

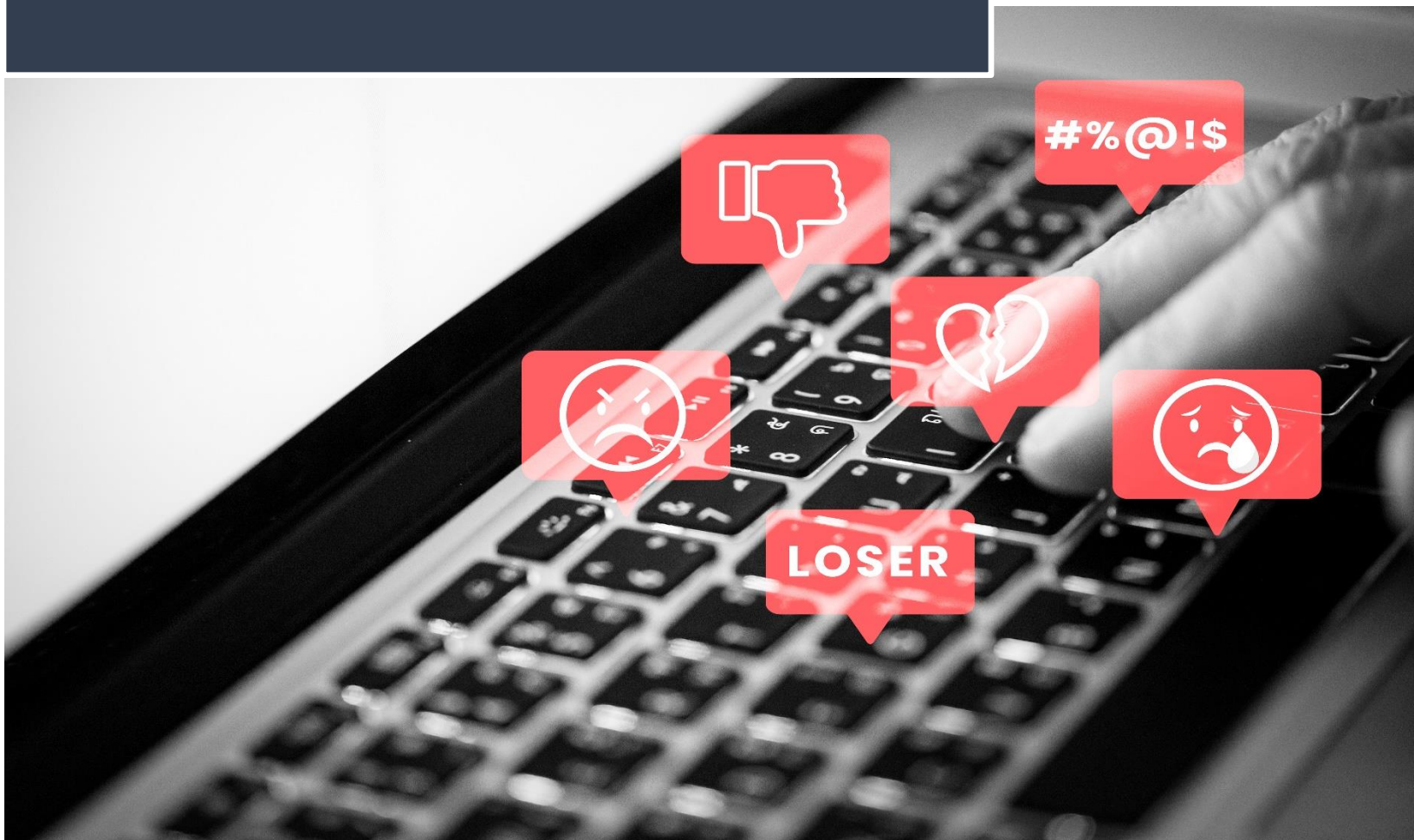
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Hate Speech, Hate Crime and Their Financial Proceeds:

The European and Greek Legal Framework

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Hate Speech, Hate Crime and Their Financial Proceeds: The European and Greek Legal Framework

Abstract

This paper examines the criminal treatment of hate speech and hate crime, which are the primary manifestations of racism and xenophobia, at both European and domestic levels. The analysis focuses on Articles 1(1)(a) and 4 of the Council Framework Decision 2008/913/JHA, which aims to combat certain forms and expressions of racism and xenophobia through criminal law. This framework decision has been incorporated into Greek law by Law No 4285/2014. The analysis aims to determine whether the European Union acted in accordance with the principle of conferral in this area of criminal law and whether the chosen legal tool appropriately exercises its legislative powers. Additionally, the paper explores whether the Greek legislator has fulfilled its obligations as derived from European law, considering the wording, scope of the Framework Decision, and relevant case-law of the ECtHR.

Key words:

racism, xenophobia, hate speech, hate crime, European criminal law

1. The institutional framework for tackling racism and xenophobia

1.1. From the international scene to European Union's actions

Racism and xenophobia encompass discriminatory attitudes and behaviors directed towards individuals or groups based on specific characteristics or qualities. According to the European Commission against Racism and Intolerance (ECRI), racism is defined as the belief that attributes such as race, color, language, religion, national or ethnic origin justify the demeaning or assertion of superiority over an individual or group. However, it is important to note that there is no universally agreed-upon definition for either racism¹ or xenophobia. Additionally, it should be acknowledged that there is no legally binding definition for these phenomena, which are frequently regarded as interchangeable or similar. Nevertheless, it could be said that while racism constitutes a form of manifest behavior, the conceptualization of xenophobia appears different, primarily describing a feeling, a 'latent resentment' that does not in itself fall within the scope of law and repression. Although both racism and xenophobia have a long, centuries-old history, traditionally linked with the element of superiority of certain races over others, the need to criminalize forms of racist and xenophobic behaviors, of which hate speech and hate crime are deemed as the most serious manifestations, arose in recent years, and associated with the efforts to enhance the protection of fundamental rights at an international and European level.

At an international level, the principal human rights instrument defining and prohibiting racial discrimination in all sectors of private and public life is the United Nations Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 21 December 1965, which was ratified by Greece by Law 494/1970. Article 1 of the Convention defines racial discrimination as any distinction, exclusion, restriction or preference based on race, color, 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. Article 4, which is considered a crucial provision in the UN Convention,² condemns all forms of propaganda and organizations that promote ideas or theories asserting the superiority of one race,

¹ ECRI General Policy Recommendation No 7.

² See D. MahaliF and J.G. Mahalic (1987). The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. Human Rights Quarterly. Vol. 9. No 1, p. 89.

color, or ethnic origin. It also addresses the promotion or justification of racial hatred and discrimination in any form. Furthermore, it calls for the immediate adoption of positive measures aimed at eliminating all incitement to such discrimination and any related acts. However, the wording of the provision is broad and reflects the classic conceptualization of racism and discrimination with regard to certain ('protected') characteristics, without making clear the link between the criminalized conduct and certain legal rights, whereas other characteristics or elements related to a person's identity -sexual orientation for example- fall outside the scope of the provision. Additionally, it should be noticed that the Convention introduces the element of 'hatred without a definition being provided. Similarly, the Convention does not provided a definition of hate speech which is broadly described in connection with the perpetrators' motive.

