

CM2209

NOTE ON THE COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL- A MORE INCLUSIVE AND PROTECTIVE EUROPE: EXTENDING THE LIST OF EU CRIMES TO HATE SPEECH AND HATE CRIME – 9 DECEMBER 2021, COM(2021) 777 FINAL

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On 9 December 2021, the Commission communicated its aim to add hate speech and hate crime as an area of crime to art. 83(1) TFEU. In a second, future stage the Commission could then propose specific directives with minimum harmonisation of definitions and sanctions. The Meijers Committee applauds the Commission's initiative in that it addresses a serious problem that touches upon the foundations of the EU. Nevertheless, the Meijers Committee holds that before taking action towards EU-harmonisation of national criminal law in this area, there are several issues that require attention. In this note, the Meijers Committee makes some initial remarks and recommendations that may help the future process.

 **Meijers
Committee**

Standing Committee of Experts on International
Migration, Refugee and Criminal Law

Note on the Communication from the Commission to the European Parliament and the Council- A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime – 9 December 2021 (COM(2021) 777 final)

On 9 December 2021, the Commission communicated its aim to add hate speech and hate crime as an area of crime to art. 83(1) TFEU. In a second, future stage the Commission could then propose specific directives with minimum harmonisation of definitions and sanctions. For that stage, the Commission plans an impact assessment and stakeholder engagement. The Meijers Committee would like to make some initial remarks that may help the future process.

The Meijers Committee applauds the Commission's initiative in that it addresses a serious problem that touches upon the foundations of the EU. Indeed, hate speech and hate crime are characterised by the fact that 'the messages conveyed – notably that the targeted victims do not belong to that society – are addressed not only to the victim, but also to their community or group' as the Commission rightly points out.¹ Nevertheless, the Meijers Committee holds that before taking action towards EU-harmonisation of national criminal law in this area, there are several issues that require attention.

1) Hate speech

The Commission refers in particular to the problem of online hate speech on social media. As there also needs to be a cross-border dimension to add this crime to Article 83(1), it could be questioned why the initiative refers to hate speech broadly and is not restricted to online hate speech. The case for offline hate speech having a cross-border dimension is more difficult to make. The fact that 'hateful messages are developed and propagated by networks with members from several countries' and that 'ideologies behind hate speech messages are developed internationally and are therefore cross-border phenomena', as the Commission states², does not in itself show how much of domestic hate speech actually has such a cross-border dimension. Therefore **the Meijers Committee recommends to critically evaluate the need to address offline hate speech.**

Moreover, the Meijers Committee would welcome an analysis of why domestic criminal justice authorities have so far largely failed to address such online hate speech. This cannot only be due to a lack of harmonised legislation as practically all EU Member States already have criminal laws in place to combat hate speech on the grounds of 'race', colour, religion, descent or national or ethnic origin (as required by Framework Decision 2008/913). While one problem seems to be that there is a large grey area with expressions that fall below the threshold of criminal hate speech, it is also obvious that many utterances that are obvious hate speech are still often not prosecuted. Thus, harmonisation of legislation will in itself not achieve much if it is not accompanied by a broader setting of priorities in investigation and prosecution, in

¹ Communication from the Commission to the European Parliament and the Council- A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime – 9 December 2021, COM(2021) 777 final, p. 7.

² Ibid., p. 14.

conjunction with civil society. **The Meijers Committee recommends to further substantiate the necessity of harmonised legislation and to indicate how priority-setting and resource allocation with regard to (online) hate speech will be improved.**

2) Hate speech and the rights to freedom of expression, freedom of religion/belief and freedom of association and assembly

Any proposal to criminalise hate speech should be in line with the fundamental rights to freedom of expression (including the right to receive information), freedom of religion and belief, and freedom of assembly and association, and the case law of the Court of Justice of the European Union and the European Court of Human Rights. While measures against certain types of hate speech may be needed to protect access to the democratic public sphere, such restrictions should always be necessary in a democratic society and be proportionate. Criminalisation should be a last resort, as the EU institutions have also stressed.³ This is especially relevant in a sensitive area such as speech regulation. The definition of criminal offences should be clearly delineated, as required by the legality principle (article 49 EU Charter of Fundamental Rights).

If proposals are made, specific and strong guarantees for freedom of expression, freedom of religion and belief and freedom of assembly and association should be included. Such guarantees are particularly important in areas such as political speech and contributions to public debate; academic freedom; the freedom to express controversial opinions and to offend, shock or disturb; media freedom and the freedom to receive and impart information.

