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REPORT

on the proposal for a Council framework decision on combating racism and xenophobia
(COM(2001) 664 – C5-0689/2001 – 2001/0270(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Ozan Ceyhun

Symbols for procedures

*	Consultation procedure *majority of the votes cast*
**I	Cooperation procedure (first reading) *majority of the votes cast*
**II	Cooperation procedure (second reading) *majority of the votes cast, to approve the common position* *majority of Parliament's component Members, to reject or amend the common position*
***	Assent procedure *majority of Parliament's component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty*
***I	Codecision procedure (first reading) *majority of the votes cast*
***II	Codecision procedure (second reading) *majority of the votes cast, to approve the common position* *majority of Parliament's component Members, to reject or amend the common position*
***III	Codecision procedure (third reading) *majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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PROCEDURAL PAGE

By letter of 21 December 2001 the Council consulted Parliament, pursuant to Article 39 of the EU Treaty, on the proposal for a Council framework decision on combating racism and xenophobia (COM(2001) 664 – 2001/0270(CNS)).

At the sitting of 16 January 2002 the President of Parliament announced that he had referred this proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and the Committee on Legal Affairs and the Internal Market and the Committee on Employment and Social Affairs for their opinions (C5-0689/2001).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Ozan Ceyhun rapporteur at its meeting of 22 January 2002.

The committee considered the Commission proposal and the draft report at its meetings of 18-19 March, 18 April and 23 May 2002.

At the latter meeting it adopted the draft legislative resolution by 29 votes to 1, with 2 abstentions.

The following were present for the vote: Robert J.E. Evans, acting chairman; Lousewies van der Laan (vice-chairman); Giacomo Santini (vice-chairman); Ozan Ceyhun, rapporteur; Niall Andrews, Kathalijne Maria Buitenweg (for Alima Boumediene-Thiery), Marco Cappato (for Maurizio Turco), Charlotte Cederschiöld, Carlos Coelho, Gérard M.J. Deprez, Francesco Fiori (for Marcello Dell'Utri, pursuant to Rule 153(2)), Evelyne Gebhardt (for Adeline Hazan), Marie-Thérèse Hermange (for Thierry Cornillet), Jorge Salvador Hernández Mollar, Anna Karamanou (for Margot Keßler), Eva Klamt, Alain Krivine (for Giuseppe Di Lello Finuoli), Hartmut Nassauer, Arie M. Oostlander (for Timothy Kirkhope), Elena Ornella Paciotti, Hubert Pirker, Bernd Posselt, Martine Roure, Gerhard Schmid, Ingo Schmitt (for Mary Elizabeth Banotti), Ilka Schröder, Miet Smet (for Giuseppe Brienza), The Earl of Stockton (for Christian Ulrik von Boetticher), Joke Swiebel, Anna Terrón i Cusí, Gianni Vattimo (for Walter Veltroni) and Christos Zacharakis (for The Lord Bethell).

The opinion of the Committee on Legal Affairs and the Internal Market is attached; the Committee on Employment and Social Affairs decided on 24 January 2002 not to deliver an opinion. One minority opinion on behalf of Marco Cappato is attached.

The report was tabled on 24 May 2002.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the proposal for a Council decision on combating racism and xenophobia (COM(2001) 664 – C5-0689/2001 – 2001/0270(CNS))

(Consultation procedure)

The European Parliament,

– having regard to the Commission proposal to the Council (COM(2001) 664[1]),

– having been consulted by the Council pursuant to Article 39 of the EU Treaty (C5-0689/2001),

– having regard to Rule 67 of its Rules of Procedure,

– having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the opinion of the Committee on Legal Affairs and the Internal Market (A5-0189/2002),

1. Approves the Commission proposal as amended;

2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;

3. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;

4. Asks to be consulted again if the Council intends to amend the Commission proposal substantially;

5. Instructs its President to forward its position to the Council and Commission.

[1] Not yet published in OJ.

Text proposed by the Commission	Amendments by Parliament

Amendment 1
Recital 6

(6) Racist or xenophobic motivation ***should*** be taken into account as an aggravating factor when imposing penalties for ordinary offences. This would constitute a direct response to perpetrators of such offences and have a deterrent effect;	(6) Racist or xenophobic motivation ***may*** be taken into account as an aggravating factor when imposing penalties for ordinary offences. This would constitute a direct response to perpetrators of such offences and have a deterrent effect;

Justification

The recital is not in line with the provisions laid down in Article 8.

Amendment 2
Recital 7

(7) An offence concerning racism and xenophobia committed in the exercise of a professional activity, should be considered as an aggravating circumstance since it entails an abuse and is particularly reprehensible;	(7) An offence concerning racism and xenophobia committed ***by means of mass-communication or*** in the exercise of a professional activity, should be considered as an aggravating circumstance since it entails an abuse and is particularly reprehensible;

Justification

This is aimed at tackling the perpetration of racism and xenophobia to a large audience principally over the internet which is increasingly being used as a medium for dissemination of racist and xenophobic material to mass audiences. Therefore the number of people that can be affected by the perpetration of a racist and xenophobic offence must be considered when deciding on aggravating factors.

