



Bruxelles, le 18 février 2022
(OR. fr, en)

6236/22

LIMITE

JAI 183
FREMP 31

NOTE

Origine:	la présidence
Destinataire:	Comité des représentants permanents
Objet:	Projet de décision concernant l'ajout des discours de haine et des crimes de haine aux domaines de criminalité visés à l'article 83, paragraphe 1, du traité sur le fonctionnement de l'Union européenne - Orientation générale / Débat d'orientation

Le 9 décembre 2021, la Commission a publié sa communication « Une Europe plus inclusive et plus protectrice: extension de la liste des infractions pénales de l'UE aux discours de haine et aux crimes de haine »¹, contenant une proposition de décision concernant l'ajout des discours de haine et des crimes de haines aux domaines de criminalité visés à l'article 83, paragraphe 1, du TFUE.

La Présidence a, sur cette base, soumis un premier projet de décision² aux délégations. Ce texte a été discuté par le groupe de travail FREMP le 10 janvier 2022.

Les ministres de la justice ont tenu un échange de vue très fructueux sur cette proposition lors de leur réunion informelle qui s'est tenue le 4 février 2022 à Lille. Cette réunion a permis de constater que 20 Etats membres sur 26 pouvant participer soutenaient expressément une telle extension.

¹ 14919/21.

² 15225/21.

Suite aux discussions et contributions écrites³ des délégations, certaines modifications des considérants ont été proposées par la Présidence. Lors de la réunion du groupe de travail FREMP le 16 février 2022, ces propositions ont été présentées, et pour certaines ajustées en cours de réunion. Une dernière version révisée a été proposée aux délégations durant la réunion ; elle n'a pas suscité d'opposition. 5 Etats membres ont rappelé qu'ils avaient toujours une réserve d'examen, de nature parlementaire pour deux d'entre eux.

Dans le projet de décision consolidé qui figure dans l'annexe à cette note, la Présidence propose un compromis équilibré portant sur l'ensemble du texte. À la lumière des discussions qui se sont déroulées au sein du groupe de travail le 16 février 2022, la Présidence estime que tous les États membres, sans préjudice des réserves parlementaires qui ne peuvent encore être levées, seront en mesure de marquer leur accord ou de ne pas s'opposer au texte actuel du projet de décision.

Le Coreper est invité à confirmer qu'il n'y a pas d'opposition au texte en annexe, et donc qu'une orientation générale pourra être arrêtée au Conseil le 4 mars 2022.

³ WK 1374/2022.

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 proposal from the Commission,

Having regard to the consent of the European Parliament⁴,

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.~~

⁴ OJ C of , p. .

- (3) Council Framework Decision 2008/913/JHA⁵, ~~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 2020-2025⁶, the LGBTIQ Equality strategy 2020-2025⁷ and strategy for the Rights of Persons with Disabilities 2021-2030⁸, **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.**

~~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.~~

- (5) 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

⁵ 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).

⁶ 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](#).

⁷ 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](#).

⁸ 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](#).

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 the following : 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.

- (6) **Article 83(1) allows for a special legislative procedure whereby the Council may extend this list. This may only be done in exceptional circumstances, after a careful assessment of the criteria set out in the treaty, which reflect the exceptional nature of the procedure, and the competence of the Union in substantive criminal law may only be extended when strictly necessary.**
- (7) As also recognised at international level⁹, 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.
- (8) 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.
- (9) 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.~~
- (10) **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~~

⁹ 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.

national borders. Their cross-border nature stems from an a protected value in the form of the shared identity shared of by a group that in most cases is present in all Member States and. It also stems from the fact that in some cases, the perpetrators and their victims are located in different 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. Past examples show conclusively that hHate 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, Hhate 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.

- (11) 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.
- (12) 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.
- (13) ~~**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.
- (14) **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 the functioning of the 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.**
- (15) 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, **including, where**

appropriate, for matters currently falling within the scope of Framework Decision 2008/913/JHA.

- (16) 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.

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- (17) The Commission proposal of such secondary legislation should be prepared in line with Better Regulation requirements, including an impact assessment and a broad consultation.
- (18) In particular, the Commission should consult Member States when preparing such secondary legislation ~~and take due consideration of duly into account~~, including on the specificities of national legislative frameworks relating to criminal law, **especially to different penalty systems**, and fundamental rights, ~~in accordance with~~. **Due consideration should be taken of the principle of the legality of crimes and punishments, which includes requirements of requires 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 freedom of expression 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.**
- (19) **As provided in Article 83(3) TFEU, where a member of the Council considers that a draft directive based on Article 83(1) would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall is to be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, is to refer the draft back to the Council, which shall is to terminate the suspension of the ordinary legislative procedure. Within the same timeframe, in case of disagreement, and if at least nine Member States may wish to establish an enhanced cooperation on the basis of the draft directive concerned.**
- (20) **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 by Member States 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 or the use of social policy. Additionnally, the same applies where appropriate to the use of restorative justice and actions designed to develop and apply non-custodial sanctions and measures alternatives to detention.**
- (21) **In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the**

Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

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- (22) **[non-participation:] In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Decision Directive and is not bound by it or subject to its application.**

OR [participation:] In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, Ireland has notified [, by letter of ...] its wish to take part in the adoption and application of this Decision Directive.

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*

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