At a European level the Council of Europe has adopted the Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems which was signed in 2003 and ratified by our country by Law No. 4411/2016.³ The Protocol is the first international legal tool to criminalize the dissemination of racist and xenophobic speech on the internet following the need to provide adequate legal responses to propaganda of such nature committed through computer systems.⁴ Religion is added to the protected characteristics if used as a pretext for one of the given factors that led to the targeting of the person or group of persons. Inter alia, racist and xenophobic insult defined as 'any offensive, contemptuous or invective expression which prejudices the honor or the dignity of a person' is also introduced.⁵ That said one could notice that the descriptions of the criminalized conducts seem to be, to an extent at least, more precise than those ones in the UN Convention. However, in as much as the Protocol addresses exclusively acts that are committed on the Internet its scope remains limited and is not sufficient to the efficient protection against such crimes on a large scale. Lastly, it is worth mentioning that the term 'hatred' is reiterated, referred to intense dislike or enmity, whereas the term of 'discrimination' refers to a different

³ FEK 142 3/8/2016.

⁴ Preamble of the Additional Protocol to the Convention on Cybercrime. European Treaty Series-No 189. Council of Europe. Strasbourg. 28.1.2003.

⁵ Explanatory report. Article 5, point 36. Available here: <https://rm.coe.int/1680989b1c>

unjustified treatment given to persons or to a group of persons on the grounds of certain characteristics.⁶

Within the European Union (hereinafter referred to as ‘Union’), the EU institutions had already condemned intolerance, racism and xenophobia since 1977 and had declared their commitment to the protection of fundamental rights and freedoms as derived, in particular, from the Constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁷ However, the primary significant attempts to the formulation of a coherent legal framework of action by means of criminal law took place not earlier than in the 1990s, following the increasing trend of racist and xenophobic incidents as was observed by the European and international fora in charge.⁸ A decisive step towards this direction was the Joint Action 96/443/JHA of July 1996,⁹ through which the Council expressed concerns that the divergences regarding the punishment of specific types of racist and xenophobic behavior among the national legal systems constitute barriers to international judicial cooperation and, consequently, to the prevention of impunity. In the same vein, the European Parliament underlined the need for more comprehensive prevention of racist behaviors and effective sanctions, noting that such forms of racial discrimination are encompassed among the most serious violations of human rights.¹⁰ Besides, according to the European Commission, racism and xenophobia constitute a direct violation of the principles of Article 2 of the Treaty of Function of the European Union (hereinafter referred to as ‘TEU’) - principles on which the Union is founded and which are considered to be common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.¹¹

In this light, Union’s intervention by means of criminal law was deemed as necessary to the approximation of the laws of the Member States and to the encouragement of criminal justice cooperation within the area of freedom, security

⁶ Explanatory report. Article 2, points 15-16, *ibid*.

⁷ Joint statement by the Parliament, the Council and the Commission on respect for fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. OJ C 103, 27.4.1977. Point 1. Available here: [https://eur-lex.europa.eu/legal-content/EL/TXT/?uri=CELEX:31977Y0427\(01\)](https://eur-lex.europa.eu/legal-content/EL/TXT/?uri=CELEX:31977Y0427(01))

⁸ ENAR (2009). The EU Lisbon Treaty. What implications for anti-racism?, Available here: https://www.storre.stir.ac.uk/bitstream/1893/6937/1/FINAL-lisbontreaty_EN_LRfinal.pdf

⁹ See: <https://eur-lex.europa.eu/legal-content/EL/ALL/?uri=CELEX%3A31996F0443>

¹⁰ European Parliament resolution on the position of the European Union at the World Conference against Racism and the situation in the Union. B5-0766/2000.

Available here: https://www.europarl.europa.eu/doceo/document/TA-5-2000-0405_EN.html

¹¹ Article 6 TEE. Preamble of the Framework Decision 2008/913/JHA, point 1.

and justice; a field of shared competence between Union and Member States which is further governed by the principles of subsidiarity and proportionality.¹² In particular, Article 5(3) of the TEU foresees that under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. On the other hand, under the principle of proportionality as derived from Article 5(4) TEU of the TEU, the content and form of Union's action shall not exceed what is necessary to achieve the objectives of the Treaties. In this realm, racism and xenophobia were identified as forms of crime which could be better combated by a holistic Union's approach.¹³ This aim was sought to be met by Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law,¹⁴ which replaced and repealed Council Joint Action 96/443/JHA.

1.2. Framework Decision 2008/913/JHA

The legal tool of Framework Decisions was introduced by the Treaty of Amsterdam. Framework Decisions were used under the so-called 'third pillar' with the aim to facilitate police and judicial cooperation in criminal matters; thataway until 2009 when they were abolished by the Treaty of Lisbon. They were a fully binding legal tool as to their purpose but they left a wide margin of appreciation to Member States to choose the form and means of implementation. Framework Decision 2008/913/JHA was particularly based on ex Articles 29, 31 and 34(2)(f)(b) of the TEU (current Articles 67(3) and 83 TFEU) and was adopted with the aim to ensure greater approximation of Member States' criminal law in the course of effectively combating particularly serious forms of racism and xenophobia¹⁵ through criminalization of hate speech and hate crime. In this realm, the Framework Decision provided for a

¹² Commission proposal for a framework decision on combating racism and xenophobia. COM (2001) 664 Final. Available here: <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52002AP0363>

¹³ Vienna Action Programme. OJ C 19, 23.1.1999. Point 51a. Available here: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999Y0123\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999Y0123(01))

¹⁴ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Available here: [EUR-Lex - 32008F0913 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/legal-content/EN/LEX/?uri=CELEX:32008F0913-EN)

¹⁵ It should be noted that, although racism and xenophobia constitute manifestations of discrimination, the fight against discrimination was not encompassed in the objectives of the Framework Decision, because it was part of the so-called 'first pillar' at the time the Framework Decision was adopted.

minimum number of common definitions of the offences and a minimum level of effective, proportionate and dissuasive sanctions against offenders. Bearing these thoughts in mind, the Framework Decision appears to comply with the principles of subsidiarity and proportionality, as explicitly declared in point 13 of the preamble, since the proposed action to be taken can, by reason of its scale and effects, be better achieved at Union level. At the same time, the Framework Decision does not go beyond reasonable.