Amendment 3
Recital 8

(8) ***It should be ensured*** that investigations and prosecutions of offences involving racism and xenophobia are not dependent on reports or accusation made by victims, who are often particularly vulnerable and reluctant to initiate legal proceedings;	(8) ***Member States may take measures so*** that investigations and prosecutions of offences involving racism and xenophobia are not ***exclusively*** dependent on reports or accusation made by victims, who are often particularly vulnerable and reluctant to initiate legal proceedings;

Justification

In the interests of subsidiarity it should be up to the competent authorities in each MS to decide how to conduct their prosecutions. Whilst the intention of the provision here is welcomed it is too proscriptive as it stands.

Amendment 4
Recital 11a (new)

(11a) The International Convention on the Elimination of All Forms of Racial Discrimination, which has been ratified by all the European Union Member States, defines an act of racism or racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. This framework decision is consistent with Article 4(b) of the Convention, which requires states to show vigilance and bring to justice any organisations which propagate ideas based on the concept of racial superiority or hatred, or engage in acts of violence or incitement to such acts.

Justification

The International Convention on the Elimination of All Forms of Racial Discrimination has been ratified by all EU Member States and therefore also forms the basis of their action in this area.

Amendment 5
Recital 15

(15) ***This*** Framework Decision ***respects*** the fundamental rights and ***observes*** the principles recognised in particular by the European Convention on Human Rights, in particular Articles 10 and 11 thereof, and by the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof***;***	(15) ***In implementing this*** Framework Decision***, Member States must respect*** the fundamental rights and ***observe*** the principles recognised in particular by the European Convention on Human Rights, in particular Articles ***9,*** 10 and 11 thereof, and by the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof***. Accordingly and having regard to the principle of subsidiarity, Member States must have a wide margin of appreciation in implementing and applying this Framework Decision***;

Justification

It is important to make it clear that fundamental rights must be respected in implementing the Framework Decision, not only the rights to freedom of expression and freedom of association, but also the right to freedom of thought, conscience and religion enshrined in Article 9 of the European Convention. It is essential to strike the right balance between combating the scourge of racism and xenophobia and fundamental rights and freedoms. Subsidiarity is also a significant consideration, particularly since the various Member States face differing problems and will have to implement the Framework Decision in the light of these problems and of their disparate legal and constitutional systems. The terminology of the European Court of Human Rights ("wide margin of appreciation") is used advisedly.

Amendment 6
Recital 16 (new)

	(16) This Framework Directive is without prejudice to the provisions of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information services, in particular electronic commerce, in the Internal Market[2] as regards the liability of internet service providers;

[2] OJ L 178, 17.7.2000, p. 1.

Justification

This point needs making in the preamble.

Amendment 7
Article 1

This Framework Decision lays down provisions for approximation of laws and regulations of the Member States and for closer co-operation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia.	This Framework Decision lays down provisions for approximation of laws and regulations of the Member States and for closer co-operation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia. ***It does not preclude the introduction or retention by Member States of legislation affording a higher degree of protection against racism and xenophobia under criminal law.***

Justification

There is no reason why Member States should be precluded from introducing or retaining legislation affording a higher degree of protection. After all, the explanatory memorandum (at page 6) refers to the Framework Decision as establishing the "minimum approximation necessary".

Amendment 8
Article 2

Article 2 – ***S***cope	Article 2 – ***Territorial s***cope
This Framework Decision applies to offences ***involving racism and xenophobia*** committed***:*** ***(a) within the territory of the Member States, or*** ***(b) by nationals of a Member State where the act affects individuals or groups of that State, or*** ***(c) for the benefit of a legal person established in a Member State.***	This Framework Decision applies to offences ***as defined in Article 4*** committed ***within the territory of a Member State.***

Justification

Clarification, necessary for legal reasons, of the offences covered and of the definition of the territorial scope and scope as regards persons. The primary aim of the Framework Decision is to harmonise, for offences committed within the European Union, the punishment of such offences by the Member States within whose territory they have been committed. In addition, Member States are to punish offences committed by their own nationals where the offence has not been committed within their own territory. This is not clearly reflected in the wording of the draft. Finally, point c does not define the Framework Decision's territorial scope or scope as regards persons but rather the purpose of the offence, and this provision should therefore be laid down in Article 4.

Amendment 9
Article 2a (new)

	Article 2a – Scope as regards persons
	The Framework Decision also applies to offences as defined in Article 4 irrespective of the place where the offence has been committed, if it has been committed by a national of a Member State, for purposes of prosecution in that Member State.

Justification

See preceding amendment.

Amendment 10
Article 3(a)

(a) *"racism and xenophobia"* shall mean the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups;	(a) *"racism and xenophobia"* shall mean the belief in race, colour, descent, religion or belief, national or ethnic origin as ***even*** a ***partial*** factor determining aversion to individuals or groups;

Justification

The definition should clarify that the belief in race, colour, descent, religion, national or ethnic origin does not need to be the sole but even a partial factor determining aversion to individuals or groups. If not, potential offenders might have an easy argument to avoid punishment. Therefore, the effectiveness of the framework decision would be reduced.

Amendment 11
Article 3(c)

(c) *"legal person"* shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for ***public international*** organisations.	(c) *"legal person"* shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for organisations ***governed by public international law***.

Justification

Clarification.

