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NOTE

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Subject:	Draft Council conclusions on combating hate crime in the European Union

I. INTRODUCTION

1. Throughout 2013, starting with the informal meeting of Justice and Home Affairs Ministers on 17-18 January 2013 in Dublin, EU action in countering hate crime, racism, anti-Semitism, xenophobia and homophobia, has been in focus. On 6 June, the Justice and Home Affairs Council adopted conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, referring in its point 8 to hate crimes and to the need for assessing the effectiveness of the existing EU legal norms on fighting hate crimes.

2. In accordance with the objectives pursued by the European Union, a series of instruments prohibiting discrimination have been adopted. Within the area of criminal law, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law¹ defines a common EU-wide criminal law and criminal justice approach to combating racism and xenophobia. This Framework Decision, limited to combating particularly serious forms of racism and xenophobia had to be transposed into national law by the Member States by 28 November 2010.

Article 1(a) and (b) of this Framework Decision requires EU Member States to take measures to punish public incitement to violence or hatred directed against a person or persons belonging to a group defined by reference to race, colour, religion, descent or national or ethnic origin and the commission of such acts by public dissemination or distribution of tracts, pictures or other material. Article 1(c) and (d) also requires EU Member States to take measures to punish any conduct publicly condoning, denying or grossly trivialising 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 and crimes defined in Article 6 of the Charter of the International Military Tribunal, appended to the London Agreement of 8 August 1945, when the conduct is carried out in a manner likely to incite to violence or hatred against a person or persons belonging to one of the groups listed in Article 1(a).

For other criminal offences, for example assault, bodily harm, murder or damage to property, etc., motivated by racism or xenophobia, the Framework Decision, in Article 4, provides: "..., *Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties.*"

¹ OJ L 328, 6.12.2008, p. 55.

While this Framework Decision is restricted to race, colour, religion, descent or national or ethnic origin, a number of Member States have opted to include in their legislation other grounds such as sexual orientation² and disability in their criminal code provisions dealing with hate speech and hate crime.

According to Article 10(3), the Council shall review this Framework Decision before 28 November 2013. For the preparation of this review, the Council shall ask Member States whether they have experienced difficulties in judicial cooperation with regard to the conduct under Article 1(1); the outcome of this part of the evaluation exercise can be found in document 16068/13, concluding that Member States either do not have any experience regarding Article 1(1) of the Framework Decision or have not experienced any difficulties in judicial cooperation.

According to Article 10(2) of the Framework Decision, the Council shall, by 28 November 2013, on the basis of a report established by the Council and a written report from the Commission³, assess the extent to which Member States have complied with the provisions of this Framework Decision.

In a legislative context, also Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims⁴ should be mentioned as it explicitly refers to victims of hate crime and to specific protection needs that these victims might have.

Finally, the Charter of Fundamental Rights contains in its Article 21 a clear prohibition of any discrimination "*based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation*".

² To date, at least 10 Member States punish homophobic hate crime.

³ The Commission has indicated that such report will only be available in 2014.

⁴ OJ L 315, 14.11.2012, p. 57.

3. Effective criminal justice responses to hate crime are impaired by under-reporting by victims. Recent extensive EU-wide surveys by the EU Agency for Fundamental Rights (FRA) into under-reported hate crime⁵ have shown that crimes motivated by another person's (perceived) race, religious beliefs, disability, sexual orientation or gender identity are a daily reality throughout the EU while only a very small proportion of these are reported to any competent authority.

FRA survey findings show that between 60 % and 90% of victims of bias motivated crimes do not report the incident to any organisation, whether law enforcement agencies, the criminal justice system, victim support services or non-governmental organisations. The main reasons put forward by victims for not reporting incidents are often summarized in statements such as: "*nothing would change*" as a result of reporting incidents, that "*such incidents happen all the time*" or that they "*did not trust the police*".

4. In June this year, the European Union Agency for Fundamental Rights (FRA) was asked to provide an opinion on Framework Decision 2008/913/JHA. The request was formulated as two questions⁶, the first being an assessment of the impact of the Framework Decision with special attention to the rights of victims of crime and second, whether FRA considered that anything further needed to be done at EU level. The FRA opinion on the Framework Decision was published on 28 October 2013.⁷

⁵ E.g. FRA (2010), *EU-MIDIS: Main results report*, Luxembourg, Publications Office ; FRA (2013), *EU LGBT survey. Results at a glance*, Luxembourg, Publications Office.

