12.06.2002.

Lithuania

According to Article 214 of the Code of Administrative Offences :

> 'Productionor keeping of printed matter, video, audio or other products propagating national, racial or religious discord with the aim of dissemination and well as its circulation or public showing shall incur a fine in the amount from LTL 1 000 to LTL 5 000 and confiscation of products of the type being manufactured, kept, showed or circulated as well as of the means used for manufacturing or showing of the said products or without confiscation of the said means. The same acts committed by a person already subjected to an administrative penalty for the offences provided for in part one of this Article shall incur a fine in the amount from LTL 5 000Lt to LTL 10 000 with confiscation of such products and means used for manufacturing or showing the products or without confiscation of the said means'.

Article 3 of the Law amending the Law on the Provision of Information to the Public (No VIII-1905 of 28 August 2000) (Visuomen_s informavimo _statymo papildymo _statymas) in which the principles of informing the public are set forth:

> 'Producers and disseminators of public information as well as journalists shall be governed in their activities by the Constitution and laws, international treaties of the Republic of Lithuania, also by the principles of humanism, equality, tolerance, and respect for an individual person; they shall respect freedoms of speech, creativity and conscience, variety of opinion, adhere to the norms of professional ethics of journalists, support the development of democracy and public openness, promote civil society and state progress, enhance state independence and develop national culture and morality'.

Article 20 of the Law on the Provision of Information to the Public (Visuomen_s informavimo _statymas) prohibits publishing information which instigates war, national, racial or religious hatred. As set forth in Article 47 of the Law, the Ethics Commission of Journalists and Publishers supervises the compliance of disseminated public information with the provisions laid down in the laws, prohibiting the incitement of national, racial, religious, social or gender hatred, libel and misinformation. The Commission may be applied to by all interested persons[176].

Attempts have been made to address this matter in Resolution of the Government No 290 of 5 March 2003 "Regarding the Approval of the Procedure for the Control of the Information that should not be Disseminated through the Computer Network and for the Distribution of Restricted Public Information" which stipulates that responsibility for the contents of an Internet page is born by its administrator. The issue of practical application of the above provision in determining the degree of responsibility and imposing sanctions has not yet been resolved.

Luxembourg

Incitement to hatred through the media and the press are forbidden according to Article 457-1 of the Penal Code (for the full text of this provision, see the paragraph 1.3.2.2. of the present opinion on the national criminal provisions on the incitement to racism and xenophobia). This prohibition includes any writing or drawing or other printed material, including any newspaper or magazine, whether printed and distributed in Luxembourg or even printed abroad, if it is circulated in the country. The wording used in Article 457-1 should ban any kind of incitement through modern communication

[176] The implementation of the above-mentioned law is monitored by the Inspector of Journalist Ethics who, within the scope of his competence, examines complaints of the interested persons about the violation of their honour and dignity in the media. The Inspector of Journalist Ethics may reprimand the producers and disseminators of public information about the noticed violations of legal acts governing the provision of information to the public and request that they be eliminated, request that a producer or disseminator of public information refute, in accordance with the established procedure, the published false information, degrading the honour and dignity of a person or damaging his legitimate interests or provide the person with a possibility to respond and deny the information by himself.

methods, including the Internet, the words used being ' spoken or visual medium' and 'audio-visual communication medium'.

Malta

The spreading of racist propaganda would fall within the ambit of the Press Act and the Broadcasting Act as both contemplate the publication of material giving rise to racial hatred as a criminal offence.

The Press Act renders it a criminal offence to threaten, insult or expose to hatred a person or group of persons 'because of their race, creed, colour, nationality, sex, disability as defined in Article 2 of the Equal Opportunities (Persons with Disability) Act, or national or ethnic origin' by the means established in the Act. These means are 'the publication or distribution in Malta of printed matter, from whatsoever place such matter may originate, or any broadcast'. In the Act 'broadcast' is defined as 'the transmission by wire or over the air, including that by satellite, in encoded or unencoded form of words or of visual images, whether or not such words or images are in fact received by any person', while 'publication' is defined as 'any act whereby any printed matter is or may be communicated to or brought to the knowledge of any person or whereby any words or visual images are broadcast'.

The Netherlands

Under Article 137e Criminal Code[177]:

> 'A person who, for any reason other than giving factual information:
>
> 1°. Makes public a statement which he knows or should reasonably suspect to be offensive to a group of persons on the grounds of their race, religion, or personal beliefs, or their hetero-or homosexual orientation, or incites hatred of or discrimination against people or violence against their person or property on the grounds of race, religion or personal beliefs, their sex or their hetero- or homosexual orientation:
>
> 2°. Disseminates, other than at a person's request, an object which he knows or should reasonably suspect to contain such defamatory statement or has such in stock for public disclosure or for dissemination; is liable to a term of imprisonment of not more than six months or a fine of the third category'.

Poland

The aforementioned Article 256 of the Penal Code introduces a ban on public propagation of a fascist or other totalitarian political system or inciting hatred on grounds of differences in nationality, ethnicity, race or religious denomination or due to lack of denomination. This regulation also refers to the public instigation to racial hatred in the media, press and Internet.

In accordance with the contents of Article 18 of the Act of 29 December 1992 on radio and television[178], broadcasts and other forms of transmission cannot propagate actions that are against the

[177] Article 137[e] of the Criminal Code reads : 'Hij die, anders dan ten behoeve van zakelijke berichtgeving:
1°. een uitlating openbaar maakt die, naar hij weet of redelijkerwijs moet vermoeden, voor een groep mensen wegens hun ras, hun godsdienst of levensovertuiging of hun hetero- of homoseksuele gerichtheid beledigend is, of aanzet tot haat tegen of discriminatie van mensen of gewelddadig optreden tegen persoon of goed van mensen wegens hun ras, hun godsdienst of levensovertuiging, hun geslacht of hun hetero- of homoseksuele gerichtheid;
2°. een voorwerp waarin, naar hij weet of redelijkerwijs moet vermoeden, zulk een uitlating is vervat, aan iemand, anders dan op diens verzoek, doet toekomen, dan wel verspreidt of ter openbaarmaking van die uitlating of verspreiding in voorraad heeft;
wordt gestraft met gevangenisstraf van ten hoogste zes maanden of geldboete van de derde categorie'.
[178] The Official Journal of 1993, No. 7, item 3, with further amendments

law and the Polish 'raison d'etat', as well as attitudes and views contradictory to morality and social well-being, and they especially cannot include contents discriminating due to race, sex or nationality.

The Sejm, Lower Chamber of Polish Parliament, is currently conducting work on the amendment of the Penal Code. One of the proposed amendments concerns the inclusion of paragraphs 2 and 3 in Article 256, which would enable prosecution of preparatory actions undertaken for the purpose of disseminating materials that propagate a fascist or other totalitarian political system and incite hatred on grounds of differences in nationality, ethnicity, race or denomination, or due to lack of denomination. The draft regulations will allow for the confiscation of these materials, as well as of the objects used for their production or distribution – even if they do not belong to the perpetrator[179].

Portugal

Paragraph 2, of Article 240 of the Criminal Code punishes anyone who, in a public meeting, in writing intended for dissemination, or by any other means of social communication, defames or insults an individual or group of individuals on grounds of their race, colour, or ethnic, national or religious origin, particularly by denying war crimes and crimes against peace or humanity, with the intention of inciting to or encouraging racial or religious discrimination.[180]

Slovak republic

The Act no. 308/2000 Coll. on Broadcasting and Retransmission and on amendments of Act no. 195/2000 Coll. on Telecommunications as amended [*zákon _. 308/2000 Z. z. o vysielaní a retransmisii a o zmene zákona _. 195/2000 Z. z. o telekomunikáciách*] states, inter alia, that the main objective of a public service broadcaster shall be to serve the public or other social interest, to contribute to the development of a democratic society, to create space in the broadcast for a plurality of opinions without favouring interests of any political party, political movement, group or part of society or religious confession or faith, and to support the development of artistic creation, culture and education.

Section 19 of the mentioned law provides special protection to human dignity and humanity and imposes strict restriction on broadcasters. A program service of the broadcaster and all of its parts must not through its processing and content impact on human dignity and the fundamental rights and freedoms of others. According to Section 19 paragraph 2 a) it must not propagate violence and in a hidden or open form instigate hatred on the grounds of gender, race, color of skin, language, faith and religion, political or other ideas, national or social origin, membership in a national or ethnic group.

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[179] The draft bill presented by the President of the Republic of Poland on the amendment of the act – The Penal Code, the act – Introductory regulations of the Penal Code and some other acts, a Sejm publication No. 181, available on the website of the Polish Sejm http://ks.sejm.gov.pl/proc4/wykazy/ust10h.htm
The Public Prosecutor's Office usually discontinues criminal proceedings brought against persons disseminating anti-Semitic propaganda (mainly books, leaflets or magazines). In the years 2002 – 2003, 11 proceedings were held in Poland concerning the instigation of racial hatred or insulting national minorities, in particular Jews (a violation of the aforementioned Articles 256 and 257 of the Penal Code). In 2004 there were 14 legal actions conducted based on Article 256 of the Penal Code and 22 based on Article 257 of the Penal Code (Statistical data from the General Headquarters of the Police, http://www.kgp/gov.pl).

[180] In 2001, Portugal the High Authority for the Media publicly denounced the existence of racist websites developed by Portuguese service providers. Recognizing the lack of monitoring and investigative means and the absence of a legislative framework this entity requested the direct intervention of the General Prosecutor's Service (*Call for action: Public Statement on Sites of fascist, racist and xenophobic contents in the Internet by the High Authority for the Media*, 27 June 2001. The authors referred that the alleged websites violated the following relevant articles: Article 46 of the Portuguese Constitution, that forbids racist and fascist organizations, and Article 240 of the Criminal Code, already mentioned above). On 17 March 2003, Portugal signed the Additional Protocol to the Convention on Cybercrime, dealing with the criminalization of acts of a racist and xenophobic nature committed through computer systems, of the Council of Europe. The freedom of the press is subject to restrictions concerning the protection of moral integrity, the accuracy and objectivity of the facts reported, and the maintenance of public order and democracy. Misuse of the press, in particular the publication of defamatory and abusive material, is subject to criminal sanctions (Decree-Law 85-C/1975 of 26 February on freedom of the press and social information.)

Section 32 paragraph 4 of this law contains the prohibition of all forms of discrimination on the basis of gender, race, color of skin, language, national or social origin or membership in a national or ethnic group in commercials and teleshoppings.

The Act no. 81/1966 Coll. on periodic press and on other mass media as amended [*zákon _. 81/1966 Zb. o periodickej tla_i a ostatn_ch hromadn_ch informa_n_ch prostriedkoch v znení neskor_ích predpisov*] in Section 23 prohibits import and distribution of foreign press if its content propagates violence and war, fascism or Nazi ideology, racial discrimination or otherwise does not accord with humanity.

The Ministry of Culture of the Slovak Republic has prepared a draft for a new press law. The draft would prohibit the dissemination of information which leads to the propagation of violence or which incites to intolerance on the grounds of gender, race, color, ethnic or social origin, genetic characteristics, sexual orientation, language, religion or faith, political or other ideas, membership in a national minority, property, age through the periodic press or agency service.

The Act no. 147/2001 Coll. on advertising as amended [*zákon _. 147/2001 Z. z. o reklame*] states, inter alia, that the advertising must not contain anything that disregards human dignity, insults national or religious sentiment as well as any form of discrimination on the basis of gender, race and social origin.

The offender of the crime under the above mentioned Section 260 of the Criminal Code (crime of Support for and propagation of movements leading to the suppression of civil rights and freedoms) should be sentenced to higher punishment when using press, film, radio, television, computer network or other similarly effective means.

Slovenia

The text of Article 300 of the Penal Code (Stirring Up Ethnic, Racial or Religious Hatred, Strife or Intolerance) has been quoted above.[181] This provision, possibly in conjunction with Article 30 of the Penal Code (Punishability of Editor-in-Chief), Article 31 of the Penal Code (Punishability of Publisher, Printer and Manufacturer), Article 32 of the Penal Code (Application of General Provisions on Criminal Liability), could be relied upon in order to prosecute the act of publicly inciting to discrimination, 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 by the public dissemination or distribution of tracts, pictures or other material.

Article 8 of the Media Act[182] provides that 'the dissemination of programming that encourages ethnic, racial, religious, sexual or any other inequality, or violence and war, or incites ethnic, racial, religious, sexual or any other hatred and intolerance shall be prohibited.' Article 47 of the same Act prohibits advertising which would 'incite racial, sexual or ethnic discrimination, religious or political intolerance.' The fines imposed for the violation of either of these provisions would be set at a minimum of 2,500.000 SIT.

The Personal Data Protection Act[183] places the data concerning racial, national or ethnical background, political, religious or philosophical affiliation and sexual life among the 'sensitive personal data'.

According to the Associations Act (Zakon o drustvih) [184] a society ceases to exist by law in case it incites to ethnic, racial, religious or other inequality or inflames ethnic, racial, religious or other hatred and intolerance.

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[181] Article 300 of the Penal Code was amended in 2004 in order to meet the requirements of the Council of Europe Convention on cybercrime and the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.
[182] Official Gazette RS, No. 35/2001.
[183] Official Gazette RS, No. 86/2004.
[184] Official Gazette RS, Nos. 60/1995 and 89/1999.

Spain

As mentioned above under the paragraph 2.2.2. on the national criminal law provisions on the incitement to racism and xenophobia, Article 510 (1) of the Penal Code provides for the offence of provocation to discrimination, hate or violence against groups or associations for racist or anti-Semitic motives. Article 510 (2) of the Penal Code punishes the dissemination of offensive false information with respect, inter alia, to the ideology, religion or beliefs, racial or ethnic grounds or national origin of groups or associations. These provisions are the most closely related to the question of public incitement to the public incitement to discrimination, 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.

Sweden

Chapter 16, Section 8 of the Penal Code covers oral expressions and dissemination through the printed word, film, sound recording (i.e. including racist music) and other such media, including via Internet. It covers also dissemination through racist organizations as well as dissemination within racist organizations.

The Act on Responsibility for Electronic Bulletin Boards from 1 May 1998[185] requires suppliers of electronic bulletin boards to delete any message, which has a content that constitutes agitation against a national or ethnic group.

United Kingdom

Under Section 18 of Public Order Act 1986 a person who uses threatening, abusive or insulting words or behaviour or displays any written material which is threatening, abusive or insulting is guilty of an offence if he intends thereby to stir up racial hatred or having regard to all the circumstances such hatred is likely to be stirred up thereby. This offence can be committed in public or private but no offence will be committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that dwelling.

In addition it is an offence under Section 19 of Public Order Act 1986 for a person to publish or distribute written material which is threatening, abusive or insulting if he intends thereby to stir up racial hatred or having regard to all the circumstances such hatred is likely to be stirred up thereby.

There is in addition under Section 20 of Public Order Act 1986 a specific offence relating to the public performance of a play which uses words or behaviour of the type previously described and incitement to racial hatred is intended or is likely to be stirred up thereby.

Furthermore Section 21 of Public Order Act 1986 makes it an offence to distribute, show or play a recording of visual images or sounds which are threatening, abusive or insulting if incitement to racial hatred is intended or is likely to be stirred up thereby.

Under Section 22 of Public Order Act 1986 the inclusion in a broadcast of a programme involving threatening, abusive or insulting visual images or sounds will entail an offence for the person providing the programme service, the person producing or directing it and any person by whom the words or behaviour are used if incitement to racial hatred is intended or is likely to be stirred up thereby.

Finally Section 23 of Public Order Act 1986 makes it an offence to possess written material or a recording of visual images or sounds of the character previously described where such possession is

[185] SFS 1998:112

with a view (in the case of written material) its display, publication, distribution or inclusion in a programme service or (in the case of a recording) its distribution, showing, playing or inclusion in a programme service by the person concerned or another. These offences are accompanied by powers of entry and search for written material and recordings of the type mentioned and also, where someone has been convicted, to order the forfeiture of the material or recording involved.

The Public Order Act 1986 only applies to Great Britain but similar provisions exist in respect of Northern Ireland by virtue of the Public Order (Northern Ireland) Order 1987[186].

In addition there are two other relevant offences. Firstly the sending of racist communications may be sanctioned by either a level 4 fine under the Malicious Communications Act 1988 or, where the public telecommunications system is involved, six months' imprisonment under the Communications Act 2003. Secondly under the Football (Offences) Act 1991 racialist chanting is an offence subject to a level 3 fine.

It should also be noted also that the Commission for Racial Equality has issued guidance for the media on stereotypes in the coverage of race and ethnic issues (www.cre.gov.uk). Such stereotypes may also be the basis of complaints to the Press Complaints Commission in respect of newspapers and magazines, Ofcom (Office of Communications) in respect of broadcasting and the Advertising Standards Authority in respect of advertising other than through broadcasting. The first and third of these are self-regulatory bodies. There is also an Internet Watch Foundation, funded by Internet service providers, which traces potentially illegal material and requests the providers to remove it, as well as providing details to the police.

2.3.2. The balance between freedom of expression and the repression of racist behaviours at the national level.

While all the Member States' domestic legislations enshrine the recognition of the right to freedom of expression and opinion, they also prohibit – albeit to a more or less far-reaching extent – racist and xenophobic behaviours. The approach chosen by most of the Member States is based on the premise that freedom of expression has a distinguished role among other fundamental rights. Therefore, the restrictions to the freedom of expression are limited to that which is strictly necessary. Since generally the law as such does not strike a balance in the abstract between the freedom of expression and the repression of racist behaviour, it is left up to the courts to strike the right balance between competing interests in each specific case.

In **Denmark** for instance, freedom of speech has priority vis-à-vis combating 'revisionist' ideologies. Therefore there is no specific criminalization of acts such as publicly condoning, denying or grossly trivialising e.g. crimes of genocide. This is supported by the explanatory notes[187] to Section 266b of the Criminal Code, where it is stated that less significant abusive statements should not be prohibited, since due respect should be given to the freedom of opinion and expression. However, one cannot reject the possibility, if a certain threshold of abusiveness is met and depending of the context that such statements could fall within the ambit of section 266b of the Criminal Code. No jurisprudence on the subject exists.[188] Section 266b (2) deals with the aggravating circumstance of propaganda. It depends on a concrete assessment whether a specific case falls within this latter subparagraph. It plays a role especially whether the discriminatory statements are systematic or organisational in nature and have been disseminated abroad with the intent to influence public opinion. Also dissemination in wider circles through the use of media such as radio, television and Internet would have a significant influence on whether it would be subsumed under paragraph 1 or paragraph 2. It should be noted however that with this approach, Denmark has been criticised for being a safe haven for the producers

[186] It should be noted that prosecutions for these offences are extremely unusual; 5 in 2000, 3 in 2001 and 1 in both 2002 and 2003.
[187] F.T. 1970/71 tillæg A sp. 1187.
[188] However, see U.1988.788V, where some relevant issues were discussed.

of neo-Nazi material : thus, the introduction of paragraph 2 in 1995 aims at making it more difficult to export such material from Denmark. In its 2002 Conclusions on Denmark, the Committee on the Elimination of Racial Discrimination, while fully acknowledging the need for a balance between freedom of expression and measures to eradicate racist abuse and stereotyping, recommends that the State party carefully monitor such speech for possible violations of Articles 2 and 4 of the ICERD. The Committee invites the State party to take particular note of paragraphs 85 and 115 of the Durban Declaration and Programme of Action, respectively, which highlight the key role of politicians and political parties in combating racism, racial discrimination, xenophobia and related intolerance. Political parties are encouraged to take steps to promote solidarity, tolerance, respect and equality by developing voluntary codes of conduct so that their members refrain from public statements and actions that encourage or incite racial discrimination[189].

Legislation in the **United Kingdom** undoubtedly reflects its interpretation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, stated on signature of the Convention in 1966, that Article 4 requires a party to the Convention to adopt further legislative measures in the fields covered by subparagraphs (a), (b) and (c) of that article only if it considers – with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular, the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) – that any additional legislation or variation of existing law and practice is necessary to meet those ends. The Committee on the Elimination of Racial Discrimination has reiterated on a number of its occasions its concern over the fact that the United Kingdom has a restrictive interpretation to the provisions of article 4 of the ICERD. It has recalled its view that such interpretation is in conflict with the United Kingdom's obligations under article 4 (b) of the Convention and draws the latter's attention to the Committee's general recommendation XV according to which the provisions of article 4 are of a mandatory character. In its most recent concluding observations it recommended a reconsideration of its interpretation of Article 4 'in the light of the State party's recognition that the right to freedom of expression and opinion are not absolute rights, and in the light of statements by some public officials and media reports that may adversely influence racial harmony'.[190] The United Kingdom has noted the Committee's continued view that all organizations of a racist nature should be prohibited by law. However, it has responded by referring to its long tradition of freedom of speech which allows individuals to hold and express views which may well be contrary to those of the majority of the population, and which many may find distasteful or even offensive. It considers that this may include material produced by avowedly racist groups and notes that successive Governments have held the view that individuals have the right to express such views so long as they are not expressed violently or do not incite violence or hatred against others. In its most recent periodic report it stated that 'the United Kingdom's domestic law in this area is tried and tested and the Government firmly believes that it strikes the right balance between maintaining the right to freedom of speech and protecting individuals from violence and hatred'[191]. In reality the requirements for a conviction under existing offences are quite exacting and securing convictions is very difficult. The introduction of the need only for a likelihood of hatred being stirred up in 1986 has overcome the problem sometimes encountered of racist statements being dressed up as the provision of information but the threshold that the words, behaviour must be threatening, insulting or abusive will be an obstacle to the more insidious forms of racism. There is no proposal to generalise the Northern Irish offence of making false statements likely to stir up hatred. Although the United Kingdom has introduced the guarantee of freedom of expression in Article 10 of the European Convention on Human Rights into its law by means of the Human Rights Act 1998, there has been no significant discussion of the finding by the European Court of Human Rights in *Jersild v. Denmark* that restrictions on expression pursuant to Article 4 of the International Convention on the Elimination of Racial Discrimination in order to tackle racism were compatible with that guarantee.

[189] Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Denmark, U.N. Doc. CERD/C/60/CO/5 (2002).
[190] CERD/C/63/CO/11, para 12, 10 December 2003.
[191] CERD/C/430/Add.313 March 2003, para 6.

In the **Netherlands**, the general approach on the issue of the publications is that one should not concentrate on particular passages in a text, but review these passages in their context and in the light of the text as a whole.[192] An author is free to choose the form in which he expresses his views, and he may use exaggerations. The limit may be reached where a specific passage is superfluous for the article as a whole and can be seen as manifestly offensive and insulting. Having said that, there appears to be a clear trend in the case-law to offer a high level of protection to the freedom of expression and the freedom of demonstration – that is, a noticeable higher level than was offered in the 1980s. In the past, demonstrations by right-wing extremists were often prohibited on the ground that they might endanger the *ordre public,* and the courts would accept that argument. In recent cases, however, the courts adopted a much more critical approach.[193] Especially *columnisten* [commentators who publish in newspapers or appear on television] have benefited from the freedom of expression. The courts have generally accepted that exaggeration is inherent in the way in which these comments are phrased. A graphic example was Theo van Gogh who was known for his vitriolic style, his provocations and his readiness to criticise various groups in society. Although in 1990 he was convicted by the Supreme Court for insulting Jews and making fun of the holocaust,[194] he continued – until his assassination in 2004 – to write very critically, in particular about Muslims and Islam, without being stopped by the courts.[195] This is not to say that there are no limits at all. There still have been instances where individuals were convicted for insult or incitement to hatred and racial discrimination.[196]

Similarly in **Hungary**, the Constitutional Court (HCC) sets a high standard for acts limiting the freedom of speech in one of its early decision. In the Decision 30/1992, AB határozat of 29 March 1992, the HCC found the facts of the crime of incitement of hatred as spelled out in Article 269 (1) of the Criminal Code to be constitutional and annulled the form of defamation laid down in paragraph (2) of the same article. Its reasoning was based on the notion that the freedom of expression has a distinguished role among other fundamental rights guaranteed by the Constitution; that in fact it is a sort of a 'mother right' of the so-called rights to 'communication'. According to the HCC justices, the right to free expression of opinion protects opinion without regard to its content in terms of value and truth, for this condition alone lives up to the ideological neutrality of the Constitution. In confirming the constitutionality of the facts of the crime of incitement, the justices apparently reasoned on grounds similar to U.S. Supreme Court Chief Justice Oliver Wendell Holmes's famous test of 'clear and present danger'. The main reason for declaring defamation unconstitutional was, however, that in this case the Hungarian Parliament had in fact made its qualification on the basis of the value content of the opinion expressed, in other words, with the violation of public peace attached to this only on the basis of presumption and statistical probability. Moreover, the HCC pointed out, not even the public peace is independent of the degree of the freedom of expression that prevails in society. Indeed, in countries where people can encounter numerous different opinions, public opinion becomes more tolerant, whereas in closed societies particular instances in which people express opinions out of the norm have far more potential to disturb the public peace. Further, the needless and disproportionate limitation of the freedom of expression has a detrimental effect on an open society. At the same time

[192] In May 2004, the government memorandum on fundamental rights in a pluralist society submitted to Parliament (Nota Grondrechten in een pluriforme samenleving, Kamerstukken II 2003/04, 29614, Nos. 1-2) concluded that the Dutch Constitution does not need to be adjusted to deal with the tension between the prohibition of discrimination on the one hand, and the freedom of religion and expression on the other hand (recent events however have illustrated the reality of this tension, cf. the statements of an imam, Mr El Moumni, on homosexuality, mentioned in the 2003 Report on the situation of fundamental rights in the Netherlands, available on http://www.cpdr.ucl.ac.be/cridho/index.php?pageid=15).
[193] See for instance Pres. Rb. Maastricht 22-03-2001, Pres. Rb. Zutphen, 13-05-2003.
[194] Hoge Raad 11 December 1990, *NJ* 1991, no. 313.
[195] See for instance Gerechtshof Amsterdam, 9 April 2001 (reviewing an article in which Van Gogh referred to Allah as 'that goatfucker from Mekka' (to mention only one element); the court found that the limits of the freedom of the press had not been exceeded). See also a decision of the *Raad voor de journalistiek* [a body set up by the profession, whose task it is to supervise compliance with journalist ethics] of 5 August 1997.
[196] See, e.g., Gerechtshof Amsterdam, 11 September 2003, LJN AK8302: four months' imprisonment (of which two suspended) for a series of speeches and statements at press conferences of the extreme right-wing party CP'86 (which was later banned on account of its racist agenda).

they added that the need to protect the 'dignity of communities' may constitute a valid constitutional limitation on the freedom of expression. Thus the Court decision does not rule out the possibility that Hungary's lawmakers might establish such protection under criminal law even beyond the scope of incitement to hatred. Still in Hungary, the Minister of Justice recently proposed that the not only civil law but criminal law sanctions shall be made available against hate speech. While the amendment of the Civil Code – providing personality rights action in cases where the dignity of someone is violated by a speech directed against a community or group without naming the person filing an action – is already being drafted, the criminal law sanctions are only at the level of political statements[197]. Moreover the E-governance Strategy and Action plan emphasizes the necessity of creating the legal framework for prosecuting racist content on the Internet[198].