Amendment 12
Article 4

Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence:	Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence:
(a) public incitement to violence or hatred ***for a racist or xenophobic purpose*** or to any other ***racist or xenophobic*** behaviour which may cause substantial damage to individuals or groups concerned;	(a) public incitement to violence or hatred ***motivated by racism or xenophobia*** or to any other behaviour ***motivated by racism or xenophobia*** which may cause substantial damage to individuals or groups concerned;
	(b) Internet service providers shall be criminally responsible under the conditions of Art. 12 to 15 of Directive 2000/31/EC;
(b) public insults or threats towards individuals or groups ***for*** a racist or xenophobic ***purpose***;	***(c)*** public ***abuse,*** insults or threats towards individuals or groups ***with*** a racist or xenophobic ***motive***;
(c) public condoning ***for a racist or xenophobic purpose*** of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court;	***(d)*** public condoning of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court ***where the words or behaviour in question are threatening, abusive or insulting and motivated by racism or xenophobia***;
(d) public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 ***in a manner liable to disturb the public peace***;	***(e)*** public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 ***where such denial or trivialisation is motivated by racism or xenophobia and threatening, abusive or insulting or effected in a manner liable to disturb the public peace***;
(e) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;	***(f)*** public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia ***with racist or xenophobic intent***;

(f) directing, supporting of or participating in the activities of a racist or xenophobic group, with the intention of contributing to the organisation's criminal activities.	***(g)*** directing, supporting of or participating in the activities of a racist or xenophobic group, with the intention of contributing to activities ***which are criminal within the meaning of this Framework Decision***.

Justification

The purpose of these changes is to make it clear that the offences should be committed with a racist or xenophobic motive or intent. This should make the offences clearer and avoid prosecutions where, for instance, racist or xenophobic material is distributed for a legitimate purpose (e.g. by a university lecturer during a history course).

Internet-criminality is a growing area and, in combination with xenophobic and racist contents, is a growing danger for democratic societies. To this ' hostile act from outside' we must act to prevent, with respect to Directive 2000/31/EC. This point shall be underlined.

The amendment also seeks to make it easier to bring a prosecution for the offence of holocaust denial (indent (e)), yet without going so far as to make this an absolute offence.

Lastly, the change to indent (g) is intended to clarify the text.

Amendment 13
Article 6, paragraph 4

4. Member States shall ensure that ancillary or alternative sanctions such as community service or participation in training courses, deprivation of certain civil or political rights or publication of all or part of a sentence may ***be imposed or foreseen for*** the offences referred to in Articles 4 and 5.	4. Member States shall ensure that ancillary or alternative sanctions such as community service or participation in training courses, deprivation of certain civil or political rights or publication of all or part of a sentence may be ***provided for in respect of*** the offences referred to in Articles 4 and 5.

Justification

Clarification.

Amendment 14
Article 6, paragraph 5

5. Member States shall ensure that fines can be imposed or payment for charitable purposes accepted in respect of the offences referred to in Articles 4 and 5.	5. Member States shall ensure that fines can be imposed or***, where provision is made for payments for charitable purposes in the national legal order,*** payment for charitable purposes accepted in respect of the offences referred to in Articles 4 and 5.

Justification

Not all Member States make provision for such payments in their national law

Amendment 15
Article 7

Member States shall ensure that in cases where the perpetrator of the offences referred to in Articles 4 and 5 is acting in ***the exercise of a professional activity and the victim is depending on this activity***, the sentence can be *aggravated*.	Member States shall ensure that in cases where the perpetrator of the offences referred to in Articles 4 and 5 is acting in ***an official or professional capacity and owes a duty of care to*** the victim ***or to minors***, ***as well as in cases where the victim of the offences is a child, within the meaning of the International Convention on the Rights of the Child, and cases where the perpetrator's activities are directed at people who are very easily influenced,*** the sentence can be *increased*.

Justification

It is by no means clear what precisely is intended by the original text. The amendment proposed seeks to clarify the provision and extend it to cover persons having a duty of care

towards minors.

This amendment seeks to incorporate into the decision the overriding interests of the child as a victim of discrimination and also as somebody who can easily be influenced using racist or xenophobic messages. This special vulnerability of children, which justifies aggravating the sentence, is emphasised in paragraphs 72 and 91 of the Durban Declaration, adopted in September 2001.

Amendment 16
Article 11

Each Member State ***shall ensure*** that investigations into or prosecution of offences referred to in ***Articles*** 4 ***and 5 shall*** not be dependent on the report or accusation made by a victim of the offence, ***at least in cases where offences referred to in Article 4, paragraphs (a), (e) and (f) have been committed in its territory***.	Each Member State ***may provide*** that investigations into or prosecution of offences ***shall, at least in cases*** referred to in ***Article*** 4***, paragraphs (a), (e) and (f) in conjunction with Article 2,*** not be ***exclusively*** dependent on the report or accusation made by a victim of the offence. ***Each Member State shall ensure that victims of racist or xenophobic offences have full access to information, aid facilities, effective protection, appropriate legal remedies and legal assistance.***

Justification

Follows from amendments 9 and 10 and clarifies the actual legally binding effect of the Article.

In the interests of subsidiarity it should be up to the competent authorities in each MS to decide how to conduct their prosecutions. Whilst the intention of the provision here is welcomed it is too proscriptive as it stands.