⁶ 11684/13 FREMP 98 JAI 573 COSCE 7 COHOM 139.

⁷ 15354/13 FREMP 164 JAI 941 DROIPEN 130 COPEN 172.

II. Fundamental Rights Conference 12-13 November 2013: Combating hate crime in the European Union

5. A conference on combating hate crime in the EU, hosted by FRA in cooperation with the Presidency and held in Vilnius on 12-13 November 2013, brought together more than 400 policy makers and practitioners from national governments, international organisations, civil society, EU institutions and bodies. Conference discussions built in particular on FRA's reports on "*Making hate crime visible in the European Union: acknowledging victims' rights*"⁸ and "*Minorities as victims of crime*" (EU-MIDIS Data in Focus 6)⁹, as well as on findings of FRA's EU LGBT (lesbian, gay, bisexual and transgender) and anti-Semitism surveys¹⁰ among others. The objectives, apart from an exchange of ideas and best practices on how to combat hate crime, were in particular to develop concrete proposals for follow-up to FRA's opinions pertaining to hate crime and to explore effective practical solutions for combating hate crime at the EU as well as Member States level.
6. Conference conclusions¹¹ called on EU institutions to make use of means in line with Article 83(1) TFEU in order to extend the crimes of incitement to violence or hatred as well as of negationism as defined under Article 1(1) of the Framework Decision on Racism and Xenophobia to all grounds of discrimination under Article 21 of the Charter of Fundamental Rights and to include in the range of criminalised forms of discrimination all attempts to revive authoritarian or totalitarian ideologies.

⁸ http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf.

⁹ http://fra.europa.eu/sites/default/files/fra-2012-eu-midis-dif6_0.pdf

¹⁰ http://fra.europa.eu/sites/default/files/fra-2013-discrimination-and-hate-crime-against-jews-eu-embargoed_en.pdf

¹¹ 16278/13 FREMP 186 JAI 1011 COPEN 206 DROIPEN 141 SOC 946.

Discussions during the conference emphasised the importance of the rights of victims of hate crime, that bias motives would be unmasked and made visible through better hate crime reporting, effective investigation and prosecution, and court decisions that acknowledge bias motives. In order to make the right of victims to have access to justice practically effective, it is crucial that victims are advised and supported and can trust in police and criminal justice systems. To that end, capacity building measures for law enforcement and criminal justice systems are of utmost importance.

A number of concrete measures in these and other areas were proposed and are included in the conference report.

III. CONCLUSION

7. On the basis described above, the Presidency prepared draft Council conclusions on combating hate crime in the EU. FREMP examined these draft conclusions at its meeting of 21 November 2013. On 3 December COREPER agreed to submit to the Council (JHA) the revised conclusions, as set out in the Annex to this note, for adoption. The Council is requested to adopt the conclusions at its meeting on 6 December 2013.

DRAFT COUNCIL CONCLUSIONS
on combating hate crime in the European Union

THE COUNCIL OF THE EUROPEAN UNION

EMPHASISING that in accordance with Article 2 of the Treaty on European Union (TEU), the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These 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;

BEARING IN MIND the strong commitment expressed in the Stockholm Programme¹²: "*Since diversity enriches the Union, the Union and its Member States must provide a safe environment where differences are respected and the most vulnerable protected. Measures to tackle discrimination, racism, anti-Semitism, xenophobia and homophobia must be vigorously pursued*".

RECOGNISING the clear link between promoting equality and fighting discrimination on the one hand and tackling hate crimes on the other;

TAKING INTO ACCOUNT existing Union legislation in the field of racism and xenophobia, in particular 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, that defines a common EU-wide criminal law and criminal justice approach to combating racism and xenophobia, as well as the anti-discrimination directives¹³;

¹² The Stockholm Programme - An open and secure Europe serving and protecting citizens (point 2.3), (OJ C 115, 4.5.2010, p 1).

¹³ E.g. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.7.2000, p. 22).