On the other hand, it should be noticed that part of theory has been cautious about Union's legislative competence in this particular area of action. These concerns are primarily based on the simple fact that the Union did not have explicit competence to produce legislature by the use of criminal law tools in the field of racism and xenophobia as derived from the provisions in question. Indeed, before the radical amendments that came along with Lisbon Treaty, Union's competency in the area of criminal law was based in ex-Article 31(1)(f)(e) of the TEU, which referred to organized crime, terrorism and drug trafficking. A view into the context of those provisions reveals that the Union obviously departed from the wording of the provisions by adopting a broad interpretation which, however, goes far beyond the linguistic meaning of Article 31(1)(e) of the TEU. To put it differently, despite the absence of explicit competence the Union took action focusing on the need to address certain conducts that threatened the core values of the Member States.¹⁶ To that end, the Union processed to a combinatorial reading of the provisions, criminalizing a conduct by use of an interpretative method rather than by law, contrary to the rules of criminal doctrine,¹⁷ but also in breach of the principle of conferral as derived from Article 5(1) of the TEU. Therefore, the criminal regulation in the field of racism and xenophobia appears to have been dictated by a genuine need to harmonize the legal systems of the Member States, however, that aim was achieved through a problematic process which calls into question the Union's competence in this area.

With regard to the substance of the provisions, the Framework Decision aims to protect the individuals' and the groups of individuals' rights and society at large.¹⁸ A first point to highlight is that the preamble refers to the elements of freedom,

¹⁶ X. Mylonopoulos (2010). Community Criminal Law and General Principles of Community Law. *Poinika Chronika*, p. 161.

¹⁷ B. Mitselou (2021). The fight against racism and xenophobia through the Criminal Law 917/1979 as amended by Laws 4285/2014 and 4497/2017. PhD Thesis, p. 127.

¹⁸ Explanatory Memorandum to COM (2014) 27-Implementation of Council framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, p. 2.

democracy, respect for fundamental rights and freedoms, and the rule of law, without specifying the extent of the protection and, in particular, the legal rights to be protected. Moreover, no definition of racism and xenophobia is provided. On the other hand, it is provided that the term ‘hatred’ should be understood as referring to race, color, religion, descent or national or ethnic origin.¹⁹ These elements, the definitions of whom - with the exception of ‘genealogical origins’ and ‘religion’ - is not encompassed in the Framework Decision, constitute the protected characteristics and considered as fundamental to individuals’ identity. Therefore, hate crimes are considered as identity crimes. This is what renders them different from ordinary crimes; hate crimes target an aspect of a person’s identity that is fundamental to their sense of self.²⁰ The choice of these characteristics is based on historical reasons and is reinforced by the frequency of discriminative behavior on the grounds of them throughout the Union.²¹ Further, it is demonstrated that hate speech and hate crime,²² as manifestations of discrimination, prejudice, hostility and hatred, are identity crimes that not only violate individuals’ rights but also the principle of equality. Besides, promoting substantive equality among human beings, including freedom from discrimination, is a foundational idea in human rights, as also reflected in the very first article of the Universal Declaration on Human Rights (UDHR), adopted by the UN General Assembly in 1948, which provides that ‘All human beings are born free and equal in dignity and rights’.²³ Hence, the gravity of such crimes lies in the perpetrator’s motive, which distinguishes these offences and makes them particularly serious both for individuals and for society as a whole.²⁴ That said, hate speech has huge negative effect on the harmed persons but also may harm the ‘dignitary order of society’.²⁵

However, it should be pointed out that the description of the offences does not appear to be clear enough since it is not linked to a specific legal right, which can be explained by the lengthy negotiations leading up to the final text because of the

¹⁹ Preamble, point 9.

²⁰ OSCE-ODIHR (2009). Hate crime laws-A practical guide. Organization for Security and Co-operation in Europe. p. 49.

²¹ Guidance note on the practical application of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, EU High Level Group on combating racism, xenophobia and other forms of intolerance. November 2018, pp. 4-5.

²² It should be noted that the terms ‘hate speech’ and ‘hate crime’ are solely mentioned in the accompanying documents of the Framework Decision.

²³ A. Dashtevski and J. Ilieva (2017). International Legal Framework for dealing with Hate Speech. *Journal of International Relations*. Vol. XV, Issue 4, p. 359.

²⁴ ODIHR, *ibid*, p. 28.

²⁵ A. Dashtevski and J. Ilieva (2017), *ibid*, p. 359.

difficulties in the agreement of specific minimum rules.²⁶ The Framework Decision was adopted after seven years of negotiations, the complexity of whom was primarily due to the divergences among the legal systems and traditions of the Member States regarding the protection of the right to freedom of expression and its limits.²⁷ Furthermore, there was strong disagreement as to whether or not racist speech should be punished independently of the occurrence of a specific result.²⁸ In this connection, a problematic point is found in Article 1(2), which leaves a broad margin of appreciation to Member States which can choose to only punish conduct that is disruptive, threatening, abusive or insulting, under the argument that solely the most serious forms of criminal offences fall within the scope of the Framework Decision. The provision was envisaged in an attempt to reconcile the different legal traditions of the Member States, but, at the same time, its optional nature entailed the risk of further significant legislative divergences over the process of incorporation into national legal order, and, consequently, of difficulties in international cooperation. The question of whether the Framework Decision ultimately achieved its objectives remains open and, in any event, cannot be answered without a view to the relevant ECtHR case-law.

2. Hate speech

2.1. Defining the boundaries between hate speech and freedom of expression

Article 20(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR) prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whereas Recommendation No 97 of the Council of Europe Committee of Ministers on Hate Speech, which was adopted by the Committee of Ministers on 30 October 1997, holds that hate speech is to be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of

²⁶A. Giannakoula (2014). The development of substantive common law in the context of the European Union: The convergence of definitions of crimes and penalties in the area of freedom, security and justice. Thessaloniki, p. 248.

²⁷ See European Commission (2014). Report from the Commission to the European Parliament and the Council on the Implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law. European Commission Report. Available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0027>

²⁸ See, for example, Council documents 5983/02, 10817/02, 11460/02, 12221/02, 13447/02, 14283/02, 15490/02, 6658/03, 7280/03, 7275/05, 5118/07. Cited by A. Giannakoula, *ibid*, p. 153.

hatred based on intolerance, including intolerant expression by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin. Nevertheless, there is no universal definition of hate speech, whilst the closest we get is a definition in a non-binding policy document of a specialized committee or a body,²⁹ like the one provided by Recommendation No 97. However, a further problematic aspect beyond the non-legally binding nature of the document is that this definition includes the justification of hatred in the sphere of prohibited speech, therefore, remaining broad in its conceptualization of hate speech and encapsulating a low threshold. Additionally, hate speech is solely linked to racial and religious grounds and, as such, other categories as for example homophobic and transphobic speech are left outside the legal spectrum.³⁰

ECtHR has avoided to introduce a definition of hate speech, insisting on a case-by-case analysis of the overall context within which the speech is expressed. This is because the criminalization of hate speech necessarily entails a restriction to the right to freedom of expression, as derived from article 10 of ECHR stipulating that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers,³¹ whereas exceptions to this rule must be applied narrowly and be convincingly justified.³² In this regard, it is noted that the ECtHR case-law has often stressed the significance of freedom of expression as one of the necessary foundations of a democratic society, which concerns not only information or ideas that are pleasantly accepted or considered non-offensive or indifferent, but also those that offend, shock or disturb the State or any part of the population.³³ On the other hand, the Court has held that it may in principle be considered necessary in democratic societies to punish or even prevent all forms of expression which disseminate, promote or justify hatred on the basis of intolerance, provided that the imposition of conditions, restrictions or penalties is proportionate to the aim pursued,³⁴ thus, confirming the possibility, under certain circumstances, of limiting the exercise of this right.³⁵ Moreover, state intervention by means of criminal

²⁹ N. Alkiviadou (2018), *ibid*, p. 205.