This amendment also seeks to strengthen the effectiveness of the framework decision by facilitating the action taken by victims, as recommended in particular by paragraph 160 of the Durban plan of action.

Amendment 17
Article 12, paragraph 1

1. Each Member State shall establish its jurisdiction ***with regard to*** the offences referred to in Articles 4 and 5 ***where the offence has been committed:*** ***(a) in whole or in part within its territory; or*** ***(b) by one of its nationals and the act affects individuals or groups of that State; or*** ***(c) for the benefit of a legal person that has its head office in the territory of that Member State.***	1. Each Member State shall establish its jurisdiction ***for*** the offences referred to in Articles 4 and 5***.***

Justification

The territorial and material scope of the act is established in Articles 2 and 2a and Articles 4 and 5, and does not need to be reiterated. In other respects, the amendments follow from amendments 9 and 10 or provide clarification.

Amendment 18
Article 12, paragraph 2

2. When establishing jurisdiction in accordance with ***paragraph 1(a)***, each Member State shall ensure that its jurisdiction extends to cases where the offence is committed through an information system and: a) the offender commits the offence when ***physically present in*** its territory, ***whether or not the offence involves racist material hosted on an information system in its territory;*** b) the offence involves racist material hosted on an information system in its territory***,*** ***whether or not the offender commits the offence when physically present in its territory***.	2. When establishing jurisdiction in accordance with ***Article 2***, each Member State shall ensure that its jurisdiction extends to cases where the offence is committed through an information system and ***either***: a) the offender commits the offence when ***on*** its territory, ***or*** b) the offence involves racist material hosted on an information system in its territory.

Justification

See amendment 17.

Amendment 19
Article 12, paragraph 3

3. A Member State may decide not to apply, or to apply only in specific cases or circumstances, the jurisdiction rule set out in ***paragraphs 1 (b) and (c)***.	3. A Member State may decide not to apply, or to apply only in specific cases or circumstances, the jurisdiction rule set out in ***Article 2a***. ***It shall inform the General Secretariat of the Council and the Commission accordingly.***

Justification

See amendment 17.

Amendment 20
Article 12, paragraph 4

4. Member States shall inform the General Secretariat of the Council and the Commission accordingly where they decide to apply paragraph 3, where appropriate with an indication of the specific cases or circumstances in which the decision applies.	***Deleted***

Justification

See amendment 17.

Amendment 21
Article 15, paragraph 1

1. Member States shall designate operational contact points or may use existing operational structures for the exchange of information and for other contacts between Member States for the purposes of applying this Framework Decision.	1. Member States shall designate operational contact points or may use existing operational structures ***such as Europol and Eurojust*** for the exchange of information and for other contacts between Member States for the purposes of applying this Framework Decision.

Justification

Europol and Eurojust are among these existing operational structures.

Amendment 22
Article 15, paragraph 4 (new)

	4. The national contact points shall report comprehensively to the European Monitoring Centre on Racism and Xenophobia (EUMC) on incidents of racism and xenophobia, police reports, prosecutions and convictions. The particulars supplied to EUMC for registration and monitoring purposes shall include details of the ethnic and cultural background of both the perpetrator and the victim.

Justification

Self-explanatory.

Amendment 23
Article 16, paragraph 3

3. On that basis, the Commission shall, by 30 June 2005, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied where necessary by legislative proposals.	3. On that basis, the Commission shall, by 30 June 2005, submit a ***first*** report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied where necessary by legislative proposals. ***At regular intervals from no more than 2 years other reports shall follow this.***

Justification

The framework decision to be effective must be regularly monitored.

EXPLANATORY STATEMENT

Introduction

The EUMC annual report for 2000 and reports by the ECRI and the NGOs working in this area confirm that racist and xenophobic violence and discrimination within the EU have not gone away, and in certain cases are on the increase. The terrorist attacks of 11 September and the worsening of the Israeli-Palestinian conflict have, over recent months, further exacerbated both anti-Islamic and anti-Semitic tensions and violence. Faced with this situation, it is therefore essential to pursue action to combat racism and xenophobia in all their forms by supplementing and strengthening the instruments available to the EU and its Member States.

I. Stepping up European cooperation in criminal matters

1. Legal background

Racism and xenophobia are a direct violation of the principles of freedom and democracy and the fundamental values shared by the EU Member States, as set out in Article 6 of the TEU and in the Charter of Fundamental Rights of the EU. The European institutions - particularly the EP - have on numerous occasions reaffirmed their determination to uphold fundamental freedoms and condemned racism and xenophobia. Their action over recent years has included the declaration of a European Year against Racism in 1997, the setting up in 1998 of the European Monitoring Centre on Racism and Xenophobia, active participation by the EU in the United Nations Conference against Racism in Durban and, more recently, the conclusions of the extraordinary European Council meeting of 21 September 2001, which focused on action to combat both terrorism and any racist and xenophobic repercussions.

Furthermore, Article 13 of the ECT prohibits all forms of discrimination, particularly those based on racial or ethnic origin and religion or belief. The two directive adopted in 2000 - one on racism in general and the other on access to employment - are founded on this provision[1].