In **Austria**, the restrictions to freedom of expression are quite extensive when it comes to the dissemination of national-socialist ideas. The Prohibition Statute provides indeed for general and quite far-reaching constitutional restrictions on the freedom of expression as regards the dissemination of national-socialist ideas. Section 3h prohibits the dissemination of the so-called *Auschwitzlüge*.[199] Thus, anyone who denies, grossly trivialises, approves or seeks to justify the National-Socialist genocide in the concentration camps or other National-Socialist crimes against humanity by making this opinion accessible to the public through printed material, broadcasting or any other means can face imprisonment between one to ten years. Complaints against convictions under the Prohibition Act have always been declared inadmissible by the European Court of Human Rights when examining their compliance with Article 10 ECHR as being necessary in a democratic society. In this context the European Court regularly refers to Article 17 ECHR which prohibits the abusive exercise of the Convention rights by enemies of a free and democratic legal order.[200] Legislation prohibiting the public dissemination of national-socialist ideology is rather extensive. However, when it comes to other racist contents the provisions provided by the Penal Code seem to be too restrictive.

In **Belgium**, the judgment n° 157/2004 issued by the Court of Arbitration (Constitutional Court) contains the clearest and most recent statement by the highest jurisdiction on the country on the relationship between freedom and expression and the adoption of criminal legislation against public statements which either publicly incite to discrimination, to hatred or to violence, or through which a person publicly proclaims his or her intention to discriminate, or to practice hatred or violence.[201] The judgment was delivered on two actions of annulment lodged against the Law of 25 February 2003 pertaining to the combat of discrimination[202] by members of the Parliament from the extreme-right 'Vlaams Blok' party (now renamed 'Vlaams Belang'), and by Mr Storme, who professes his sympathies for this party. In its judgment of 6 October 2004, the Court of Arbitration decided to annul in part Article 6 § 1 of the Law,. This provision is contained in chapter III of the law, which contains

[197] According to the Minister three possible ways are open for the legislator. First, the provision criminalizing hate speech could be placed in the chapter of the Criminal Code containing crimes against the liberty and dignity of person. Second, the legislator could create a minor offence against hate speech, thus avoiding the heightened scrutiny of the Constitutional Court in relation to criminal sanctions. Finally, the above mentioned civil law solution would be the only way to get remedy for hate speech. The latter one – as the draft indicates – would provide all the remedies available for the violation of personality rights, except for monetary sanctions.

[198] The E-governance Strategy and Action Plan 2005, pp. 44-45.
Available at: http://misc.magyarorszag.hu/binary/5317_ekkstrat_melleklet0952a.pdf

[199] Federal Law Gazette [BGBL] 13/1945 as amended by BGBL 148/1992.

[200] E.Ct.H.R., *B.H., M.W., H.P. and G.K. v. Austria* (Application No. 12774/87), decision of 12 October 1989; E.Ct.H.R., *Schimanek v. Austria* (Application No. 32307/96), decision of 1 February 2000.

[201] This legislation, although it does concern all forms of discrimination (including discrimination based on race or ethnic origin), does not contain criminal provisions which concern racism and xenophobia, as such provisions have been located instead in the Law of 30 July 1981 combating certains forms of behavior inspired by racism and xenophobia. However, the principles invoked by the Court of Arbitration may be transposed, without any modification, to legislation criminalizing racism and xenophobia, albeit with the reservation that in this latter domain, the requirements of the International Convention on the Elimination of All Forms of Racial Discrimniation may play a certain role.

[202] Loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme, *M.B.,* 7 mars 2003, Err. *M.B.,* 13 mai 2003 (this Law implements Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation).

its criminal provisions. In the original version of Artilce 6 § 1, it reads :

> Est puni d'emprisonnement d'un mois à un an et d'une amende de cinquante EUR à mille EUR ou d'une de ces peines seulement :
> - quiconque, dans l'une des circonstances indiquées à l'article 444 du Code pénal, incite à la discrimination, à la haine ou à la violence à l'égard d'une personne, d'un groupe, d'une communauté ou des membres de celle-ci, en raison du sexe, de l'orientation sexuelle, de l'état civil, de la naissance, de la fortune, de l'âge, de la conviction religieuse ou philosophique, de l'état de santé actuel ou futur, d'un handicap ou d'une caractéristique physique;
> - quiconque, dans l'une des circonstances indiquées à l'article 444 du Code pénal, donne une publicité à son intention de recourir à la discrimination, à la haine ou à la violence à l'égard d'une personne, d'une groupe, d'une communauté ou des membres de celle-ci, en raison du sexe, de l'orientation sexuelle, de l'état civil, de la naissance, de la fortune, de l'âge, de la conviction religieuse ou philosophique, de l'état de santé actuel ou futur, d'un handicap ou d'une caractéristique physique.

The Court of Arbitration decided that the first alinea did not constitute a disproportionate restriction to freedom of expression, provided the 'discrimination' referred to in that alienea is construed as referring to direct and intentional discrimination, rather than indirect discrimination (see para. B.56 of the judgment)[203]. But the Court decided to annul the second alinea of Article 6 para. 1 of the Law of 25 February 2003, which provided that criminal sanctions could apply to any person proclaiming his/her intention to discriminate, or to practice hate or violence against a person based on certain personal characteristics of that person, under the conditions of publicity stipulated in Article 444 of the Penal Code. The Court considers that this constitutes a disproportionate restriction of freedom of expression, as it makes it impossible for any debate to take place in order to discourage a person publicizing such an intention from acting on the basis of that intention (paragraphs B.59 to B.62).[204] The crucial distinction between the first and the second alinea is that inciting to discrimination, to hatred or to violence, which the 1st alinea of Article 6 § 1 is about, is is fact a form of discrimination – in effect, a discriminatory *act*, rather than a mere *statement* which may or may not produce certain consequences. The Court says about the the *act* of inciting, which is analogous to the act of instructing to discrimination, that :

> Le terme « incitation » indique par lui-même que les actes incriminés vont au-delà de ce qui relève des informations, des idées ou des critiques. Le verbe « inciter à », dans son sens courant, signifie « entraîner, pousser quelqu'un à faire quelque chose ». Il ne peut y avoir incitation que si les propos tenus ou les écrits diffusés dans les conditions décrites à l'article 444 du Code pénal comportent un encouragement, une exhortation ou une instigation à la discrimination' (B.49).

In its judgment, the Court also annuls Article 2 para. 4, al. 5 of the Law of 25 February 2003, which prohibits direct or indirect discrimination in 'the distribution, the publication or the public display of a text, an announcement, a sign or any other medium that is discriminatory' ('la diffusion, la publication ou l'exposition en public d'un texte, d'un avis, d'un signe ou de tout autre support comportant une discrimination'): here also, the annulment is justified by the consideration that freedom of expression may only be restricted by measures strictly necessary and corresponding to a pressing social need (B.71 to B.73). This judgment also insists on the fact that any restriction to freedom of expression

[203] Indeed, referring to the definition of indirect discrimination as an apparently neutral measure which however results in a particular disadvantage being imposed on certain categories of persons, the Court considers : 'on imagine mal comment il pourrait être incité intentionnellement à une « pratique apparemment neutre » ou à un acte dont le caractère discriminatoire ne se manifeste que par son « résultat dommageable ». Une telle définition contient un élément d'incertitude qui n'empêche pas qu'une discrimination indirecte puisse faire l'objet d'une mesure civile mais qui n'est pas compatible avec l'exigence de prévisibilité propre à la loi pénale' (para. B.55 of the judgment).

[204] According to the Court, 'Une telle interdiction, en ce qu'elle se réfère aux motifs de discrimination énumérés à l'article 6, § 1er, deuxième tiret, revient à étouffer le débat puisqu'elle empêche que celui qui exprime cette intention puisse être contredit et dissuadé de la mettre à exécution' para. B.60).

must comply with the requirement, derived from the Belgian Constitution, that no preventive censorship may be allowed; it imposes a requirement that any such restriction be strictly proportionate to the objective which it aims to fulfil, in accordance with Article 10 ECHR; and where restrictions to freedom of expression are imposed through the criminal law, it recalls that they must comply with the principle of legality, which the European Court of Human Rights derives from Article 7 ECHR.

In **Germany**, even though the Federal Constitutional Court, according to Article 5 of the Constitution, emphasizes in its constant case law the high position of freedom of expression and freedom of assembly in a democracy, the Court decided that denial of the persecution of the Jews by the National Socialism regime is not protected by the freedom of expression[205]. As to the application of both criminal law and the law regulating public meetings, however, the balance beween freedom of expression and the repression of racist behaviours is often discussed. This discussion took place recently with regard to the ruling of the new paragraph 4 of Section 130 Criminal Code[206] which entered into force on the 1st April 2005 and which punishes whoever, publicly or at a meeting, disturbs the public peace by expressing approval of, glorifying or justifying the acts of violence and tyranny committed under the national-socialist regime in a manner which violates the dignity of the victims thereof. This new provision is controversial because of its potential limitation on the freedom of expression and the freedom of assembly. The Federal Constitutional Court, in a case regarding an interim order, is examining its constitutionality (Decision (chamber) of 16 August 2005 - 1 BvQ 25/05).

In **Ireland**, the Constitution guarantees, in Article 40.6.1°, the right of 'citizens to express freely their convictions and opinions', however this guarantee of free expression is replete with permissible grounds for limitation, including, *inter alia*, in the interest of public order, morality and the authority of the State. According to certain scholars the relation between the 1989 Prohibition of Incitement to Hatred Act and the constitutional guarantee of free speech was given significant consideration during the preparation of the legislation. Clearly the legislators were of the view that the legislation struck the appropriate balance, and given the relative weakness of Article 40.6.1° this is probably a fair conclusion.[207] However, whether or not the legislation is precise or proportionate enough to satisfy international best practice in the field is another matter.[208]

In **Poland**, the Constitution, in Article 14, guarantees freedom of the press and other means of social communication (mass media). Article 54 of the Constitution ensures that everyone enjoys the freedom to express opinions, as well as to acquire and to disseminate information. Preventive censorship of the means of social communication (mass media) and the licensing of the press shall be prohibited. In accordance with the contents of Article 31 para. 3 of the Constitution, any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute (i.e., by the adoption of a legislative act), and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morality, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights. The limitations of freedom of speech follow extraordinary acts[209]. In **Spain**, it is the Constitutional Court and the Supreme Court that strike the balance between competing interests in this field. In its decision

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[205] Order of 13 April 1994 - 1 BvR 23/94 -, BVerfGE 90 page 241, 249.
[206] Law of 24 March 2005, Federal Law Gazette 2005, part I , page 969.
[207] Hilary Delany, 'The Prohibition of Incitement to Hatred Act, 1989' (1990) *Irish Current Law Statutes Annotated*.
See also *Murphy v IRTC* [1999] 1 IR 12, in which the Irish Supreme Court held a legislative prohibition on religious advertisements in the broadcast media to be consistent with the constitutional guarantee of freedom of expression.
[208] See Mark Tottenham,'A Review of Irish Censorship Legislation: Is a Prior Restraint Preferable to Prosecution?' (2003) 21 *Irish Law Times* 282 and Dominic McGoldrick and Therese O'Donnell, 'Hate Speech Laws: Consistency with National and International Human Rights Laws' (1998) 18 *Legal Studies* 453.
[209] In its Conclusions on **Poland**, the CERD Committee, while noting the State party's efforts to prohibit, through legislation, all dissemination of ideas based on racial superiority or hatred and incitement to racial hatred, reminds the State party of its obligation under article 4 to prohibit all organizations and activities, including those of the mass media, which promote and incite racial discrimination. It suggests that the State party strengthen its efforts to implement existing legislation in this regard. (Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Poland**,** CERD/C/62/CO/6 (2003)).

(STC 214/1991 of 11 November 1991) the Constitutional Court decided the freedom of expression does not entail the right to organise demonstrations or public campaigns which express racism and xenophobia. Three recent decisions of the Supreme Court address the issue of the balance between freedom of expression and the private life and the right to honour of a citizen (STS Sale I Civile, of 17 June 2004, STS Sale I Civile, of 8 July 2004 et STS Sale I Civile, of 9 July 2004). In **Finland** the issue of a potential tension between freedom of expression and the need to criminalize such racist acts that make use of this freedom has been recognized on various levels, including by the legislature and by scholars. While potentially the Supreme Court as the final judicial instance in criminal law matters is best placed for developing a systematic approach to this tension, so far this has not happened.

Prosecution of acts disclosing racist or xenophobic attitudes

In the public discussion in **Finland**, criticism has been directed to the exercise of prosecutorial powers, because no prosecution resulted in certain high-profile cases where politicians or other persons in a visible public position had used language that might give rise to an indictment. Because of the persistence of such a reluctance to prosecute – which also takes place in other Member States, in particular **Greece, Estonia, Latvia**[210], **Poland**[211] and **Sweden**[212] –, it could be said that freedom of expression so far appears to carry more weight in the mindset of relevant authorities than protection against racist utterances, and that this can be seen as the main reason for the lack of decisive case law. This has been highlighted also in the ECRI Reports on **Poland, Sweden** and **Czech Republic** for instance, in which the ECRI recommends that police and judicial authorties fully investigate and prosecute racially motivated crimes by acknowledging and taking into account the racist element of a crime[213]. In **Spain**, any offence which has been committed on the basis of a racist grounds should be prosecuted without consultation ('poursuivie d'office') since racist and anti-Semitic grounds or other grounds related to the ideology, religion, beliefs, ethnic or national origin of the victim are considered to constitute an aggravating circumstance pursuant to Article 22 (4) of the Penal Code. In **France**, an internal circular of 16 July 1998 addresses the issues of racism and xenophobia by requesting the prosecutors to intensify their efforts in this field. Public prosecutors are invited, according to ECRI Second Report on France, to step up measures against racism by keeping a closer watch on the sections of the press which act as a mouthpiece for racist arguments, keeping the distribution of tracts under surveillance and making use of Article 187-1 and 2 of the Criminal Code whenever possible. Public prosecutors' departments must also work more closely with associations to combat racism, etc.[214] In **Belgium**, the low level of priority given to the prosecution of offences based on racism or

[210] In **Latvia**, Section 78 and 150 of the Criminal Law are rather new (they were not included in the Criminal Code which was in force before the adoption of the Criminal Law in 1998) and very rarely used in practice allegedly because the high level of necessary evidence, although question of narrow interpretation has been raised by some legal experts and law enforcement representatives. Section 78 includes an intentionality of action, and the investigators and prosecutors mainly have not succeeded to prove an intention. In practice, it is not enough to prove that the reasonable person should know that his/her action can lead to the consequences foreseen in the section. It should be clearly recognized (in the most part of cases subjectively - by the admitting) that the person has performed a deliberate action with intent to cause conflict or hatred.

[211] The Public Prosecutor's Office usually discontinues criminal proceedings brought against persons disseminating anti-Semitic propaganda (mainly books, leaflets or magazines). In the years 2002 – 2003, 11 proceedings were held in Poland concerning the instigation of racial hatred or insulting national minorities, in particular Jews (a violation of the aforementioned articles 256 and 257 of the Penal Code). In 2004 there were 14 legal actions conducted based on Article 256 of the Penal Code and 22 based on Article 257 of the Penal Code (Statistical data from the General Headquarters of the Police, http://www.kgp/gov.pl).

[212] Prosecutions of hate speech are, however, rare. The proportion of White-Power –related crimes has been estimated to 40 % of the total number of reported racist, xenophobic and anti-Semitic crimes in 2002 and 2003 and within these cases, the most common offence was racial agitation (ECRI, Third Report on Sweden, Strasbourg 14 June 2005, CRI(2005)26, p. 31).

[213] See : European Commission against Racism and Intolerance, Third Report on Poland adopted on 17 December 2004, point 22 ; European Commission against Racism and Intolerance, Third Report on Sweden adopted on 17 December 2004, points 18-19 ; European Commission against Racism and Intolerance,Third Report on the Czech Republic adopted on 5 December 2003, point 19.

[214] This Report is available on http://www.coe.int/T/e/human_rights/ecri/1-ECRI/3-General_themes/3-Legal_Research/1-National_legal_measures/France/France%20SR.asp#P339_22612

The text of this Bill reads as follows: '[public prosecutors are requested to] intensifier leur action, à améliorer la réponse judiciaire face aux nouvelles formes de discrimination qui se manifestent dans les secteurs de l'activité économique, industrielles et commerciales, à collaborer plus étroitement avec l'ensemble des partenaires de l'institution judiciaire,

xenophobia and the lack of means of prosecutorial authorities to follow upon such offences is illustrated by the statistics provided by the Ministry of Justice (College of Procurators-Generals) on the number of racism-cases in jurisdiction[215]. The majority (2415 out of 3693, i.e. 65%) of the racism / xenophobia cases of the period 1998-2002 had, at the moment of the data analysis (i.e. February 2003), not led to any consequences. Of these 2415 cases which were not followed upon, 68,8% were dismissed on technical grounds, 29,7% were dismissed because of reasons of opportunity and 1,6% because of another motive. In only 112 cases (i.e. 3%) at least one accused was summoned to appear in court. 93 of these 112 cases led to a sentence being pronounced: 69% of these sentences involved a conviction for racism. If the analysis is based on the final verdicts, i.e. not on the qualification allocated on the level of the public prosecutor, it is shown that 120 persons were convicted for racism during the period 1998-2002. This number of convictions can be interpreted as quite limited for a period of five years. Nevertheless, the RAXEN Analytical Report on Legislation points out that in comparison to the years before this number constitutes a spectacular amelioration. In **Portugal**, in 2001, the Portuguese High Authority for the Media publicly denounced the existence of racist websites developed by Portuguese service providers. Recognizing the lack of monitoring and investigative means and the absence of a legislative framework, this entity requested the direct intervention of the General Prosecutor's Service.[216]

2.3.3. The abuse of fundamental rights

Article 17 of the European Convention on Human Rights states that no provision in that instrument may be interpreted 'as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth [in the ECHR] or at their limitation to a greater extent than is provided for in the Convention'. In so far as it concerns individuals, the Court reads this provision as aimed at 'making it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ... no one may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms; ...'.[217] Article 17 ECHR thus creates an obstacle to an individual or a group relying on the freedoms guaranteed in the Convention in order to promote objectives which run counter to the values of the Convention, for instance in order to promote racial hatred or discrimination.[218] For instance, the Court has considered that, like any other remark directed against the values underlying the Convention, the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10 and that there is'a category [of] clearly established historical facts – such as the Holocaust - whose negation or revision would be removed from the protection of Article 10 by Article 17'.[219] One recent example of the Court relying on this clause is the case of *Garaudy v. France*. There, the applicant had been convicted on the basis of the Freedom of the Press Act of 19 July 1881 for publicly defaming a group of persons (the Jewish community), denying crimes against humanity and incitement to racial discrimination and hatred. The French courts had rejected his claim that those convictions were in violation of the freedom of expression guaranteed in Article 10 ECHR. The European Court of Human Rights agreed. Finding that, in his book *Les mythes fondateurs de la politique israélienne* (*The*

notamment l'ensemble des services qui concourent à la sécurité ainsi que les associations de lutte contre le racisme et à entreprendre des actions concrètes dans le cadre d'une politique pénale qui peut être l'occasion d'initiatives très diverses en fonction des spécificités locales existantes.'

[215] This information is provided by the RAXEN Analytical Report on Legislation, Belgium, 2004, p. 5. This Report, which is drafted by the Centre for Equal opportunities and Opposition to Racism is available on http://eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&catid=418ea9767affb

[216] *Call for action: Public Statement on Sites of fascist, racist and xenophobic contents in the Internet by the High Authority for the Media*, 27 June 2001. The authors referred that the alleged websites violated the following relevant articles: Article 46 of the Portuguese Constitution, that forbids racist and fascist organizations, and Article 240 of the Criminal Code, already mentioned above.

[217] Eur. Ct. HR, *Lawless v. Ireland,* judgment of 1 July 1961, Series A no. 3, p. 45, § 7.

[218] See in particular *Glimmerveen and another v. the Netherlands*, Commission decision of 11 October 1979, Decisions and Reports (DR) 18, p. 198, and *Pierre Marais v. France*, Commission decision of 24 June 1996, DR 86, p. 184.

[219] Eur. Ct. HR, *Lehideux and Isorni* v. France, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, §§ 47 and 53.

Founding Myths of Israeli Politics) the publication of which led to those convictions, the applicant systematically denies the crimes against humanity perpetrated by the Nazis against the Jewish community, the Court reasoned :

> There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention.

The Court therefore concluded that, in accordance with Article 17 of the Convention, the applicant could not rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity. With respect to the parts of the book which, being critical of the actions of the State of Israel and of the Jewish community, had led to the applicant's convictions for publishing racially defamatory statements and inciting to racial hatred, the Court – while again expressing its doubts as to whether the expression of such opinions could attract the protection of the provisions of Article 10 of the Convention, as it found that the applicant 'in fact pursues a proven racist aim' –, considered that in any event, the grounds on which the domestic courts convicted Mr Garaudy of publishing racially defamatory statements and inciting to racial hatred were relevant and sufficient, and that the interference with his freedom of expression was therefore'necessary in a democratic society' within the meaning of Article 10 § 2 of the Convention. This case clearly illustrates the willingness of the European Court of Human Rights to allow for restrictions to freedom of expression where such restrictions are justified by the need to combat racism and xenophobia, or the denial of the Holocaust.

2.3.4. The acceptable limitations to freedom of expression.

All the EU Member States are parties to the International Covenant on Civil and Political Rights. Article 19(2) of the International Covenant on Civil and Political Rights guarantees freedom of expression which, it states, 'shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'. This right is not absolute. According to Article 19(3) of the Covenant : 'The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals'. Furthermore, Article 20(2) of the Covenant provides that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. In its General Comment n°11 : Article 20 (1983),[220] the Human Rights Committee underlined that 'these

[220] Human Rights Committee, General Comment n°11 : Article 20 (1983), in : Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 133.

required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities. The prohibition under (…) paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. (…) For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation'. Therefore the prohibition of the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence not only constitutes a restriction to freedom of expression which the States parties to the Covenant are authorized to adopt ; rather, the States parties are under an obligation to adopt legislation which effectively imposes such a prohibition, through the imposition of effective, proportionate and dissuasive sanctions. The compatibility of such prohibition with the right to freedom of expression has also been confirmed by the Committee on the Elimination of Racial Discrimination. Referring also to Article 20(2) of the International Covenant on Civil and Political Rights, the Committee on the Elimination of Racial Discrimination notes in its General Recommendation XV, that : 'the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. This right is embodied in article 19 of the Universal Declaration of Human Rights and is recalled in article 5 (d) (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Its relevance to article 4 is noted in the article itself. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance'.[221]

Although the European Convention on Human Rights does not contain a provision similar to Article 20 of the International Covenant on Civil and Political Rights or Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, the principle of freedom of expression as stipulated in Article 10 ECHR does not constitute an obstacle to the States parties complying with those provisions. As already mentioned, Article 17 ECHR makes it impossible for an individual to rely on the guarantee of freedom of expression in order to disseminate ideas based upon racial superiority or hatred, or in order incite to discrimination, hostility or violence. Moreover, the European Court of Human Rights interprets Article 10 of the European Convention on Human Rights, to the fullest extent possible, in order to facilitate compliance by the States parties with those other international obligations. The judgment of the Court in the case of *Jersild v. Denmark* has already been recalled in this regard. In general, the European Convention on Human Rights is interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969), which principles include that of *pacta sunt servanda.*[222] Therefore compliance with other international obligations constitutes in the view of the European Court of Human Rights a legitimate public interest of a considerable weight, which may be taken into account when examining the restrictions to freedom of expression under Article 10 § 2 ECHR.