³⁰ N. Alkiviadou (2018), *ibid*, p. 205.

³¹ A. Dashtevski and J. Ilieva (2017), *ibid*, p. 363.

³² ECtHR, *The Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, § 59.

³³ ECtHR, *Handyside v. the United Kingdom*, judgment of 7 December 1976, § 49.

³⁴ ECtHR, *Erbakan v. Turkey*, judgment of 6 July 2006, §56; *Gündüz v. Turkey*, judgment of 13 November 2003, §40.

³⁵ See also ECtHR, *The Jewish community of Oslo et al. v. Norway*, judgment of 15 August 2005.

law tools, is deemed compatible with the requirements of the ECHR if necessary in a democratic society.³⁶ On the basis of the above-mentioned arguments and pursuant to certain criteria that the Court has formulated through its case-law, the ECtHR follows a case-by-case approach, examining the particular context of speech. Therefore, hate speech sometimes falls into the legitimate restrictions of Article 10(2) of the ECHR and sometimes falls into Article 17 which prohibits the abuse of a right, holding, in these cases, that racist speech cannot be subject either in principle to the protective content of Article 10 of the ECHR.³⁷ However, the fact that the Court has not, as yet, offered a definition of hate speech has been reasonably characterized as ‘unsatisfactory from the point of judicial interpretation, doctrinal development and general predictability and foreseeability’.³⁸

2.2. Public incitement to violence or hatred: Article 1(1) of the Framework Decision & Article 1 of Law No 4285/14

Pursuant to Article 1(1)(a) of the Framework Decision, each Member State shall take the measures necessary to ensure that intentional public incitement to violence or hatred that is directed against a group of individuals or a member of a group defined by reference to race, color, religion, descent or national or ethnic origin is punishable. The provision is similar to the respective provision in the UN Convention in as much as it links the offence to the public utterance of the speech without requiring the occurrence of a specific result. The purpose of the provision was to criminalize racist speech when it is directed against a group of individuals or a member of a group targeted on the grounds of these protected characteristics. With regard to the public utterance of speech, what seems to be of interest to the EU legislature is the dynamics of the externalization of speech, as derived from the range of individuals likely to be affected by the restriction of their equal participation in the community. Therefore, hate speech forms an other-directed speech which rejects the core human rights principles, human dignity and equality, and seeks to degrade the standing of

³⁶ ECtHR, *Incal v. Turkey*, judgment of 9 June 1998, § 50.

³⁷ See ECtHR, *Féret v Belgium* ECHR, judgment of 16 July 2009; *Norwood v United Kingdom*, judgment of 16 November 2004; *Seurot v France*, judgment of 18 May 2004; *Pavel Ivanov v Russia*, judgment of 24 February 2004. Of the same opinion is also CERD which has highlighted 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’. See CERD General Recommendation 15: Measures to Eradicate Incitement to or Acts of Discrimination (1994) A/48/18 at 114, § 4.

³⁸ N. Alkiviadou (2018). The Legal Regulation of Hate Speech: The International and European Frameworks. *Croatian Political Science Review*. Vol. 55, No. 4, p. 206.

individuals and groups in the estimation of society.³⁹ It would therefore appear that both public order and human dignity are violated. The latter is intertwined with the equal treatment of individuals and, in some legal orders, is recognized as a legal right itself.⁴⁰ Furthermore, the provision in par. (2), although optional, shows that the EU legislature intended to protect individual rights; in particular personal freedom and honor. An argument in favor of this view is also derived from the clause of respect for fundamental rights contained in the Framework Decision.⁴¹ Nevertheless, the element of hatred, the definition of which is unsuccessfully attempted in point 9 of the preamble, where the EU legislature ends up in a tautological reiteration of it, appears problematic. The major problem, however, lies in the difficulty of legally establishing an inner condition on the one hand, and the opposition of the criminalization of such condition to criminal doctrine on the other. Moreover, the choice of the EU legislature to include the element of hatred, which is an inner factor, in the legal definition of the offences referred to in Article 1, means that the limits of the offence are not precisely defined.⁴²

The above-mentioned provision was incorporated into the domestic legal order by article 1 of Law no. 4285/2014.⁴³ Pursuant to this article a ‘mixed’ offence is criminalized. In particular, anyone who intentionally, publicly, orally or through the press, the internet or by any other means or manner, incites, provokes, stimulates or incites acts or actions that may cause discrimination, hatred or violence against an individual or group of individuals targeted on the grounds of race, color, religion, descent, national or ethnic origin, sexual orientation, gender identity or disability, in such a way as to endanger public order or pose a threat to the life, liberty or physical integrity of the aforementioned individuals shall be punished. ‘Gender characteristics’ have also been added to the above-mentioned characteristics by virtue of article 7(2) of Law No. 4491/2017.⁴⁴

In principle, the choice of the Greek legislature to encompass among the protected characteristics those ones of sexual orientation, gender identity, gender characteristics or disability, thus extending the scope of the provision must be seen as a positive step. The enlargement of the grounds of discrimination was a national choice

³⁹ A. Dashevski and J. Ilieva (2017), *ibid*, p. 362.

⁴⁰ A. Giannakoula, *ibid*, p. 249.

⁴¹ Preamble, point 14 and Article 7 of the Framework Decision.

⁴² A. Giannakoula, *ibid*, p. 148.

⁴³ FEKA' 191/10.9.2014.

⁴⁴ FEKA' 152/13.10.2017.

in line with the requirements of the ECtHR, which in *Vejdeland and Others v. Sweden* held that discrimination based on sexual orientation is as serious as discrimination based on race, origin or color.⁴⁵ Another interesting finding of this judgement is also the observation that it is not necessary for speech ‘to directly recommend individuals to commit hateful acts’ given that harm may arise from ‘insulting, holding up to ridicule or slandering specific groups of the population’.⁴⁶ The term ‘gender identity’ was proposed by The Greek National Commission for Human Rights (GNCHR) as appropriate for the full protection of victims in line with the relevant international bodies’ recommendations. However, it is surprising that the above-mentioned characteristics do not include the elements of language and ethnicity, which often constitute the baseline for racist acts,⁴⁷ and the element of ideological beliefs, although the provision includes religion among them.⁴⁸ At the same time it is noteworthy that the absence of provisions addressing attacks on sexual orientation and gender identity, resulting in an arbitrary and unjustified hierarchy of hatred that is deemed worthy of legal address on an international and European scale,⁴⁹ is an obvious weakness of the provision.