2. Inadequacies of European criminal policy

However, up to now, the EU's only means of taking criminal action against racist and xenophobic violence has been a joint action adopted in 1996. Although this joint action has enabled progress to be made in European judicial cooperation, it has proved inadequate - as the Council recognises in its first report on the matter[2]. It is essential for perpetrators of acts of racist violence not to be able to take advantage of the fact that they are treated differently in different Member States in order to escape prosecution.

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[1] Council Directive 2000/43/EC of 29 June 2000, OJ L 180, 19.7.2000, p. 22.
Council Directive 2000/78/EC of 27 November 2000, OJ L 303, 2.12.2000, p. 16.
[2] Council report on implementation of the joint action of 15 July 1996, 7808/1/98.

Whence the need for this proposal for a framework decision based on Articles 29 and 34 of the TEU, which the EP called for in paragraph 17 of its resolution of 21 September 2000 on the European Union's position at the World Conference against Racism. The proposal for a framework decision will lead to a genuine approximation of national criminal law, thus resolving the problem of double criminality, which is currently preventing effective action being taken against racist behaviour in the EU.

II. Substance of the proposal for a framework decision

Compared with the joint action, the proposal for a framework decision contains:

- a broader definition of offences involving racism and xenophobia;
- minimum penalties for both natural and legal persons;
- provision for aggravating circumstances being taken into account in certain cases;
- the strengthening of judicial cooperation procedures in order to facilitate the prosecution of the perpetrators of racist offences, particularly on the Internet.

1. A broader definition of offences involving racism and xenophobia

The list of racist and xenophobic offences contained in the joint action of 1996 has been taken over, added to and further clarified.

The obligation to make racist and xenophobic acts punishable as criminal offences is no longer limited simply to cases of public incitement to violence or hatred but now extends also to 'any other racist or xenophobic behaviour', particularly the dissemination of racist content on the Internet: anything which is illegal off-line must be illegal on-line.
Similarly, the trivialisation of genocide has, in accordance with German law, now been added to its public denial.

Lastly, Article 4 requires the Member States to ensure that such conduct is punishable as a criminal offence. The option that previously existed of choosing between making such conduct punishable as a criminal offence and derogating from the principle of double criminality no longer applies.

2. Minimum penalties

Article 5 lays down minimum penalties to apply throughout the EU. These include: custodial sentences of not less than six months for the offences referred to in Article 4(b) to (e); and custodial sentences of not less than two years for the offences referred to in Article 4(a) and (f), namely public incitement to violence or hatred for a racist or xenophobic purpose. Aid and abetting or attempting to commit a racist offence are also punishable. Provision is also made for ancillary or alternative sanctions such as community service, deprivation of certain civil or political rights, fines or the confiscation of equipment.

Furthermore, Article 9 stipulates that legal persons can be held liable for the offences referred to in Articles 4 and 5 and for a lack of supervision or control, which covers in particular the

activities of Internet content providers.

3. Aggravating circumstances for racist and xenophobic offences

The provisions of Articles 7 and 8 are also of essential importance to the punishment of racist behaviour in that they specify that the sentence can be aggravated when an offence is perpetrated in the exercise of a professional activity and that racist and xenophobic motivation may be regarded as aggravating circumstances for offences other than those referred to in Articles 4 and 5.

4. Procedural provisions

With a view to further strengthening the measures that may be taken against racist behaviour, given that victims are often scared to take legal action Article 11 stipulates that each Member State shall ensure that investigations into or prosecution of offences shall not be dependent on the report or accusation made by a victim of the offence.

With regard to jurisdiction, Article 12(2) stipulates that each Member State shall ensure that its jurisdiction extends to cases where the offence is committed through an information system and the offender makes use of racist material hosted in its territory but is not physically present in its territory, and vice-versa.

Lastly, when the proposal for a European arrest warrant is adopted, nationality will no longer be a ground for refusing extradition.

5. Judicial cooperation

The designation of operational contact points by the Members States, for which provision was already made in the joint action, is made compulsory in the proposal for a framework decision. The contact points will be responsible for facilitating the exchange of information between Member States on racist or xenophobic offences.

The Member States are also required to forward to each other any information they may have on the storage in their territory of material to be used for racist or xenophobic purposes. The framework decision will enter into force no later than 30 June 2004.

Conclusion

Subject to the amendments tabled, which seek mainly to define still more clearly offences involving racism, to extend the scope of the aggravating circumstances for racist offences and to strengthen the provisions against racism on the Internet, unreserved approval can be given to the framework decision, both as regards principles and as regards procedural details.

Lastly, it should be emphasised that this measure does not run counter to the principle of freedom of expression, a fundamental value every bit as important as that of non-discrimination, but whose abuse should be duly punished. When freedom of expression is used to damage the reputation or rights of others, as set out in Article 10(2) of the European

Convention on Human Rights (to which reference is made in Article 11 of the European Union Charter of Fundamental Rights), it may be suspended or penalties may be applied. In this connection, those Member States[5] which, when ratifying the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1996, attached statements and reservations about the protection of freedom of expression, should now withdraw those reservations. The perpetrators of racist or xenophobic offences must be given no opportunity to put forward spurious arguments invoking freedom of expression in order to escape prosecution for their acts.

[5] Austria, Belgium, France, Ireland, Italy and the United Kingdom.