In the current EU climate with illiberal forces on the rise, the Commission needs to be aware that designation of speech as hate speech can be used as a stick for illiberal authorities to target minority groups and their opposition forces. This does not mean that forms of hate speech should not be criminalised, but **the EU should urge Member States to adopt precise and restrictive definitions.**

The Meijers Committee thus advises to keep EU-harmonised criminalisation limited to expressions that cause a danger or have a strong potential to lead to harmful consequences (i.e. hatred or discrimination). After all, the Council has stated that 'criminalisation of a conduct at an unwarrantably early stage' should be avoided; 'conduct which only implies an abstract danger to the protected right or interest should be criminalised only if appropriate considering the particular importance of the right or interest which is the object of protection.'⁴ Whether

³ Council of the European Union, 'The future of EU substantive criminal law – Draft report by the Presidency', 28 May 2019, Council document 8619/19; Meijers Committee Note CM1908 – Response to a Note from the Presidency on 'The future of EU substantive criminal law – Policy debate', 10 October 2019, https://www.commissie-meijers.nl/wp-content/uploads/2021/09/CM1908_EN.pdf; Council Conclusions on model provisions, guiding the Council's criminal law deliberations, 2979th JHA Council meeting, 30 November 2009; European Parliament, Resolution 'An EU approach to criminal law', 22 May 2012 (2010/2310(INI)); European Commission Communication 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', 20 September 2011, (COM(2011)0573).

⁴ Council Conclusions on model provisions, guiding the Council's criminal law deliberations, 2979th JHA Council meeting, 30 November 2009

something counts as hate speech is a highly contextual question in which Member States have different traditions and approaches.

Additionally, **the Meijers Committee advises to reconsider to what extent there should be a focus on ‘hatred’ only, as the Commission does. There may be reasons to include certain types of incitement to *discrimination*, which does not always involve outright explicit hatred, but can be packaged in less emotional language, while such incitement may be as harmful as hate speech.**

3) Hate speech: criminalisation and the role of online platforms

The Meijers Committee sees the adoption of minimum rules on hate speech criminalisation as an opportunity for the EU to align its rules on criminal justice with its rule-setting regarding the way online platforms moderate hate speech. EU instruments increasingly incentivise platforms to take action against illegal content online, and to this end instruments such as the Digital Services Act and the Audio-Visual Media Services Directive tend to refer to EU instruments, such as the current Framework Decision 2008/913 on combating certain forms and expressions of racism and xenophobia by means of criminal law and to domestic law on illegal speech (which may be harmonised by such EU instruments).

Such instruments were, however, originally made for the strict purposes of criminalisation only, and were not made with the idea of online platforms’ content moderation in mind. **When new instruments on criminalisation are discussed in the future, it is important to align these discussions with instruments on content moderation by online platforms and to come to a broader vision on what minimum should be criminalised and what (else) should be countered (and how) online.**

Moreover, the EU could at least encourage state authorities (in particular, prosecution services) to adopt a clear vision and strategy on how their work and their priorities relate to the moderation of hate speech by online platforms – where currently, they sometimes seem to rely too much on platforms to moderate speech.

4) Hate crime and the cross-border element

With regard to hate crime, the case for presenting it as a cross-border problem could be strengthened: this is not so clear in the current initiative. ‘Hate crime’ refers to a very broad range of crimes, from assault to insult, areas which the EU has so far considered to fall within the ambit of domestic decision-making. Clearly, the element of bias/hate makes such crimes more serious, but does that make it a ‘cross-border’ issue? The Commission’s statement that ‘Hate travels across national borders, leading to a spiral of violence’ rather makes a case for prohibiting the (online) hate *speech* underlying hate crime, than hate crime itself. That ‘[h]ate crimes can be committed by networks with members from several countries (within or outside the EU) that inspire, organise, or carry out physical attacks’ may be true, but without any empirical data it is not clear what proportion of hate crime actually has such cross-border elements. **The Meijers Committee advises to better substantiate the cross-border element in hate crime, e.g. by delving**

more concretely into actual hate crime cases and numbers in the Member States and the cross-border elements in them, including the psychological spillover impact on victims and society.

5) Hate crime: how to criminalise?

Currently, the Framework Decision on Racism and Xenophobia (2008/913/JHA) does not necessarily require separate statutory offences or a statutory aggravated circumstance: ‘...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’ (Article 4). The current initiative does not yet make clear to what extent the plan is to change the current obligations from the Framework Decision into a stricter regime that requires action by the legislature. Whatever road is taken, **the Meijers Committee recommends to consider the differences in the way such obligations take effect in the Member States with their different sanctioning regimes, so that harmonisation does not lead to unjustifiable differences in eventual sanctioning outcomes.**

While EU-wide harmonisation of hate crime legislation may help to emphasise the seriousness of hate crime and its prioritisation in practice, it is very important that **legislation is complemented by effective investigation and prosecution, including addressing biases by police when people report hate crime.** For instance, specialised units in police and prosecution are important. However, on a daily basis most cases will first reach non-specialised officers, so a serious effort should be made to increase knowledge and address biases in police and prosecution services at large.