A State party to the European Convention on Human Rights will not be found in violation of Article 10 ECHR where it imposes restrictions on freedom of expression, which are sufficiently foreseeable under the existing legislation, and which may be justified as necessary in a democratic society in order to protect the rights of others of for the prevention of disorder or crime. This may be presumed to include such restrictions which a State has imposed in order to comply with its obligations under Article 20 of the International Covenant on Civil and Political Rights or under Article 4 of the

[221] Committee on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention, adopted by the Committee at its forty-second session (1993)(doc. A/48/18), in : Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 207, at para. 4.

[222] See Eur. Ct. HR (GC), *Waite and Kennedy v. Germany* judgment of 18 February 1999 (Appl. no. 26083/94), ECHR 1999-I at §§ 63 and 72 ; Eur. Ct. HR (GC), *Al-Adsani v. the United Kingdom* judgment of 21 November 2001 (Appl. no. 35763/97), ECHR 2001-XI, §§ 54-55 ; Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim _irketi v. Ireland* judgment of 30 June 2005, § 150.

International Convention on the Elimination of All Forms of Racial Discrimination. Indeed, insofar as all the EU Member States are parties to all the abovecited instruments, their national authorities are to seek a balance between freedom of expression on the one hand, the protection from public incitement 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, on the other hand, under a framework which is strictly defined under international law. Here, the international law of human rights defins both the minimum standards for the protection of freedom and expression, and the minimum obligations of States in combating such forms of incitement to violence or hatred, thus severely limiting the margin of appreciation left to the Member States, unless they have made reservations with respect to either of the applicable provisions[223]. The following paragraphs identifies certain examples of how this balance has been struck by each Member State, in certain cases which have been submitted to its national jurisdictions :

Austria

The National-Socialist Prohibition Act (*NS-Verbotsgesetz*)[224] provides for general and quite far-reaching constitutional restrictions on the freedom of expression as regards the dissemination of national-socialist ideas. In a judgment of 29 November 1985 the Constitutional Court made it clear that the constitutional provisions of the Prohibition Act were directly applicable not only in criminal proceedings but to be taken into account and to be executed by every court and administrative authority within their respective competences. As a consequence all legal acts which directly or indirectly aim at revitalising national-socialist ideas are to be considered null and void, i.e. as if they did not exist. Complaints against convictions under the Prohibition Act have always been declared inadmissible by the European Court of Human Rights when examining their compliance with Article 10 ECHR as being necessary in a democratic society. In this context the European Court regularly refers to Article 17 ECHR which prohibits the abusive exercise of the Convention rights by enemies of a free and democratic legal order.[225]

Czech Republic

On 10 March 2005, the Supreme Court delivered its ruling in the much debated case of criminal charges against a publisher of Hitler's Mein Kampf was delivered. In this final ruling on the matter the defendant was acquitted. The case started in 2000 when Mr. Zítko published Hitler's Mein Kampf in a leather jacket with golden inscription, including Nazi swastika. The case sparked an extensive public debate on the limits to freedom of expression. Mr. Zítko was firstly found guilty by both court instances (District Court and Court of Appeal) of the crime of Promotion of a movement that aims at the suppression of human rights and freedoms (sect. 260 of the Criminal Code). He was then acquitted by the Supreme Court on the basis of lacking *mens rea* because it was not proved that his intention was to promote such a movement. The decision was based mainly on the fact that the cover of the book stated that 'nobody doubts that Nazism is a synonym to evil and that it deprived dozens of millions of people of their lives.' It further announced that 'the aim of publishing the book is to demythicize Hitler's Mein Kampf and to assure that history will not repeat itself'.

Latvia

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[223] As recalled hereabove, reservations or declarations were made by **Austria**, **Belgium**, **Ireland**, **Italy** and the **United Kingdom** when signing or ratifying the Convention on the Elimination of All Forms or Racial Discrimination which emphasize the importance attached to the fact that Article 4 of the ICERD provides that the measures laid down in subparagraphs (a), (b), and (c) should be adopted with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention. These States therefore consider that the obligations imposed by Article 4 CERD must be reconciled with the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association. However, as has been noted, the principle of freedom of expression should not be seen as extending to the forms of speech which, under Article 20 of the International Covenant on Civil and Political Rights and Article 4 ICERD, the States parties to those instruments are to prohibit and effectively prosecute.

[224] For further details on the Prohibition Act and its criminal provisions and severe sanctions see paragraph 4. below.

[225] Eur. Ct. H.R., *B.H., M.W., H.P. and G.K. v. Austria* (Appl. No. 12774/87), decision of 12 October 1989, *Schimanek v. Austria* (Appl. No. 32307/96), decision of 1 February 2000.

In the cases of incitement to hatred through the giving of speeches or other forms of expression, in particular through the media, the press and Internet, the abovementioned Section 78 of the Criminal Law is applicable. However, the intention to incite hatred has to be proven. In the case of Landmanis (Sentences of the Liepaja City Court on 12.01. 2001. Nr. K20-90/1 and Kurzeme District Court on 11.11.2003. Nr.KA02-4/02) the publisher of monthly magazine *Patriot* G. Landmanis distributed three issues of this monthly, as well as satirical magazine on Holocaust, which includes publications with negative, abusive, contemptuous and offensive statements towards the Jewish people. Both the first and the second instance court found that the intention is proven particularly by the fact that the activities were performed systematically and within a continuous period of time. It could be more difficult to prove the intention if the single act would be committed, and without proving of intention it is not possible to call the person to the criminal responsibility under the Section 78.

The Netherlands

On 27 January 2005, the Rechtbank Den Haag delivered a judgment in a case involving a rap song in which a Member of Parliament, Ms Hirsi Ali, was threatened. The song recorded in 2003 included the text 'We are now preparing her liquidation / Because of what she said on integration'. The song – which was never distributed on record but was put on Internet – also contained insults of Ms Hirsi Ali. In convicting the members of the rap group, the Hague Court of First Instance observed: 'Everyone should be, within the limits of the law, allowed to express his or her opinions without being hindred by others in a unlawful – let alone criminal – fashion. For politicians, in this case a member of parliament, there is an additional element: they must be able to perform their functions without being exposed to threats and insults. *Moreover, the public nature of the established facts bears the risk that third parties are inspired to commit acts of violence and that feelings of unrest and insecurity in society are amplified*. Of course the suspects are entitled to the freedom of expression as well, and, if they wish to respond to public statements by which they consider themselves harmed, they have the right to express their views in public in a form – artistic or not – which may be chosen by them. However, in doing so they are bound by law. As been observed above, they have transgressed the limits imposed by law.'[226] The Hague Court imposed a penalty of 140 hours of *taakstraf* [community service] and a suspended prison sentence of two months, with a probationary period of two years.

Poland

Art. 256 of the Criminal Code introduces the penalty of fines or imprisonment for up to 2 years for public propagation of fascist or other totalitarian political systems or exhorting to hatred based on national, ethnic, racial, religious differences or as a result of atheism. In a judgment of 28 March 2002 (I KZP 5/2002), the Supreme Court was requested to interpret this provision in the context of a case concerning people, who rented a club and organised transport to that club for individuals, who shouted out fascist slogans. The District Court asked : 'Does the expression 'propagates', used in art. 256 of the Criminal Code to describe a causative act, imply that public approval for a fascist or any other totalitarian political system, expressed i.e. by publicly exhibiting a swastika, performing fascist gestures of greeting etc., only [falls under the prohibition] specified in Art. 256 of the Criminal code, when it is simultaneously connected with (public) dissemination (popularisation) of knowledge about this system, meaning engaging in propaganda?' The Supreme Court ruled that 'propagation', as

[226] Rechtbank Den Haag, 27 January 2005, LJN AS 4030, emphasis added. The Dutch text reads : 'Iedereen moet, binnen de grenzen van de wet, vrijelijk zijn/haar mening kunnen uiten, zonder door anderen op onrechtmatige, laat staan strafbare, wijze gehinderd te worden. Voor politici, in het onderhavige geval een kamerlid, komt daarbij dat zij hun taak moeten kunnen uitoefenen zonder aan bedreigingen en beledigingen te worden blootgesteld. *Bovendien brengt het openlijke karakter van de bewezenverklaarde feiten het risico met zich dat derden worden geïnspireerd tot geweldpleging jegens politici en dat gevoelens van onrust en onveiligheid in de samenleving versterkt worden*. Ook verdachten komt het recht van vrijheid van meningsuiting toe, alsmede om deze naar aanleiding van uitlatingen in het openbaar waardoor zij zich gekwetst voelen, openlijk te uiten in een door hen gekozen, al dan niet artistieke, vorm. Daarbij zijn zij echter gebonden aan door de wet gestelde grenzen. Zoals hiervoor al is overwogen hebben zij deze overschreden'.

interpreted by Art. 256 of the Criminal code, means any behaviour consisting in publicly presenting fascist or any other totalitarian political system with the intent to persuade others.

Slovak Republic

In April 2003, the Military County Court convicted two persons for the crime of Defamation of nation, race, and conviction. According to the judgement, both accused persons were making in public statements such as 'All Gypsies should be shot to death and exterminated, because they are not human beings'. After the Appeal Military Court dismissed the appeal, both convicted offenders filed together a constitutional complaint to the Constitutional Court of the Slovak Republic arguing that the military courts have breached their fundamental rights under Article 17 paragraph 2 and Article 26 paragraph 1 and 2 of the Slovak Constitution, and Article 7 paragraph 1 and Article 10 paragraph 1 of the European Convention on Human Rights. The Constitutional Court has dismissed the complaint of applicants which it found manifestly ill-founded. In the view of the Constitutional Court, the decisions of both first instance court as well as appeal court were well and sufficiently reasoned and both courts' judgments were made within their constitutional competence. In its conclusion the Constitutional Court pointed out that the application of relevant provisions of Criminal Code regulating the elements of crime of Defamation of nation, race, and conviction by military courts cannot be considered as either arbitrary or inconsistent with the Constitution of the Slovak Republic and the European Convention on Human Rights.

United Kingdom

One notable recent instance of restriction to freedom of expression being upheld is *R (on the Application of Louis Farrakhan) v Secretary of State for the Home Department* in which the Court of Appeal upheld the exclusion of the spiritual leader of the Nation of Islam, a religious, social and political movement whose aims included 'the re-generation of black self-esteem, dignity and self-discipline' on the basis that his presence would be deeply offensive to large sections of the population, likely to cause racial disharmony, especially between the Muslim and Jewish community, and possibly incite racial hatred contrary to the Public Order Act 1986 and Public Law (Amendment) Act 1996.[227] Significant considerations in the ruling were: the risk to public order from Farrakhan's presence; the fact that this was an immigration decision; and the fact that the exclusion only denied Farrakhan a particular forum rather than the freedom to express his views per se as no restriction had been placed on his disseminating information or opinions within the United Kingdom by any means of communication other than his physical presence).

It will be noted that the general principles which have been recalled concerning the relationship between freedom of expression and public incitement 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, are applicable also to the media. In this regard, it will be recalled that Article 22b of Directive 89/552/EC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities,[228] as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997,[229] obliges the member states to ensure that "broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality" (Article 22).[230] Beyond the

[227] [2002] All ER 289.
[228] *O.J.* L 298, 27 November 1989, pp.0023-0030.
[229] *O.J.* L 202, 30 July 1997, pp.0060-0070.
[230] For instance, in the **Slovak Republic**, the Act no. 308/2000 Coll. on Broadcasting and Retransmission and on amendments of Act no. 195/2000 Coll. on Telecommunications as amended [*zákon _. 308/2000 Z. z. o vysielaní a retransmisii a o zmene zákona _. 195/2000 Z. z. o telekomunikáciách v znení neskor_ích predpisov*] contains a Section 19 which provides special protection to human dignity and humanity and imposes strict restriction on broadcasters. A program service of the broadcaster and all of its parts must not through its processing and content impact on human dignity and the fundamental rights and freedoms of others. It must not, for instance, propagate violence and in a hidden or open form instigate hatred on the basis of gender, race, color of skin, language, faith and religion, political or other ideas, national or social origin, membership in a national or ethnic group, propagate war or describe cruel or other inhumane behavior by

television broadcasting activities which are covered by this Directive, the Member States may introduce certain similarly drafted provisions which apply to the other media.[231] Indeed, where there is a demonstrated 'pressing need' to do so, certain prior restraints may be imposed to the media : as recalled by the European Court of Human Rights, 'Article 10 does not in terms prohibit the imposition of prior restraints on movement or all bans on dissemination', although 'the dangers inherent in prior restraints are such that they call for the most careful scrutiny'[232].

2.4. The incrimination of the conduct of 'Publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes'.

Article 4 (c) and (d) of the Proposal for a Council Framework Decision on combating racism and xenophobia[233] provides that Member States shall ensure that both 'public condoning for a racist or xenophobic purpose of 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' and the 'public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 in a manner liable to disturb the public peace', committed by any means, are punishable as criminal offences (emphasis added).

According to Article 6 of the Council of Europe Additional Protocol to the Convention on Cybercrime of 28 January 2003 concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, each State Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: 'distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party'. It adds that a State Party may either (a) require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise ; (b) reserve the right not to apply, in whole or in part, paragraph 1 of this article.

These restrictions to freedom of expression are compatible with the requirements of the international law of human rights, to the extent at least that the laws which make it a criminal offence to challenge the conclusions and the verdict of the International Military Tribunal at Nuremberg are not exceedingly vague and overbroad[234]. While the European Court of Human Rights recognizes that 'it is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issue, which is part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation', it nevertheless considers that the negation or revision of clearly established historical facts such as the Holocaust is removed from the protection of Article 10 by Article 17.[235] Indeed, the Committee on the Elimination of All Forms of

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means which may be considered as inappropriate underestimation, excuse or approve of it, depict without justification scenes of actual violence where an actual account of dying is emphasized in an inappropriate form, or depict persons subjected to physical or psychic suffering in a way which may be considered as unjustified attack on human dignity.

[231] For instance, in **Portugal**, where the Law on Television (Law n.o 32/2003, 22nd August) prohibits television programmes which would violate the dignity of the human being or incite to hate, racism or xenophobia, also provides in the Statutes of Journalists (Law nº 1/99,13th January, art.14) that journalists should refrain from practising discriminatory acts, on the grounds of religion, race, nationality or sex, having in mind the prevention of violent acts involving groups.

[232] Eur. Ct. HR (2nd sect.), *Chauvy and Others v. France* (Appl. 64915/01), judgment of 29 June 2004, § 66.

[233] Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia, COM (2001) 664 final.

[234] See Human Rights Committee, *R. Faurisson v. France*, communication n° 550/1993, views adopted on 8 November 1996, para. 9.3.

[235] Eur. Ct. HR (GC), *Lehideux and Isorni v. France*, judgment of 23 September 1998, *Reports* 1998-VII, § 51; Eur. Ct. HR,

Racial Discrimination regularly recalls that the prohibition of attempts to justify crimes against humanity, and of their denial, should not be limited to those committed during the Second World War[236].

There is no unanimity among Member States on the issue of the incrimination of the conduct of publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes. Whilst certain States have adopted specific provisions incriminating the conducts at stake, others incriminate these behaviours through their general legislations.

Austria and **Germany**, when referring to the crimes committed by the National-Socialist regime, do incriminate this attitude in the most extensive way. In **Austria**, Section 3 lit h Prohibition Statute penalises anyone who denies, grossly trivialises, approves or seeks to justify the National-Socialist genocide or other National-Socialist crimes against humanity by making this opinion accessible to the public through printed material, broadcasting or any other means. The related sanction ranks between one and ten years imprisonment. Publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity or war crimes, which are not in connection with National Socialist ideology is generally not punishable under Austrian law. Section 282 para. 2 Penal Code penalises anyone who publicly endorses a crime punishable by more than 1 year imprisonment, if the endorsement is in contrast to the general sense of justice. The crime of genocide is prohibited under Section 321 Penal Code. In **Germany**, according to Section 130 § 3 of the Criminal Code, 'whoever, publicly or at a meeting, expresses approval of, denies or minimizes an act committed under the rule of National Socialism of the type indicated in section 6 subsection (1) of the Code of Crimes against International Criminal Law, and does so in a manner capable of disturbing the public peace, shall be punished with imprisonment for not more than five years or a fine'. According to Section 130 paragraph 4 of the Criminal Code[237], 'whoever, publicly or at a meeting, disturbs the public peace by expressing approval of, glorifying or justifying the acts of violence and tyranny committed under the National Socialist regime in a manner which violates the dignity of the victims thereof shall be punished with imprisonment for not more than three years or a fine'. The approval, denying and minimizing of equivalent crimes which have not been committed under the rule of National Socialism, are not punishable according to Section 130 paragraph 3 Criminal Code. The approval of such a crime, however, is punishable according to Section 140 no. 2 Criminal Code, if the approval is made publicly, in a meeting or through dissemination of writings, audio and visual recording media, data storage media, illustrations and other images in a manner that is capable of disturbing the public peace. In **Belgium**, Article 1 of the Law of 23 March 1995 on punishing the denial, minimisation justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War[238] punishes whoever, in the circumstances given in Article 444 of the Penal Code denies, grossly minimises, attempts to justify, or approves the genocide committed by the German National Socialist Regime during the Second World War[239]. In the event of repetitions, the guilty party may in addition have his civic rights suspended in accordance with Article 33 of the Penal Code[240]. In

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Garaudy v. France, decision of 24 June 2003; Eur. Ct. HR (2nd sect.), *Chauvy and Others v. France* (Appl. 64915/01), judgment of 29 June 2004, § 69.

[236] On this issue, see for instance : Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, France, U.N. Doc. CERD/C/304/Add.91 (2000), point 6.

[237] This provision has been introduced by the Law of 24 March 2005, Federal Gazette part I 2005, p. 969.

[238] Loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale, *M.B., 30 mars 1995).* This law was amended by a law of 7 May 1999 (Loi du 7 mai 1999 modifiant la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, ainsi que la loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale, *M.B.,* 25 juin 1999).

[239] For the application of the previous paragraph, the term genocide is meant in the sense of Article 2 of the International Treaty of 9 December 1948 on preventing and combating genocide.

[240] On this issue, the RAXEN Analytical Report on Legislation, Belgium, 2004 (p. 32) provides the following example: On 15 January 2002 the Correctional Court of Brussels sentenced a person that had disseminated between December 1997 and February 1999 racist and negationist texts via the Internet. After his neglection of repeated warnings, the provider filed a complaint. The judge sentenced the accused in absentia to one year of imprisonment because of infringements against the anti-racism law and the law on the denial of the holocaust.

Cyprus, Section 7 of the Law Ratifying the Additional Protocol to the Convention on Cybercrime concerning the Criminalisation of Acts of Racist or Xenophobic Nature committed through Computer Systems (not yet in force) provides that any person, who, with the intent to incite racism and xenophobia, intentionally and without right, through a compute system, denies, grossly minimises, approves or justifies acts constituting genocide and acts against humanity, commits a crime punishable up to 5 years imprisonment and/or a fine up to £20 000 CYP. In the **Czech Republic**, such conducts are punished pursuant to Section 261A of the Criminal Code (the sanctions are however limited to crimes committed by Nazis or Communists)[241]. On the contraray, and as mentioned above, in **Denmark** freedom of speech has priority vis-à-vis combating 'revisionist' ideologies. Therefore no specific criminalization of these acts exists. This is supported by the explanatory notes[242] to Section 266b of the Criminal Code, where it is stated that less significant abusive statements should not be prohibited, since due respect should be given to the freedom of opinion and expression. However, one cannot reject the possibility, if a certain threshold of abusiveness is met and depending of the context that such statements could fall within the ambit of section 266b. No jurisprudence on the subject exists.[243] In **Finland**, there are good grounds for the view that such actions are punishable, but there is not yet conclusive case law on this issue. Certain scholars are of the view that condoning, denying or grossly trivialising crimes of genocide fall within the ambit of Chapter 11 Section 8 of the Penal Code (i.e. ethnic agitation), because such views in practice include the claim that the victims are deliberately lying or otherwise distorting the facts.[244] This line of interpretation was accepted in a recent case decided by the Court of first instance of Vantaa.[245] In **Greece**, there is no specific incrimination of the abovementioned conducts; the approval, denying and minimizing of crimes against humanity or war crimes could fall under Law 927/25.6.1979, complemented by Article 24 of Law 1419/8.3.1984 and modified by Article 72 of Law 2910/2001, which penalises certain racist or xenophobic behaviours. In **France**, Section 24bis of the Act of 29 July 1881, as amended by the Act of 13 July 1990 sanctions the public denial of crimes against humanity, the existence of which has been recognised by a French or international court. The main purpose of this section is to condemn the denial of the Nazi holocaust. Articles 211-1 and 212-1 to 213-5 of the Penal Code sanction the apology of crimes against humanity. In **Hungary** led by the outcry generated by the neo-Nazis' hate speech being unpunished, Parliament in 1996 amended the wording of incitement against the community. The new Article 269 reads as follows 'A person who, in front of a large public gathering, incites hatred against (a) the Hungarian nation, (b) any national, ethnic, racial or religious group, further against certain groups among the population, 'or commits another act suitable for the arousal of hatred' commits a felony and is to be punished by imprisonment for a period of up to three years.' In **Italy**, the Penal Code provides two general norms that could be used to sanction the conducts at stake. Article 272 punishes all propaganda and apology of subversive behaviour aiming at the violent elimination of a social class or at the elimination of the legal, political, economic and social order of the State (anarchy). Article 414 of the Penal Code punishes the public instigation to commit a crime or to commit the public apology of a crime[246]. However in general, crimes of opinions are rarely recognised since an extensive understanding is given to Article 21 of the Constitution (freedom of speech). In **Latvia**, there is no legislation punishing such conduct. The Criminal Law[247] contains prohibition of genocide (Section 71), as well as incitement to genocide, (Section 71), crimes against peace (Section 72), war crimes (Section 74), force against residents in the area of hostilities (Section 75), incitement to war of

[241] Sec. 261a: A person who publicly denies, disputes, advocates/approves or attempts to justify Nazi or Communist genocide or other crimes committed by Nazis or Communists against humanity, shall be sentence to a term of imprisonment of from six months to three years.
[242] F.T. 1970/71 tillæg A sp. 1187.
[243] However, see U.1988.788V, where some relevant issues were discussed.
[244] Mika Illman, *Hets mot folkgrupp*. Suomalainen lakimiesyhdistys, 2005, p. 247 ff. Ari-Matti Nuutila, 'RL 11: Sotarikokset ja rikokset ihmisyyttä vastaan'. In Olavi Heinonen & al, *Rikosoikeus*. WSOY, 2002, p. 570. Timo Makkonen, *Syrjinnän vastainen käsikirja*. IOM Helsinki, 2003, 273-274.
[245] 14 June 2004, nr 04/1603 (not yet final).
[246] The Italian Constitutional Court in its Decision 65/1970 declared that the 'apology' has to be a concrete act likely to cause a crime, beyond the simple manifestation of ideas. The new Decree-Law 144/2005, converted into Law 155/2005, introduces in Article 414 of the Penal Code that the penalties for instigating or justifying ('apologia') criminal activities will be increased by half, if the public instigation or the apology relates to a crime linked with terrorism or crimes against humanity.
[247] Adopted on 17 June 1998, in force since 1 April 1999, with amendments adopted till 10 June 2005.

aggression (Section 77), and destruction of cultural and national heritage Section 79). In **Luxembourg**, Article 457-3 of the Penal Code forbids any kind of public expression tending to contest, to minimize, to justify or deny the holocaust or any other genocide.[248] The question whether publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes is a criminal offence in **Malta** is a difficult issue. Unless the conduct can be made to fall within the terms of incitement to racial hatred, or within the terms of the Press Act, then it is difficult to see how the conduct would be considered as criminal under Maltese law. In reality where such conduct is publicly condoned or trivialized it is difficult to imagine that whoever is doing that would not also be inciting to racial hatred or spreading false news within the terms of the Press Act. However the conduct *per se* under this head is not specifically proscribed under Maltese law. In the **Netherlands**, there is no specific provision for these kinds of conducts. However, the *Hoge Raad* [Supreme Court] held in a judgment of 25 November 1997 that the denial of the Holocaust amounts to *belediging* [insult or defamation] of Jews, which means that this conduct falls within the scope of Article 137c Criminal Code. This approach is still followed by the courts; in December 2004, for instance, a man was sentenced to four weeks' imprisonment for denying the holocaust on his website. The NGO Centre for Information and Documentation on Israel (CIDI) had reported the website to the police.[249] In addition, as was already noted in the Opinion of the EU Network of Independent Experts on Fundamental Rights on violent radicalisation[250], the Dutch Government is currently preparing a legislative proposal to criminalise the *apologie du terrorisme*. According to the draft text, a new provision (Article 137h) would be inserted in the Criminal Code. It would prohibit, *inter alia*, the glorification or denial of international crimes, crimes against humanity and terrorist offences which carry life imprisonment, where the person concerned knows or could have known that such statements will or may cause a serious disturbance of public order. Offenders may be fined or imprisoned for a maximum period of a year. Sentences are doubled in case of habitual offenders and where two or more persons co-operate. In **Poland**, in accordance with the contents of article 13 § 1 of the Penal Code, anyone who, with the intent to commit a prohibited act, directly attempts its commission through his behaviour, although this does not subsequently ensue, shall be held liable. In accordance with the contents of article 14 § 1, this attempt is subject to a penalty within the limits of the punishment provided for the given offence. Based on Article 256, in connection with Article 13 of the Penal Code, it is possible to penalise an individual who attempts to publicly promote a fascist or other totalitarian system of state or incite hatred on grounds of differences in national, ethnicity, race or religion or due to the lack of any religious denomination. Based on Article 257, in connection with Article 13 of the Penal Code, it is also possible to penalise an individual who attempts to publicly insult a group of persons or a particular individual due to his/her national, ethnic, racial or religious origin or due to the lack of denomination, or for these reasons attempts to violate the personal inviolability of another individual. In **Slovenia**, Article 300 of the Penal Code was amended in 2004 in order to meet the requirements, determined in the Convention of the Council of Europe on cybercrime (signed in Budapest on 23 November 2001) and the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Accordingly, denial, gross minimisation, approval or justification of genocide or crimes against humanity were added to the elements of crime, and Paragraph 3 was amended since

[248] Est puni d'un emprisonnement de huit jours à six mois et d'une amende de 251 à 25.000 euros ou de l'une de ces peines seulement celui qui, soit par des discours, cris ou menaces proférés dans des lieux ou réunions publics, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au regard du public, soit par tout moyen de communication audiovisuelle, contesté, minimisé, justifié ou nié l'existence d'un ou de plusieurs crimes contre l'humanité ou crimes de guerre tels qu'ils sont définis par l'article 6 du statut du tribunal militaire international annexé à l`accord de Londres du 8 août 1945 et qui ont été commis soit par les membres d'une organisation déclarée criminelle en application de l'article 9 dudit statut, soit par une personne reconnue coupable de tels crimes par une juridiction luxembourgeoise, étrangère ou internationale.
Est puni des mêmes peines ou de l'une de ces peines seulement celui qui, par un des moyens énoncés au paragraphe précédent, a contesté, minimisé, justifié ou nié l'existence d'un ou de plusieurs génocides tels qu'ils sont définis par la loi du 8 août 1985 portant répression du génocide et reconnus par une juridiction ou autorité luxembourgeoise ou internationale

[249] Rechtbank 's Hertogenbosch, 21 December 2004, LJN AR7891.

