



**JUSTICE briefing on the European Commission
Proposal for a Council Framework Decision on
Racism and Xenophobia
(as amended by Droipen 38, 12 June 2002)**

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Introduction

1. JUSTICE welcomes the European Commission's proposal for a Council Framework Decision on Racism and Xenophobia. The abolition of dual criminality for crimes of "racism and xenophobia" through the Council Framework Decision on the European Arrest Warrant means that, in effect, each Member State is accepting the law relating to "racism and xenophobia" of all the other Member States. Given the disparity of the laws across the EU relating to racism and xenophobia, this proposal for a degree of harmonisation of the laws is helpful in providing some level of legal certainty in this regard and in helping to prevent racist and xenophobic groups taking advantage of differences in the laws of the Member States in order to pursue their racist and xenophobic activities.
2. JUSTICE believes that, while much of the conduct referred to in the proposal is contained in the 1996 Joint Action concerning action to combat racism and xenophobia¹, the clearly binding nature of a Framework Decision with its specific references to penalties and sanctions and jurisdiction is a helpful development in EU co-operation to combat racism and xenophobia.
3. There is a delicate balance to be met in any legislation relating to so-called "hate crimes" between protection of the rights to freedom of expression and freedom of association under Articles 10 and 11 respectively of the ECHR (reflected and expanded in the Chapter II of the Charter of Fundamental Rights of the European Union) and the protection of the rights of others. "Hate crimes" can amount to breaches of the victim's rights to protection from inhuman and degrading treatment under Article 3 of the ECHR and they may also infringe the right to respect for private and family life under Article 8 ECHR and in some cases the right to manifest religion or belief as protected by Article 9 ECHR. Article 17 of the ECHR also provides a prohibition of abuse of rights. In order to achieve this balance, the draft Framework Decision must pass two general tests to ensure that it does not amount to an obligation on Member States to draft legislation in breach of fundamental rights despite the statement to the contrary in paragraph 15 of the preamble.

Test 1 - Is there a pressing social need?

¹ OJ L 185, 24/07/1996, p. 0005-0007

4. The extension of the principle of mutual recognition in European judicial co-operation means that a cohesive and clear approach to what is understood to be criminal conduct of a racist and xenophobic nature in Europe would be helpful. A European definition of the minimum levels of legislation relating to the criminality of racism and xenophobia serves two purposes. Firstly, it allows for a degree of legal certainty in a European judicial space as to the meaning of racism and xenophobia which would allow individuals to regulate their conduct accordingly. Secondly, it prevents racist and xenophobic groups exploiting the differences between the laws of the Member States to pursue their racist and xenophobic aims.²
5. The increased use of the internet and the freedom of movement within the EU have meant that particular elements of racist and xenophobic conduct which may, in the past, have been viewed as specific to particular Member States (who legislated accordingly) must now be seen as pan-European problems and should therefore be legislated for on a European level.

Test 2 - Is there a proportionate link between the aim pursued and the measure adopted?

6. Criminalisation of conduct which amounts to a restriction of the right to freedom of expression and/or freedom of association is an extremely coercive measure. In order to be proportionate, the type of conduct targeted must be very clearly defined so as to prevent only the exact type of conduct required and no more. Combating racism and xenophobia in the community should be done in a holistic way including education and awareness raising and could include possible civil penalties. Extreme care must be taken not to restrict legitimate academic research, journalism and artistic expression by too broad drafting of provisions which could place obligations on Member States to effectively breach their obligations under international human rights law.
7. The most recent draft of the Proposal for a Council Framework Decision on Racism and Xenophobia (Droipen 38, 12 June 2002) is substantially different from the original Commission proposal. The offences listed in the latest draft are more clearly defined and less wide-ranging than the original proposal although there remain points on the specific

² The comment on this proposal from the Standing Committee of Experts on International Immigration, Refugee and Criminal Law in the Netherlands raises the particular problem of cross-border racism citing extreme right wing demonstrations which are legal in the Netherlands being used as a platform for German members of extreme right parties to express views in German which would be criminalised in Germany under German hate-speech laws.

offences which still need to be clarified. There follows an analysis of key points of concern.