As regards public incitement to acts of violence or hatred on the grounds of the protected characteristics, it is noted that this conduct was already described as criminal offence in the article 1 of Law No. 927/1979⁵⁰. Law No. 4285/2014 added the terms of incitement, which is provided for in the Framework Decision, provocation and stimulation. These terms are found in scattered provisions of the Greek Penal Code and constitute gradations of provocation to commit an offence that can be included in the conceptualization of incitement.⁵¹ Furthermore, the placement of the element of hatred in the constituent elements of crime raises questions. Nevertheless, in as much as the inclusion of the element of hatred in Greek law in this way is problematic, so too, it can be argued, regarding the wording of the Framework Decision. That being said, hatred is an inner condition which takes place in the ‘inner-

⁴⁵ ECtHR, *Vejdeland and Others v. Sweden*, judgment of 9 February 2012, §55; *Lilliendahl v. Iceland*, judgment of 11 June 2020, §§38,44.

⁴⁶ ECtHR, *Vejdeland and Others v. Sweden*, *ibid*, §54.

⁴⁷ ECRI Annual Report for Greece 2015. Available here: <https://rm.coe.int/fifth-report-on-greece/16808b5796>

⁴⁸ I. Apostolaki (2002). The criminal repression of racial, national and religious discrimination. *Poiniki Dikaiosini*.

⁴⁹ N. Alkiviadoy (2018), *ibid*, p. 226.

⁵⁰ FEKA' 139/28.6.1979.

⁵¹ Judgment 3/2010 of the Greek Supreme Court in full Court. Available here:

http://www.areiospagos.gr/nomologia/apofaseis_DISPLAY.asp?cd=H9946F7BRL9LVHZJYRVYLEKKBG78DDI&apof=3_2010

mental state' of the offender.⁵² The mere criminalization of an internal condition related to emotions, therefore, without the additional requirement of its manifestation to the outside world raises reasonable questions as to the compliance of this provision with the principles of criminal law and in particular that of legitimacy which dictates criminalization of conducts and not emotions in line with the principle of *cogitationis poenam nemo patitur*.⁵³ Moreover, article 7 of the Greek Constitution also links the crime to the commission of an act. It is worth noting that in the initial draft law submitted for consultation, the use of the term 'hostility' which describes acts of hatred and indicates the demand for manifestation of the emotion was stipulated as better.⁵⁴ In the light of the foregoing considerations, I consider as more correct the view that favors a tight interpretation of the provision so that only incitement to discrimination and acts of hatred or violence fall within its scope.⁵⁵

Furthermore, it should be noted that the offence includes acts or actions that may cause discrimination, hatred or violence. It should be clarified that the reference to actions could have been omitted since acts include both actions and omissions. The introduction of the verb 'may', which takes as the reference point of the offence a present or future offence and not an offence that has already been committed, can be seen as positive.⁵⁶ In addition, the introduction of the term of 'discrimination' in excess of the minimum requirements laid down in the Framework Decision is noteworthy. However, a further positive step would be a clear definition of the conceptualization of discrimination so that the offence is more precisely defined.⁵⁷

For the offence to be established, the act must also be objectively likely to endanger public order or threaten the life, liberty or physical integrity of the individuals or groups targeted. Moreover, as noted in the explanatory memorandum to the incorporation law, the criminalization of events that are considered completely inappropriate to lead to the victimization of a particular group or individual because

⁵² X. Mylonopoulos, *Criminal Law - General Part I*, Ed. Law & Economy, P.N. Sakkoulas 2007, p. 603.

⁵³ N. Androulakis, *Criminal Law-General Part*, ed. Ant. Sakkoula, Athens-Komotini, 1985, p. 162; I. Manoledakis, *Criminal Law (Articles 1-49 of the Penal Code), General Part Compendium*, Thessaloniki, Sakkoula, 1999, p. 140.

⁵⁴ The original draft law under the title "On combating certain forms and manifestations of racism and xenophobia through criminal law" consulted between 21 February and 3 March 2011 included the term hostility with the note that it should be understood as referring to both the cultivation and the externalisation of feelings of hate and rivalry.

⁵⁵ E. Simeonidou-Kastanidou (2016). The criminal treatment of racism and xenophobia in M. Gasparinatos (ed.) *Crime and criminal repression in an era of crisis. Honorary volume for Professor Nestor Kourakis*. Ant. Sakkoulas Publications: Athens, p. 1657.

⁵⁶ E. Simeonidou-Kastanidou (2013). Manifestations of racism and freedom of expression. *Poinika Chronika*, p. 487.

⁵⁷ M. Kaifa-Gbandi (2016). The criminal repression of racist rhetoric, racist crimes and racist discrimination: towards an effective protection of human dignity. *Criminal Law*, pp. 104.

of their physical and cultural characteristics must be avoided. In this connection, the Greek legislature has held that it is not sufficient to merely consider the probability of exposure to danger in the abstract, but that it is necessary to investigate *in concreto* the suitability of each specific event to produce an immediate and imminent danger both overall for peaceful and orderly social coexistence and for the rights of the group or individual against whom it is directed.⁵⁸ Under these thoughts, the following can be concluded: First, a specific risk offence is criminalized;⁵⁹ the risk is encompassed within the constituent elements of crime and aims at increasing the protection of legal rights already at the preliminary stage of the infringement, without requiring its fulfillment. Secondly, the Greek legislature added to the list of protected legal rights public order and the right to life, liberty and physical integrity. It should be noted that it has also been argued that the value of human beings should be taken a legal right itself; a choice which would also be in compliance with the spirit of the Framework Decision.⁶⁰ Moreover, we should not disagree that human value constitutes a 'key concept' as the 'logical self-evident of the post-liberal democratic legal order'.⁶¹

It is worth noticing that the European Commission has sent a letter of formal notice to Greece⁶² with the reasoning that the Framework Decision has not been fully or accurately transposed into the domestic legal order. This warning notice states that the Greek legal system criminalizes hate speech solely when public incitement to violence or hatred endangers public order or constitutes a threat to the life, liberty or physical integrity of individuals. The following conclusions should be made on this point:

Article 1(2) of the Framework Decision, as rendered in the Greek translation of the document, expressly provides that for the purposes of par. (1), Member States may choose to punish only conduct which is either manifested in a manner that disturbs public order or is threatening, abusive or insulting. Regardless of the risks posed by this provision, as set out above, the EU legislature has chosen to leave a wide margin of appreciation to the Member States and the Greek legislature has made use of this

⁵⁸ Explanatory memorandum to the draft law 'Amendment of Law No. 927/1979 (A' 139) and its adaptation to Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (L 328)'.
⁵⁹ Simeonidou-Kastanidou considers, however, that a potential (or abstractly specific risk) offence is committed. See, for example, *The criminal treatment of racism and xenophobia*, *ibid.*

⁶⁰ M. Kaiafa-Gbandi, *ibid.*, p. 106.

⁶¹ I. Manoledakis (1997). Human dignity: a legal good or an absolute limit to the exercise of power? in I. Manoledakis and C. Prittwitz (eds.) *The Criminal Protection of Human Dignity" (Greek-German Symposium, Thessaloniki 1995)*, Sakkula Publications. Thessaloniki, pp. 18-19.