MINORITY OPINION

By Marco Cappato
On the proposal for a Council Framework Decision on combating racism and xenophobia (COM(2001) 664 - C5-0689/2001 - 2001/0270(CNS)

The Universal Declaration of Human Rights stipulates that 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'. These principles of a free society are undermined by laws which make 'beliefs' a criminal offence, in a manner which is typical of totalitarian regimes.

This is the line adopted by the Commission when it calls for the 'public condoning for a racist purpose', the 'dissemination of tracts containing expressions of racism' and incitement to such acts and other similar acts to be made punishable as criminal offences. Such measures, for which maximum sentences of at least two-years' imprisonment are laid down in cases of criminal association, should logically be followed by the public burning of a substantial proportion of world literature and art. To the great delight of populist and anti-European movements, the Voltairian spirit of tolerance expressed in the phrase "I disapprove of what you say but will defend to the death your right to say it" is being trampled under foot by a form of eurobureaucratic folly which is far more dangerous than the 'monster' which it claims to be fighting.

22 May 2002

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the proposal for a Council Framework Decision on combating racism and xenophobia (COM(2001) 664 – C5-0689/2001 – 2001/0270(CNS))

Draftsman: Arlene McCarthy

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Arlene McCarthy draftsman at its meeting of 24 January 2002.

It considered the draft opinion at its meetings of 16 April, 23 April and 22 May 2002.

At the last meeting it adopted the following amendments unanimously.

The following were present for the vote: Giuseppe Gargani (chairman); Willi Rothley, Ioannis Koukiadis and Bill Miller (vice-chairmen), Arlene McCarthy(draftsman), Janelly Fourtou, Marie-Françoise Garaud, Evelyne Gebhardt, Fiorella Ghilardotti, Malcolm Harbour, Heidi Anneli Hautala, Kurt Lechner, Klaus-Heiner Lehne, Neil MacCormick, Toine Manders, Hans-Peter Mayer (for Rainer Wieland), Manuel Medina Ortega, Giacomo Santini (for Paolo Bartolozzi pursuant to Rule 153(2)), Marianne L.P. Thyssen, Rijk van Dam (for Ole Krarup) and Diana Wallis.

SHORT JUSTIFICATION

Your draftsman welcomes this proposed legislation for which Parliament has called for some considerable time. It will be extremely important also for the candidate countries and in this connection I would call to mind Claude Moraes' opinion which this committee adopted on 21 February 2000.

We are inevitably a multi-racial, multi-cultural community and likewise our Member States. To gain the utmost benefits from this state of affairs, it is essential to stamp out racism and xenophobia, in the last resort by criminalising it. For the ancient Greeks, xenophobia, "fear of strangers" was one thing, quite another was "filoxenia", welcoming of strangers, which was regarded as the highest virtue for a Greek citizen. Such a situation can be achieved in our society in the long term through education and changing attitudes, particularly in some sectors of the media. Racism and xenophobia thrive among the weak and worst-educated strata of society, who are easy prey for unscrupulous fringe parties, particularly at times of economic hardship and in areas in which traditional industries have died out and jobs are hard to find. It is also by ensuring proper provision for the vulnerable and through job creation that we should be looking to stamp out this insidious menace.

What this opinion seeks to achieve is effective criminal legislation, which results neither in putting the threshold for prosecution so high that no prosecutions ensue nor in setting it so low that it jeopardises the freedoms of expression and association. Accordingly, it concentrates on the legal issues raised by the proposed framework decision.

These include:

- Freedom of expression and information within the meaning of the European Convention on Human Rights and the Charter of Fundamental Rights. It is noted in this connection that some Member States have entered reservations in this connection with respect to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

- The definitions (in particular the inclusion of the reference to religion in Article 3 may create difficulties).

- Jurisdiction and the Internet.

- The question of *mens rea* and of the threshold for triggering the various offences. Should it be possible to infer intention from the surrounding circumstances or should, as in the proposal, the test be intention *simpliciter*? If the threshold is set too high, there will be few successful prosecutions, if too low, too many frivolous prosecutions.

AMENDMENTS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission[6]	Amendments by Parliament
Amendment 1 Recital 6	
(6) Racist or xenophobic motivation ***should*** be taken into account as an aggravating factor when imposing penalties for ordinary offences. This would constitute a direct response to perpetrators of such offences and have a deterrent effect;	(6) Racist or xenophobic motivation ***may*** be taken into account as an aggravating factor when imposing penalties for ordinary offences. This would constitute a direct response to perpetrators of such offences and have a deterrent effect;
Justification	
The recital is not in line with the provisions laid down in Article 8.	
Amendment 2 Recital 15	

[6] OJ C 075, 26.03.2002, p.269.

(15) ***This*** Framework Decision ***respects*** the fundamental rights and ***observes*** the principles recognised in particular by the European Convention on Human Rights, in particular Articles 10 and 11 thereof, and by the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof***;***	(15) ***In implementing this*** Framework Decision***, Member States must respect*** the fundamental rights and ***observe*** the principles recognised in particular by the European Convention on Human Rights, in particular Articles ***9,*** 10 and 11 thereof, and by the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof***. Accordingly and having regard to the principle of subsidiarity, Member States must have a wide margin of appreciation in implementing and applying this Framework Decision***;

Justification

It is important to make it clear that fundamental rights must be respected in implementing the Framework Decision, not only the rights to freedom of expression and freedom of association, but also the right to freedom of thought, conscience and religion enshrined in Article 9 of the European Convention. It is essential to strike the right balance between combating the scourge of racism and xenophobia and fundamental rights and freedoms. Subsidiarity is also a significant consideration, particularly since the various Member States face differing problems and will have to implement the Framework Decision in the light of these problems and of their disparate legal and constitutional systems. The terminology of the European Court of Human Rights ("wide margin of appreciation") is used advisedly.

