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European Union

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LIMITE

FREMP 27  
JAI 147

#### NOTE

From:	Presidency
To:	Delegations
Subject:	Draft Council decision extending the list of eurocrimes of Article 83(1) in the Treaty on the functioning of the European Union to hate crime and hate speech - Examination of the Presidency paper

#### COURTESY TRANSLATION

Following the discussions during the FREMP working party on 10 January 2022, and account been taken in particular to the written contributions from delegations<sup>1</sup> and the positions expressed by the Ministers of Justice at their informal meeting on 4 February 2022, the Presidency proposes some modifications in the text of the draft decision included in the annex to this note. The proposed modifications are indicated in **bold underlined** for additions or in ~~strike through~~ for deletions.

Delegations will be invited to express themselves on this text at the meeting of the FREMP working party on 16 February 2022. The intention of the Presidency is to thereafter submit the text to the Council with a view of reaching a general approach.

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<sup>1</sup> WK 1374/2022 REV 1.

**Draft COUNCIL DECISION**  
**on adding hate speech and hate crime to the areas of crime laid down in Article 83(1)**  
**of the Treaty on the Functioning of the European Union**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 17(1) thereof,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(1), third subparagraph, thereof,

Having regard to the consent of the European Parliament<sup>2</sup>,

Whereas:

- (1) All forms and manifestations of hatred and intolerance, including hate speech and hate crime, are incompatible with the Union values of human dignity, freedom, democracy, equality, rule of law and respect for human rights, including the rights of persons belonging to minorities enshrined in Article 2 of the Treaty on European Union ('TEU'). Those values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
- (2) The Union constitutes an area of freedom, security and justice with respect for fundamental rights and different legal systems and traditions of the Member States. It aims to ensure a high level of security, through measures including preventing and combating crime, racism and xenophobia.

~~Under Article 83(1) of the Treaty on the Functioning of the European Union ('TFEU'), the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Those areas of crime are listed in that Article.~~

~~That list of areas of crime, as it currently stands, does not allow for establishing minimum rules concerning the definition and sanctions of hate speech and hate crime.~~

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<sup>2</sup> OJ C of, p. .

- (3) Council Framework Decision 2008/913/JHA<sup>3</sup>, **which was adopted on the legal basis of former article 29 of the Treaty on European Union, now article 67(3) TFEU**, provides for effective, proportionate and dissuasive criminal sanctions for racist and xenophobic hate speech and hate crime, applicable across the Union. It requires Member States to criminalise hate speech, i.e. the public incitement to violence or hatred, on grounds of race, colour, religion, descent or national or ethnic origin. The same requirement applies to all crimes, other than hate speech, **but** committed **likewise exclusively** with a racist or xenophobic motivation.
- (4) The need to effectively address hate speech and hate crime on other grounds beyond those covered by Framework Decision 2008/913/JHA, and in particular on the grounds of sex, sexual orientation, age and disability has been identified in the Union of Equality strategies, namely the Gender Equality strategy 2020-2025<sup>4</sup>, the LGBTIQ Equality strategy 2020-2025<sup>5</sup> and strategy for the Rights of Persons with Disabilities 2021-2030<sup>6</sup>, **and also derives from the international commitments of the Union and its Member States starting with articles 16 and 17 of the UN Convention on the Rights of Persons with Disabilities.**
- (5) The EU and all its Member States are party to the UN Convention on the Rights of Persons with Disabilities. Its Article 16 on freedom from exploitation, violence and abuse states that parties should take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities. Persons with disabilities should be protected both within and outside the home, from all forms of exploitation, violence and abuse. Parties should also take all appropriate measures to prevent all forms of exploitation, violence and abuse. Article 17 on protecting the integrity of the person states that all persons with disabilities have a right to respect for their physical and mental integrity on an equal basis with others.
- (6) Under Article 83(1) of the Treaty on the Functioning of the European Union ('TFEU'), the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime, **which** are listed **exhaustively** in this Article, **are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.** As it currently stands, this list does not allow for establishing minimum rules concerning the definition and sanctions of hate speech and hate crime.

<sup>3</sup> 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 (OJ L 328, 6.12.2008, p. 55).

<sup>4</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Union of Equality: Gender Equality Strategy 2020-2025', of 5.03.2020, [COM\(2020\)152](#).

<sup>5</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Union of Equality: LGBTIQ Equality Strategy 2020-2025', of 12.11.2020, [COM\(2020\) 698](#).

<sup>6</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Union of Equality Strategy for the Rights of Persons with Disabilities 2021-2030' of 3.03.2021, [COM\(2021\) 101](#).