RECALLING the Statement by the Council inserted in the minutes of the Council at the time of the adoption of Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law¹⁴, in which the Council deplors all crimes of genocide, crimes against humanity and war crimes, including those committed by totalitarian regimes;

RECALLING the Council conclusions of 25 February 2011 on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union,¹⁵ its conclusions of 23 May 2011 on the Council's actions and initiatives for the implementation of the Charter of Fundamental Rights of the European Union¹⁶, and its conclusions of 6 June 2013 on fundamental rights and rule of law and on the Commission 2012 report on the application of the Charter of Fundamental Rights of the European Union¹⁷;

BEARING IN MIND the Stockholm Programme underlining that "*The Union is an area of shared values, values which are incompatible with crimes against humanity, genocide and war crimes, including crimes committed by totalitarian regimes. Each Member State has its own approach to this issue but, in the interests of reconciliation, the memory of those crimes must be a collective memory, shared and promoted, where possible, by us all. The Union must play the role of facilitator*";

RECALLING the Council conclusions of 9 June 2011 on the memory of the crimes committed by totalitarian regimes in Europe, and REAFFIRMING the importance of raising awareness of the crimes committed by totalitarian regimes by promoting a shared memory of these crimes across the Union and underlining the significant role that this can play in preventing the rehabilitation or rebirth of totalitarian ideologies, underlined by the establishment of the Europe-wide Day of Remembrance (23 August) of the victims of all totalitarian and authoritarian regimes;

¹⁴ OJ L 328, 6.12.2008, p. 55.

¹⁵ 6387/11 FREMP 13 JAI 101 COHOM 44 JUSTCIV 19 JURINFO 5.

¹⁶ 10139/1/11 FREMP 53 JAI 318 COHOM 131 JUSTCIV 128 JURINFO 30.

¹⁷ 10168/13 FREMP 73 JAI 430 COHOM 99 JUSTCIV 139 EJUSTICE 53 SOC 386 CULT 65 DROIPEN 63.

WELCOMING the important role the European Union Agency for Fundamental Rights has in providing expert and independent analysis relating to fundamental rights within the remit of its mandate in this area, and DIRECTING ATTENTION to the recent reports by the Fundamental Rights Agency documenting the extent and impacts of hate crimes in Europe, recommending action to make hate crimes more visible and acknowledging the rights of victims at three levels: legislation, policy and practice;

UNDERLINING the importance of the work done by other international organisations, in particular the Council of Europe (CoE) and its central role in the promotion and development of human rights, democracy and rule of law, HAVING REGARD to the European Convention on Human Rights (ECHR), notably its Article 14 and the case law relating thereto, and the work done by the European Commission against Racism and Intolerance (ECRI) and STRESSING the importance of creating synergies;

In this regard NOTING the case law of the European Court of Human Rights (ECtHR) and the requirement to render visible - to "unmask" - racist and bias motives leading to criminal offences¹⁸, which is reflected in Article 4 of the Framework Decision, that calls on EU Member States to take into consideration any racist or xenophobic motivation leading to a criminal offences in the determination of penalties;

EMPHASISING the vital importance of freedom of expression (Article 11 of the Charter on Fundamental Rights), also referred to in Article 7 of the Framework Decision, while recognising the relevant case law of the ECtHR according to which some particular forms of expression, including those constituting hate speech, are not protected by Article 10 of the European Convention on Human Rights¹⁹;

¹⁸ E.g. European Court of Human Rights (ECtHR), *Nachova and Others v. Bulgaria*, Nos. 43577/98 and 43579/98, 6 July 2005 and *Stoica v. Romania*, no. 42722/02.

¹⁹ E.g. European Court of Human Rights (ECtHR), *Gunduz v. Turkey* No. 35071/97, 4 December 2003 and *Garaudy v. France* No. 65831/01, 24 June 2003.

