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SELECT COMMITTEE ON
THE EUROPEAN UNION

COMBATING RACISM AND
XENOPHOBIA—DEFINING CRIMINAL
OFFENCES IN THE EU

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TWENTY-NINTH REPORT

23 JULY 2002

By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

COMBATING RACISM AND XENOPHOBIA—DEFINING CRIMINAL OFFENCES IN THE EU

14904/01	Droipen 105—Proposal for a Council Framework Decision on Combating Racism and Xenophobia
5983/02	Droipen 4—Proposal for a Council Framework Decision on Combating Racism and Xenophobia
9740/02	Droipen 38—Proposal for a Council Framework Decision on Combating Racism and Xenophobia
10338/02	Droipen 44—Proposal for a Council Framework Decision on Combating Racism and Xenophobia

SCRUTINY HISTORY

1. In November 2001 the Commission brought forward its proposal for a Council Framework Decision on combating racism and xenophobia (Droipen 105). The document was sifted to Sub-Committee E (Law and Institutions) for detailed examination. There followed correspondence between the Committee and the Government on that draft. Negotiations in the Council have given rise to a number of suggested amendments, copies of which have been furnished to the Committee (Droipen 4, 38 and 44). On 26 June the Committee met Lord Filkin, Parliamentary Under-Secretary of State at the Home Office, and officials. The Minister responded to the Committee's questions on issues raised by the proposal and the amendments proposed in Droipen 38. This was most helpful and we are grateful to the Minister and his officials for the explanations given at that meeting.

2. Droipen 105 (the Commission's original proposal) and Droipen 38 (the text before the meeting on 26 June) are printed in Appendix 2 to this Report. Droipen 4 was superseded by Droipen 38 and is not printed. Since the meeting on 26 June the Government has deposited a further text (Droipen 44). The changes proposed are also reproduced in Appendix 2.

THE PROPOSAL—ITS AIM

3. The purpose of the Framework Decision is two-fold: first, to ensure that racism and xenophobia are punishable in all EU Member States by criminal penalties, which can give rise to extradition or surrender; and, second, to improve judicial co-operation to combat these offences. The Framework Decision would replace the 1996 Joint Action concerning action to combat racism and xenophobia and is aimed at addressing its shortcomings. The list of offences contained in the Joint Action is expanded. There is also a change in the method of achieving approximation: while the Joint Action gave Member States the option either to incriminate certain conduct or to derogate from the principle of dual criminality, the Framework Decision would impose an express obligation on Member States to treat forms of racist and xenophobic conduct as criminal offences.

THE PROPOSAL—MAIN ELEMENTS

4. The main elements of the Decision involve:

Criminalising racist and xenophobic behaviour;

- Establishing racist and xenophobic motivation as a possible aggravating circumstance when determining penalties for offences other than those specifically referred to in the Decision;
- Introducing liability for legal persons (*eg* companies) for racist and xenophobic offences;
- Ensuring the initiation of prosecution independent of the victim's report/accusation;
- Establishing rules for jurisdiction; and
- Facilitating extradition and prosecution.

Racist and xenophobic offences are defined by reference to colour, race, national or ethnic origin, and also religion and belief.

ISSUES RAISED

5. The proposal raises a number of important and controversial issues:

Balancing the protection of communities with freedom of expression

(i) The early drafts of the proposal have been criticised for defining offences of racism and xenophobia so broadly that they could prejudice freedom of expression. The later drafts include a number of safeguards in this respect, but would still make criminal the supply of information or material resources knowing that this would contribute to the criminal activities of a racist group. The implications for free speech remain to be explored.

The scope of the offence

(ii) Serious concerns have also been raised regarding the terminology used and the drafting of offences. The proposal would make criminal the 'public condoning' of genocide and war crimes and the 'gross trivialisation' of the Holocaust: it is not clear what is meant by these terms. In the interests of legal certainty, it is necessary that these terms should be clarified.

Impact on domestic legislation—incitement to religious hatred

(iii) The proposal would make criminal public incitement to discrimination, violence or racial hatred in respect of a religious group. This would require domestic legislation on incitement to religious hatred. The introduction of such an offence in our law is a matter of some controversy, and it is one of the issues currently being examined by the Select Committee on Religious Offences. The Government proposed an alternative wording under which religion is included as an element of racist and xenophobic offences only if "used as a pretext" for public incitement to racial hatred. Droipen 44 adopts similar wording. The implications of these texts for domestic legislation need to be carefully examined.

Relationship with the European Arrest Warrant

(iv) Racism and xenophobia is one of the offences listed in the European Arrest Warrant in respect of which double criminality is not a prerequisite for the purposes of effective extradition/surrender. This may prove problematic, as there appear to be considerable differences in the extent to, and the manner in, which racism and xenophobia may be crimes in other EU Member States. Difficulties would not necessarily be removed by the adoption of the current proposal: Member States would not be prohibited from providing in their national systems a wider range of racism and xenophobia offences than those specified in the proposed Decision. This could result in the issuing of a European Arrest Warrant for behaviour that not only does not constitute an offence in this country and other Member States but also is viewed as a legitimate freedom of expression here and elsewhere.

Extent of EU competence—aggravating circumstances

(v) According to Article 5, "racist or xenophobic motivation" is to be regarded as an aggravating circumstance for any offences not falling within the scope of the proposal. It thus establishes a general aggravating circumstance, applying to all offences and not just those enumerated in Title VI TEU. It is unclear whether the EU has competence to establish a general 'sentence enhancement' provision in this manner, or whether aggravating circumstances should only involve Title VI offences. There is an important competence issue here.

RECOMMENDATION

6. Our work is not done. The proposal is retained under scrutiny while negotiations in Brussels continue. The Committee expects to return to its examination of the Framework Decision in the autumn. Meanwhile we are taking the opportunity to publish, and thus make more widely available, the minutes of evidence of the meeting on 26 June, the earlier Ministerial correspondence and memoranda received from interested parties. They are printed in Appendix 2.

7. The Commission's proposal for a Council Framework Decision on combating racism and xenophobia raises important questions to which the attention of the House should be drawn and makes this brief interim Report to the House for information.

APPENDIX 1

Sub-Committee E (Law and Institutions)

The members of Sub-Committee E are:

Viscount Bledisloe
Lord Brennan
Lord Fraser of Carmyllie
Lord Hunt of Wirral
Lord Lester of Herne Hill
Lord Mayhew of Twysden
Lord Plant of Highfield
Lord Richard
Lord Scott of Foscote (Chairman)
Baroness Thomas of Walliswood
Lord Thomson of Monifieth

