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SELECT COMMITTEE ON
THE EUROPEAN UNION

THE PROPOSED FRAMEWORK DECISION ON RACISM AND XENOPHOBIA—AN UPDATE

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CONTENTS

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1 JULY 2003

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

ORDERED TO REPORT

THE PROPOSED FRAMEWORK DECISION ON RACISM AND XENOPHOBIA—AN UPDATE

Docs 15490/1/02 and	Proposal for a Council Framework Decision on combating racism and xenophobia
7280/03 Droipen 14	

PURPOSE OF REPORT

1. This is our second Report on the proposal for a Framework Decision on combating racism and xenophobia. In our first Report[1] on this subject we identified, for the information of the House, the key issues raised by the Commission's proposal. In this Report we take the opportunity to update the House as regards the main developments in the text and the progress of its scrutiny.[2]

THE PROPOSAL

2. The aim of the proposal[3] is to approximate Member States' laws and regulations regarding racism and xenophobia in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties and sanctions are provided for natural and legal persons who commit such offences. The draft Framework Decision sets out the conduct which must be punishable, the penalties applicable to such conduct and measures for ensuring effective judicial cooperation between Member States in this context.

SCRUTINY HISTORY

3. The proposal has a lengthy scrutiny history and the text has been substantially redrafted since the original Commission proposal. The negotiation of the Framework Decision has been actively pursued by successive Presidencies over the past eighteen months. No agreement, however, was achieved under the Danish or the Greek Presidency—the Framework Decision is subject to unanimity and a number of Member States have difficulties with the text.[4] It is as yet unclear what degree of priority the incoming Italian Presidency will attach to the measure.

4. The draft Framework Decision has been the subject of substantial correspondence between the Committee and the Government. On 30 April we had a further meeting with Lord Filkin CBE, Parliamentary Under Secretary of State at the Home Office, and officials.[5] The Government's

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1 *Combating Racism and Xenophobia—Defining criminal offences in the EU* (29th Report, 2001-02, HL Paper 162).

2 Carried out by Sub-Committee E (Law and Institutions) chaired by Lord Scott of Foscote. The membership of the Sub-Committee is set out in Appendix 1.

3 The Framework Decision would replace the 1996 Joint Action concerning action to combat racism and xenophobia [1996] OJ L 185/5.

4 This can be seen from section II "Outstanding Questions" and the footnotes to the Text of the Decision in Droipen 14, Doc 7280/03.

5 The Committee's first meeting with the Minister on this subject was in June 2002. A transcript of that meeting is printed with our first Report, *Combating Racism and Xenophobia—Defining criminal offences in the EU* (29th Report, 2001-02, HL Paper 162).

Explanatory Memorandum dated 25 March 2003, the ministerial correspondence and the transcript of the meeting with the Minister are printed in Appendix 2 of this Report. We would like to record our appreciation and thanks for the assistance given by the Minister in this matter.

ISSUES RAISED

5. As we indicated in our earlier Report the proposed Framework Decision raises a number of important and controversial issues.

Definition of offences concerning racism and xenophobia (Article 1)

6. A major concern of the Committee has been to clarify the scope of any criminal offences which would be required in domestic law. We have been critical of the terminology and drafting of the offences in Article 1 and have sought clarification of a number of terms and phrases (see letter of 29 October). Three particular issues are to be noted. First, there is the use of the term "xenophobia". Generally the Framework Decision uses "racism and xenophobia" as a composite phrase. Neither term is defined in the instrument. We do not use the term "xenophobia" in our law. And even in the context of the Framework Decision itself there is a question of what, if anything, "xenophobia" adds to "racism". The Government takes the view that the inclusion of references to national origin, nationality and citizenship in our own law is sufficient to cover the concept of xenophobic hatred. It therefore does not see any objection to the use of the term "xenophobia" in the Framework Decision (letter of 23 May).

7. Second, Article 1 includes in the offences of racism and xenophobia 'public incitement to discrimination'. When we took evidence from the Government in June 2002, the Government took the view that such a provision was unnecessary—the issue was 'properly dealt with by civil law measures in line with the European Community directives' and it was 'not appropriate to deal with it in criminal law'.[6] But the phrase remains in the draft Decision. When we recently asked the Minister whether Article 1 was now acceptable to the Government he explained that the Government had been prepared, in the context of the Danish Presidency's attempt to secure a compromise, to accept the text in Article 1 provided the Framework Decision provided a means by which the offence could be restricted to conduct presently criminal under UK law. This is provided by Article 8(1), on which we comment further in paragraph 12 below (Q 19).