⁶² Available here: https://ec.europa.eu/commission/presscorner/detail/el/inf_21_2743

possibility by limiting the offence to the cases analyzed above. In view of that and given the linguistic equivalence of the legal EU documents, by virtue of the grammatical wording of par. (2) of the Framework Decision, as rendered in the Greek translation, the relevant discretion lies with the national legislature, who chose to make use of that option, moving within the linguistic meaning of the EU provision. From that point of view, I consider that the Greek legislature's compliance with the EU provision can be upheld. On the other hand, in other language versions of the Framework Decision (e.g. English, French), the wording refers to public incitement to violence or hatred that may (or is likely to) disturb public order, without the requirement to have actually endangered it, or is threatening, abusive or insulting, without naming specific legal rights. The Greek legislature has ended up criminalizing an offence of specific - and not abstract - risk, justifying this choice on the grounds of the adequacy of risk. The key question, however, is which are those events that are completely inappropriate to lead to the victimization of a particular individual or group. Furthermore, it is not clear what the conceptualization of victimization consists of. In principle, it appears questionable to argue that acts which are clearly capable of causing discrimination, hatred or violence are at the same time completely insufficient to lead to victimization on the grounds that they do not amount to an offence against public order or to a threatening, abusive or insulting content to specific legal rights. Additionally, victimization can reasonably be said to occur by the mere provocation of discrimination, hatred or violence, consisting in the public denial of the equal value and equal treatment of the targeted individuals or groups. That said, the observation that the Greek legislature has failed to clarify which legal rights it wished to protect and for what reasons appears to be reasonable.⁶³

It is underlined that ECtHR considers a restriction to freedom of expression to be justified where, in the circumstances in which the speech is expressed, it is established that there is a real risk⁶⁴ for the rights of third parties or for public order; otherwise, an 'aggressive state of preparedness' against the members of a group, forming the baseline for excluding the possibility of their equal and free participation in social life.⁶⁵ Besides, with the recent judgment in *Lilliendahl v. Iceland* the Court held that into the category of hate speech not only puts speech which explicitly calls

⁶³ M. Kaiafa-Gbandi, *ibid*, pp. 105-109.

⁶⁴ ECtHR, *Perincek v. Sweden*, judgment of 15 October 2015, §§ 204-208

⁶⁵ E. Simeonidou-Castanidou, *ibid*, p. 1664.

for violence or other criminal acts, but also attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression.⁶⁶ What the ECtHR seems to emphasize at is whether the speech is objectively capable of undermining the equal value of the targeted individual or group in the community. The recent decision 858/2020 of the Greek Supreme Court moves into the same direction, placing the focus on human dignity, from which derives the right to equal treatment, free development of personality and the prohibition of any discrimination.⁶⁷

Taking these considerations into account, the compliance of the provision with both the spirit of the Framework Decision and the case-law of the ECtHR raises questions. In particular, the appropriateness of the Greek legislature's decision to criminalize an offence of a specific risk by limiting the scope of the criminal offence seems to be inherently questionable.

3. Hate crime: Article 4 of the Framework Decision & Articles 10 of Law No 4285/14 & 82A of the Greek Penal Code

Article 4 of the Framework Decision titled 'Racist and Xenophobic motivation' addresses the so-called 'hate crime' and covers offences committed by racist and xenophobic motives, which encompass (almost) any offence of those criminalized under the Greek Penal Code.⁶⁸ In particular, it provides for an obligation for Member States to ensure that such motives are considered as aggravating circumstances or, alternatively, are taken into account by the courts in the determination of the penalties. With this provision, the EU legislator has sought to ensure that Member States recognize the particular gravity of such crimes and that national legal systems will include provisions in their criminal law that deal with this motive in a specific way.⁶⁹

⁶⁶ Judgment of 11 June 2020, §36.

⁶⁷ See. G. Nouskalis on the comparison of the judgments 858/2020 and 3/2010 of the Greek Supreme Court and the shift of focus to human dignity. Conditions for punishing homophobic speech under Art. 927/1979 in the recent case law examples of the ECtHR and the Supreme Court (decision in 'Lilliendahl v. Iceland' and AP 858/2020) - Interpretative shift towards broader protection against discrimination after Law 4285/2014'. *Criminal Law 1/2021*, pp. 11-13.

⁶⁸ Guidance note on the practical application of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, *ibid*, p. 8.

⁶⁹ Guidance note on the practical application of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, *ibid*, p. 8. Explanatory Memorandum to COM (2014) 27-Implementation of Council framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, *ibid*, p. 6.

The above-mentioned provision was incorporated into the Greek legal order by article 10 of Law No. 4285/14 which was further incorporated in article 82A of the Greek PC. Pursuant to article 82A PC, as in force, if a crime has been committed against the victim whose selection was made because of the characteristics set out in article 1, the minimum penalty has to be increased. In particular, for misdemeanors punishable by imprisonment of up to one year, the minimum sentence is increased by six months, whereas in other misdemeanor cases it has to be increased by one year. For felonies, the minimum penalty shall be increased by two years. It should be noted that, possibly by mistake, cases of misdemeanors punishable (also) by a fine or social service are not regulated.

This article constitutes a specialization of the main offence by introducing an independent aggravating circumstance for cases where the perpetrator acted with racist motives for reasons related to the victim's characteristics, without requiring these to be cumulative. It is therefore a distinct variant of the main offence. It is clear from the wording of the article that the main offence may be (almost) any misdemeanor or felony from among all the offences laid down in the Penal Code, unless otherwise provided for. Consequently, any crime committed against a person who bears the characteristics provided for in article 82A PC becomes a 'specifically' criminalized offence if the basic conduct is 'enriched' by the objective element of the victim's choice on the grounds of the protected characteristics.⁷⁰ It should be noted that the racist motive must be the dominant motive of the perpetrator and it is not sufficient for it to coexist with other reasons.⁷¹ However, it must be accepted that a racist motive does not have to be the sole reason for committing the crime, but a combination of motives may be present. Accepting a different position would limit the regulatory scope of the provision and could ultimately lead to its non-application because of the difficulties of proof.⁷²

In its initial wording, article 81A PC criminalized the racist crime if the act was motivated by hatred on the grounds of at least one of the characteristics stated in the provision. The element of hatred was encompassed within the constituent elements of

⁷⁰A. Stephanidou (2002). Crime with Racist Characteristics: An Analysis of the Provisions of Article 82A of the Penal Code. *Lawspot*, last visited on 27.5.2022. Available here: <https://www.lawspot.gr/nomika-nea/egklima-me-ratsistika-haraktiristika-analysi-ton-diataxeon-toy-arthroy-82a-toy-poinikoy>

⁷¹G. Voulgaris (2010). Hate Crimes. *Poiniki Dikaiosi*, p. 711.