[250] This Opinion is available on the website of the EU Network of Independent experts on Fundamental Rights : http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm#

confiscation is almost impossible in an information system. In the **Slovak Republic,** the new Article 422 of the Criminal Code punishes 'any person who publicly denies, calls in question, approves or justifies a holocaust'. In **Spain**, Article 607 (2) of the Penal Code punishes the denial of the Holocaust, dissemination by any means of ideas or doctrines which deny or justify the crimes detailed in Article 607 (1) of the Criminal Code (not. crimes against humanity) related to genocide or purport to rehabilitate regimes or institutions which advocate these crimes. Eventually, in **Sweden** and in the **United Kingdom**, at the time of writing there are neither provisions nor draft bills on the subject matter[251].

2.5. The incrimination of the conduct of 'Instigating, aiding, abetting and attempting the conduct mentioned above'.

Article 5 of the Proposal for a Council Framework Decision on combating racism and xenophobia[252] request Member States to ensure 'that instigating, aiding, abetting or attempting to commit an offence referred to in Article 4 [i.e. offences concerning racism and xenophobia] is punishable'. While some of the Member States expressly provide provisions on the instigating, aiding, abetting or attempting of racially motivated offences, others apply their general criminal rules to these conducts.

As to the first category of States, in **Austria** for instance, the Prohibition Statute criminalises the recruitment of members of National-Socialist organisations as well as financial contributions or other forms of supporting such organisations (Section 3 lit a no 3, Sec 3 lit b). Any 'abetment' or 'attempt' to commit such crime is equally punishable (Section 12, 15 Penal Code). If a person engaged in founding, participating in or supporting a National-Socialist organisation and out of her/his free will interrupts these actions before public authorities get notice, Sec 3 lit c establishes that the person concerned is not punishable. In **Cyprus**, once the Law Ratifying the Additional Protocol to the Convention on Cybercrime concerning the Criminalisation of Acts of Racist or Xenophobic Nature committed through Computer Systems will enter into force, Section 8 of the said law criminalises the 'aiding' and 'abetting' of any of the crimes referred to in sections 4-7 of the said Law. In **Ireland**, Section 4(1) of the 1989 Act makes it a criminal offence for anyone to 'prepare' or be in possession of any written material or any form of recording, whether audio or visual, with a view to distributing such material, in circumstances were such material is threatening, abusive or insulting and is intended or, having regard to all the circumstances, is likely to stir up hatred. This would appear to extend the legislation to the inchoate offence of 'attemp'. In the **Netherlands**, Article 137f Criminal Code[253] provides that 'A person who takes part in activities, or who extends *financial or other material support* to activities, aimed at discrimination against persons on the grounds of race, religion or personal beliefs, their sex or their hetero-or homosexual orientation, is liable to a term of imprisonment of not more than three months, or a fine of the second category'.

Other Member States apply their general criminal law to these issues. In the **United Kingdom**, there are no specific offences but such conduct would be covered by the general criminal law that makes it an offence to 'conspire', to 'attempt' or to 'assist' the commission of an offence. Similarly in the **Czech Republic**, the conducts punishable under the Criminal Code also cover the 'preparation' of a crime, 'attempt' to commit a crime, 'organizing' of a crime, 'instigating / abetting' and 'assisting / aiding' a crime. In **Belgium,** Article 51 of the Penal Code would apply to these offences too but it may

[251] In **Sweden**, the specially appointed Commission of Inquiry presented a report in 2002 with a number of proposals, *inter alia*, the introduction of a new Act on International Crimes containing provisions on criminal responsibility for genocide, crimes against humanity and war crimes. The Commission suggested with the provisions of the Rome Statute as its primary model a new wording of Chapter 2 of the Swedish Penal Code concerning the competence of Swedish courts in criminal cases, i.e. the new legislation will make it possible to hold individuals responsible for genocide, crimes against humanity and war crimes (SOU 2002:98, Internationella brott och svensk jurisdiktion. www.riksdagen.se).

[252] Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia, COM (2001) 664 final.

[253] Article 137f of the Criminal Code reads: 'Hij die deelneemt of geldelijke of andere stoffelijke steun verleent aan activiteiten gericht op discriminatie van mensen wegens hun ras, hun godsdienst, hun levensovertuiging, hun geslacht of hun hetero- of homoseksuele gerichtheid, wordt gestraft met gevangenisstraf van ten hoogste drie maanden of geldboete van de tweede categorie'.

be too general a provision in order to punish the attempt to commit an offence, unless certain material acts have taken place which may be seen as the first steps towards the commission of the offence. In **Denmark,** Section 21 of the Danish Criminal Code criminalizes an unsuccessful 'attempt' of a criminal act; the sanction can be the same as if the criminal act was carried out. However, the perpetrator must have risked at least 4 months imprisonment, if he had succeeded in his criminal intentions. No specific reference to racist motivated acts is stipulated in the provision, but all criminal acts are covered. Section 23 of the Danish Criminal Code criminalizes 'instigating', 'aiding' and 'abetting' a criminal act. The sanction can be the same as if the criminal act was carried out by the person himself. No specific reference to racist motivated acts is stipulated in the provision, but all criminal acts are covered. In **Estonia**, 'instigating', 'aiding', 'abetting' and 'attempting' the conduct s at stake are covered by the general part of the Criminal Code. In **France**, Article 23 of the Law of 29 July 1881 regarding the freedom of the press punishes the complicity of crimes and offences committed by the press.[254] In **Finland**, 'instigating' (chapter 5 section 5 of the Penal Code), and 'aiding' and 'abetting' (5:6) in the said crimes are criminal acts. 'Attempting' the crime of ethnic agitation is not (5:1). In **Germany**, the 'attempt' of these conducts is not punishable. 'Instigating' (Section 26) and 'accessoryship' (Section 27 Criminal Code) are punishable. In **Hungary,** the general rules of the Criminal Code for 'attempt', 'aiding', 'instigating', and 'abetting' apply for the crime incitement against community. According to article 16 of the Criminal Code 'The person, who commences the perpetration of an intentional crime, but does not finish it, shall be punishable for 'attempt'. The item of punishment of the finished crime shall be applied for the attempt as well. Article 18 refers to the culpability for 'preparation': '(1) If the law orders especially, that who provides for the perpetration of a crime the conditions required therefor or facilitating that, who invites, offers for, undertakes its perpetration, or agrees on joint perpetration, shall be punishable for preparation.' Finally, Article 21 applies to 'abetting': '(1) Abettor is a person who intentionally persuades another person to perpetrate a crime. (2) Accessory is, who intentionally grants assistance for the perpetration of a crime. (3) The item of punishment established for the perpetrators shall also be applied for the accomplices. In **Latvia** the General part of the Criminal Law contains the provisions which are applicable for all substantive provisions of this law, and regulates how the person should be punished for instigating, aiding, abetting and attempting of crimes[255]. In **Luxembourg,** according to Article 67

[254] Article 23 de la Loi du 29 juillet 1881 sur la liberté de la presse : 'Seront punis comme complices d'une action qualifiée crime ou délit ceux qui, soit par des discours, cris ou menaces proférés dans des lieux ou réunions publics, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au regard du public, soit par tout moyen de communication audiovisuelle, auront directement provoqué l'auteur ou les auteurs à commettre ladite action, si la provocation a été suivie d'effet. Cette disposition sera également applicable lorsque la provocation n'aura été suivie que d'une tentative de crime prévue par l'article 2 du Code pénal»

[255] **Section 15.** Completed and Uncompleted Criminal Offences

[..] (2) Preparation for a crime and an attempted crime are uncompleted criminal offences ; (3) The locating of, or adaptation of, means or tools, or the intentional creation of circumstances conducive for the commission of an intentional offence, shall be considered to be preparation for a crime if, in addition, it has not been continued for reasons independent of the will of the guilty party. Criminal liability shall result only for preparation for serious or especially serious crimes; (4) A conscious act (failure to act), which is directly dedicated to intentional commission of a crime, shall be considered t; be an attempted crime if the crime has not been completed for reasons independent of the will of the guilty party ; (5) Liability for preparation for a crime or an attempted crime shall apply in accordance with the same section of this Law as sets out liability for a specific offence ; (6) A person shall not be held criminally liable for an attempt to commit a criminal violation.

Section 20. *Joint Participation*

(1) An act or failure to act committed knowingly, by which a person (joint participant) has jointly with another person (perpetrator), participated in the commission of an intentional criminal offence, but he himself or she herself has not been the direct perpetrator of it, shall be considered to be joint participation. Organisers, instigators and accessories are joint participants in a criminal offence ; (2) A person who has organised or directed the commission of a criminal offence shall be considered to be an organiser ; (3) A person who has induced another person to commit a criminal offence shall be considered to be an instigator ; (4) A person who knowingly has promoted the commission of a criminal offence, providing advice, direction, or means, or removing impediments for the commission of such, as well as a person who has previously promised to conceal the perpetrator or joint participant, the instruments or means for committing the criminal offence, evidence of the criminal offence or the objects acquired by criminal means or has previously promised to acquire or to sell these objects shall be considered to be an accessory ; (5) A joint participant shall be held liable in accordance with the same Section of this Law as that in which the liability of the perpetrator is set out ; (6) Individual constituent elements of a criminal offence which refer to a perpetrator or joint participant do not affect the liability of other participants or joint participants ; (7)

the Penal Code, any kind of behaviour, which may consist in assisting the main author of the deed us punishable as a deed of accomplice or even of co-author. In **Malta**, according to the general criminal law provisions band to the notions of complicity and attempts, it is quite clear that the above crimes are capable of both 'complicity' and 'attempt', and whoever renders himself an accomplice in the commission of such crimes or attempts to commit same would be punishable under Maltese law in terms of the general provisions regarding complicity and attempts. In **Poland**, in accordance with the contents of Article 13 § 1 of the Penal Code, anyone who, with the intent to commit a prohibited act, directly 'attempts' its commission through his behaviour, although this does not subsequently ensue, shall be held liable. In accordance with the contents of article 14 § 1, this attempt is subject to a penalty within the limits of the punishment provided for the given offence. Based on Article 256, in connection with Article 13 of the Penal Code, it is possible to penalise an individual who attempts to publicly promote a fascist or other totalitarian system of state or incite hatred on grounds of differences in national, ethnicity, race or religion or due to the lack of any religious denomination. Based on Article 257, in connection with Article 13 of the Penal Code, it is also possible to penalise an individual who attempts to publicly insult a group of persons or a particular individual due to his/her national, ethnic, racial or religious origin or due to the lack of denomination, or for these reasons attempts to violate the personal inviolability of another individual. In **Portugal**, the 'forms of participation' in a crime are defined in the first part of the Penal Code. Article 23 of the Penal Code prescribes a general rule, according to which the attempt of a crime is punishable only when the crime itself is punishable with more than 3 years of imprisonment, which is the case of the crimes stated in Articles 132 (homicide) and 239 (genocide). Abetting is also punishable, according to Article 27 of the Penal Code. Instigating and aiding is also punishable (Art. 240). In **Slovenia** the general rules of criminal law would also apply: Article 26 of the Penal Code (Criminal Solicitation), Article 27 of the Criminal Code (Criminal Support), Article 28 of the Penal Code (Punishability of Those Soliciting or Supporting a Criminal Attempt) and Article 29 of the Penal Code (Limits of Criminal Liability and Punishability of Accomplices).

3. The ban of racist symbols

Member States are relatively divided on the issue of the ban of racist symbols. Whereas certain Member States such as **Austria, Germany, Hungary, Latvia, Slovak Republic** and **Sweden** do provide an explicit prohibition to wear certain symbols or insignia, other Member States have decided to address this issue through general rulings or through specific rulings but applying only in specific areas (see eg **Portugal** and **Spain** that have enacted laws that prohibit to wear racist insignia or to show racist symbols during sport events).

In **Austria**, according to section 1 and 3 Insignia Act[256] (*Abzeichengesetz*) it is forbidden to publicly wear, display, depict or disseminate insignia of an organisation that is prohibited in Austria under

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If a joint participant has not had knowledge of a criminal offence committed by a perpetrator or other joint participants, he or she shall not be held criminally liable for such ; (8) If the perpetrator has not completed the offence for reasons independent of his or her will, the joint participants are liable for joint participation in the relevant attempted offence. If the perpetrator has not commenced commission of the offence, the joint participants are liable for preparation for the relevant offence ; (9) Voluntary withdrawal, by an organiser or instigator from the completing of commission of a criminal offence shall be considered as such only in cases when he or she, in due time, has done everything possible to prevent the commission with his or her joint participation of the contemplated criminal offence and this offence has not been committed. An accessory shall not be held criminally liable if he or she has voluntarily refused to provide promised assistance before the commencement of the criminal offence.

The offence included in the first paragraph of the Section 78, as well as in the Section 150 is a less serious crime (an intentional offence for which the Criminal Law provides for deprivation of liberty for a term exceeding two years but not exceeding five years) The offence included in the second paragraph of the Section 78 is a serious crime (an intentional offence for which the Criminal Law provides for deprivation of liberty for a term exceeding five years but not exceeding ten years).

[256] Federal Law Gazette [BGBL] 84/1960 as amended by BGBL 117/1980.

Austrian law, particularly under the Prohibition Statue[257]. Wearing neo-Nazi symbols is therefore considered as an offence under the Insignia Act in connection with the Prohibition Statute and can be fined up to 720 Euro. Insignia include emblems, symbols and signs. This prohibition also applies to insignia that, because of their similarity or their evident purpose, are used as substitutes for one of the above mentioned insignia. In **Germany**, Section 86a of the Criminal Code prohibits the use of symbols of 'unconstitutional organizations'[258]. Taking into account the context of Section 86a and Section 86 of the Criminal Code, these organizations are:

a) parties which have been declared to be unconstitutional by the Federal Constitutional Court or parties or organizations, as to which it has been determined, no longer subject to appeal, that they are a substitute organization of such a party (Section 86 paragraph 1 no. 1 Criminal Code),
b) organizations, which have been banned, no longer subject to appeal, because they are directed against the constitutional order or against the idea of international understanding, or as to which is has been determined, no longer subject to appeal, that they are a substitute organization of such a banned organization (Section 86 paragraph 1 no. 2 Criminal Code),
c) and former National Socialist organizations.

The dissemination and public use of the symbols are punishable according to Section 86a paragraph 1 no.1. The producing, stocking, import and export of symbols is punishable according to paragraph 1 no. 2. Furthermore according to paragraph 2 of Section 86a of the Criminal Code the use of symbols which are so similar as to be mistaken for those named in sentence 1, is punishable. In **Hungary**, Article 269/B of the Criminal Code prohibits the use of symbols of despotism[259]: '(1) The person who (*a)* distributes; (*b)* uses before great publicity; (*c)* exhibits in public; a swastika, the SS sign, an arrow-cross, sickle and hammer, a five-pointed red star or a symbol depicting the above, - unless a graver crime is realized - commits a misdemeanour, and shall be punishable with fine. (2) The person, who commits the act defined in subsection (1) for the purposes of the dissemination of knowledge, education, science, or art, or with the purpose of information about the events of history or the present time, shall not be punishable. (3) The provisions of subsections (1) and (2) do not extend to the official symbols of states in force.' In **France**, Article R 645 – 1 of the Penal Code, when prohibiting the wearing of uniforms and/or emblems reminiscent of those of persons responsible for crimes against humanity, refers to the uniforms worn by the members of an organisation declared criminal under Article 9 of the Charter of the International Military Tribunal, appended to the London Agreement of 8 August 1945, or by a person found guilty of crimes against humanity by a French or international

[257] Sec 12 para 1 Association Act (*Vereinsgesetz*) prohibits associations if their purpose, name or form of organisation is illicit; See: Österreich, BGBl I 66/2002, (26.04.2002).

[258] *Symbols* within the meaning of Section 86a paragraph 1 of the Criminal code mean characteristic signs which may be recognized by in the form of visible or audible, embodied or un-corporeal symbols, that give uninhibited third persons the impression of a symbol of an organization of that kind which is referred to in Section 86 paragraph 1 no. 1, 2 or 4 Criminal code. Section 86a paragraph 2 sentence 1 designates as symbols, in particular, flags, insignia, uniforms, slogans and forms of greeting. The term *use* in the meaning of Section 86a of the Criminal code stands for the showing or use of the symbols under circumstances, which may be understood as a confession to the aims of the banned organization. Every use that makes the symbol optical or acoustical perceptible is included in this term.

[259] In Spring 2000 this passage criminalizing the use of dictatorial symbols was declared constitutional. Although the grounds of the judgment [Constitutional Court decision 14/2000. (V.12.)] again repeat the arguments underpinning Decision 30/1992. AB határozat of 29 March 1992 of the Hungarian Constitutional Court on the issue of incitement, giving special place to dignity of communities and endangering of public peace as possible grounds for restricting freedom of speech, the judges do not identify another basic right of greater weight regarding the constitutionality of restriction, as specified in the test used in the decision, so legitimization of lesser weight had to be sought. The judgment claimed to have found this in the fact that 'Article 61 of the Constitution does not defend statements of opinion incompatible with constitutional values.' Activity incompatible with the constitution is specified with reference to Article 2, Paragraph (3) of the Constitution which provides that no organization of society, state body or citizen may conduct activity directed at the violent acquisition or exercise of power, or at exclusive possession of power. Under this constitutional provision, everybody is entitled and obliged to act against such endeavors by legal means. At the same time, the majority constitutional judges failed to prove that the activity of persons committing an offense under the provision is necessarily directed at violent acquisition or exercise of power, or exclusive possession of power. This is obviously not provided by the challenged Article 269/B. The grounds for judgment given in the majority decision at one point even acknowledge the lack of a dangerous situation by saying, 'the provision prohibits preparatory conduct, and the constitutional state defends public peace, with due heed to recent historical events.'

court[260]. In **Latvia**, the ban of racist symbols is included only in the Law on the Meetings, Demonstrations and Pickets but not in Criminal law[261]. **Poland** lacks regulations that would ban racist symbols. However, in accordance with the interpretation of Article 256 of the Penal Code, the ban on public propagation of a fascist or other totalitarian political system represents a ban on any behaviour consisting in the public presentation of these political systems with the intent to convince others[262]. This also includes the public presentation of fascist symbols and gestures[263]. In **Portugal,** the Law on Preventive and Punitive Measures to Adopt in case of sport violence expressly forbids the use of signs or symbols that may incite to violence racism and xenophobia[264]. Similarly in **Spain** there are very few norms regulating racist symbols. Wearing racist symbols could fall under Article 18 of the Penal Code but under very restrictive conditions. However the context in which this issue is addressed is the wearing of racist symbols at sport events. Article 66 of Organic Law 10/1990 of 25 October prohibits the introduction and the display of racist symbols, signs, insignia at during sport events. In **Sweden**, according to a precedent-setting ruling by the Supreme Court in 1996 the prohibition against threats or expressions comprising contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious belief or sexual orientation (Chapter 16, Section 8 of the Penal Code) includes the use of Nazi symbols or other expressions of racist opinions in public. A person wearing such symbols shall be sentenced for agitation against a national or ethnic group. On the basis of the jurisprudence and the relevant provision on racial agitation in the Penal Code, the Act banning the wearing of uniforms or similar clothing exhibiting the wearer's political opinions was considered unnecessary and it was abolished on 1 July 2002. In the **Slovak Republic**, the new Criminal Code – which will come into force on 1 January 2006 – contains the elements of crimes of support for and propagation of movements leading to the suppression of civil rights and freedoms that may be considered as the ban of racist symbols. Section 422 paragraph 1 of the new Criminal Code[265] prohibits any public demonstration of sympathy for the movements leading to the suppression of civil rights by using flags, insignias, uniforms and slogans[266].

With regard to the other Member States, often the issue of the wearing of racist symbols falls under general provisions of criminal law. In **Belgium**, Law of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia does not enshrine any provisions concerning the ban of racist symbols[267]. The fact of wearing racist symbols could however fall under Article 1(3) of the Law of 30 July 1981 if it could be considered as inciting discrimination, violence or hatred against a person or a

[260] ECRI Second Report on France. This Report is available on http://www.coe.int/T/e/human_rights/ecri/1-ECRI/3-General_themes/3-Legal_Research/1-National_legal_measures/France/France%20SR.asp#P339_22612

[261] Adopted on 16.01.1997, in force since 13.02.1997, with amendments adopted till 25.03.2004.
Section 11. During the meetings, demonstrations and pickets it is prohibited for the participants of that events:
[..] 4) to wear an uniform or a dress similar to uniform with a purpose to express certain political views;
5) to use the flags, emblems, hymns and symbols (also stylized) of former USSR, Latvian SSR and Nazi Germany; [..].

[262] The Supreme Court's ruling of 28 March 2002, No. KPZ 5/02.

[263] S. Hoc, Comments to the Supreme Court's resolution of 28 March 2002, I KPZ 5/02, The rulings of Common Courts, 2002/12/164 - vol.1

[264] Law nº 38/98 of 4 of August.

[265] Section 422 of the New Criminal Code
Section 422/1
A person who publicly, particularly by using flags, insignias, uniforms and slogans demonstrates sympathy for movements which by using violence, the threat of violence or threat of other aggravated harm aim at suppressing citizen's rights and freedoms shall be sentenced to a term of imprisonment of from six months to three years.
(…)

[266] Section 422/1
A person who publicly, particularly by using flags, insignias, uniforms and slogans demonstrates sympathy for movements which by using violence, the threat of violence or threat of other aggravated harm aim at suppressing citizen's rights and freedoms shall be sentenced to a term of imprisonment of from six months to three years.

Section 422/2
The same punishment shall be imposed on any person who publicly denies, calls in question, approves or justifies a holocaust.