As to the definition of ‘hate crime’, it has long been acknowledged by experts that the term ‘hate’ can be misleading as it focuses too much on the perpetrator’s alleged emotional state, which can also be difficult to prove. Thus ‘bias crime’ or ‘bias motivation’ are increasingly used instead. For instance, the Organisation for Security and Co-operation defines hate crime as ‘criminal acts motivated by bias or prejudice *towards* particular groups of people’ (emphasis in original).⁵ The Commission’s initiative focuses heavily on the element of ‘hatred’ being ‘an intrinsic feature of both hate speech and hate crime’ and mentions that ‘the perpetrator’s motive is key’.⁶

However, if motive would guide the definitions, this could make it more difficult for legal systems that are not used to taking perpetrator’s motives into account (e.g. the Netherlands) to adopt such hate crime legislation. In domestic legal systems, a hate crime may be identified by a variety of different circumstances such as the expression(s) of the perpetrator, the characteristics of the victim and the situation at hand, and the experience of the victim. **The Meijers Committee thus advises to take into account how the language used in a hate crime instrument could be**

⁵ See in this context: <https://hatecrime.osce.org/>

⁶ Communication from the Commission to the European Parliament and the Council– A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime – 9 December 2021, COM(2021) 777 final, p. 7.

interpreted in different Member States and to use best practices in the Member States for an adequate formulation.

6) Discrimination grounds

While the prohibited discrimination grounds (characteristics) will be determined in future directives, the current Communication from the Commission is unclear about the criteria that will be used to determine these grounds. On the one hand the Communication mentions on p. 5 – apart from the grounds of ‘race’, colour, religion, descent or national or ethnic origin (as currently included in Framework Decision 2008/913⁷) – ‘in particular the grounds of sex, sexual orientation, age and disability’ (noting that these are mentioned in Article 19(1) TFEU). However, on p. 1, the Commission mentions a larger list: ‘Hate is moving into the mainstream, targeting individuals and groups of people sharing or perceived as sharing ‘a common characteristic’, such as race, ethnicity, language, religion, nationality, age, sex, sexual orientation, gender identity, gender expression, sex characteristics or any other fundamental characteristic, or a combination of such characteristics’. The Commission notes that these characteristics are ‘in general, noticeable to others and therefore more easily targeted... they refer to an aspect of a person’s identity that is unchangeable or fundamental to a person’s sense of self, while also being a sign of a group identity’.

The latter does not apply to the ground ‘age’, however. And language seems to be a discrimination ground that is problematic in some states, not necessarily others.

The Meijers Committee thus recommends to provide more clarity about the criteria that the Commission will use to determine the applicable discrimination grounds. Specifically, the Meijers Committee recommends to reconsider whether discrimination grounds should necessarily be the same for hate crime and hate speech. After all, hate crime and hate speech are different areas of crime that involve different fundamental rights issues. For example, prosecuting hate *speech* requires a complex balancing act with regard to the right to freedom of expression.

Another relevant question is whether groups that are dominant or most powerful in a particular society, should also be protected against hate speech and hate crime by EU-harmonised legislation. As the rationale behind such criminalisation is mostly to protect minority or vulnerable groups, **the Meijers Committee recommends to consider how states could be incentivised (also based on the fundamental principle that criminal law should be a last resort) to protect those groups that need it most** – which will often involve a contextualised assessment.

7) Gender and the relationship of the Communication to the proposal for a Directive on combating violence against women and domestic violence

With regard to gender, the EU should **clarify the relationship of this Communication to the proposal to criminalise specific forms of violence against women and domestic violence**

⁷ 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.

(COM(2022)105).⁸ According to the Communication (December 2021), which predates the proposal on violence against women and domestic violence (2022), ‘this initiative on extending the list of EU crimes creates an additional legal basis for addressing those specific forms of serious violence against women and girls that can also be defined as misogynous hate speech or hate crime with an objectively identifiable gendered bias motive.’⁹ However, the proposal on violence against women and domestic violence also contains the criminalisation of ‘Cyber incitement to violence or hatred’, namely ‘intentional conduct of inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex or gender, by disseminating to the public material containing such incitement by means of information and communication technologies’.¹⁰ How does this provision relate to the 2021 Communication, and does the 2022 proposal not already take an advance on something that has yet to be included in art. 83(1)?

With regard to hate *crime*, it is unclear how the Commission views the relationship between gender-based violence and gender hate crime. To what extent is there overlap, and what are relevant differences?

8) Restorative justice

Whereas criminal justice can be an important element of a comprehensive approach to dealing with hate speech and hate crime, the Meijers Committee would like to **encourage the Commission to include restorative justice approaches to dealing with this issue.**¹¹ Restorative justice is ‘an approach of addressing harm or the risk of harm through engaging all those affected in coming to a common understanding and agreement on how the harm or wrongdoing can be repaired and justice achieved’.¹² For both victims and offenders, participating in such processes can lead to a more satisfactory experience of justice and a sense of fairness. Restorative approaches could also be part of the sentences that the Commission could propose, such as by including community service benefiting the communities affected.

⁸ Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM/2022/105 final.

⁹ Communication from the Commission to the European Parliament and the Council– A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime – 9 December 2021, COM(2021) 777 final, p. 5.

¹⁰ Article 10

¹¹ See e.g. LetsGoByTalking (*restorative justice for victims of anti-LGBT hate crimes*), <https://www.letsbygobytalking.eu/> and Jubany, O. (ed.), *Justice outside the box: the restorative approach to anti-LGBT hate crimes*, Brussels: European Commission 2021.

¹² European Forum for Restorative Justice, 2022, <https://www.euforumrj.org/en/restorative-justice-nutshell>