JUSTICE briefing on the European Commission Proposal for a Council Framework Decision on Racism and Xenophobia (Initial Proposal)

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 inclusion of "racism and xenophobia" in the list of types of offence for which the test of dual criminality will not be applied under the Council Framework Decision on the European Arrest Warrant and Surrender between the Member States 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 xenophobia[1], the clearly binding nature of a Framework Decision along 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 a series of 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. The offences listed in Article 4 of the proposal clearly engage Articles 10 and 11 of the ECHR. The question then is whether the list of offences represents a legitimate restriction on those rights.

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[1] OJ L 185, 24/07/1996, p. 0005-0007

Is the restriction prescribed by law?

4. The first part of the test to be applied is whether the restriction is prescribed by law. In order to be prescribed by law the restriction must be sufficiently clear so as to allow a person to regulate their conduct accordingly. The Framework Decision and the national implementing legislation is likely to meet this requirement. If a restriction is drafted too broadly, however, it may not be deemed to be prescribed by law and this may be the case with a number of the offences described in their current draft form.

Does the restriction pursue a legitimate aim under the ECHR?

5. This second part of the test is clearly met by the Framework Decision as it is clearly designed to protect the rights of others and to prevent disorder or crime.

Is it necessary in a democratic society?

6. It is this third limb of the test which raises the most important concerns relating to the legitimacy of the current draft of the Framework Decision and the obligations that it will put on Member States to legislate accordingly. The notion of "necessary in a democratic society" raises two specific questions. Firstly, is there a pressing social need in practice; and secondly, is there a proportionate link between the aim pursued and the measure adopted?

Pressing social need

7. It is clear that racism and xenophobia, as defined in Article 3(a) of the proposal, and criminal acts arising out of racism and xenophobia, are problems that need to be addressed in a democratic, pluralist, multi-cultural society such as Europe. 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]

8. 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. The types of offence in general described in Article 4 therefore meet a pressing European social need.

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

9. It is this final part of the test which is crucial to an analysis of the text of the proposal. 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.

10. This basic test must be applied to all of the offences listed in the proposal and should again be tested in each Member State in relation to legislation implementing such a Framework Decision. There follows a brief analysis of each of the offences listed along with suggestions for how the drafting could be improved.

<u>The offences – Article 4</u>

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[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.

11. JUSTICE would suggest that the definition of the offences in Article 4 in general would be made clearer by the insertion in the heading of Article 4 of a reference to the purpose and outcome of the conduct. For example, the Article could begin as follows:

> "Member States shall ensure that the following intentional conduct committed by any means for a racist or xenophobic purpose and causing alarm or distress or degrading to individuals or groups concerned or in a manner liable to disturb the public peace is punishable as criminal offence:"

12. This would help to prevent the potential for criminalising mere thoughts or opinions which, however offensive they may be, attract the protection of Article 10 ECHR, or of criminalising legitimate journalistic, academic or artistic treatment or debate of issues surrounding the problem of racism and xenophobia. A definition of "racist or xenophobic purpose" would be helpful to clarify this point.

Article 4(a)

13. JUSTICE believes that the wording of Article 4(a) could be too extensive to be a proportionate response to the threat of racism and xenophobia. The notion of "any other racist or xenophobic behaviour" is extremely vague and does not specify the necessity for criminality in the behaviour concerned. The term "substantial damage" is not sufficiently clear either.

14. JUSTICE would suggest the following wording would appropriately cover the type of conduct which is to be criminalised:

> "Public incitement to violence or hatred for a racist or xenophobic purpose"

Article 4(b)

15. JUSTICE believes that the drafting of Article 4(b) is too wide and as such may lead to breaches of Article 10 ECHR in national legislation implementing the Framework Decision. The article should contain a reference to the effect of such "public insults or threats" in order to specifically target the evil which it is seeking to prevent.

16. JUSTICE would suggest the following wording would more clearly define the object of this provision:

"public insults and threats towards individuals or groups for a racist or xenophobic purpose such as to cause alarm or distress or in a manner liable to disturb the public peace"

Article 4(c)

17. If the insertion suggested at paragraph 11 above were included in Article 4, Article 4(c) may be more acceptable. JUSTICE would ask, however, for a clarification of the definition of the term "public condoning" as it is not entirely clear exactly what type of conduct would be covered by this. JUSTICE welcomes the fact that the wording in the proposal is substantially more clearly defined than the parallel wording in the 1996 Joint Action which, in JUSTICE's view was probably not proportionate to the aims.