[267] Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, *M.B.*, 8 August 1981. This law has been amended by the Law of 15 February 1993, *M.B.,* 19 February 1993 ; Law of 12 April 1994 (*M.B.*, 14 May 1994) ; Law of 7 May 1999 (*M.B.*, 25 June 1999) ; Law of 20 January 2003 (*M.B.*, 12 February 2003) and Law of 23 January 2003 (*M.B.*, 13 March 03).

group as defined by this provision, or if could be considered as announcing an intention towards discrimination, hatred or violence against a person or a group as defined by this provision. In the **Czech Republic** for instance, the conduct will be punishable under Section 260/1,2/a (which prohibits the support and propaganda of movements aimed at suppressing man´s rights and freedoms)[268] or 198a (which prohibits the incitement of national and racial hatred) of the Criminal Code. The symbols are recognized as such when they are connected with the movement pursuant to Sec. 260, if there are doubts of whether the symbol is connected with the movement, authorized expert is invited to give expertise. In **Lithuania,** the ban does not tackle racist symbols or insignia as such but this conduct is however likely to fall under Article 214 of the Code of Administrative Offences, which prohibits the 'production or keeping of printed matter, video, audio or other products propagating national, racial or religious discord with the aim of dissemination and well as its circulation or public showing'. In **Slovenia** too, it would fall under the provisions of the Penal Code or the Media Act. In **Finland**, although there is no domestic legislation concerning the ban on racist symbols as such, the use of such symbols in public can however be deemed threatening, defamatory or insulting in particular instances, and may thus be punishable under Chapter 11, Section 8 of the Penal Code. Similarly in **Ireland**, there is no specific domestic legislation concerning the ban of racist symbols as such, however, insofar as the Act prohibits the public display, distribution or broadcasting of material, including 'any sign or other visual representation', which is threatening, abusive or insulting and is intended, or likely, to stir up hatred, then it is fair to assume that if a given symbol were to become associated with racism and xenophobia within the Irish jurisdiction, then such a symbol would fall under the general scheme of the Prohibition of Incitement to Hatred Act, 1989. In **Italy**, the use of racist symbols could turn into the crime of 'apologia del fascismo' and be punished under the article forbidding the apology of fascism (art. 4 of law 645 of 1952)[269]. In **Luxembourg**, the ban of racist symbols is not foreseen as such, but may be included in the prohibition of incitement of Article 457-1 of the Penal Code (emblems or any other medium). **Poland** lacks regulations that would ban racist symbols. However, in accordance with the interpretation of Article 256 of the Penal Code, the ban on public propagation of a fascist or other totalitarian political system represents a ban on any behaviour consisting in the public presentation of these political systems with the intent to convince others[270]. This also includes the public presentation of fascist symbols and gestures[271]. In the **Netherlands**, there is no express prohibition on the use of nazi or racist symbols (such as the SS symbol or the White Power sign). But there is case-law that the writing of swastikas and SS-signs on a wall amounts to incitement to racial discrimination, and is therefore prohibited under Article 137d Criminal Code.[272] A man who had put on traffic signs stickers with a Celtic Cross and texts against migrant workers, was found guilty of the same offence.[273] Publicly wearing a black swastika on a red armband has been interpreted as

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[268] Sec. 260 – *Support and Propaganda of Movements Aimed at Suppressing Man´s Rights and Freedoms*
Sec. 260/1: A person who supports or propagates a movement which aims at suppressing the rights and freedoms of a man (human being), or which promotes national, racial, class or religious hatred, or hatred against another group of persons shall be sentenced to a term of imprisonment of from one to five years.
260/2: An offender shall be sentenced to a term of imprisonment from three to eight years if: (a) he commits an act pursuant to subsection (1) by using the press (print), film, radio or TV broadcasting, or some other similarly efficient means; or (b) he commits such act as a member of an organized group; or (c) he commits such act during a state of emergency or a state of war.

[269] Law 20 giugno 1952, n. 645 - 4. Apologia del fascismo.
- Chiunque fa propaganda per la costituzione di una associazione, di un movimento o di un gruppo avente le caratteristiche e perseguente le finalità indicate nell'articolo 1 è punto con la reclusione da sei mesi a due anni e con la multa da lire 400.000 a lire 1.000.000 (1). Alla stessa pena di cui al primo comma soggiace chi pubblicamente esalta esponenti, princìpi, fatti o metodi del fascismo, oppure le sue finalità antidemocratiche. Se il fatto riguarda idee o metodi razzisti, la pena è della reclusione da uno a tre anni e della multa da uno a due milioni (4). La pena è della reclusione da due a cinque anni e della multa da 1.000.000 a 4.000.000 di lire se alcuno dei fatti previsti nei commi precedenti è commesso con il mezzo della stampa (1). La condanna comporta la privazione dei diritti previsti nell'articolo 28, comma secondo, numeri 1 e 2, del c.p., per un periodo di cinque anni (5). (1) La misura della multa è stata così elevata dall'art.113, quarto comma, L. 24 novembre 1981, n. 689. La sanzione è esclusa dalla depenalizzazione in virtù dell'art.32, secondo comma, della legge sopracitata. (4) Comma così sostituito dall'art.4, D.L. 26 aprile 1993, n. 122. (5) Così sostituito dall'art.10, L. 22 maggio 1975, n. 152.

[270] The Supreme Court's ruling of 28 March 2002, No. KPZ 5/02.

[271] S. Hoc, Comments to the Supreme Court's resolution of 28 March 2002, I KPZ 5/02, The rulings of Common Courts, 2002/12/164 - vol.1

[272] See, e.g., Rechtbank Leeuwarden, 13 May 1993.

[273] Gerechtshof 's Hertogenbosch, 11 October 2004, LJN AR3683.

expressing support for the nazi ideology, which is insulting to Jews and others, and hence in breach of Article 137c CC. [274] Several individuals have been prosecuted for selling *Mein Kampf*. When a copy was offered on a flea market in Amsterdam, the Regional court found a breach of Article 137e CC and ordered confiscation of the book, which it considered defamatory of Jews and inciting to racial discrimination. The court did not impose further penalties since the book seller had only one copy in his possession and he did not intend to impart the ideas contained in *Mein Kampf* (but merely wanted to make profit). The court also observed that the book is available in libraries and may be obtained through Internet, which had confused the suspect as to the criminal nature of his act.[275] A similar judgment was passed a year later in Dordrecht, where a salesman at a book market had a copy of the Dutch translation, as well as an English version of *Mein Kampf,* in his stand with books on the Second World War. [276] Although the present Opinion of the Network is confined to the application of criminal law, it may be noted that in civil proceedings it was held that a school could remove pupils who wear sweaters of the brand *Lonsdale* in combination with a jacket, thereby showing the letters NSDA, a reminder of nazi-party NSDAP. The court found that the decision to remove the pupils if they insist on wearing these clothes did not violate the right to freedom of expression.[277]

4. The incrimination of forms of 'institutional racism'.

Article 4 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides that States 'shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination'. According to paragraph 18 (h) of the ECRI General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination, criminal law should penalise 'racial discrimination in the exercise of one's public office or occupation'[278]. The need for an incrimination of forms of 'institutional racism' – whether by civil servants in general or by members of the police forces – also appears in the conclusions and recommendations of the Committee on the Elimination of Racial Discrimination. In its 2000 Conclusion on **Malta** for instance, the Committee notes with concern that the new Police Code (Malta Police Force Act) provides that officers found to have treated persons in a discriminatory manner in the course of their duties are subjected to disciplinary action only. It recommends to the State party to 'take the necessary measures to ensure that criminal charges are brought against police officers for acts violating the provisions of the Convention'[279].

The Proposal for a Council Framework Decision on combating racism and xenophobia does not envisage addressing the issue of institutional racism, understood as racist acts or racial discrimination committed or incited by public authorities or public institutions, national or local. Even though Article 9 of the Proposal tackles the liability of legal persons for racist or xenophobic offences ('Member States shall ensure that legal persons can be held liable for the forms of conduct referred to in Articles 4 and 5, committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person' (…)), Article 3 of the Proposal excludes that public authorities fall within the ambit of this provision. It explicitly provides that the notion of 'legal person' – which shall apply for the purposes of the Framework Decision – means 'any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations'.

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[274] Gerechtshof Leeuwarden, 26 April 1994, confirmed by the Supreme Court on 21 February 1995, *NJ* 1995, no. 542.

[275] Rechtbank Amsterdam, 18 November 1998 (*Rechtspraak Reassendiscriminatie 1995-2000 [RR]*, nr. 499), upheld by the Gerechtshof Amsterdam on 20 April 2000 (rolnr. 23-001459-99).

[276] Rechtbank Dordrecht, 9 November 1999, *RR* 1995-200, nr. 531.

[277] Judgment of 21 March 2003, LJN AF6131.

[278] According to the Explanatory memorandum attached to ECRI General Policy Recommendation No.7, 'racial discrimination in the exercise of one's public office or occupation includes notably the discriminatory refusal of a service intended for the public, such as discriminatory refusal by a hospital to care for a person and the discriminatory refusal to sell a product, to grant a bank loan or to allow access to a discotheque, café or restaurant'.

[279] Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Malta, U.N. Doc. CERD/C/304/Add.94 (2000).

As regards the situation in the Member States, most of them enshrine provisions regarding the duties of civil servants in their *civil or administrative legislation*. In **Austria** for instance, in cases were civil servants issue administrative decisions which are discriminatory on the grounds of race, ethnic origin, nationality etc. they can be challenged by the person concerned. The legal basis for the prohibition of discriminatory administrative decisions is to be found in Article 7 of the Federal Constitution[280] *(Bundes-Verfassungsgesetz)*, Article 2 of the Basic Act[281] (*Staatsgrundgesetz*), Article 66 para 1 and 2 of the State Treaty of Saint Germain[282] (*Staatsvertrag von Saint Germain*), in the Federal Constitutional Act implementing the International Convention on the Elimination of All Forms of Racial Discrimination[283] and as well in Article 14 ECHR[284] (only if other rights of the Convention are affected). Section 43 of the Civil Servant Act[285] (*Beamtendienstrechtsgesetz*) establishes that civil servants carrying out their duties at the federal level are obliged to act impartially and avoid anything that could lead to the impression that they are acting biased. Disciplinary sanctions for breaches of this obligation can range from admonition to dismissal (Section 92 Civil Servant Act). The person, who was discriminated is not considered to be a party in the disciplinary proceedings and has therefore no possibility to challenge the decision. Similar regulations can be found in the law of the federal provinces, applicable on the employment relationships between the federal provinces, the communities and the association of communities and their civil servants. Some of them express explicitly, that discrimination on grounds as race or ethnic origin form a breach of the official duties of the civil servants (e.g. Section 10 of the Corinthian Antidiscrimination Act[286] (*Kärtner Antidiskriminierungsgesetz*) and Section 13 of the Tyrolean Antidiscrimination Act 2005[287] (*Tiroler Antidiskriminierungsgesetz*); others are formulated in more general terms, comparable to the Civil Servant Act, holding that civil servants have to act impartially, when carrying out their duties. Pursuant to Section 33 of the Security Police Act in connection with Section 5 of the Directive for Interventions by Members of the Public Security Service[288], police officers have to refrain from any behaviour that might give rise to the impression of prejudice or could be perceived as discriminatory on grounds of gender, race or colour, national or ethnic origin, religious denomination, political opinion or sexual orientation. In case a person feels discriminated according to this provision he/she can file a complaint with the Independent Administration Review Board (*Unabhängiger Verwaltungssenat)*. In **Cyprus** it was reported in the daily press[289] that a law proposal is being discussed according to which a Committee is to be established which will review the acts of the police, and especially complaints for ill-treatment by the Police and any other human rights violations. The Council of Ministers passed the law proposal which is entitled *Law on the Police (Independent Committee Investigating Complaints) of 2005*.[290] The proposal is expected to be discussed before the House of Parliament. In **Italy**, Legislative Decree of July 25, 1998, n. 286 in particular at Articles 43 and 44 consider as illegal every act of discrimination based on racial, ethnic, national or religious grounds against foreigners as well as against citizens. The remedy is civil in nature and based on compensation for damages. The persons guilty of the discrimination may be, inter alia, 'public officer or a person assigned a public service or a person operating a service of public necessity who, in performing his duties, carries out or omits acts which are not provided for by law with regard to an Italian or foreign citizen, only because he is foreign or belongs to a particular race, ethnic group or

[280] Federal Law Gazette [BGBL] 1/1930 as last amended BGBL 106/2004.
[281] Staatsgrundgesetz vom 21. Dezember 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder, RGBl. Nr. 142/1867 as last amended by BGBL 648/1988.
[282] Staatsvertrag von Saint - Germain -en-Laye vom 10. September 1919, StGBl. 303/1920 as last amended by BGBl 179/2002.
[283] Bundesverfassungsgesetz zur Beseitigng rassischer Diskriminierung (RassDiskrBVG), (BGBl) 390/1973.
[284] Konvention zum Schutze der Menschenrechte und Grundfreiheiten, [BGBL] 210/1958 as last amended by BGBL III 179/2003.
[285] Federal Law Gazette [BGBL] 333/1979 as amended by BGBL I 80/2005.
[286] Gesetz vom 21. Oktober 2004, mit dem die Kärntner Landesverfassung geändert und ein Gesetz über das Verbot der Diskriminierung auf Grund der ethnischen Zugehörigkeit, der Religion, der Weltanschauung, einer Behinderung des Alters, der sexuellen Ausrichtung und des Geschlechts erlassen werden, Law Gazette of Corinthia [LGBL] 63/2004.
[287] Gesetz vom 1. Februar 2005 über das Verbot von Diskriminierungen (Tiroler Antidiskrminierungsgesetz 2005 - TADG 2005), Law Gazette of Tyrol [LGBL] 25/2005.
[288] Richtlinien-Verordnung, Federal Law Gazette [BGBL] 266/1993.
[289] Filelefthe ros newspaper, 28 July 2005 and Politis newspaper, 2 August 2005.
[290] _ π___ _____ (_____ ____ _____ _____ ___ ____π____) _____ ___ 2005.

nationality'. In **Latvia**, Section 5 of the Law on Police[291] provides that the operations of the police shall be organised 'observing lawfulness, humanism, human rights, social justice, transparency and authority, and relying on the assistance of the public. The police shall protect the rights and lawful interests of persons irrespective of their citizenship, social, economic and other status, race and nationality, gender and age, education and language, attitude towards religion, political and other convictions [..]'. Similar declarative provisions are included in some other laws regulating the functioning of different institutions. In **Portugal**, Decree-Law 275-A/2000 (Organic Law of the Judiciary Police), establishes in its Article 13-b) that it is the special duty of police officers to act without discrimination on the grounds of ascendancy, sex, race, language, origin territory, religion, political or ideological ideas, education, economic and social condition.

Certain Member States also address the issue of institutional racism through *codes of conduct or internal circulars*. In **Greece**, for instance, Article 5, paragraph 3 of the Code of ethics of the police forces provides that one of the fundamental elements of the behaviour of police forces consist in their duty to avoid any prejudices based on colour, sex, national origin, ideology and religion, sexual orientation, age, disability, family status, economical social status or any other ground.[292] Paragraph 4 of this same Article provides that police officers shall pay particular attention to the protection, inter alia, of the persons members of socially vulnerable groups or minority groups. This Code of ethics has been complemented by internal bills of the Ministry of Public Order and of the National Direction of the Police reaffirming the necessity to combat the development of racist or xenophobic phenomena within the Greek police.

Eventually only few Member States directly address the issue of institutional racism in their *criminal law*. This is the case **Cyprus** where Section 105 of the Penal Code provides that civil servants may be guilty of the offence of 'abuse of power' (a sentence of imprisonment for a term not exceeding two years or a fine not exceeding £1500 CYP may be imposed). This offence may occur when civil servants discriminate an individual during the course of their duties. In **Belgium**, Article 4 of Law of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia[293] – which is a criminal law – as amended by Law of 12 April 1994 reads : 'Any civil servant or public official, any bearer or agent or public authority or public power, who in the exercise of his duties commits discrimination against a person on account of his so-called race, colour, descent, origin or nationality, or who arbitrarily denies any person the exercise of a right or liberty that he may claim, shall be punished by a prison sentence of two months to two years[294]. The same punishments shall apply when the facts are perpetrated against a group, a community or the members of it on account of the so-called race, colour, descent, origin, or nationality of its members or some of them. If the accused shows that he acted on the orders of his superiors, in matters that come under their authority and in which he was in a subordinate position with respect to them, the punishments shall only be applied to the superiors who gave the orders. If civil servants or public officials are accused of having ordered, allowed of facilitated the above-mentioned arbitrary acts, and if they claim that their signature was obtained unawares, they shall be required in such a case to stop the act and to denounce the guilty party, otherwise proceedings shall be taken against him personally. If one of the above-mentioned arbitrary

[291] Adopted on 04.06.1991, in force since 04.06.1991, with amendments adopted till 26.04.2005.

[292] Le Code de déontologie des officiers de la Police (décret présidentiel no 254/2004) prévoit, dans l'art. 5, paragraphe 3, que le devoir d'éviter des préjudices fondés sur la couleur, le sexe, l'origine nationale, l'idéologie et la religion, l'orientation sexuelle, l'âge, le handicap, la situation familiale, le statut économique et social ou autre signe distinctif d'une personne constitue l'un des paramètres fondamentaux du comportement des officiers de la Police.

[293] Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, *M.B.*, 8 August 1981. This law has been amended by the Law of 15 February 1993, *M.B.,* 19 February 1993 ; Law of 12 April 1994 (*M.B.*, 14 May 1994) ; Law of 7 May 1999 (*M.B.*, 25 June 1999) ; Law of 20 January 2003 (*M.B.*, 12 February 2003) and Law of 23 January 2003 (*M.B.*, 13 March 03).

[294] By 'discrimination' in this Act is meant any form of distinction, exclusion, restriction or preference, whose purpose or whose result is or could be to destroy, compromise or limit the equal recognition, enjoyment or exercise of human rights and the fundamental freedoms on a political, economic, social or cultural level, or in any other area of social life (Article 1 of Law of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia). Article 1 (2) adds that any conduct which enjoins to someone to discriminate against another person, a community or a group or any of their members, shall also be considered as constituting a discrimination.

acts is committed by means of the false signature of a public official, the perpetrators of the forgery and those who made fraudulent or malicious use of it shall be punished by ten to fifteen years of hard labour'[295]. Furthermore Article 5 bis of the Law of 30 July 1981, as amended by the Law of 12 April 1994 provides ancillary penalties of ineligibility and disqualification from discharging public duties[296]. In **Latvia**, Section 78 of the Criminal Law forbids commitment of acts knowingly directed towards instigating national or racial hatred or enmity, or knowingly restricting, directly or indirectly, of economic, political, or social rights of individuals or the creating, directly or indirectly, of privileges for individuals based on their racial or national origin. If such acts are committed by a group of persons, a State official, or a responsible employee of an undertaking (company) or organisation, it is qualified as an aggravating factor and lead to the more severe sanction. However, this is individual responsibility not concerned with expressions of institutional discrimination. There are changes prepared in the Criminal Law in line with Race Directive (2000/43/EC). The draft amendments foresee that the second part of the Section 78 will include sanction for breach of prohibition of commitment of acts knowingly directed towards instigating national or racial hatred or enmity if it has caused substantial damage, or is associated with violence, fraud or threats, or is committed by a group of persons, a State official, or a responsible employee of an undertaking (company) or organisation, or is committed using an automatic system of data processing. The second part of the Section 150 then will include sanction for breach of prohibition of discrimination based on gender, age, race, skin colour, nationality or ethnic belonging, religious, political or other conviction, social origin, education, social or property status, kind of employment, state of health or sexual orientation if the substantial damage is caused, or if it is associated with violence, fraud or threats, or where it committed by a group of persons, a State official, or a responsible employee of an undertaking (company) or organisation, or it is committed using an automatic system of data processing. These amendments so far have been adopted only in the first reading (on 7 April 2004). In **France**, Article 432-7 of the Penal Code[297] provides that when the discrimination defined by Article 225-1 of the Penal Code (for the text of this provision, see above) is committed in respect of a natural or legal person, by a person holding public authority or discharging a public service mission, in the discharge or on the occasion of that office or mission, this will be punished by three years' imprisonment and a fine of € 45,000 where it consists: 1° of refusing the benefit of a right conferred by the law; 2° of hindering the normal exercise of any given economic activity. Moreover according to Article 226-19 of the Penal Code, apart from the cases set out by law, the recording or preserving in a computerised memory, without the express agreement of the persons concerned, of name-bearing data which, directly or indirectly reveals the racial origins, political, philosophical or religious opinions, trade union affiliations or the sexual morals of the subjects, is punished by five years' imprisonment and a fine of € 300,000. The same penalty applies to the recording or preserving in a computerised memory of name-bearing information relating to offences, convictions or supervision measures outside the cases provided for by law. In **Spain,** Article 616 of the Penal Code provides that officials or private and public authorities having been found guilty of an offence involving disrcimination may be banned from holding public office. Article 511 of the Penal Code provides that public officials having committed offences within the scope of Article 511 (racial and ethnic discrimination by public officials) shall receive the maximum sentence provided for therein and shall be suspended from their duties. Moreover Article 3 of the Institutional Law 1/1979 of 26 September states that measures taken by prison authorities should not

[295] On this issue, the RAXEN Analytical Report on Legislation, Belgium, 2004 (p. 31) provides the following example:
On 24 December 2002 the Correctional Court of Dendermonde sentenced a Chief of Police to an imprisonment of 9 months with three years postponement for the instigation of police force members to violence against migrants, and for the act of discrimination in his function of Chief of Police (art. 4). The statements of numerous force members and employees showed that the suspect put forward his racist ideas in a rude manner: 'you have to squeeze the shit out of their bodies until you drop dead yourself' and 'you have to beat them until you drop dead yourself, otherwise you haven't done your job properly'. The judge was of the opinion that it was intolerable that a Chief of Police instigated his subordinates to beat up migrants. Even the fact that a small group of migrant youngsters caused trouble in the community could not justify the punishable behaviour of the defendant. The RAXEN Report, which is drafted by the Centre for Equal opportunities and Opposition to Racism, is available on http://eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&catid=418ea9767affb

[296] 'En cas d'infraction visée aux articles 1er, 2, 2 *bis*, 3 et 4 de la présente loi, le condamné peut, en outre, être condamné à l'interdiction conformément à l'article 33 du Code pénal'.

[297] Ordinance no. 2000-916 of 19th September 2000 Article 3 Official Journal of 22nd September 2000 came into force the 1st January 2002

discriminate i.a. on racial grounds. In **Luxembourg**, according to Article 456 of the Penal Code, discrimination as specified in Article 454 of the Penal Code 'committed against a natural person or legal entity, group or community of persons by a person exercising public authority or responsible for a task in the public service, in the exercise of, or while exercising his duties or tasks shall be punishable by a term of imprisonment of from one month to three years and a fine of from 251 euros to 37.500 euros, or one of these punishments alone', where it consists of (1) 'refusal of the benefit of a right granted by law, (2) constraint of the normal exercise of any economic activity whatsoever'. Eventually, in the **Netherlands**, Article 137g and Article 429quater Criminal Code criminalise those who, in the exercise of their public function or profession, discriminate on the basis of race. The Dutch Criminal Code – as all the other Member States Criminal Legislations – does not operate a reversal of the burden of proof.[298] Any racist practices of law enforcement officers could be addressed by the *Nationale ombudsman* or specific complaints bodies supervising the police. This means that any civil servant, including the police, face more severe penalties than private persons in case of violation of the penal code relating to discrimination. In its Conclusions on the Netherlands, the ICERD Committee welcomes the progress made towards the full implementation of Article 4 of the Convention through the adoption of these further amendments to the Criminal Code increasing the maximum penalties for structural forms of systematic racial discrimination[299].

As mentioned above, usually there is no specific criminal regulation for expressions of institutional racism, meaning that the general rules of criminal law apply both to the civil servants and to other citizens. This is the case in **Hungary** and in **Germany** for instance, where there is no specific regulation for institutional racism. In Hungary, investigation against a member of the police is carried out – in every case – by the prosecutor's office, but otherwise the general rules of procedure apply, there is no reversal of proof, the investigating authority has to provide sufficient evidence for conviction. The burden of proof shifts only in cases brought under the Act on equal treatment (Act No. CXXV of 2003). In the **United Kingdom**, there is no legislation with the specific objective of criminalising institutional racism but the focus on 'institutional racism' has been prevalent since it was coined by Sir William MacPherson in his report on the investigation into the killing of a Stephen Lawrence, a black schoolboy (24 February 1999). This found that this was a feature of policing and a range of proposals were advanced in order to deal with it, particularly as regards the training and supervision of the police, the handling of racist incidents and the investigation of complaints against the police. The Home Secretary launched an Action Plan in March 1999 designed to ensure that the police service are giving the tackling of racist incidents and crimes a high priority. Since then the numbers of such incidents recorded by the police has increased, which is at least partly attributable to improved recording practices by the police. There is now a new simplified definition of a racist incident, as recommended by the Stephen Lawrence inquiry: 'any incident which is perceived to be racist by the victim or any other person'. In September 2000, the Association of Chief Police Officers issued a comprehensive guide - Breaking *the Power of Fear and Hate* - for police officers investigating and preventing hate crime, including racist crime. This was the subject of an extensive consultation, which included members of the community and was endorsed by the Lawrence Steering Group. Her Majesty's Inspector of Constabulary (HMIC) have found weakness in police training in community and race relations and the Lawrence Steering Group has endorsed an action plan to ensure that effective training in this area is delivered in all police services to a consistent standard. It has been accepted that all 'stops' as well as 'stops and searches' should be recorded and a copy of the record form be given to those stopped, responding to the concern that a disproportionately high number of 'stops and searches' are carried out by the police against members of ethnic or racial minorities. However, members of such minorities are likely to be the subject of profiling following recent terrorist attacks and this may lead to perceptions of racism, even if this is not actually occurring. Moreover a recent report for the Commission for Racial Equality (*A formal investigation of the police service of*

[298] See, e.g., Rechtbank Dordrecht, 3 December 2003, LJN AN9333, where the 'bouncer' of a bar was charged with refusing entry to Turkish visitors whilst admitting a white visitor: the 'bouncer' was acquitted since the court did not rule out there may have been other reasons than their ethnic background for refusing entry to the complainants.

[299] Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Netherlands, U.N. Doc. CERD/C/64/CO/7 (2004).