Amendment 3
Recital 16 (new)

	(16) This Framework Directive is without prejudice to the provisions of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information services, in particular electronic commerce, in the Internal Market[7] as regards the liability of internet service providers;

[7] OJ L 178, 17.7.2000, p. 1.

Justification

This point needs making in the preamble.

Amendment 4
Article 1

This Framework Decision lays down provisions for approximation of laws and regulations of the Member States and for closer co-operation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia.	This Framework Decision lays down provisions for approximation of laws and regulations of the Member States and for closer co-operation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia. ***It does not preclude the introduction or retention by Member States of legislation affording a higher degree of protection against racism and xenophobia under criminal law.***

Justification

There is no reason why Member States should be precluded from introducing or retaining legislation affording a higher degree of protection. After all, the explanatory memorandum (at page 6) refers to the Framework Decision as establishing the "minimum approximation necessary".

Amendment 5
Article 2

Article 2 – ***S***cope This Framework Decision applies to offences ***involving racism and xenophobia*** committed***:*** ***(a) within the territory of the Member States, or*** ***(b) by nationals of a Member State where the act affects individuals or groups of that State, or*** ***(c) for the benefit of a legal person established in a Member State.***	Article 2 – ***Territorial s***cope This Framework Decision applies to offences ***as defined in Article 4*** committed ***within the territory of a Member State.***

Justification

Clarification, necessary for legal reasons, of the offences covered and of the definition of the territorial scope and scope as regards persons. The primary aim of the Framework Decision is to harmonise, for offences committed within the European Union, the punishment of such offences by the Member States within whose territory they have been committed. In addition, Member States are to punish offences committed by their own nationals where the offence has not been committed within their own territory. This is not clearly reflected in the wording of the draft. Finally, point c does not define the Framework Decision's territorial scope or scope as regards persons but rather the purpose of the offence, and this provision should therefore be laid down in Article 4.

Amendment 6
Article 2a (new)

Article 2a – Scope as regards persons

The Framework Decision also applies to offences as defined in Article 4 irrespective of the place where the offence has been committed, if it has been committed by a national of a Member State, for purposes of prosecution in that Member State.

Justification

See amendment 5.

Amendment 7
Article 3

For the purposes of this Framework Decision, the following definitions shall apply:	For the purposes of this Framework Decision, the following definitions shall apply:
(a) "*racism and xenophobia*" shall mean the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups;	(a) "*racism and xenophobia*" shall mean the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups;
(b) "*racist or xenophobic group*" shall mean *as* a structured organisation established over a period of time, of more than two persons, acting in concert to commit offences referred to in Article 4, paragraphs (a) to (e).	(b) "*racist or xenophobic group*" shall mean a structured organisation established over a period of time, of more than two persons, acting in concert to commit offences referred to in Article 4, paragraphs (a) to (e).
(c) *"legal person"* shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for ***public international*** organisations.	(c) *"legal person"* shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for organisations ***governed by public international law***.

Justification

Clarification.

Amendment 8
Article 4

Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence:	Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence:

(a) public incitement to violence or hatred ***for a racist or xenophobic purpose*** or to any other ***racist or xenophobic*** behaviour which may cause substantial damage to individuals or groups concerned;	(a) public incitement to violence or hatred ***motivated by racism or xenophobia*** or to any other behaviour ***motivated by racism or xenophobia*** which may cause substantial damage to individuals or groups concerned;
(b) public insults or threats towards individuals or groups ***for*** a racist or xenophobic ***purpose***;	(b) public ***abuse,*** insults or threats towards individuals or groups ***with*** a racist or xenophobic ***motive***;
(c) public condoning ***for a racist or xenophobic purpose*** of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court;	(c) public condoning of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court ***where the words or behaviour in question are threatening, abusive or insulting and motivated by racism or xenophobia***;
(d) public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 ***in a manner liable to disturb the public peace***;	(d) public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 ***where such denial or trivialisation is motivated by racism or xenophobia and threatening, abusive or insulting or effected in a manner liable to disturb the public peace***;
(e) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;	(e) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia ***with racist or xenophobic intent***;
(f) directing, supporting of or participating in the activities of a racist or xenophobic group, with the intention of contributing to the organisation's criminal activities.	(f) directing, supporting of or participating in the activities of a racist or xenophobic group, with the intention of contributing to activities ***which are criminal within the meaning of this Framework Decision***.

Justification

The purpose of these changes is to make it clear that the offences should be committed with a racist or xenophobic motive or intent. This should make the offences clearer and avoid prosecutions where, for instance, racist or xenophobic material is distributed for a legitimate

purpose (e.g. by a university lecturer during a history course).

The amendment also seeks to make it easier to bring a prosecution for the offence of holocaust denial (indent (d)), yet without going so far as to make this an absolute offence.

Lastly, the change to indent (f) is intended to clarify the text.