⁷²In particular, in the case of No. 927/1979, judicial authorities had the tendency to apply this Law only to cases where the racist motive was the sole reason for the crime. See ECRI, 4th Report. Available here: <https://rm.coe.int/fourth-report-on-greece-greek-version-/16808b5795>

the racist crime that had to be present at the time of the commitment of crime. The requirement of hatred referred to the inner-mental state of the offender and created evidentiary difficulties which played a significant role to the rarity of the application of the law.⁷³ To that end, the element of ‘hatred’ had already been abolished by Law No. 4356/2015⁷⁴ in order to be included in the provision not only offenders whose sole motive is hatred, but also those who, allegedly motivated by any other motive, choose the victim because of the characteristics listed in the provision.⁷⁵ In the light of the current provision, the selection of the victim on the grounds of these characteristics is of interest, irrespective of whether they are actually present or whether the belief in question is based on an incorrect assessment of the offender.⁷⁶

The national legislature shifted attention from the element of ‘hatred’ to that of ‘choice’, within which the element of discrimination and the element of prejudice coexist. Hence, the main difference is that the focus shifts from the offender’s motive to the victimization of the targeted individual or group because of their characteristics. It can thus be argued that the increase in the penalty is based on the increased wrongfulness of the conduct in question because it violates, not only the primarily protected legal rights that fall into the scope of each crime but also human dignity.⁷⁷ At the same time, the current wording addresses the problem of the difficulties of proof through the introduction of objective factual circumstances. Consequently, the Greek legislature appears to have complied with their obligations under the EU law, as they derive both from the wording of article 4 of the Framework Decision and the unequivocal decision of the EU legislature to combat hate crimes efficiently.⁷⁸ Moreover, the provision meets the requirement of adequate protection against racially motivated offences that shall be provided by the national legal systems as stated by ECtHR case-law; otherwise, failure to effectively deal with hate crimes ‘would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights’.⁷⁹

⁷³ Explanatory memorandum Law No. 4356/2015.

⁷⁴ FEK 181 A’ 24.12.2015.

⁷⁵ Available here: <https://www.hellenicparliament.gr/UserFiles/2fo26f42-950c-4efc-b950-340c4fb76a24/s-simvi-eis.pdf>

⁷⁶ E. Simeonidou-Kastanidou, The criminal treatment of racism and xenophobia, *ibid.* See also M. Kayafa-Gbandi, who argues that such an interpretation expands the offence beyond the wording of the provision, *ibid.* p. 110. Similarly, K. Kosmatos and M. Martinis, analysis of Article 82A of the CC in A. Charalambakis *The new Penal Code - interpretation according to the article of Law 4619/2019*. Volume I, Nomiki Bibliothiki, p. 650.

⁷⁷ M. Kaiafa-Gbandi (2020). *The Law of Criminal Sanctions*. Nomiki Bibliothiki, p. 196.

⁷⁸ Guidance note on the practical application of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, *ibid.*, p. 8.

⁷⁹ ECtHR, Šečić v. Croatia, judgment of 31 May 2007, §67

One last issue that is called into question is the relationship between articles 82A and 184(2) PC. Article 184 PC is laid down in the chapter of crimes against public order and foresees the imprisonment of up to one year or a fine to those who in public by any means or via the internet provoke or incite (others) to commit a misdemeanor or felony and thereby endanger public order (offence of specific endangerment). This act is punishable by imprisonment for up to three years or a fine if the offender attempts to commit assault against a group or individual identified on the grounds of race, color, etc. Pursuant to the provision when the crime of racial incitement is committed, the application of article 82A PC is excluded. Although it is conceivable that there may be overlapping between the two provisions, the Greek legislature chose to maintain both in view of the requirement of article 82A for commitment of crime against a specific individual, who is not necessary to be fulfilled in the case of racial incitement.⁸⁰ In conclusion, it can be said in principle that if the act is directed against a specific individual, article 82A PC should be applied, whilst if it is directed against an indefinite number of individuals belonging to the targeted group, article 184(2) PC should be applied.⁸¹ However, it should be noted that the specialization of the act in article 184(2) PC describes one form of incitement (racist incitement) which is linked to the result of the public utterance of racist speech. This result consists in the attempt of committing assault against an individual or group bearing the prescribed characteristics and addresses a single form of discriminative manifestation. On the other hand, article 82A is set out as an aggravating circumstance in any offence, thus taking on a broader content that encompasses both the provocation of discrimination in its various manifestations and the possibility of provoking discrimination. Consequently, article 184(2) PC appears as a more specific provision in comparison to article 82A PC, which, therefore, should not be applied.⁸² In summary, the clause of non-application of article 82 PC in cases of racist incitement aims to exclude the double assessment of the crime, although without leading to inadequate treatment of the racist motive, since the perpetrator who allegedly motivated by this racist motive commits the crime, will be punished under the increased punishment set by the aggravating circumstance of article 184(2) PC.

⁸⁰ Explanatory memorandum n. 4619/2019

⁸¹ E. Kaberou (2019). Analysis of article 184 of the Penal Code in A. Charalambakis (ed.) *The new Penal Code - interpretation according to article of Law 4619/2019*. Vol. I, Nomiki Bibliothiki, p. 1232.

⁸² G. Nouskalis, *ibid*, pp. 14-15.

4. Targeting the profits of hate speech

Although hate speech and hate crime date back in time, the frequency of such crimes is being amplified, at an unprecedented scale, by new communication technologies; one of the most common ways of spreading divisive rhetoric on a global scale. Therefore, the central question is which should be the role of social media platforms that operate as intermediaries and the extent of their potential liability given that digital service providers and platforms often do not enforce or do not have the capacity to enforce their own community guidelines.⁸³ In addition to the legal challenges, another question that needs to be answered is related to the fact that hate speech turns out to be not only harmful but also profitable for the platforms themselves; in this context, how realistic it is for them to oppose their own interests?

Today, the most debated European instrument countering illegal hate speech online is the Code of Conduct (CoC)⁸⁴ between Facebook, Microsoft, Twitter and YouTube (The ‘IT Companies’) and European Commission which was agreed in May 2016, following the Joint Statement issued by the Justice and Home Affairs Council of 24 March 2016 on the terrorist attacks in Brussels which underlined that necessity of countering terrorist propaganda and developing a code of conduct against hate speech online.⁸⁵ However, as the European Parliament underlines, this voluntary mechanism represents a less intrusive interference with freedom of expression, but it also lacks the constitutional safeguards for the protection of the same. Further, it is also suspected that individuals who want to engage in hate will migrate to other, less-regulated platforms.⁸⁶ In addition, there is a risk that lawful speech may be removed in error, or that the general environment will inhibit individuals from expressing themselves online,⁸⁷ while it is possible that authorities can pressure private

⁸³ Opinion of the European Committee of the Regions on extending the list of EU crimes to hate speech and hate crimes (2023/C 79/03). Available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52022IR1407>

⁸⁴ The EU Code of Conduct on countering illegal hate speech online. Available here: [The EU Code of conduct on countering illegal hate speech online \(europa.eu\)](https://ec.europa.eu/justice/eu-code-of-conduct-on-countering-illegal-hate-speech-online/)

⁸⁵ Joint statement of EU Ministers for Justice and Home Affairs and representatives of EU institutions on the terrorist attacks in Brussels on 22 March 2016. Available here: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/24-statement-on-terrorist-attacks-in-brussels-on-22-march/>

⁸⁶ European Parliament (2020). Hate speech and hate crime in the EU and the evaluation of online content regulation approaches, Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies, p. 53.