England and Wales, March 2005) has shown that there is much to be done. As Sir David Calvert-Smith, who led the investigation, said: 'There is no doubt that the Police Service [in England and Wales] has made significant progress in the area of race equality in recent years. However, there is still a long way to go before we have a service where every officer treats the public and their colleagues with fairness and respect, regardless of their ethnic origin. Willingness to change at the top is not translating into action lower down, particularly in middle-management where you find the ice in the heart of the Police Service. For example, managers are not properly supported or fully trained on how to handle race grievances, so relatively minor issues are often unnecessarily escalated …We also found that none of the organisations we worked with complied fully with the race equality duty. For example, we wanted to find out whether ethnic minority officers were being disproportionately disciplined, but when we asked a sample group of forces for their discipline statistics, two thirds were unable to provide them in the requested format. These forces were either not recording the data as required by the ethnic monitoring duty or were not properly monitoring them. We also found that few forces appeared to be carrying out full race impact assessments of their new policies; risking difficulties arising which could have been ironed out earlier'. The report recommended that racial misconduct is made a separate and, depending on the gravity, sackable offence but this is still a matter of discipline rather than the criminal law. Police forces and authorities, like all other public bodies, have had until May this year to review their race equality schemes. The Commission for Racial Equality is now considering whether their revised schemes come up to scratch before considering whether it needs to go down the legal route to enforce compliance with the law. Eventually it should be noted that in **Sweden**, as from 1 January 2005 there is a special unit (*Riksenheten for polismål*) with nation wide competence and comprised by prosecutors with special skills to handle all the investigations concerning alleged police misconduct, including acts of racism or racial discrimination. Moreover, Swedish authorities have set up two inquires on discrimination at structural or institutional level.[300] In June 2005 the first part of the report on structural discrimination was published.[301] Draft bill preparation within the Government Offices will follow.

[300] Dir. 2003:118, Inquiry into structural discrimination and Dir. 2004:54, Iquiry into Power, Integration and structural discrimination.
[301] SOU 2005:41, Bortom Vi och Dom- teoretiska reflektioner om makt, integration och strukturell diskriminering.

APPENDIX I.

ECRI general policy recommendation N°7 on national legislation to combat racism and racial discrimination

adopted by ECRI on 13 December 2002

The European Commission against Racism and Intolerance (ECRI):

Recalling the Declaration adopted by the Heads of State and Government of the member States of the Council of Europe at their first Summit held in Vienna on 8-9 October 1993;

Recalling that the Plan of Action on combating racism, xenophobia, antisemitism and intolerance set out as part of this Declaration invited the Committee of Ministers to establish the European Commission against Racism and Intolerance with a mandate, inter alia, to formulate general policy recommendations to member States;

Recalling also the Final Declaration and Action Plan adopted by the Heads of State and Government of the member States of the Council of Europe at their second Summit held in Strasbourg on 10-11 October 1997;

Recalling that Article 1 of the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights;

Having regard to the International Convention on the Elimination of All Forms of Racial Discrimination;

Having regard to Convention No 111 of the International Labour Organisation concerning Discrimination (Employment and Occupation);

Having regard to Article 14 of the European Convention on Human Rights;

Having regard to Protocol No 12 to the European Convention on Human Rights which contains a general clause prohibiting discrimination;

Having regard to the case-law of the European Court of Human Rights;

Taking into account the Charter of Fundamental Rights of the European Union;

Taking into account Directive 2000/43/EC of the Council of the European Union implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Directive 2000/78/EC of the Council of the European Union establishing a general framework for equal treatment in employment and occupation;

Having regard to the Convention on the Prevention and Punishment of the Crime of Genocide;

Recalling ECRI's general policy recommendation No 1 on combating racism, xenophobia, antisemitism and intolerance and ECRI's general policy recommendation No 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level;

Stressing that, in its country-by-country reports, ECRI regularly recommends to member States the adoption of effective legal measures aimed at combating racism and racial discrimination;

Recalling that, in the Political Declaration adopted on 13 October 2000 at the concluding session of the European Conference against racism, the governments of member States of the Council of Europe committed themselves to adopting and implementing, wherever necessary, national legislation and administrative measures that expressly and specifically counter racism and prohibit racial discrimination in all spheres of public life;

Recalling also the Declaration and the Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa, from 31 August to 8 September 2001;

Aware that laws alone are not sufficient to eradicate racism and racial discrimination, but convinced that laws are essential in combating racism and racial discrimination;

Stressing the vital importance of appropriate legal measures in combating racism and racial discrimination effectively and in a way which both acts as a deterrent and, as far as possible, is perceived by the victim as satisfactory;

Convinced that the action of the State legislator against racism and racial discrimination also plays an educative function within society, transmitting the powerful message that no attempts to legitimise racism and racial discrimination will be tolerated in a society ruled by law;

Seeking, alongside the other efforts underway at international and European level, to assist member States in their fight against racism and racial discrimination, by setting out in a succinct and precise manner the key elements to be included in appropriate national legislation;

Recommends to the governments of member States:

a. to enact legislation against racism and racial discrimination, if such legislation does not already exist or is incomplete ;

b. to ensure that the key components set out below are provided in such legislation.

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KEY ELEMENTS OF NATIONAL LEGISLATION AGAINST RACISM AND RACIAL DISCRIMINATION

I. Definitions

1. For the purposes of this Recommendation, the following definitions shall apply :

a) “racism” shall mean the belief that a ground such as race1, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.

b) “direct racial discrimination” shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

c) “indirect racial discrimination” shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter

would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

II. Constitutional law

2. The constitution should enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality or national or ethnic origin. The constitution may provide that exceptions to the principle of equal treatment may be established by law, provided that they do not constitute discrimination.

3. The constitution should provide that the exercise of freedom of expression, assembly and association may be restricted with a view to combating racism. Any such restrictions should be in conformity with the European Convention on Human Rights.

III. Civil and administrative law

4. The law should clearly define and prohibit direct and indirect racial discrimination.

5. The law should provide that the prohibition of racial discrimination does not prevent the maintenance or adoption of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons designated by the grounds enumerated in paragraph 1 b) (henceforth: enumerated grounds), or to facilitate their full participation in all fields of life. These measures should not be continued once the intended objectives have been achieved.

6. The law should provide that the following acts, inter alia, are considered as forms of discrimination: segregation; discrimination by association; announced intention to discriminate; instructing another to discriminate; inciting another to discriminate; aiding another to discriminate.

7. The law should provide that the prohibition of discrimination applies to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors, in all areas, notably: employment; membership of professional organisations; education; training; housing; health; social protection; goods and services intended for the public and public places; exercise of economic activity; public services.

8. The law should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions.

9. The law should place public authorities under a duty to ensure that those parties to whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination. In particular, the law should provide that public authorities should subject the awarding of contracts, loans, grants or other benefits to the condition that a policy of non-discrimination be respected and promoted by the other party. The law should provide that the violation of such condition may result in the termination of the contract, grant or other benefits.

10. The law should ensure that easily accessible judicial and/or administrative proceedings, including conciliation procedures, are available to all victims of discrimination. In urgent cases, fast-track procedures, leading to interim decisions, should be available to victims of discrimination.

11. The law should provide that, if persons who consider themselves wronged because of a discriminatory act establish before a court or any other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination.

12. The law should provide for effective, proportionate and dissuasive sanctions for discrimination

cases. Such sanctions should include the payment of compensation for both material and moral damages to the victims.

13. The law should provide the necessary legal tools to review, on an ongoing basis, the conformity with the prohibition of discrimination of all laws, regulations and administrative provisions at the national and local levels. Laws, regulations and administrative provisions found not to be in conformity with the prohibition of discrimination should be amended or abrogated.

14. The law should provide that discriminatory provisions which are included in individual or collective contracts or agreements, internal regulations of enterprises, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations should be amended or declared null and void.

15. The law should provide that harassment related to one of the enumerated grounds is prohibited.

16. The law should provide for an obligation to suppress public financing of organisations which promote racism. Where a system of public financing of political parties is in place, such an obligation should include the suppression of public financing of political parties which promote racism.

17. The law should provide for the possibility of dissolution of organisations which promote racism.

IV. Criminal law

18. The law should penalise the following acts when committed intentionally:

a) public incitement to violence, hatred or discrimination,
b) public insults and defamation or
c) threats
against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;

f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d) and e);

g) the creation or the leadership of a group which promotes racism ; support for such a group ; and participation in its activities with the intention of contributing to the offences covered by paragraph 18 a), b), c), d), e) and f);

h) racial discrimination in the exercise of one's public office or occupation.

19. The law should penalise genocide.

20. The law should provide that intentionally instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraphs 18 and 19 is punishable.

21. The law should provide that, for all criminal offences not specified in paragraphs 18 and 19, racist motivation constitutes an aggravating circumstance.

22. The law should provide that legal persons are held responsible under criminal law for the offences set out in paragraphs 18, 19, 20 and 21.

23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraphs 18, 19, 20 and 21. The law should also provide for ancillary or alternative sanctions.

V. Common provisions

24. The law should provide for the establishment of an independent specialised body to combat racism and racial discrimination at national level (henceforth: national specialised body). The law should include within the competence of such a body: assistance to victims; investigation powers; the right to initiate, and participate in, court proceedings; monitoring legislation and advice to legislative and executive authorities; awareness-raising of issues of racism and racial discrimination among society and promotion of policies and practices to ensure equal treatment.

25. The law should provide that organisations such as associations, trade unions and other legal entities which have, according to the criteria laid down by the national law, a legitimate interest in combating racism and racial discrimination, are entitled to bring civil cases, intervene in administrative cases or make criminal complaints, even if a specific victim is not referred to. If a specific victim is referred to, it should be necessary for that victim's consent to be obtained.

26. The law should guarantee free legal aid and, where necessary, a court-appointed lawyer, for victims who wish to go before the courts as applicants or plaintiffs and who do not have the necessary means to do so. If necessary, an interpreter should be provided free of charge.

27. The law should provide protection against any retaliatory measures for persons claiming to be victims of racial offences or racial discrimination, persons reporting such acts or persons providing evidence.

28. The law should provide for one or more independent bodies entrusted with the investigation of alleged acts of discrimination committed by members of the police, border control officials, members of the army and prison personnel.

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EXPLANATORY MEMORANDUM TO ECRI GENERAL POLICY RECOMMENDATION N°7 ON NATIONAL LEGISLATION TO COMBAT RACISM AND RACIAL DISCRIMINATION

Introduction

1. This general policy recommendation (hereafter: the Recommendation) focuses on the key elements of national legislation to combat racism and racial discrimination. Although ECRI is aware that legal means alone are not sufficient to this end, it believes that national legislation against racism and racial discrimination is necessary to combat these phenomena effectively.

2. In the framework of its country-by-country approach, ECRI regularly recommends to member States of the Council of Europe the adoption of effective legal measures aimed at combating racism and racial discrimination. The Recommendation aims to provide an overview of these measures and to clarify and complement the recommendations formulated in this respect in ECRI's country-by-country reports. The Recommendation also aims to reflect the general principles contained in the international instruments mentioned in the Preamble.

3. ECRI believes that appropriate legislation to combat racism and racial discrimination should include provisions in all branches of the law, i.e. constitutional, civil, administrative and criminal law. Only such an integrated approach will enable member States to address these problems in a manner which is as exhaustive, effective and satisfactory from the point of view of the victim as possible. In the field of combating racism and racial discrimination, civil and administrative law often provides for flexible legal means, which may facilitate the victims' recourse to legal action. Criminal law has a symbolic effect which raises the awareness of society of the seriousness of racism and racial discrimination and has a strong dissuasive effect, provided it is implemented effectively. ECRI has taken into account the fact that the possibilities offered by the different branches of the law are complementary. As regards in particular the fight against racial discrimination, ECRI recommends that the member States of the Council of Europe adopt constitutional, civil and administrative law provisions, and that, in certain cases, they additionally adopt criminal law provisions.

4. The legal measures necessary to combat racism and racial discrimination at national level are presented in the form of key components which should be contained in the national legislation of member States. ECRI stresses that the measures it recommends are compatible with different legal systems, be they common law or civil law or mixed. Furthermore, those components that ECRI considers to be key to an effective legal framework against racism and racial discrimination may be adapted to the specific conditions of each country. They could thus be set out in a single special act or laid out in the different areas of national legislation (civil law, administrative law and penal law). These key components might also be included in broader legislation encompassing the fight against racism and racial discrimination. For example, when adopting legal measures against discrimination, member States might prohibit, alongside racial discrimination, other forms of discrimination such as those based on gender, sexual orientation, disability, political or other opinion, social origin, property, birth or other status. Finally, in a number of fields, member States might simply apply general rules, which it is therefore not necessary to set out in this Recommendation. This is the position, for example, in civil law, for multiple liability, vicarious liability, and for the establishment of levels of damages; in criminal law, for the conditions of liability, and the sentencing structure; and in procedural matters, for the organisation and jurisdiction of the courts.

5. In any event, these key components represent only a minimum standard; this means that they are compatible with legal provisions offering a greater level of protection adopted or to be adopted by a member State and that under no circumstances should they constitute grounds for a reduction in the level of protection against racism and racial discrimination already afforded by a member State.

I. Definitions

Paragraph 1 of the Recommendation

6. In the Recommendation, the term "racism" should be understood in a broad sense, including phenomena such as xenophobia, antisemitism and intolerance. As regards the grounds set out in the definitions of racism and direct and indirect racial discrimination (paragraph 1 of the Recommendation), in addition to those grounds generally covered by the relevant legal instruments in the field of combating racism and racial discrimination, such as race, colour and national or ethnic origin, the Recommendation covers language, religion and nationality[2]. The inclusion of these grounds in the definitions of racism and racial discrimination is based on ECRI's mandate, which is to combat racism, antisemitism, xenophobia and intolerance. ECRI considers that these concepts, which vary over time, nowadays cover manifestations targeting persons or groups of persons, on grounds such as race, colour, religion, language, nationality and national and ethnic origin. As a result, the expressions "racism" and "racial discrimination" used in the Recommendation encompass all the phenomena covered by ECRI's mandate. National origin is sometimes interpreted as including the concept of nationality. However, in order to ensure that this concept is indeed covered, it is expressly included in the list of grounds, in addition to national origin. The use of the expression "grounds such as" in the definitions of racism and direct and indirect racial discrimination aims at establishing an open-ended list of grounds, thereby allowing it to evolve with society. However, in criminal law, an

exhaustive list of grounds could be established in order to respect the principle of forseeability which governs this branch of the law.

7. Unlike the definition of racial discrimination (paragraphs 1 b) and c) of the Recommendation), which should be included in the law, the definition of racism is provided for the purposes of the Recommendation, and member States may or may not decide to define racism within the law. If they decide to do so, they may, as regards criminal law, adopt a more precise definition than that set out in paragraph 1 a), in order to respect the fundamental principles of this branch of the law. For racism to have taken place, it is not necessary that one or more of the grounds listed should constitute the only factor or the determining factor leading to contempt or the notion of superiority; it suffices that these grounds are among the factors leading to contempt or the notion of superiority.

8. The definitions of direct and indirect racial discrimination contained in paragraph 1 b) and c) of the Recommendation draw inspiration from those contained in the Directive 2000/43/CE of the Council of the European Union implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and in the Directive 2000/78/CE of the Council of the European Union establishing a general framework for equal treatment in employment and occupation as well as on the case-law of the European Court of Human Rights. In accordance with this case-law, differential treatment constitutes discrimination if it has no objective and reasonable justification. This principle applies to differential treatment based on any of the grounds enumerated in the definition of racial discrimination. However, differential treatment based on race, colour and ethnic origin may have an objective and reasonable justification only in an extremely limited number of cases. For instance, in employment, where colour constitutes a genuine and determining occupational requirement by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, differential treatment based on this ground may have an objective and reasonable justification. More generally, the notion of objective and reasonable justification should be interpreted as restrictively as possible with respect to differential treatment based on any of the enumerated grounds.

II. Constitutional law

9. In the Recommendation, the term "constitution" should be understood in a broad sense, including basic laws and written and unwritten basic rules. In paragraphs 2 and 3, the Recommendation provides for certain principles that should be contained in the constitution; such principles are to be implemented by statutory and regulatory provisions.

Paragraph 2 of the Recommendation

10. In paragraph 2, the Recommendation allows for the possibility of providing in the law for exceptions to the principle of equal treatment, provided that they do not constitute discrimination. For this condition to be met, in accordance with the definitions of discrimination proposed in paragraph 1 b) and c) of the Recommendation, the exceptions must have an objective and reasonable justification. This principle applies to all exceptions, including those establishing differential treatment on the basis of nationality.

Paragraph 3 of the Recommendation

11. According to paragraph 3 of the Recommendation, the constitution should provide that the exercise of freedom of expression, assembly and association may be restricted with a view to combating racism. In articles 10 (2) and 11 (2), the European Convention on Human Rights enumerates the aims which may justify restrictions to these freedoms. Although the fight against racism is not mentioned as one of these aims, in its case-law the European Court of Human Rights has considered that it is included. In accordance with the articles of the Convention mentioned above, these restrictions should be prescribed by law and necessary in a democratic society.

III. Civil and administrative law

Paragraph 4 of the Recommendation

12. The Recommendation provides in paragraph 4 that the law should clearly define and prohibit direct and indirect racial discrimination. It offers a definition of direct and indirect racial discrimination in paragraph 1 b) and c). The meaning of the expression "differential treatment" is wide and includes any distinction, exclusion, restriction, preference or omission, be it past, present or potential. The term "ground" must include grounds which are actual or presumed. For instance, if a person experiences adverse treatment due to the presumption that he or she is a Muslim, when in reality this is not the case, this treatment would still constitute discrimination on the basis of religion.

13. Discriminatory actions are rarely based solely on one or more of the enumerated grounds, but are rather based on a combination of these grounds with other factors. For discrimination to occur, it is therefore sufficient that one of the enumerated grounds constitutes one of the factors leading to the differential treatment. The use of restrictive expressions such as "difference of treatment solely or exclusively based on grounds such as …" should therefore be avoided.

Paragraph 5 of the Recommendation

14. In its paragraph 5, the Recommendation provides for the possibility of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons designated by the enumerated grounds, or to facilitate their full participation in all fields of life. An example of temporary special measures designed to prevent or compensate for disadvantages linked to the enumerated grounds: a factory owner who has no black employees among his managerial staff but many black employees on the assembly line might organise a training course for black workers seeking promotion. An example of temporary special measures designed to facilitate the full participation, in all fields of life, of persons designated by the enumerated grounds: the police could organise a recruitment campaign designed so as to encourage applications particularly from members of certain ethnic groups who are under-represented within the police.

Paragraph 6 of the Recommendation

15. The Recommendation specifically mentions in paragraph 6 certain acts which should be considered by law as forms of discrimination. In theory, the application of the general legal principles and the definition of discrimination should enable these acts to be covered. However, practice demonstrates that these acts often tend to be overlooked or excluded from the scope of application of the legislation. For reasons of effectiveness, it may therefore be useful for the law to provide expressly that these acts are considered as forms of discrimination.

16. Among the acts which the Recommendation mentions specifically as forms of discrimination, the following warrant a brief explanation:

· Segregation is the act by which a (natural or legal) person separates other persons on the basis of one of the enumerated grounds without an objective and reasonable justification, in conformity with the proposed definition of discrimination. As a result, the voluntary act of separating oneself from other persons on the basis of one of the enumerated grounds does not constitute segregation.

· Discrimination by association occurs when a person is discriminated against on the basis of his or her association or contacts with one or more persons designated by one of the enumerated grounds. This would be the case, for example, of the refusal to employ a person because s/he is married to a person belonging to a certain ethnic group.

· The announced intention to discriminate should be considered as discrimination, even in the absence of a specific victim. For instance, an employment advertisement indicating that Roma/Gypsies need

not apply should fall within the scope of the legislation, even if no Roma/Gypsy has actually applied.

Paragraph 7 of the Recommendation

17. According to paragraph 7 of the Recommendation, the prohibition of discrimination should apply in all areas. Concerning employment, the prohibition of discrimination should cover access to employment, occupation and self-employment as well as work conditions, remunerations, promotions and dismissals.

18. As concerns membership of professional organisations, the prohibition of discrimination should cover: membership of an organisation of workers or employers, or any organisation whose members carry on a particular profession ; involvement in such organisations ; and the benefits provided for by such organisations.

19. Concerning education, the prohibition of discrimination should cover pre-school, primary, secondary and higher education, both public and private. Furthermore, access to education should not depend on the immigration status of the children or their parents.

20. As concerns training, the prohibition of discrimination should cover initial and on-going vocational training, all types and all levels of vocational guidance, advanced vocational training and retraining, including the acquisition of practical work experience.

21. As concerns housing, discrimination should be prohibited in particular in access to housing, in housing conditions and in the termination of rental contracts.

22. As concerns health, discrimination should be prohibited in particular in access to care and treatment, and in the way in which care is dispensed and patients are treated.

23. Concerning social protection, the prohibition of discrimination should cover social security, social benefits, social aid (housing benefits, youth benefits, etc.) and the way in which the beneficiaries of social protection are treated.

24. As concerns goods and services intended for the public and public places, discrimination should be prohibited, for instance, when buying goods in a shop, when applying for a loan from a bank and in access to discotheques, cafés or restaurants. The prohibition of discrimination should not only target those who make goods and services available to others, but also those who receive goods and services from others, as would be the case of a company which selects the providers of a given good or service on the basis of one of the enumerated grounds.

25. Concerning the exercise of economic activity, this field covers competition law, relations between enterprises and relations between enterprises and the State.

26. The field of public services includes the activities of the police and other law enforcement officials, border control officials, the army and prison personnel.

Paragraph 8 of the Recommendation

27. According to paragraph 8 of the Recommendation, the law should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions. The obligations incumbent on such authorities should be spelled out as clearly as possible in the law. To this end, public authorities could be placed under the obligation to create and implement "equality programmes" drawn up with the assistance of the national specialised body referred to in paragraph 24 of the Recommendation. The law should provide for the regular assessment of the equality programmes, the monitoring of their effects, as well as for effective implementation mechanisms and the possibility for legal enforcement of these programmes, notably through the national specialised

body. An equality programme could, for example, include the nomination of a contact person for dealing with issues of racial discrimination and harassment or the organisation of staff training courses on discrimination. As regards the obligation to promote equality and prevent discrimination, the Recommendation covers only public authorities; however, it would be desirable were the private sector also placed under a similar obligation.

Paragraph 10 of the Recommendation

28. According to paragraph 10 of the Recommendation, in urgent cases, fast-track procedures, leading to interim decisions, should be available to victims of discrimination. These procedures are important in those situations where the immediate consequences of the alleged discriminatory act are particularly serious or even irreparable. Thus, for example, the victims of a discriminatory eviction from a flat should be able to suspend this measure through an interim judicial decision, pending the final judgement of the case.

Paragraph 11 of the Recommendation

29. Given the difficulties complainants face in collecting the necessary evidence in discrimination cases, the law should facilitate proof of discrimination. For this reason, according to paragraph 11 of the Recommendation, the law should provide for a shared burden of proof in such cases. A shared burden of proof means that the complainant should establish facts allowing for the presumption of discrimination, whereupon the onus shifts to the respondent to prove that discrimination did not take place. Thus, in case of alleged direct racial discrimination, the respondent must prove that the differential treatment has an objective and reasonable justification. For example, if access to a swimming pool is denied to Roma/Gypsy children, it would be sufficient for the complainant to prove that access was denied to these children and granted to non-Roma/Gypsy children. It should then be for the respondent to prove that this denial to grant access was based on an objective and reasonable justification, such as the fact that the children in question did not have bathing hats, as required to access the swimming pool. The same principle should apply to alleged cases of indirect racial discrimination.

30. As concerns the power to obtain the necessary evidence and information, courts should enjoy all adequate powers in this respect. Such powers should be also given to any specialised body competent to adjudicate on an individual complaint of discrimination (see paragraph 55 of the present Explanatory Memorandum).

Paragraph 12 of the Recommendation

31. Paragraph 12 of the Recommendation states that the law should provide for effective, proportionate and dissuasive sanctions for discrimination cases. Apart from the payment of compensation for material and moral damages, sanctions should include measures such as the restitution of rights which have been lost. For instance, the law should enable the court to order re-admittance into a firm or flat, provided that the rights of third parties are respected. In the case of discriminatory refusal to recruit a person, the law should provide that, according to the circumstances, the court could order the employer to offer employment to the discriminated person.

32. In the case of discrimination by a private school, the law should provide for the possibility of withdrawing the accreditation awarded to the school or the non-recognition of the diplomas issued. In the case of discrimination by an establishment open to the public, the law should provide for the possibility of withdrawing a licence and of closing the establishment. For example, in the case of discrimination by a discotheque, it should be possible to withdraw the licence to sell alcohol.

33. Non-monetary forms of reparation, such as the publication of all or part of a court decision, may be important in rendering justice in cases of discrimination.

34. The law should provide for the possibility of imposing a programme of positive measures on the discriminator. This is an important type of remedy in promoting long-term change in an organisation. For instance, the discriminator could be obliged to organise for its staff specific training programmes aimed at countering racism and racial discrimination. The national specialised body should participate in the development and supervision of such programmes.

Paragraph 15 of the Recommendation

35. According to paragraph 15 of the Recommendation the law should provide that harassment related to one of the enumerated grounds is prohibited. Harassment consists in conduct related to one of the enumerated grounds which has the purpose or the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. As far as possible, protection against harassment related to one of the enumerated grounds should not only target the conduct of the author of the harassment but also that of other persons. For instance, it should be possible for the employer to be held responsible, where applicable, for harassment by colleagues, other employees or third parties (such as clients and suppliers).

Paragraph 16 of the Recommendation

36. Paragraph 16 of the Recommendation states that the law should provide for the obligation to suppress public financing of political parties which promote racism. For example, public financing for electoral campaigns should be refused to such political parties.