Article 4(d)

18. This offence relates to "holocaust denial". Although this is not currently a criminal offence in the UK, the UK has adopted the 1996 Joint Action which includes a very similar provision. JUSTICE is concerned by the inclusion of "trivialisation" as a possible element of this offence. As the Framework Decision intends to set minimum standards for the criminalisation of racist and xenophobic conduct allowing Member States to legislate beyond the Framework Decision should they so wish, JUSTICE would suggest that this provision should apply only to "public denial" and not extend to "trivialisation" of such crimes. Again, JUSTICE believes that the clarity and precision of this provision would be greatly improved with the general insertion suggested above at paragraph 11.

Article 4(e)

19. JUSTICE has serious concerns about the compliance of Article 4(e) with Article 10ECHR. The draft prohibits:

    "public dissemination or distribution of tracts, pictures or other material **containing expressions of racism and xenophobia**"

    It is JUSTICE's view that this provision, in the absence of a qualifying racist and xenophobic purpose would seriously curtail artistic expression, legitimate journalistic debate or academic research. The ECHR found a breach of Article 10 in *Jersild v*

Denmark[3] where a journalist was convicted for reporting the views of racist skinheads in a news item. The Court made it quite clear that the press has a role as a public watchdog and that public debate on the dangers of racism is crucial to addressing the issue. Secondary expression of racist or xenophobic views should clearly not be caught by this offence. Expressions of racism or xenophobia could, equally, form part of an artistic work which does not have a racist or xenophobic purpose (for example, the views expressed by a character in a novel or in a film[4]).

20. In order for this provision to be proportionate to its aim, it must specify the purpose of the distribution and dissemination of the racist and xenophobic expressions. The following is suggested as a more appropriate draft:
    "public dissemination or distribution <u>for a racist or xenophobic purpose</u> of tracts, pictures or other material containing expressions of racism and xenophobia."

Article 4(f)

21. The offence described in Article 4(f) impacts on the right to freedom of association as protected by Article 11 ECHR. JUSTICE's first concern is that, while the "directing, supporting of or participating in" activities is only criminalized where there is an intention to contribute to an organisation's criminal activities, such criminal activities are not, in the current draft, sufficiently clear as to allow a person to be sure that they were not falling foul of this provision.

22. JUSTICE is also concerned about the inclusion of the "supporting of" an organisation's activities. In JUSTICE's view, this part of the provision goes beyond a proportionate restriction on the right to freedom of association and should not be included. Clearly intentionally directing or participating in criminal activities amounts to criminal offending and this would seem not to be a disproportionate restriction on Article 11 ECHR rights. To reiterate the point in paragraph 21, however, this could be a disproportionate restriction where the criminal activities cited were not sufficiently defined.

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[3] Series A 298 (1994)

[4] One might query whether works such as *The Satanic Verses* by Salman Rushdie, historical studies of Nazi propaganda or the Australian film *Romper Stomper* about right wing extremists would be criminalized by the provision as it is currently drawn – this surely cannot be the intention of the provision.

The Penalties and Sanctions – Article 6

23. JUSTICE would like to see more of a focus on training and awareness raising measures and more consideration of restorative justice in the draft of Article 6. 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

24. 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.

25. 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

26. 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

27. 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.

28. **JUSTICE is particularly concerned by the possible impact that some parts of the proposal could have on legitimate artistic, academic and journalistic activity. JUSTICE would welcome the inclusion of a specific defence provision in the proposal for such legitimate 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 be a useful safeguard to prevent the Framework Decision forming the basis for an abuse of fundamental rights – a purpose for which it is quite clearly not designed.

29. JUSTICE would welcome the inclusion in Article 4 of conditions of purpose and effect on the criminal nature of the offences as outlined in paragraph 11 (above). Such an inclusion would help to define and focus the offences on the desired aims without extending the restrictions on freedom of expression and association any further than necessary.

30. 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.

JUSTICE - June 2002

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