Amendment 9
Article 6, paragraph 4

4. Member States shall ensure that ancillary or alternative sanctions such as community service or participation in training courses, deprivation of certain civil or political rights or publication of all or part of a sentence may ***be imposed or foreseen for*** the offences referred to in Articles 4 and 5.	4. Member States shall ensure that ancillary or alternative sanctions such as community service or participation in training courses, deprivation of certain civil or political rights or publication of all or part of a sentence may be ***provided for in respect of*** the offences referred to in Articles 4 and 5.

Justification

Clarification.

Amendment 10
Article 6, paragraph 5

Member States shall ensure that fines can be imposed or payment for charitable purposes accepted in respect of the offences referred to in Articles 4 and 5.	Member States shall ensure that fines can be imposed or***, where provision is made for payments for charitable purposes in the national legal order,*** payment for charitable purposes accepted in respect of the offences referred to in Articles 4 and 5.

Justification

Not all Member States make provision for such payments in their national law

Amendment 11
Article 7

Member States shall ensure that in cases where the perpetrator of the offences referred to in Articles 4 and 5 is acting in ***the exercise of a professional activity and the victim is depending on this activity***, the sentence can be *aggravated*.	Member States shall ensure that in cases where the perpetrator of the offences referred to in Articles 4 and 5 is acting in ***an official or professional capacity and owes a duty of care to*** the victim ***or to minors***, the sentence can be *increased*.

Justification

It is by no means clear what precisely is intended by the original text. The amendment proposed seeks to clarify the provision and extend it to cover persons having a duty of care towards minors.

Amendment 12
Article 11

Each Member State shall ensure that investigations into or prosecution of offences referred to in ***Articles*** 4 ***and 5 shall*** not be dependent on the report or accusation made by a victim of the offence, ***at least in cases where offences referred to in Article 4, paragraphs (a), (e) and (f) have been committed in its territory***.	Each Member State shall ensure that investigations into or prosecution of offences ***shall, at least in cases*** referred to in ***Article*** 4***, paragraphs (a), (e) and (f) in conjunction with Article 2,*** not be dependent on the report or accusation made by a victim of the offence.

Justification

Follows from amendments 5 and 6 and clarifies the actual legally binding effect of the Article.

Amendment 13
Article 12, paragraph 1

1. Each Member State shall establish its jurisdiction ***with regard to*** the offences referred to in Articles 4 and 5 ***where the offence has been committed:*** ***(a) in whole or in part within its territory; or*** ***(b) by one of its nationals and the act affects individuals or groups of that State; or*** ***(c) for the benefit of a legal person that has its head office in the territory of that Member State.***	1. Each Member State shall establish its jurisdiction ***for*** the offences referred to in Articles 4 and 5***.***

Justification

The territorial and material scope of the act is established in Articles 2 and 2a and Articles 4 and 5, and does not need to be reiterated. In other respects, the amendments follow from amendments 5 and 6 or provide clarification.

Amendment 14
Article 12, paragraph 2

2. When establishing jurisdiction in accordance with ***paragraph 1(a)***, each Member State shall ensure that its jurisdiction extends to cases where the offence is committed through an information system and: a) the offender commits the offence when ***physically present in*** its territory, ***whether or not the offence involves racist material hosted on an information system in its territory;*** b) the offence involves racist material hosted on an information system in its territory***,*** ***whether or not the offender commits the offence when physically present in its territory***.	2. When establishing jurisdiction in accordance with ***Article 2***, each Member State shall ensure that its jurisdiction extends to cases where the offence is committed through an information system and ***either***: a) the offender commits the offence when ***on*** its territory, ***or*** b) the offence involves racist material hosted on an information system in its territory.

Justification

See amendment 13.

Amendment 15
Article 12, paragraph 3

3. A Member State may decide not to apply, or to apply only in specific cases or circumstances, the jurisdiction rule set out in ***paragraphs 1 (b) and (c)***.	3. A Member State may decide not to apply, or to apply only in specific cases or circumstances, the jurisdiction rule set out in ***Article 2a***. ***It shall inform the General Secretariat of the Council and the Commission accordingly.***

Justification

See amendment 13.

Amendment 16
Article 12, paragraph 4

4. Member States shall inform the General Secretariat of the Council and the Commission accordingly where they decide to apply paragraph 3, where appropriate with an indication of the specific cases or circumstances in which the decision applies.	***Deleted***

Justification

See amendment 13.

Amendment 17
Article 15, paragraph 4 (new)

	4. The national contact points shall report comprehensively to the European Monitoring Centre on Racism and Xenophobia (EUMC) on incidents of racism and xenophobia, police reports, prosecutions and convictions. The particulars supplied to EUMC for registration and monitoring purposes shall include details of the ethnic and cultural background of both the perpetrator and the victim.

Justification

Self-explanatory.

Amendment 18
Article 16, paragraph 3

On that basis, the Commission shall, by 30 June 2005, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied where necessary by legislative proposals.	On that basis, the Commission shall, by 30 June 2005, submit a report to the European Parliament and to the Council on the operation of this Framework Decision. ***The Commission shall further report to the European Parliament and to the Council every five years on the basis of information provided by the Member States, the European Monitoring Centre on Racism and Xenophobia and interested non-governmental organisations.***

Justification

Self-explanatory.