Paragraph 17 of the Recommendation

37. Paragraph 17 of the Recommendation states that the law should provide for the possibility of the dissolution of organisations which promote racism. In all cases, the dissolution of such organisations may result only from a Court decision. The issue of the dissolution of these organisations is also dealt with under Section IV - Criminal law (see paragraphs 43 and 49 of the present Explanatory Memorandum)

IV. Criminal law

Paragraph 18 of the Recommendation

38. The Recommendation limits the scope of certain criminal offences set out in paragraph 18 to the condition that they are committed in "public". Current practice shows that, in certain cases, racist conduct escapes prosecution because it is not considered as being of a public nature. Consequently, member States should ensure that it should not be too difficult to meet the condition of being committed in "public". Thus, for instance, this condition should be met in cases of words pronounced during meetings of neo-Nazi organisations or words exchanged in a discussion forum on the Internet.

39. Some of the offences set out in paragraph 18 of the Recommendation concern conduct aimed at a "grouping of persons". Current practice shows that legal provisions aimed at sanctioning racist conduct frequently do not cover such conduct unless it is directed against a specific person or group of persons. As a result, expressions aimed at larger groupings of persons, as in the case of references to asylum seekers or foreigners in general, are often not covered by these provisions. For this reason, paragraph 18 a), b), c), and d) of the Recommendation does not speak of "group" but of "grouping" of persons.

40. The term "defamation" contained in paragraph 18 b) should be understood in a broad sense, notably including slander and libel.

41. Paragraph 18 e) of the Recommendation refers to the crimes of genocide, crimes against humanity and war crimes. The crime of genocide should be understood as defined in Article II of the Convention

for the Prevention and Punishment of the Crime of Genocide and Article 6 of the Statute of the International Criminal Court (see paragraph 45 of the present Explanatory Memorandum). Crimes against humanity and war crimes should be understood as defined in Articles 7 and 8 of the Statute of the International Criminal Court.

42. Paragraph 18 f) of the Recommendation refers to the dissemination, distribution, production or storage of written, pictorial or other material containing racist manifestations. These notions include the dissemination of this material through the Internet. Such material includes musical supports such as records, tapes and compact discs, computer accessories (e.g. floppy discs, software), video tapes, DVDs and games.

43. Paragraph 18 g) of the Recommendation provides for the criminalisation of certain acts related to groups which promote racism. The concept of group includes in particular de facto groups, organisations, associations and political parties. The Recommendation provides that the creation of a group which promotes racism should be prohibited. This prohibition also includes maintaining or reconstituting a group which has been prohibited. The issue of the dissolution of a group which promotes racism is also dealt with under Section III - Civil and administrative law (see paragraph 37 of the present Explanatory Memorandum) and below (see paragraph 49 of the present Explanatory Memorandum). Moreover, the notion of "support" includes acts such as providing financing to the group, providing for other material needs, producing or obtaining documents.

44. In its paragraph 18 h) the Recommendation states that the law should penalise racial discrimination in the exercise of one's public office or occupation. On this point, the definitions contained in paragraphs 1 b) and c) and 5 of the Recommendation apply *mutatis mutandis*. Racial discrimination in the exercise of one's public office or occupation includes notably the discriminatory refusal of a service intended for the public, such as discriminatory refusal by a hospital to care for a person and the discriminatory refusal to sell a product, to grant a bank loan or to allow access to a discotheque, café or restaurant.

Paragraph 19 of the Recommendation

45. Paragraph 19 of the Recommendation provides that the law should penalise genocide. To this end, the crime of genocide should be understood as defined in Article II of Convention on the Prevention and Punishment of the Crime of Genocide and Article 6 of the Statute of the International Criminal Court, i.e. as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group". The Recommendation refers only to penalisation of genocide and not of war crimes and crimes against humanity since these are not necessarily of a racist nature. However, if they do present such a nature, the aggravating circumstance provided for in paragraph 21 of the Recommendation should apply.

Paragraph 20 of the Recommendation

46. Paragraph 20 of the Recommendation provides that instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraphs 18 and 19 should be punishable. This recommendation applies only to those offences for which instigating, aiding, abetting or attempting are possible.

Paragraph 21 of the Recommendation

47. According to paragraph 21 of the Recommendation, the racist motivation of the perpetrator of an offence other than those covered by paragraphs 18 and 19 should constitute an aggravating circumstance. Furthermore, the law may penalise common offences but with a racist motivation as

specific offences.

Paragraph 22 of the Recommendation

48. According to paragraph 22 of the Recommendation, the law should provide for the criminal liability of legal persons. This liability should come into play when the offence has been committed on behalf of the legal person by any persons, particularly acting as the organ of the legal person (for example, President or Director) or as its representative. Criminal liability of a legal person does not exclude the criminal liability of natural persons. Public authorities may be excluded from criminal liability as legal persons.

Paragraph 23 of the Recommendation

49. According to paragraph 23 of the Recommendation, the law should provide for ancillary or alternative sanctions. Examples of these could include community work, participation in training courses, deprivation of certain civil or political rights (e.g. the right to exercise certain occupations or functions; voting or eligibility rights) or publication of all or part of a sentence. As regards legal persons, the list of possible sanctions could include, besides fines: refusal or cessation of public benefit or aid, disqualification from the practice of commercial activities, placing under judicial supervision, closure of the establishment used for committing the offence, seizure of the material used for committing the offence and the dissolution of the legal person (see on this last point paragraphs 37 and 43 of the present Explanatory Memorandum).

V. Common provisions

Paragraph 24 of the Recommendation

50. According to paragraph 24 of the Recommendation, the law should provide for the establishment of an independent specialised body to combat racism and racial discrimination at national level. The basic principles concerning the statute of such a body, the forms it might take, its functions, responsibilities, administration, functioning and style of operation are set out in ECRI's general policy recommendation no 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level.

51. The functions attributed to this body should be provided by law. The Recommendation enumerates a certain number of such functions. Assistance to victims covers provision of general advice to victims and legal assistance, including representation in proceedings before the courts. It also covers assistance in seeking friendly settlement of complaints.

52. As concerns investigation powers, in order that a national specialised body may conduct these effectively, it is essential that the law provides the latter with the requisite powers, subject to the rules of procedure of the national legal order. This includes powers granted in the framework of an investigation, such as requesting the production for inspection and examination of documents and other elements; seizure of documents and other elements for the purpose of making copies or extracts; and questioning persons. The national specialised body should also be entitled to bring cases before the courts and to intervene in legal proceedings as an expert.

53. The functions of the national specialised body should also include monitoring legislation against racism and racial discrimination and control of the conformity of legislation with equality principles. In this respect, the national specialised body should be entitled to formulate recommendations to the executive and legislative authorities on the way in which relevant legislation, regulations or practice may be improved.

54. As concerns awareness-raising of issues of racism and racial discrimination among society and promotion of policies and practices to ensure equal treatment, the national specialised body could run

campaigns in collaboration with civil society; train key groups; issue codes of practice; and support and encourage organisations working in the field of combating racism and racial discrimination.

55. In addition to these functions, the national specialisedbody may be attributed other responsibilities. Moreover, another body could be entrusted with the adjudication of complaints through legally-binding decisions, within the limits prescribed by the law.

Paragraph 25 of the Recommendation

56. The Recommendation provides in its paragraph 25 that organisations such as associations, trade unions and other legal entities with a legitimate interest should be entitled to bring complaints. Such a provision is important, for instance, in cases where a victim is afraid of retaliation. Furthermore, the possibility for such organisations to bring a case of racial discrimination without reference to a specific victim is essential for addressing those cases of discrimination where it is difficult to identify such a victim or cases which affect an indeterminate number of victims.

Paragraph 27 of the Recommendation

57. According to paragraph 27 of the Recommendation, the law should provide protection against retaliation. Such protection should not only be afforded to the person who initiates proceedings or brings the complaint, but should also be extended to those who provide evidence, information or other assistance in connection with the court proceedings or the complaint. Such protection is vital to encourage the victims of racist offences and discrimination to put forward their complaints to the authorities and to encourage witnesses to give evidence. In order to be effective, the legal provisions protecting against retaliation should provide for an appropriate and clear sanction. This might include the possibility of an injunction order to stop the retaliatory acts and/or to compensate victims of such acts.

APPENDIX II.

This document presents an overview of the current policies which, in the Netherlands, seek to combat racism, through both legal and non-legal means. The Network considers it important that criminal law provisions relating to racism and xenophobia are related to an overall strategy to combat racism and racial discrimination, of which an approach based on criminal law should be only a part. In this respect, the adoption of national action plans against racism, as recommended by the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) held in Durban in September 2001, presents the benefit of improving the coordination between different strategies to combat racism, thus ensuring an adequate complementarity between those strategies.

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The Netherlands – National Action Plan against Racism (NAP) – Progress report

(a) Letter from the Minister for Immigration and Integration to the Speaker of the House of Representatives, 10 June 2005

In my capacity of coordinating Cabinet Member for the National Action Plan against Racism (NAP)[302] I hereby present you with the progress report for December 2003-March 2005. This is the first paper in which I report on the progress made in respect of the various action points as formulated in the NAP.

During General Consultations with the Standing Parliamentary Committee for Justice on 15 April 2004,[303] I promised that I would inform the House on the implementation of the NAP within the framework of the annual budget. Because of the large number of action points that have been implemented by now or are part of current initiatives, I have decided to inform the House by separate letter. In this way, I can address the progress of the action points in greater detail.

Implementation of action points from National Action Plan against Racism

The conclusion may be drawn that a large number of action points from the NAP have already been implemented successfully. Other action points are part of current policy and receive ample attention.

In recent decades, the foundations were laid for the equal treatment of all people in the Netherlands. Successive Governments endeavoured to combat racism and discrimination through legislation and policy. Much has been achieved: not only the inclusion of Article 1 in the Dutch Constitution, but also the realisation of the Equal Treatment Act (*Algemene Wet Gelijke Behandeling*) and the increase in the punishment for structural discrimination. In addition, policy has been established in the area of labour market discrimination and the emancipation of women and girls from ethnic minorities.

However, combating racial discrimination and related intolerance is not just a matter of legislation and central government policy. Social organisations run by and for minorities, schools, local authorities, the police, the Public Prosecution Department, companies, individuals – everyone should make a contribution to a more tolerant society, which is open to a variety of views and cultures. Dialogue and debate are necessary to promote respect for all.

During the period discussed in this progress report, social tensions in the Netherlands erupted. The Government has tried in various ways to emphasise the unity of society and to promote a bond between all (groups of) citizens. Not only by entering into the debate and the dialogue itself, but also by showing great involvement and dedication in implementing the action points from the NAP.

I trust that I have informed you satisfactorily.

The Minister for Immigration and Integration,

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302 Presented by letter of 19 December 2003, 29 200 VI, no. 121.

303 29 200 VI, no. 158.

(b) Progress report December 2003 – January 2005

1. Introduction

In 2001, the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) was held in Durban. This Conference generated a final declaration and a 219-point action programme. The participating countries, including the Netherlands, undertook to draw up a national action plan to combat the aforementioned forms of discrimination. After elaborate field consultation, the National Action Plan against Racism (NAP) was presented in December 2003 (Parliamentary Documents 29 200 VI, no. 62). In compiling the NAP, it was decided to abandon the structure of the Durban action points and to focus the action plan on those areas that needed the most attention. The result was an action plan with three substantive themes, namely living environment, awareness-raising and equal treatment in the labour market, and one organisational theme: infrastructure.

During General Consultations with the Standing Parliamentary Committee for Justice (Parliamentary Documents 29 200 VI, no. 158), I promised that I would inform the House on the implementation of the NAP within the framework of the annual budget. Because of the large number of action points that have been implemented by now or are part of current initiatives, I have decided to inform the House by separate letter, which will enable me to address the progress of the action points in more detail. This report concerns the period from December 2003 to March 2005 inclusive.

This progress report was prepared by the governmental anti-discrimination consultation (*Antidiscriminatie Overleg Rijksoverheid*, ADOR). First of all, this report comprises a brief description of the NAP, followed by an overview of current themes and developments. Subsequently, the actual progress of each action point will be discussed. As this report only reflects the actual status of the implementation of the action points, there has been no extensive consultation with field parties. However, information from the field has been used in this report.

2. National Action Plan against Racism in brief

The Government Programme (*Hoofdlijnenakkoord*) states the following as regards combating discrimination: 'An important point of departure in our society is that space is given to religious, cultural and ethnic differences, and that – based on the fundamental Dutch norms and values – everyone respects the views of his fellow-man in a society characterised by tolerance. Respect, tolerance and tackling discrimination are essential for preserving social cohesion.'

In addition, anti-racism policy is characterised by the following points of departure:

- Discrimination and racism can manifest themselves in various shapes. This may be overt discrimination based on external features, but also more subtle forms of unequal treatment.
- Unequal treatment is unacceptable, because it is contrary to the foundations of the Dutch legal system while it also undermines respectful interaction between citizens in this country.
- In fighting xenophobia, prejudices and discrimination, the focus should be on all forms of discrimination, both the more 'traditional' forms of discrimination against persons from ethnic minorities by a group of indigenous persons, and the tensions arising between the various communities in a multi-ethnic society.
- The focus of combating discrimination, racism and xenophobia should not be exclusively on compliance with laws, rules and social etiquette. What is needed is the acknowledgement by all groups within society that despite unmistakable differences between the groups, everyone is a citizen of the same society. Shared citizenship means the recognition of basic, common norms and values. The realisation of full and shared citizenship offers the best guarantees against prejudices and discrimination.

- Protection and reinforcement of the position of persons who belong to groups that are or threaten to become victims of discrimination and intolerance are part of the Dutch policy. This concerns not only discrimination based on ethnic origin, but also discrimination based on other grounds such as gender, sexual orientation, religion or beliefs, age or disability. Article 1 of the Dutch Constitution, the non-discrimination principle, is the guideline for legislation and policy in this respect.

The central objective of the NAP is to bring citizens closer together (conciliation). The NAP stresses the importance of society as a unity and wants to build bridges between individuals and groups. People must become aware of the things they actually share with each other, without immediately judging the extent to which they differ.

Combating racism, xenophobia and related intolerance is not a matter for the Government alone. Therefore the action plan is aimed at all parties that may contribute to the realisation of the NAP, such as the central, local and provincial authorities, the Public Prosecutions Department, the police, anti-discrimination bureaus, non-governmental organisations, companies, trade unions and employers' organisations, minority organisations and social institutes in areas of social life such as school, work, community and sports club, but also the individual citizens themselves.

The action points chosen in the NAP have been selected on the basis of long-term viability, practical and financial feasibility, policy priorities, alignment with existing policy plans and projects, collaboration possibilities and the dedication and involvement to be expected. The nationwide coordination of the NAP falls within the responsibility of the Minister for Immigration and Integration.

3. Current themes and developments

Broad Initiative on Social Cohesion (BIMB)
Following the assassination of Theo van Gogh, tensions in society erupted dramatically. In order to stress the importance of society as a unity, the Government took the initiative to start a social dialogue in the form of the Broad Initiative on Social Cohesion (*Breed Initiatief Maatschappelijke Binding*, BIMB). The House was informed on this subject by letter of 16 March 2005 (Parliamentary Documents 30 054, no. 1). This initiative gave a new impulse to the NAP's core objective, i.e. to bring citizens closer together. The themes from the NAP recur in a wider context in the Joint Declaration of 26 January 2005. The NAP stresses the importance of society as a unity and wants to build bridges between individuals and groups. People must become aware of the things they actually share with each other. The BIMB has the same objective. With this initiative, the Government, social and religious organisations, municipalities and citizens want to give an extra impulse to their individual efforts to improve mutual relationships and increase everyone's involvement. The initiative comprises a range of specific, appealing joint campaigns aimed at all areas of society where citizens come into direct contact with each other: at the office and in the factory, in the shop and in the market place, at school, on the sports field, in the community centre, the coffee house, the playground and in clubs, in the street and in the neighbourhood, in church and in the prayer area. The NAP and the campaigns resulting from the BIMB are therefore perfectly compatible.

Fundamental rights in a pluriform society
Another important contribution to the debate on liberty and its limits in Dutch society is the memorandum entitled 'Fundamental rights in a pluriform society' ('*Grondrechten in een pluriforme samenleving*') (Parliamentary Documents, 29 614, no. 2). This memorandum was submitted to the Lower House on 18 May 2004. On 24 November 2004, the Lower House held a round table discussion with experts about the memorandum. At the end of November 2004 a staff member of the Ministry of the Interior and Kingdom Relations presented the issues of the memorandum and the Dutch approach in this respect in the Council of Europe, which aims to draw up a best practices handbook as regards the tense relationship of fundamental rights. In June 2005, the subject will again be discussed within the Council of Europe. Subsequently, the memorandum 'Fundamental rights in a pluriform society' served as input for a teaching package on the rule of law published by the municipality of Amsterdam on 26 November 2004 in connection with the criminal proceedings against Mohammed B. The Lower

House discussed the memorandum on 22 and 24 February 2005 and passed a motion (Parliamentary Documents 29 614 no. 5) inviting the Government to consider, after consultation with the relevant bodies, companies and persons, a permanent effort to disseminate and refresh knowledge and understanding of our fundamental rights, and to inform the Lower House on the resulting plan of action. This motion is now carried out. Among other things, preparations have started for the compilation of a Guide on Fundamental Rights and Democracy (*Handreiking Grondrechten en Democratie*). In addition, the Minister of Administrative Reform is talking with the Minister of Education, Culture and Science about the establishment of a Centre for History and Democracy (*Centrum voor Geschiedenis en Democratie*).

Centre for History and Democracy
Recent political and social developments have shown that the level of support for the rule of law and democracy in society needs structural reinforcement. Active and critical citizenship should be promoted. A Centre for History and Democracy can make an important contribution in this respect and is meant to structurally fill a typically Dutch gap in the area of *l'éducation civique*. The functioning of our democracy and the development of the Dutch state will take centre stage here. Visitors can gain hands-on experience with the workings of democracy and the rule of law, deal with dilemmas, meet politicians and other participants in the democratic process and experience (again) what it was like to live in the Netherlands of decades ago. The establishment of the Centre will also give expression to the much-emphasised Government view that awareness of the development of the Dutch state, the principles of a democracy based on the rule of law and the propagation of these principles are of fundamental importance for our society.

Conference 'Equality in a future Europe'
During the Dutch EU Presidency, attention was paid to combating discrimination in a broad sense. In this context, the conference 'Equality in a future Europe' was held on 22 and 23 November 2004. The main conclusion of this conference was that legislation and regulations alone cannot effectively combat discrimination. It is just as important to embed the values of equal treatment and non-discrimination in social life. The action points from the NAP confirm this idea within the theme of awareness-raising.

4. Legislation and regulations

As the National Platform for Consultation and Cooperation against Racism and Discrimination (*Nationaal Platform voor overleg en samenwerking tegen Racisme en Discriminatie*, NPRD) rightly observed in its then recommendation on the NAP, the legal framework for tackling discrimination largely meets the criteria established at the WCAR.

Since the presentation of the NAP in December 2003, a number of amendments have been made to legislation pursuant to European directives. The Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Directive 2000/43/EC) and the Directive establishing a general framework for equal treatment in employment and occupation (Directive 2000/78/EC) were implemented in the Equal Treatment Act (*Algemene wet gelijke behandeling*, Awgb) with the EC Implementation Act (*EG-implementatiewet*) of 21 February 2004. The amendments took effect on 1 April 2004. At present, a Bill is being prepared to integrate the Equal Treatment Act on the basis of disability or chronic illness (*Wet gelijke behandeling op grond van handicap en chronische ziekte*, Wgbh/cz), the Equal Treatment Act on the basis of age in employment (*Wet gelijke behandeling op grond van leeftijd bij de arbeid*, Wgbl) and the Equal Opportunities Act (*Wet gelijke behandeling mannen en vrouwen*, Wgb m/v) into the Equal Treatment Act.

In addition, the Act on increasing the penalty for structural forms of discrimination (*Wet verhoging strafmaat bij structurele vormen van discriminatie*) took effect on 1 February 2004 (Parliamentary Documents 27 792). The maximum sentence for systematically and deliberately insulting persons on account of race, religion, beliefs or sexual orientation and systematically inciting discrimination has been doubled to two years. The maximum sentence for systematically

disseminating discriminatory material and systematically discriminating against others in the exercise of their office, profession or business is now one year.

5. The action points from National Action Plan against Racism

5.1 Living environment

Promoting a joint approach to create a safe and pleasant living environment

Everyone who lives in the Netherlands must understand that even in 'public areas' discrimination and therefore racism and related forms of intolerance are not allowed. All individuals have the right to live, grow up and relax safely. In order for local integration to be successful, the policy of municipal and provincial authorities should pay attention to combating discrimination.

To create a safe and pleasant living environment, a number of action points were defined. Below is an overview of their current status.

• *In collaboration with, among others, the National Federation of Anti-Discrimination Bureaus (*Landelijke Vereniging van antidiscriminatiebureaus*, LVADB) and the National Bureau Against Racial Discrimination (*Landelijk Bureau ter bestrijding van Rassendiscriminatie*, LBR), the Ministry of Justice promotes the exchange of successful initiatives aimed at tackling racism and discrimination;*

On their websites, various social organisations fighting racism and discrimination[304] describe good practices and offer the possibility, where necessary with the aid of training courses, of helping other organisations set up similar initiatives.

The Ministry of Justice regularly highlights good practices during conferences, such as recently during the EU Presidency, when the Minister for Immigration and Integration brought the Rotterdam project 'Door Policy Panel' ('*Panel Deurbeleid*') to the attention of her European colleagues. This has caused the authorities in Berlin and Vienna to express an interest in such an initiative.

Within the framework of the Broad Initiative on Social Cohesion, the Government once more underlines successful initiatives of citizens, (local) authorities and social organisations to reinforce the bond between citizens and society. Among other things, this is done via de website www.zestienmiljoenmensen.nl. Another website set up by socially engaged persons and bodies is the website www.nederlandnietkapottekrijgen.nl. This website highlights ideas to bring people together in society.

Another campaign starting in the course of 2005 is the integration campaign, as announced to the House by the Minister for Immigration and Integration during the continuation of the debate on 2 September 2004 about the report 'building bridges' ('*bruggen bouwen*') issued by the Blok Committee. This integration campaign will focus on the positive side of the integration debate, by paying attention to people in Dutch society who have developed joint initiatives to bring people together at work, at the sports club or in the neighbourhood.

• *National NPRD campaign geared to promoting social debate and dialogue, sub-activities:*

- NPRD sees to it that local Platforms are set up in four major cities.

The NPRD intended to establish local platforms in four cities / regions, which could be used for exchanging good practices, among other things. However, many municipalities took active steps themselves to tackle discrimination, often with the aid of the anti-discrimination bureaus (ADBs). On this occasion, the ADBs and national knowledge and expertise centres worked together in the context of the project 'Discrimination? Phone Us Now!' ('*Discriminatie? Bel Gelijk*!'), which indirectly led to an improved exchange of knowledge and experience.

- NPRD has a booklet developed, with practical tips on 'tackling discrimination in the community',

- Study days on tackling discrimination in the neighbourhood;

Every day, people spend a lot of time in their living environment, where they want to feel at home and safe. Unfortunately, this does not always happen. Some people are threatened and insulted in the

[304] Examples include: www.kiem.nl; www.lbr.nl; www.discriminatie.nl; www.forum.nl; www.annefrank.org; www.tijm.nl; www.div-management.nl; www.radar.nl.

street, while others encounter physical violence or violence against their property. Discrimination and non-acceptance lead to great contrasts within neighbourhoods. The NPRD publication entitled 'Discrimination in the neighbourhood' ('*Discriminatie in de buurt*') was published in November 2004 and deals with the practical aspects of discrimination and non-acceptance in the living environment. In October and November 2004, the NPRD organised study days in four cities / regions (Dordrecht, Friesland, Eindhoven and Rotterdam). All participants in the study days received a copy of the NPRD publication 'Discrimination in the neighbourhood'. Follow-up activities were developed, partly on the basis of the study days, comprising plans to train key figures in migrant organisations to become spokespersons on the theme of discrimination in Dordrecht, a large provincial manifestation in Friesland, various follow-up meetings with youth workers on the theme of intolerance (approach and policy) in Eindhoven and talks about internal policy-making and follow-up activities with migrant organisations in Rotterdam.

• *Through administrative consultations with municipalities and provinces, the Minister for Immigration and Integration indicates that for local integration to succeed, their policy must pay attention to tackling discrimination, including racism;*
This action point is a permanent issue for the Minister for Integration and Immigration. During the administrative consultations with municipalities and provinces in 2004, the Minister stressed the importance of tackling discrimination and racism at local and provincial level. This will not be different in 2005. Within the administrative consultation, the Minister for Immigration and Integration put forward a proposal early in February 2005 to set up a directing group in which the central government, the Association of Netherlands Municipalities (*Vereniging van Nederlandse Gemeenten*, VNG), the Interprovincial Consultations (*Interprovinciaal Overleg*, IPO), the LBR-LV federation, the Equal Treatment Commission (*Commissie gelijke behandeling*, CGB), the Public Prosecutions Department and the police are represented, in order to jointly develop a plan of approach regarding the local fight against discrimination and the future of the anti-discrimination bureaus. This plan of approach is expected to be ready by the autumn.