8. Third, there is the Framework Decision's treatment of religion. An earlier version of the proposal required making public incitement to discrimination on grounds of religious conviction a criminal offence. Article 1(a) now refers to discrimination on grounds of religion. A recital states that "religion" broadly refers to persons defined by reference to their religious convictions or beliefs".[7] Incitement to religious hatred is not criminalised under our present domestic law and the Government has been concerned throughout the negotiations not to prejudice or pre-empt the work of the Select Committee on Religious Offences, chaired by Viscount Colville. That Committee has specifically considered the case for creating an offence of incitement to religious hatred.[8] Its Report has now been published.[9] The Select Committee has concluded that such an offence would remedy the anomaly that some religions receive protection under race relations legislation while others do not and would discourage extremists from using the pretext of religion to pursue a racist agenda. But, having considered the options and acknowledging the issue of freedom of expression, the Report leaves it to Parliament to decide whether there should be an offence of incitement to religious hatred. It notes, however, that the Framework Decision could provide the starting point for legislation which would not be confined to race and religion and which could provide the opportunity to include incitement to hatred across a range of targets of hate crime (including, for example, the gay community and asylum seekers).[10] As mentioned the Government has been keen to maintain flexibility on "religious" offences in the context of the negotiation of the Framework Decision. We await the response of the Government to the Report of Viscount Colville's Committee.

9. A separate issue arises from the reference to "religion" in Article 1(a) and its definition in the new recital 5(b): "religion broadly refers to persons defined by reference to their religious convictions or beliefs". We note that the Framework Decision does not explicitly include incitement to

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6 *Combating Racism and Xenophobia—Defining criminal offences in the EU* (29th Report, 2001-02, HL Paper 162). Q 41.

7 The references in Articles 1(c) and (d) to "religious conviction" have also been amended to refer simply to "religion".

8 The possibility of creating an offence of incitement to religious hatred had been proposed by the Government in the Anti-Terrorism, Crime and Security Bill in 2001 and was revived in Lord Avebury's Religious Offences Bill (HL Bill 39 53/1) in 2002.

9 *Select Committee on Religious Offences in England and Wales*. Session 2002-03, HL Paper 95.

10 *Ibid*, at para 135.

discrimination on the ground of absence of religious convictions or belief. The Government explained that it was not the intention to turn the instrument into a broad charter against discrimination on any grounds but to deal with what was seen as the most salient and dangerous issues, namely racial discrimination and, in the view of the majority of Member States, discrimination on grounds of religion (Q 22). But the Framework Decision would not prevent legislation in the future prohibiting incitement to discrimination against people with no religious belief (letter of 23 May).

Liability of legal persons (Article 5)

10. Under the Framework Decision racism and xenophobia offences could be committed by both natural and legal persons. Article 5 deals with the liability of legal persons (*eg* companies). Member States would be required to impose "sanctions or measures" on a legal person where a lack of supervision or control has contributed to the committing of an offence for its benefit. Here the Government has had to rethink its approach to the implementation of Article 5(2) (letter of 10 February and Explanatory Memorandum of 25 March, para 13). The problem identified is not one restricted to this Framework Decision but is common to a number of Third Pillar measures.

Freedom of speech (Article 7)

11. A number of Member States and a number of individuals have expressed concern over the implications of the Framework Decision for freedom of speech. Article 7 has been devised, and revised, to meet these concerns. It provides that the Framework Decision should not "have the effect of requiring Member States to take measures in contradiction to their constitutional rules and fundamental principles relating to freedom of association, freedom of the press and freedom of expression in other media or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability". We sought clarification of what this meant and whether Article 7 provided adequate safeguards for press freedom. Further, there is a question of its compatibility with recital 16*bis*, which suggests that the Article should not result in the exemption of the press from criminal liability.[11] The Government appears prepared to accept Article 7 as part of an overall compromise package, even though the precise scope of this provision remains unclear. The Government has said that it does not need, and therefore does not intend, to rely on Article 7 to protect freedom of speech in the UK. The UK will rely on Article 8 (Q 26, letter of 23 May).