- (7) Article 83(1) allows for a special legislative procedure whereby the Council may extend this list. This may only be done in exceptional circumstances, and the competence of the Union in substantive criminal law may only be extended when strictly necessary.
- (8) As ~~also~~ recognised at international level<sup>7</sup>, hate speech and hate crime are a set of offences with common characteristics. These offences are characterised by the bias motivation that triggers the perpetrator's action against persons or groups, sharing or perceived as sharing protected characteristics. Hatred is an intrinsic special feature of both phenomena, connecting this broader group of crimes.
- (9) Hate speech and hate crime undermine the fundamental rights and values upon which the Union is founded, in particular human dignity and equality. In addition, they cause harm not only to the individual victims, but also to ~~wider communities~~ the groups affected and society at large, including by having a chilling effect on freedom of expression. They impede pluralism and tolerance, by leading to polarisation and negatively affecting public debate and democratic life.
- (10) The freedom of expression and information is enshrined in Article 11 of the Charter of Fundamental Rights of the European Union and is one of the essential foundations of a democratic society. Establishing hate speech as a crime is necessary to protect the rights and freedoms of others and genuinely meets objectives of general interest recognised by the Union. ~~Any Union legislation requiring Member States to criminalise hate speech and thus affecting the right to freedom of expression should be proportionate and respect the essence of the right to freedom of expression.~~
- (11) Furthermore, hate speech and hate crime spread across national borders. Hate speech can lead not only to conflict, but also to hate crimes. Both spread across national borders. Their cross-border nature stems from a protected value in the form of the shared identity of a group that in most cases is present in all Member States, and the fact that hate speech can be easily reproduced and widely shared online through the internet, including social media, and offline through television broadcasts, public events, written press and political speech. Hate speech can not only lead to conflict but also to hate crime. More generally, hate crimes have a ripple effect and impact in every Member State, which fosters a climate of fear and risks undermining civil peace. Finally, ~~H~~hate crimes can be committed or facilitated by networks with members from several countries, who inspire, organise, or carry out different types of physical attacks, including physical ones. This creates a need to combat them on a common basis. ~~More broadly, hate crime has a spill-over effect across Member States, which contributes to a climate of fear, and can trigger social conflicts.~~

<sup>7</sup> See for example Council of Europe Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "hate speech" and OSCE Ministerial Council Decision No. 9/09 on combating hate crimes, of 2 December 2009.

- (12) Hate speech and hate crime are widespread across the Union and have been increasing over the last years. **The emergence of new information technologies have allowed a more viral expression of such calls to hatred, and more generally of unlawful content. Furthermore,** the COVID-19 pandemic has heightened the feelings of insecurity, isolation and fear. This has created an atmosphere in which hate speech has flourished, while being also used to target **specific populations, in particular groups who are already marginalised-minority groups, also often** resulting in hate crime.
- (13) Hate speech and hate crime undermine the very foundations of a democratic and pluralistic society and the common values enshrined in Article 2 of the TEU. The particular gravity of these conducts, given their impact on fundamental rights and values, and their cross-border nature calls for common action at Union level. A common Union criminal law response is necessary to effectively address the challenges raised by hate speech and hate crime. It would also ensure a consistent protection of the victims of hate crime, as well as access to special protection measures granted to the most vulnerable victims of crime. A common approach should also enhance judicial cooperation between Member States, which is rendered indispensable by the cross-border dimension of these phenomena.
- (14) **In light of the above, and of the study of which conclusions are presented in the Commission's Communication** ~~Hate speech and hate crime~~ **constitute an "area of crime" and** ~~therefore~~ meet the criteria set out in Article 83(1) of the TFEU. **The extent of this phenomenon and the major risks it poses to the shared values of the Union and its Member States justify the recourse to the special legislative procedure provided for in this article** ~~and can be identified as another 'area of crime', in addition to those already listed in that provision.~~
- (15) **The purpose of approximation of the legislations of Member States concerning the definition and sanction of certain forms of hate speech and hate crime cannot be achieved satisfactorily by the Member States acting individually, and minimum rules making it possible to fight them on a common basis should be envisaged. This purpose can thus best be achieved at Union level, using measures adopted in accordance with the principle of subsidiarity described in Article 2 of the Treaty on European Union and enshrined in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, any subsequent measure proposed by the Commission should not exceed what is necessary to achieve this purpose.**
- (16) Therefore, extending the list of areas of crime in Article 83(1) of the TFEU to cover hate speech and hate crime is necessary, as a first step, to enable, as a second step, the adoption of substantive secondary legislation establishing minimum rules on the definitions and sanctions of hate speech and hate crime.
- (17) This Decision ~~should not affect~~ **is without prejudice to** the actions that may be undertaken in a second step. In particular, it does not **determine** or pre-empt the scope and content of the secondary legislation to be subsequently proposed.

- (18) **Furthermore, the Member States know that different types of measures are needed to combat hate crime and hate speech, in particular preventive measures which should be applied on a general basis and not be limited to a criminal law response. Thereby, by adopting this decision, the Council encourages the development of preventive measures, such as online content moderation, the use of social policy, restorative justice and actions designed to develop and apply alternatives to detention.**
- (19) The Commission proposal of such secondary legislation should be prepared in line with Better Regulation requirements, including an impact assessment and a broad consultation.
- (20) In particular, the Commission should consult Member States when preparing such secondary legislation **and take due consideration of** , ~~including~~ on the specificities of national legislative frameworks relating to criminal law and fundamental rights, **in accordance with the principle of the legality of crimes and punishments, which includes requirements of precision, clarity and intelligibility of criminal law. More specifically, any Union law that requires Member States to criminalise hate speech and therefore limits freedom of expression must be proportionate and respect the essence of this right, as laid down according to constitutional traditions, similarly to procedural guarantees or special rules for the determination or limitation of liability recognised in some Member States in relation to freedom of press and freedom of expression in other media.**

HAS ADOPTED THIS DECISION:

*Article 1*

Hate speech and hate crime shall be an area of crime within the meaning of Article 83(1) of the TFEU.

*Article 2*

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels,

*For the Council  
The President*