• *The RADAR projects in Rotterdam, 'Door Policy Panel' and 'Clubfacts', should result in this initiative being picked up by other cities.*
Recently, the activities of the Rotterdam Anti-Discrimination Council (*Rotterdamse Anti-Discriminatieraad, RADAR*) regarding discrimination in bars and clubs received a lot of media coverage. RADAR is regularly contacted by other municipalities and ADBs about this project. Early in December 2004, RADAR organised a national information event for representatives of bars and clubs, municipalities, the police, anti-discrimination initiatives and researchers from a dozen municipalities. A number of municipal authorities, including those of Utrecht, Dordrecht, Breda and Eindhoven, are already at an advanced stage in introducing such an approach in their own municipalities. The experiences of the Rotterdam Door Policy Panel are now also integrated into the new course books of the 'basic security diploma for doormen'. By now, the Rotterdam model is starting to attract attention from outside the national borders: RADAR has already given presentations in Berlin and Vienna.

The Minister for Immigration and Integration has also taken the initiative to hold talks with bar and club owners and with youngsters who were refused admittance. These talks will take place by the middle of 2005.

The 'Clubfacts' project had the effect that on 22 April 2004 the first Clubstars Award was presented to the Rotterdam discotheque 'Off_Corso'. The website www.clubstars.nl contains all the details of the project and the clubs taking part in this project. In addition, youngsters are given tips on what they can do to make the Rotterdam night life even better. A positive development is that the Province of South-Holland has shown an interest in this project and that exploratory contacts have been established to extend this project to the entire province.

5.2 Awareness-raising

Eradicating prejudices and expressions of racism and discrimination
All sections of society must be aware that discrimination is not to be tolerated, and acknowledge their own prejudices and discriminatory behaviour; this is and continues to be essential in overcoming

expressions of discrimination and related forms of intolerant behaviour. Transferring knowledge of values and norms and knowledge of world history (persecution of the Jews, the history of slavery) is an important tool in realising this.

• *National NPRD campaign geared to promoting social debate and dialogue: sub-activities in the context of education:*
On the NPRD's instructions, the Anne Frank Foundation (*Anne Frank Stichting*) developed and implemented a pilot at a Regional Training Centre (*Regionaal Opleidingen Centrum*, ROC). This pilot focused on how the various groups interact in education. It is the first step for schools towards a discussion of the prejudices and racism issue and a first step towards a change in behaviour.

Successful projects in schools have been described and included in the publication entitled 'You can tell it works' ('*Je merkt 't, 't werkt'*), issued in November 2004. This publication provides a list of projects in the area of conflict mediation and preventing undesirable behaviour in schools. Many schools are in the process of creating a school climate where everyone feels safe and happy. In doing so, they can draw from a wide range of projects and programmes by way of support. It is important that schools ask themselves the following questions when making a selection from these projects: what is suitable for us, what are our priorities, what works? This publication provides an overview of existing projects and programmes and discusses the factors that make these projects a success.

On 4 November, the NPRD organised a national study day for people from education and policy makers about successful projects in the field of safety and tackling undesirable behaviour in schools. The NPRD and the LBR received many responses further to this study day, ranging from requests for information and training to questions about the aforementioned publication, about School without Racism (*School zonder Racisme*) and World School (*Wereldschool*). In April 2005, the 100th plaque was presented to a school that had indicated it wanted to be a world school.

Where education is concerned, the Centre Information and Documentation on Israel (CIDI) took the initiative to set up a Foundation, in which the gay and lesbian organisation COC, RADAR and a number of Islamic organisations also participate. The organisations in this Foundation will together offer the diversity programme 'A World of Difference', developed by the Anti Defamation League in the USA, to schools and other interested parties in the Netherlands.

• The KPC Group supports groups wanting to implement projects on active citizenship;
The KPC Group has been instructed to support schools that want to implement projects on active citizenship. This support not only comprises teaching materials, but also a financial contribution to put projects into operation, both in primary and in secondary education.

• This school year, citizenship internship pilot projects will be implemented at ten secondary schools;
To promote citizenship internships in secondary education, the Ministry of Education, Culture and Science, together with the Ministry of Health, Welfare and Sport, has initiated various activities since 2003. By letter of 17 May (VO/S&O/2005/15559) the two Ministers informed the Lower House on the progress.

• *The Schools Knowledge Network will offer a website for values and norms as a platform for the exchange of good practical examples;*
The section on values and norms within the website of the Schools Knowledge Network (*Kennisnet scholen*) has gone live. This website has been developed especially for teachers and students in primary education, secondary education, vocational education and adult education who want to think about values and norms and want to start a discussion on this theme at school or in the classroom.

• More attention for values, norms, political science and history in integration programmes;
*Pursuant to the Government Programme (*Hoofdlijnenakkoord*) of 16 May 2003, which states that 'whoever wants to settle permanently in this country should be an active participant in society and will have to learn the Dutch language, be aware of the Dutch values, and comply with the norms', the 'modernisation of the integration system' was started the same year. Roughly speaking, this means that from June 2005 anyone wishing to move to the Netherlands for the purpose of family formation or family reunification will have to pass the basic citizenship test while still abroad, and that the*

integration in the Netherlands will be revised. From the middle of 2006, newcomers and 'oldcomers' no longer have a duty to integrate, but are actually obliged to pass the citizenship test.

Both tests consist of a Dutch Language section and a Knowledge of Dutch Society section. The basic test to be taken abroad is nearly ready. The test includes questions about geographic features of the Netherlands, key points from Dutch history, an outline of the political system, the importance of learning Dutch, social etiquette in the Netherlands, finding work, child rearing and education. Although the test makes no specific reference to 'norms and values', it is evident that these recur in all aspects of the test. The Ministry of Justice has recently started defining the key areas for the test taken in the Netherlands. By the end of April it will be clear which areas should be part of the citizenship test in the Netherlands. Expectations are that the Ministry of Justice will have completed the modernisation of the integration system by the end of 2006/beginning of 2007. As an interim result, the basic citizenship test taken abroad will be introduced in June of this year.

The importance of knowledge of the Dutch language and culture cannot be stressed often enough. Participation in society may prevent discrimination and exclusion. In due course, and in a wider context, the Centre for History and Democracy mentioned in section 3 above can also make an important contribution in this respect.

• *The Minister for Immigration and Integration will further structure the concept of shared citizenship through public debates, among other things, in collaboration with various organisations including FORUM;*
This is a current activity, the first results of which will become visible in 2005. During the coming months, FORUM will 'flesh out' the idea of shared citizenship, so as to increase its appeal throughout the population. FORUM will do this by addressing and discussing actual (policy) dilemmas and recurring issues concerning citizenship in an interesting and concrete way, thus filling in the practical (policy) details of the concept. This year, FORUM will organise three dialogue meetings with key figures from three target groups: the indigenous and ethnic social midfield; policy thinkers and social scientists; politicians and policy makers. The results of these dialogue meetings will be incorporated into a final document on shared citizenship, which will be published.

• In administrative consultations with municipalities and provinces, the Minister for Immigration and Integration will speak about the role model function of officials with regard to respectful treatment;
As stated above, in the administrative consultations with municipalities and provinces the Minister for Immigration and Integration already paid considerable attention to combating discrimination and racism, and this will be a permanent item on the agenda.

• The Ministry of Education, Culture and Science subsidises the National Institute for the Study of Dutch Slavery and its Legacy (*Nationaal Instituut Nederlands Slavernijverleden en –erfenis*, Ninsee);
The Ministry of Education, Culture and Science subsidises the National Institute for the Study of Dutch Slavery and its Legacy for the period 2005-2008. This subsidy funds the costs of collecting, documenting and publishing information about the history of Dutch slavery, and of education and scientific research.

• *The Education Inspectorate will give extra attention to anti-Semitism in its inspections;*
The action point regarding the Education Inspectorate has been given wider application: within the scope of 'social safety at schools', which also covers racism and anti-Semitism, the Inspectorate has intensified its supervision of safety at schools, including prevention of discrimination. Schools are responsible for a safe school climate, but the way in which this is done differs per school.

• *The National Expertise Centre against Discrimination (*Landelijk Expertise Centrum Discriminatie*, LECD) of the Public Prosecutions Department is developing a handbook for members of the Public Prosecutions Department on expediency in criminal cases;*
The structure and provisional contents of this handbook have been determined in outline. The nature and scope of the discrimination issue, for instance the criminal assessment of sensitive cases, issuing recommendations to the public prosecutors' offices and the police, and making contributions both in the legislative areas and in the local tripartite consultations, combined with the detection and

prosecution of discrimination cases within the Public Prosecutions Department, have increased the LECD's workload. As a result, the actual compilation of such a handbook has not yet commenced. However, one of the LECD's primary tasks in 2005 will be to give active follow-up to the chosen structure and contents of the handbook. This action point is feasible, partly in view of the increase in the LECD's staff.

• *The awareness-raising campaign 'Discrimination? Phone us now!'. A working alliance of various ministries, the LVADB and the CGB.*
The awareness-raising campaign 'Discrimination? Phone us now!' and the discrimination hotline were launched on Tuesday, 29 June 2004. The results of the campaign 'Discrimination? Phone us now!' were presented to the House by letter of 29 March 2005.[305] This campaign was orchestrated by the anti-discrimination bureau RADAR in Rotterdam, on behalf of the National Federation of Anti-Discrimination Bureaus and Reporting Centres and in collaboration with the CGB and the national NGOs in the field of equal treatment. The subsidy for this campaign was provided by the European Commission within the scope of the European action programme to combat discrimination, and by the Ministries of the Interior and Kingdom Relations, Justice (Immigration and Integration), Health, Welfare and Sport, and Social Affairs and Employment. The campaign structure was described in the letter of 9 August 2004 from the Minister of Social Affairs and Employment, also on behalf of the Minister for Immigration and Integration and the Minister of Justice, answering the questions posed by the Member of Parliament Mr Dijsselbloem (Parliamentary Documents, 2003-2004, Appendix, no. 2017).

5.3 Equal treatment in the labour market

Promoting the equal treatment of ethnic minorities in the labour market
Long-term participation in the labour market is one of the main tools in promoting the integration of ethnic minorities. In addition to giving jobseekers/employees the opportunity to file complaints at the moment when discrimination is experienced, it is important to encourage employers to conduct an intercultural management or diversity policy. Through monitoring and picking up signals from the field, the government intends to supervise the effects of the measures taken by employers' organisations and trade unions.

• *The Ministry of Social Affairs and Employment is exploring scope for improved ways of securing the equal treatment of ethnic minorities in the procedures concerning using and taking psychological tests;*
The Ministry of Social Affairs and Employment has subsidised the LBR to develop a procedure, in collaboration with the Netherlands Institute of Psychologists (*Nederlands Instituut van Psychologen*), on using and taking psychological tests where ethnic minorities are concerned. The procedure is aimed at promoting the equal treatment of ethnic minorities, so as to provide them with equal opportunities in job applications and their further career within a company, insofar as psychological tests and/or structured questionnaires are used for this purpose. Another instruction involved the compilation of an overview of workable psychological tests that may be used for ethnic minorities, with recommendations for further improvement of their use. The development of the procedure and the compilation of the overview were recently completed. Through a follow-up subsidy, they are expected to become available towards the summer of 2005 in the form of an official publication.

• *The Ministry of Social Affairs and Employment is exploring its external working conditions policy for opportunities to encourage parties to take appropriate action to provide more effective working conditions services to employees of non-Dutch heritage; This also involves equal opportunities issues; A proposal for an approach will be published in the course of 2004;*
In its ancillary working conditions policy, the Ministry of Social Affairs and Employment looks at the possibilities of providing more effective working conditions services to ethnic employees, e.g. via training and information activities for working conditions professionals and employers. An example of

[305] Letter from the Minister of Social Affairs dated 29 March 2005, presenting the final report on the project 'Discrimination? Phone us now!' (reference: AV/IR/2005/ 16729).

a project developed by parties in the past year is the Social Medical Assistance of Ethnic Minorities (*Assist Sociaal Medische Begeleiding van Allochtonen*) of STECR, the Platform for Reintegration.

• *Follow-up expert meeting on undesirable forms of conduct in November 2003, the results of which will be included in the working conditions policy geared to target groups;*
In 2004 an Evaluation of the Working Conditions Act (*Arbowet*) and Undesirable Forms of Conduct took place. In comparison with the evaluation of the law in 2000, it appears that employers are now better at fulfilling their obligations. This also applies to Small and Medium-Sized Enterprises (SMEs). A striking point is the increase in the number of codes of conduct. Researchers conclude that undesirable conduct at the workplace is widespread and has sometimes even increased, while at the same time employers received fewer complaints about aggression, violence and sexual harassment. The number of complaints about bullying remained more or less the same.

The fact that employees have indicated a rise in undesirable conduct shows that the application of policy is still capable of improvement. The trade unions and employers' organisations will play an important part here. In this context it is observed that many Health and Safety Covenants and Declarations of Intent[306] were concluded in recent years, in which tackling aggression and violence at the workplace was an important item.

In 2005, a good practices study into tackling undesirable conduct will be started, which will also consider the results of the Health and Safety Covenants. The findings of this study will be presented at an expert meeting for, in particular, employers, employees and working conditions services.

A question often raised is whether a provision on discrimination at work should be included in the Working Conditions Act. The answer is that the inclusion of an anti-discrimination section in the Working Conditions Act would not be expedient. The development and implementation of 'equal treatment' regulations offers sufficient opportunities to attend to the prevention of discrimination at the workplace (and in the labour market). In outline, this also applies to the theme of 'bullying at work'.

In addition, the following activities may be mentioned which, although they were not included as action points, are aimed at realising the NAP objective in respect of the labour market.

Recently, State Secretary Van Hoof commissioned the study 'Ethnic minorities in the labour market. Pictures and facts, impediments and solutions' ('*Etnische minderheden op de arbeidsmarkt. Beelden en feiten, belemmeringen en oplossingen*') in order to chart the labour market position of ethnic minorities. The Lower House was informed by letter about the results of this study and the Government's response to it. This concerns the letter of 14 April 2005 (Parliamentary Documents 27 223, no. 65) and the letter of 12 May 2005 (AM/AMI/05/30446).

The *NPRD* initiated the following activities in 2004 in respect of the *labour market*: Assertiveness training courses were developed for employees. Employee training courses were organised in three regions that aimed to increase the assertiveness of employees who encounter discrimination at work. The LBR will issue a handbook/publication in due course on employee assertiveness.

An example of collaboration between ADBs in the Netherlands with regard to the labour market is the EQUAL project 'the Prize, the Code and the Monitor' ('*de Prijs, de Code en de Monitor*'). This project was completed in December 2004 with the publication entitled 'Sidelined or Lucky Break?' ('*Buitenspel of Buitenkans*?'). This publication contains a wealth of information about companies competing in a number of regions for a prize for exemplary intercultural staff policy. The project was carried out by RADAR, in collaboration with the consultancy firm DUO-A and the ADBs of Overijssel, West and Central Brabant, Limburg-South, Haaglanden, Friesland and the national federation of ADBs.

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306 Covenants: Municipalities, Academic hospitals, Leisure centres and swimming pools, Mobility sector, Temporary employment agencies, Mental Healthcare, Welfare and Youth Assistance and Primary and Secondary Education, Ambulances. Declarations of Intent: health and safety plus covenant Taxis, intinerant trade and retail, Security sector, Childcare/playgroups, National Agency of Correctional Institutions.

• *At the end of 2003, beginning of 2004, a bill will be offered to the Lower House to amend the Central and Local Government Personnel Act (*Ambtenarenwet*), which will compel the competent authority of a government body to draft a code of conduct on integrity;*
The Bill amending the Central and Local Government Personnel Act was submitted to the Lower House on 21 February 2004 (29 436, no. 2). Based on the advice of the Council of State, the proposed Section 125quater, Subsection a of the Central and Local Government Personnel Act was extended to include the explicit stipulation that integrity policy should in any case pay attention to promoting integrity awareness and preventing abuse of powers, conflicts of interest and discrimination. The House reported on 14 April 2004. The Memorandum pursuant to the report was sent to the Lower House on 13 October 2004. The plenary discussion of this bill by the Lower House took place in March 2005. The Lower House passed the bill unanimously on 15 March 2005.

• *The Ministry of the Interior and Kingdom Relations will realise a model code of integrity for the government. This model code will integrally include the Model Code of Conduct against Racial Discrimination for the Government Sector (*Model Gedragscode Rijksoverheid tegen Rassendiscriminatie*);*
The purpose of the model code is expressly to address the themes of respect for each other's rights/integrity and the prevention of discrimination. Preventing discrimination is regarded as one of the core values within the government sector, and concerns the way in which civil servants treat civilians as well as the way in which civil servants treat each other. On this point, furthermore, the code of integrity contains an explicit reference to the Model Code of Conduct against Racial Discrimination for the Government Sector. The interdepartmental coordination procedure is now complete. The code will be submitted to the Public Sector Negotiation Committee (*Sectoroverleg Rijk*, SOR), whereafter the Minister of the Interior and Kingdom Relations will adopt the final version.

• *In 2004, the Ministry of the Interior and Kingdom Relations will organise a start conference to implement the model code of integrity;*
This action point has not been carried out as yet. The model code procedure is expected to be completed in the course of 2005. Once the model code has been adopted, a start conference will be organised in the second half of 2005.

• *In its training courses, the Ministry of Defence emphasises the unacceptable nature of undesirable conduct and trains managers to act against it;*
This action point is part of current policy. Two studies were published in 2004, by KPMG and by the Inspector-General of the Armed Forces, about the prevention of undesirable conduct. Based on these studies, an action plan will be drawn up in the coming months, setting out how the Ministry of Defence intends to prevent undesirable conduct and make it the subject of discussion in the next few years.

• *In the annual reports of the Ministry of Defence, the effects of this active approach will be reported.*
Racism is one of the items reported via the central counsellors in their annual reports. A register is kept of the number of complaints filed and their settlement.

5.4 Infrastructure

In the Netherlands, a large number of national, regional and local (private) organisations and bodies are actively registering, monitoring, combating and preventing racism and related intolerance, and raising awareness of them. In addition, a number of specific bodies are active in this field, including the LECD. Consequently, there is a real risk of fragmentation, complex coordination and duplication.

Streamlining the infrastructure/grounds for anti-discrimination

• *The Ministry of Justice works to realise a merger/intensive collaboration between the LBR and the LVADB;*

Various steps were taken already in 2004 to achieve intensive collaboration. At present, work is in progress to complete the one-stop-shop construction of the LBR and the LVADB. The two organisations will constitute a federation, consisting of a federation board, a federation council, a federation office and federation members. To this end, the two organisations will sign a declaration of intent. The LBR/LVADB federation will be established in the course of 2005.

• *The Ministry of Justice strives to continue or expand the 'recently launched coordination consultation' between the LVADB, the LBR, the LECD and the National Bureau against Racial Discrimination (*Landelijk Bureau Discriminatiezaken Politie*, LBD);*
The coordination consultation takes place every two months, and is periodically attended by the account manager of the Ministry of Justice. Initiated by the LECD, the purpose of the so-called 'L consultation' is to improve the form and implementation of the Discrimination Order (*Aanwijzing Discriminatie*). After all, the latter stipulates that the Public Prosecutions Department, police and ADBs should hold periodic consultations to coordinate discrimination cases at hand and to determine policy at local and district level. In their capacity of national coordinating and/or advisory and/or expertise centres or agencies, the so-called 'Ls' can direct their support organisations and make arrangements during the coordination consultations. An obstacle in 2004 was that the LBD of the police no longer took part in the L consultation, while on 31 December 2004 the LBD ceased to exist. By now the Council of Police Commissioners has decided to secure the function of the LBD by transferring it to the National Expertise Centre for Diversity (*Landelijk Expertise Centrum Diversiteit*) of the police. The Ministry of Justice invites the four parties to continue with the coordination consultation.

• *The government is working to realise better cooperation and improved alignment of the activities of the Complaints Bureau for Discrimination on the Internet (*Meldpunt Discriminatie Internet*, MDI), the LECD of the Public Prosecutions Department and the LBD.*
This consultation takes place periodically and has been professionalized to a considerable extent in that, in accordance with the Discrimination Order, all parties, i.e. the MDI, the LECD, the Amsterdam Public Prosecutions Department and the police force of Amsterdam-Amstelland are represented at the table in order to discuss the state of affairs, the progress of detection and prosecution and current reports on the basis of an Excel file containing all the discrimination reports made nationwide by the MDI. Taking and sharing responsibility has led to an improvement in the handling of cases, from the legal-technical contents of the reports made by the MDI to the approach taken by the police/digital investigation department and the procedure within the Public Prosecutions Department. The streamlining of reports and their registration is now going well, and the consultation is yielding results. Files that were 'on the list' for a while have been finalised, which has resulted in a number of convictions, transactions and prosecutions. This does not alter the fact that there is sometimes still a difference of opinion between the parties about the punishability of expressions and the best way to deal with such expressions. However, this is all the more reason to maintain a good level of collaboration.

As stated above, the LBD has been absent from the consultation for quite a while. The LECD has taken over the LBD's tasks where possible, also at national level with regard to the approach taken by the police. The police force of Amsterdam-Amstelland is represented, but its powers and possibilities do not extend to encouraging other forces, asking questions, etc. In that case, the LECD tries to achieve matters via the public prosecutor of the district concerned who deals with discrimination cases. However, this is time consuming, inefficient and undesirable. As both the police and the LBD set up for this purpose have recently indicated that they will give greater priority to this consultation, an improvement can be expected on this point. This will increase the level of collaboration.

<u>Streamlining complaints registration and policy monitoring</u>

• *Municipalities and provinces pursue the trajectory launched by the central government aimed at promoting the professionalisation of anti-discrimination bureaus;*

This action point concerns a current activity. The incentive scheme to promote the professionalisation of anti-discrimination bureaus ran from the middle of March 2001 to early August 2004. The scheme was meant to give ADBs the opportunity to professionalize (further). Now that the scheme has finished and there has been an evaluation of the professionalisation process, the Ministry of Justice has decided to set up a directing group in which various parties are represented (central government, the VNG, the IPO, the LBR-LV federation, the CGB, the Public Prosecutions Department and the police). This directing group will draw up a plan of approach regarding the future of the ADBs.

• *Working with the organisations involved, the Ministry of Justice strives to realise more uniform registration of discrimination complaints;*
This action point is part of current activities. The intensive collaboration between the LBR and the LVADB has already resulted in a more uniform complaint registration procedure. In addition to registering complaints under the discrimination sections 137c to 137f inclusive of the Penal Code (*Wetboek van Strafrecht*), the Public Prosecutions Department will now also register offences under ordinary law of a discriminatory nature. This is made possible by the introduction of a new registration system within the Public Prosecutions Department. In January 2004, the Council of Police Commissioners decided that registration of discrimination cases should be implemented in all regional forces as a precondition for a better approach to discrimination cases.
These developments can be included in further consultations with all the parties involved. The pursuit of uniform registration by all the parties involved is certainly useful. Only then will it be possible to chart the true nature and scope of the discrimination problem with the aid of figures.

• *In collaboration with the LBR and the Anne Frank Foundation, the Ministry of Justice is developing a new Racism Monitor;*
This concerns a current activity. With the aid of a guidance committee, there have been talks with the parties involved since 2004 about the structure of a new monitor. The Racism Monitor 2005 will be the first version structured along different lines. This monitor will contain 14 thematic sections, whereby it is borne in mind that the comparability of data with the monitors of previous years should be retained. Among other things, the new Racism Monitor should make it possible for the government to develop appropriate policy to combat and prevent racism and discrimination and to meet international reporting requirements.

• *Research is being conducted to see whether, how and when the events code (13 DI) can be introduced in COMPAS (the Public Prosecutions Department registration system) at national level;*
All criminal offences referred to the Public Prosecutions Department are registered in the so-called COMPAS system. Criminal discrimination offences are normally registered and dealt with under the special discrimination sections included in the Penal Code. These offences are registered at national level in a so-called 'query', and the LECD uses the data from the query in preparing its annual Facts and Figures (*Cijfers in Beeld*) report. However, there are also offences which, although discriminatory in nature, are registered under a so-called section under ordinary law – when viewed from a legal perspective and perhaps more appropriate in some cases – and are also prosecuted, settled and in some cases dismissed under such a section. These facts are disregarded in the so-called discrimination query, which after all only comprises Sections 137 c, d, e, f, g and 429quater of the Penal Code. The COMPAS system offers the possibility of highlighting these offences under ordinary law of a specific nature by means of a so-called offence code. At the LECD's request, the public prosecutor's office in Amsterdam conducted a pilot in which offences under ordinary law of a discriminatory nature were given a special code in COMPAS. The pilot ran for one year and started on 1 April 2003, which is also when the revised Discrimination Order took effect. Based on the results of the pilot it was decided to introduce the pilot nationwide, so as to give the Public Prosecutions Department a better insight at national level into the nature and scope of discrimination. As the Public Prosecutions Department is in the process of releasing an entirely new computer/operating program called GPS, which will completely replace the COMPAS system, the attention and focus will be on including such a compulsory 'coding' of offences under ordinary law of a discriminatory nature in the new GPS system. The Public Prosecutions Department hopes that GPS will annually distil not only the offences under the special discrimination sections but also the offences under ordinary law of a discriminatory

nature, thus providing an (increasingly) more complete picture of the nature and scope of discrimination offences referred to the Public Prosecutions Department.

• *The Ministry of Justice is subsidising the LBR and the MDI.*

In 2004 and 2005, the Ministry of Justice granted the LBR a subsidy for various projects and activities. The Ministry of Justice also granted a subsidy to the MDI in 2004 and 2005 for a number of activities.