TAKING INTO ACCOUNT that the internet is a commonly used "instrument" for spreading hate speech and that many of the most serious incidents of harassment are happening on the internet, and UNDERLINING the importance of the Additional Protocol to the CoE Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems;

EMPHASISING the need to assist, support and protect the victims of hate crime, BEARING in mind the Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims, specifically making reference to victims of hate crime²⁰;

STRESSING the need for an effective and systematic collection of reliable and comparable data on hate crimes, including, as far as possible, the number of such incidents reported by the public and recorded by the authorities; the number of convictions; the bias motives behind these crimes; and the punishments handed down to offenders;

UNDERLINING the importance of training for practitioners coming into contact with victims of hate crime in order to increase their awareness of the needs of victims of hate crime and to enable them to deal with these victims in a respectful and professional manner, *inter alia* with a view to facilitate reporting of this type of crime;

TAKING NOTE OF the attention paid by the European Parliament to the fight against racism, xenophobia, homophobia and hate crime. The Parliament's resolution adopted on 14 March 2013 calls for a comprehensive strategy for fighting hate crime, bias violence and discrimination and for strengthening of efforts at European and national level in that regard, particularly in relation to better collection of data, support for victims and encouragement for victims to report incidences. The Parliament also reiterates its call for a stronger framework for protection of LGBT people and better implementation of national Roma integration strategies;

²⁰ OJ L 315, 14.11.2012, p. 57. Denmark did not participate in the adoption of this Directive and is not bound by it.

LOOKING FORWARD to receiving from the Commission the report pursuant to Article 10(2) of 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 for assessing the effectiveness of the existing EU legal norms on fighting hate crimes in order to enable the Council to assess the extent to which Member States have complied with the provisions of the Framework Decision;

TAKING NOTE of the Commission's intentions, as indicated in the Report to the European Parliament and to the Council entitled "*The memory of the crimes committed by totalitarian regimes in Europe*" of 22 December 2010, to keep under review the conditions for an additional legal instrument, including in the light of the findings of the forthcoming report.

INVITES MEMBER STATES TO:

1. ensure that Framework Decision 2008/913/JHA has been fully transposed into national legislation and implemented in practice;
2. consider the experience of other Member States in extending within their criminal legislation, the scope of punishable hate crime offences and the inclusion of other bias motives behind these offences;
3. ensure prompt and effective investigation and prosecution of hate crimes ensuring that bias motives are taken into consideration and throughout criminal proceedings;
4. take appropriate measures to facilitate the reporting of hate crimes by victims and as far as possible also associations supporting them, including measures to build trust in police and other state institutions;
5. collect and publish comprehensive and comparable data on hate crimes, as far as possible including the number of such incidents reported by the public and recorded by law enforcement authorities; the number of convictions; the bias motives behind these crimes; and the punishments handed down to offenders;
6. ensure that victims of hate crime are assisted, supported and protected, taking into account the Victims' Directive to be implemented by 16 November 2015, in particular the case-by-case assessment of a victim's protection needs, as defined in Article 22 of the Directive;

7. promote training for relevant practitioners coming into contact with victims of hate crime, thereby enabling them to efficiently assist these victims;
8. enhance preventive measures, *inter alia* by reflecting remembrance in human rights education, history curricula and relevant training, taking steps to educate the public on the values of cultural diversity and inclusion, and aiming for all sectors of society to have a role in combating such intolerance; and
9. consider ratifying the Additional Protocol to the CoE Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, if they have not yet done so;

INVITES THE COMMISSION TO:

10. in accordance with existing obligations assess Union legislation currently in place and submit the report to the Council;
11. ensure appropriate follow-up to this assessment;
12. when assessing the extent to which the Member States have taken the necessary measures in order to implement the Victims' Rights Directive, pay due attention to how the case-by-case assessment of victim's protection needs (Article 22) has been reflected in national legislation;
13. facilitate the exchange of good practices between Member States actors and provide guidance to promote such practices;
14. allocate the necessary budget to fund projects to prevent and combat hate crime, including remembrance projects and awareness raising campaigns, under the Union financing programmes;
15. contribute to improving the collection of reliable and comparable data and its analysis; and
16. improve strategic cooperation with external stakeholders (international organisations and civil society);

INVITES RELEVANT EU AGENCIES TO:

17. particularly with regard to the Fundamental Rights Agency, CEPOL, Eurojust and Europol continue their efforts to counter hate crime taking into account their respective mandates and pool their expertise;
 18. the Fundamental Rights Agency to continue assessing in an objective, reliable and comparable manner the extent of racism, xenophobia, anti-Semitism and other forms of hate crime through EU-wide surveys;
 19. the Fundamental Rights Agency to work together with Member States to facilitate exchange of good practices and assist the Member States at their request in their effort to develop effective methods to encourage reporting and ensure proper recording of hate crimes.
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