Racist and Xenophobic Offences – Article 1

8. The number of types of offence listed has been reduced. Those areas of the proposal that were of greatest concern to JUSTICE have been removed from the text. The new text does contain some points that require clarification.
9. The first provision states that “the following intentional conduct when committed without right is punishable”. It is difficult to understand where the type of conduct outlined (incitement to racial hatred or violence) could be described as “with right”. As such, the inclusion of the specification that the conduct must be “without right” is meaningless at best and, at worst, is an opening for Member States to allow for the possibility of this sort of conduct to be condoned in certain cases. In this regard, JUSTICE prefers the alternative text suggested by the UK delegation.
10. The new text contains no reference to “public insults or threats”. The previous wording was extremely wide. The UK delegation’s text contains a reference to public insults or threats but does not mention the effect of those public insults or threats as a condition for criminality. If public insults or threats are to be included in the Framework Decision, JUSTICE would wish to see the inclusion of a condition that such insults and threats were the cause of alarm or distress.
11. JUSTICE welcomes the inclusion of an element of intent in the offences of condoning crimes of genocide and holocaust denial contained in new Article 1 (b) and (c). JUSTICE is still concerned that the reference to “trivialisation” in Article 1(c) is too broad. The instrument is designed to provide a basic level of harmonisation in the laws relating to racism and xenophobia leaving Member States free to legislate to a higher level within the terms of the Framework Decision.
12. JUSTICE believes that “discrimination” is an issue that is properly dealt with under EC directives in the first pillar and as such “incitement to discrimination” should not be included within the text of the Framework Decision. Criminalisation of racist and xenophobic acts is only likely to be a proportionate restriction on freedom of expression or association in extreme cases, civil remedies being available for many kinds of discriminatory conduct. When the incitement to discrimination is severe enough to justify

criminalisation, the conduct is likely to include some form of incitement to violence or racial hatred in any event. JUSTICE would suggest that “discrimination” should be removed from the definitions of offences included in Article 1.

13. JUSTICE welcomes the removal of mere “supporting” from the provisions for offences relating to a racist or xenophobic group.

The Penalties and Sanctions – Article 6

14. JUSTICE would like to see more of a focus on training and awareness raising measures and more consideration of restorative justice in the approach to penalties and sanctions. Racism and xenophobia are serious social problems which need to be addressed appropriately and in a holistic way. Consideration should be given as to whether custodial sanctions and penal measures in general are always the most effective way of tackling racism and xenophobia in all their manifestations.

Initiation of Prosecutions – Article 11

15. Article 11 makes prosecution of and investigation into offences not dependent on the report or accusation made by a victim. This, while understandably aimed at redressing the problem that many victims of racist and xenophobic offences do not report the crime for a number of reasons, creates other problems.
16. In order to ensure that prosecution and investigation into alleged offences is proportionate and appropriate and not, in itself, biased along racist or xenophobic lines (whether intentional or not), there must be sufficient monitoring of such prosecutions and investigations. Each Member State should produce an annual report of investigations and prosecutions for racist and xenophobic offences including statistics relating to the ethnic origin, nationality, race or religion of the accused and of the victim.

Jurisdiction – Article 12

17. JUSTICE would point out, in relation to jurisdiction, that there appears to be a jurisdictional gap which may or may not be intentional. There is no apparent jurisdiction over the situation where, for example a British national commits an offence in France which affects individuals or groups in the Netherlands. JUSTICE would suggest that,

given the increasing use of the internet, if this Framework Decision is to have the desired effect on a Europe wide basis, this jurisdictional loophole needs to be closed.

Conclusions

18. JUSTICE recognises that there are occasions when a restriction on the rights to freedom of expression and of association may be justified. Racism and xenophobia is clearly a social problem in Europe and JUSTICE welcomes moves to combat the problem. Any restriction on the rights to freedom of expression and association must be strictly proportionate and only address the specific aim. JUSTICE has concerns that some of the offences listed in the Commission's proposal are not sufficiently narrowly defined as to meet that proportionality test although JUSTICE lauds the aims of the proposal to tackle racism and xenophobia in Europe.
19. This Framework Decision is welcome as it gives a degree of clarification as to what is to be understood as a racist and xenophobic offence in the European Union. Unfortunately, as the offences only provide a basic minimum standard rather than a general harmonisation of criminal laws relating to racism and xenophobia, the abolition of dual criminality through the European Arrest Warrant in relation to this type of offence still creates a high degree of legal uncertainty within the European Union. JUSTICE is concerned that such a level of uncertainty may raise serious human rights issues.
20. JUSTICE would welcome the inclusion of a specific defence provision in the proposal for legitimate academic, artistic or journalistic activity. If such a defence were included within the Framework Decision, it would oblige Member States to consider such issues when implementing it. This would provide a useful safeguard across the European Union in terms of protection of fundamental rights.
21. JUSTICE would suggest that annual reports should be provided by the investigating and prosecuting authorities of the Member States in order to adequately monitor the implementation of the Framework Decision. It is the effective implementation of legislation to combat racism and xenophobia which is absolutely crucial in fighting this social phenomenon. Careful thought should also be given to approaching the problem in a more holistic way including training and awareness raising and the effectiveness of penal sanctions to combat the problem should be under constant review.

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