⁸⁷ C. O’ Regan and S. Teil (26.2.2020), Hate speech regulation on social media: An intractable contemporary challenge, Research Outreach. Last seen 6.5.2023. Available here [Hate speech regulation on social media: A contemporary challenge \(researchoutreach.org\)](https://researchoutreach.org/2020/02/hate-speech-regulation-on-social-media-an-intractable-contemporary-challenge/)

companies to remove content which the former would not be authorized to remove if it is below a certain threshold of illegality.⁸⁸

The above arguments are not exhaustively listed raising also reasonable concerns of illicit substitution of law enforcement by service providers which serve private interests seeking the maximization of their own profit. Although the motives behind the crime vary, particularly attention needs to be drawn to the economic aspect of hatred which is linked to its generated profits for social media platforms. The latter seem to be directly monetarily benefited from the advertising revenue. However, the lack of editorial oversight and the speed amount of content in digital era result in advertising being placed alongside content created by people from across the world. That means that an advertiser could see their advertisement appear alongside a post featuring an ordinary or 'innocent' topic just as easily as alongside an extremist poster.⁸⁹ At the same time, the more hateful the speech is the most profitable turns out to be, as explained by the fact that this content attracts bigger engagement.⁹⁰ As a result, if these platforms adopt safer mechanisms or, to put it differently, if they '*change the algorithm to be safer, people will spend less time on the site, they'll click on less ads, they'll make less money*' as '*people enjoy engaging with things that elicit an emotional reaction, and the more anger they get exposed to, the more they interact and the more they consume*'.⁹¹

Consequently, despite the fact that the 'IT Companies' argue that they share the European Commission's and EU Member States' commitment to tackle illegal hate speech online, the above situation creates a conflict of interest in that while arguing that they seek to remove hate speech from their platforms, at the same time, these companies wish to gain attention, generate controversy and increase engagement on

⁸⁸ European Parliament (2020), *ibid* p. 53.

⁸⁹ K. Leeataru (14.12.2018). Should Social Media Be Allowed To Profit From Terrorism And Hate Speech? Forbes. Last seen 18.6.2023. Available here: [Should Social Media Be Allowed To Profit From Terrorism And Hate Speech? \(forbes.com\)](#)

⁹⁰ United Nations, UN News (2023), Hate speech: Turning the Tide. Last seen 6.5.2023. Available here: [Hate Speech: Turning the tide | UN News](#)

⁹¹ T. Bateman (2021). Facebook profits off hate and that's why it won't change, says whistleblower Frances Haugen. Euronews.next. Last seen 6.5.2023. Available here: [Facebook profits off hate and that's why it won't change, says whistleblower Frances Haugen | Euronews](#)

See also A. Aziz (2020). Facebook Ad Boycott Campaign 'Stop Hate For Profit' Gathers Momentum And Scale: Inside The Movement For Chang. Forbes. Last seen 6.5.2023. Available here: [Facebook Ad Boycott Campaign 'Stop Hate For Profit' Gathers Momentum And Scale: Inside The Movement For Change \(forbes.com\)](#)

their platforms,⁹² ending up directly monetarily benefiting from that speech.⁹³ Similarly, that seems to be the case for the so-called influencers who wish to gain followers and increase their own visibility and influence,⁹⁴ without having either any legal obligation or motive not to do so.

In summary, the role of social media platforms and perhaps of people who influence other people on social media can be complementary to a broader framework of actions to tackle hate speech and hate crime, but the primary focus should be on the effective implementation of a robust legal framework that provides for legally binding obligations. The example is offered by the Network Enforcement Act, also known as NetzDG, a German law against fake news and hate crimes on social media passed in October 2017. The law imposed a number of obligations on telecommunications service providers which, for profit, operate online platforms designed to allow users to share any content with other users or make that content available to the public. However, in order to avoid further isolated solutions that exacerbate differences, if not controversies, among national legal orders, the next step should be an effective EU liability regime that specifically addresses the economic aspect of these crimes and does not reflect the limitations of the current voluntary instruments.

5. Conclusion

In conclusion, despite the issues that call into question the Union's competence in the field of racism and xenophobia accompanied with the concerns of ineffectiveness, Framework Decision 2008/913/JHA has contributed, although to an extent, to the uniform criminalization of the most serious manifestations of racism and xenophobia within the European area addressing hate speech and hate crime directly. It has also been a driving force for the Greek legal order, which, prior to the adoption of Law No. 4285/2014, had been trapped in an ineffective anti-racist law that remained in practice inapplicable due to its inherent weaknesses. On the other hand, it is a fact that there is an increasing trend in hate speech and hate crimes worldwide, which dictates to effectively combat such phenomena through a holistic approach,

⁹² United Nations, UN News (2023), *ibid.*

See also P. Mozur (15.12.2018). A Genocide Incited on Facebook, with Posts from Myanmar's Military, New York Times. Last seen 6.5.2023. Available here: [A Genocide Incited on Facebook, With Posts From Myanmar's Military - The New York Times \(nytimes.com\)](#)

⁹³ United Nations, UN News (2023), *ibid.*

⁹⁴ United Nations, UN News (2023), *ibid.*

including criminal law.⁹⁵ In this light, on 9 December 2021 the European Commission presented its initiative to extend the list of crimes that fall into article 83(1) of the Treaty of Function of the European Union (TFEU) in order to encompass hate speech and hate crime in the area of particularly serious cross-border crime.⁹⁶ Obviously, on the one hand, these manifestations constitute forms of particularly serious crime. On the other hand, it should not be overlooked that the cross-border nature of crime is also a prerequisite of Union's competency which must be fulfilled in order to avoid a potentially unreasonable interference of the Union in the sensitive field of criminal law; a field that is closely linked to the state dominance. However, if the arguments against the cross-border nature of hate speech and hate crime are overcome,⁹⁷ the implementation of this proposal may decisively contribute to the effective combatting of racism and xenophobia through a more appropriate and coherent legal tool - a Directive-, while, at the same time, to the elimination of the current concerns that Framework Decision 2008/913/JHA legitimately raises.

⁹⁵ ECRI Annual Reports for 2019 and 2020. Available here: <https://rm.coe.int/ecri-annual-report2019/16809ca3e1> and <https://rm.coe.int/annual-report-on-ecri-s-activities-for-2020/1680a1cd59>

⁹⁶ COM (2021) 777 Final .9.12.2021. Available here: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6561

Available here: <https://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:32016R0794&from=EN>

⁹⁷ In this regard, it is noted that Regulation EU 2016/794 of the European Parliament and of the Council of 11 May 2016 encompasses racism and xenophobia among the serious forms of crime with a cross-border nature. Available here: <https://op.europa.eu/en/publication-detail/-/publication/f866de4e-57de-11ec-91ac-01aa75ed71a1/language-en>

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