Scope of criminal liability/exclusions (Article 8(1))

12. Article 8(1) provides four means by which a Member State can limit the scope of criminal liability under Article 1 of the Framework Decision. These provisions are important for the UK. The Minister explained how the UK would take fullest advantage of Article 8(1) so that the Framework Decision would not require any substantial amendment of UK law. For example, the Government could accept the amendment made to Article 1 in order to include incitement to discrimination (see paragraph 7 above) because it would be able to rely on Article 8(1)(b) and (d) to limit the offence of incitement to discrimination to conduct which was likely to stir up hatred or violence and was threatening, abusive or insulting (*ie* to the case where the conduct would fall within the scope of our current domestic law on incitement to racial hatred) (Q 19). The Minister made clear the Government's intention to rely on all the derogations given by Article 8(1) and that the Government would not agree to any amendment of the Treaty (for example, to permit the Framework Decision to be changed by qualified majority voting) which might jeopardise that position (QQ 21, 27).

Scope of criminal liability/mutual assistance (Article 8(3))

13. Article 8(3) has taken on a particular importance in the negotiations. It enables Member States to refuse mutual legal assistance on the basis of the requirement of double criminality (*ie* on the grounds that the conduct, though illegal in the State requesting assistance, is not illegal in the requested State). Refusal of assistance would be possible only where at least a significant part of the offence had been committed in the requested State or where the offence had been committed outside the territory of the requesting State and the law of the requested State did not allow prosecution for the same offences when committed outside its territory. The obligation to provide assistance remains, in

[11] Recital 16bis states: "Considerations relating to respect for the freedom of association, freedom of the press and freedom of expression in other media may have led to special rules in national law as to the determination or limitation of liability, without, however, having as a result that no one can be held criminally responsible for offences committed through the intermediary of the press, public media and professional organisations".

the view of the Government, too wide—it would require UK authorities to search for and seize material that is not illegal in the UK (Explanatory Memorandum of 25 March).

Relationship with the European Arrest Warrant

14. Racism and xenophobia belong to the list of offences for which the requirement of dual criminality[12] is removed for the purpose of the execution of the European Arrest Warrant (EAW).[13] We suggested to the Government that the Framework Decision should provide a definition of racism and xenophobia for the purposes of the EAW. In this way some of the difficulty and criticism surrounding the inclusion of racism and xenophobia in the listed offences[14] in the EAW might be overcome. The Government, however, was not prepared to discuss any such limitation on the definition of offences under the Framework Decision (letter of 10 January). This is regrettable. In our view, an important opportunity to provide an element of legal certainty in a particularly sensitive area of the criminal law is being missed. However, consistent with the approach being taken in relation to mutual legal assistance (described in paragraph 13 above) the Government gave the Committee an assurance that no one who has acted in a lawful manner in this country would be extradited under an EAW to another Member State for a racism and xenophobia offence where the whole or a part of the conduct occurred in the UK. An amendment to the Extradition Bill would be brought forward to address the issue (QQ 39, 44).[15]

RECOMMENDATION

15. The Framework Decision remains a complex and politically sensitive matter on which we will keep a close eye. **We make this Report to the House for information**.

[12] The requirement that the conduct in question if committed in the requested State would be criminal there.

[13] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L 190/1.

[14] Article 2(2) of the EAW lists 32 offences. The effect of being listed is that the principle of dual criminality (that the conduct must be criminal in both the requesting and requested States) does not apply if the offence is punishable in the States issuing the warrant by a custodial sentence of a maximum of at least 3 years.

[15] To this end the Government has tabled amendments (Nos 112 and 126) to clauses 63 and 64 of the Bill presently before the House. The amendments were agreed to: see Official Report of the Grand Committee on the Extradition Bill (Sixth Day) (HL Debs 1/7/03, at GC 202-208 and GC 230).

APPENDIX 1

Sub-Committee E (Law and Institutions)

The members of Sub-Committee E are:

Lord Brennan
Lord Fraser of Carmyllie
Lord Grabiner
Lord Henley
Lord Lester of Herne Hill
Lord Mayhew of Twysden
Lord Neill of Bladen
Lord Plant of Highfield
Lord Scott of Foscote (Chairman)
Baroness Thomas of Walliswood
Lord Thomson of Monifieth