

**The legal grounds
for inclusive EU legislation
against bias
violence and hatred**

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Introduction

The following analysis examines the question of whether the European Union ('EU') has competence to adopt legislation on crimes motivated by hatred ('hate crimes') against the specified groups listed in Article 19 of the Treaty on the Functioning of the European Union ('TFEU'), which is the legal base for adopting legislation to combat discrimination on grounds of race, sex, sexual orientation, disability, age and religion.

To place this issue in context, the analysis first of all examines the overall legal framework for criminal law in the European Union (section 1), and then also examines the legal framework relating to human rights protection in the EU (section 2), in particular examining the rights to equality and non-discrimination. After an assessment of the issue of competence (section 3), the analysis then examines the prospects for adoption of EU legislation with a limited number of Member States (section 4), and then examines the possibility of adopting legislation outside of the EU legal framework entirely, in particular within the Council of Europe legal framework (section 5).

The Annex to this report sets out a simplified flow-chart of the EU's decision-making procedures, both to adopt legislation and to authorise 'enhanced cooperation' (ie adoption of the legislation among only a limited number of Member States).

It is assumed throughout this analysis that legislation on homophobic hate crimes could or should also be drawn up in conjunction with criminal law legislation related to other forms of discrimination not yet addressed by EU law (as regards criminal law), for example as regards offences deriving from sexism or religious bigotry. Addressing all of these forms of discrimination together would avoid perpetuating the 'hierarchy of discrimination' which exists in EU law (in that some of the groups listed in Article 19 TFEU enjoy more protection than others as regards EU law). However, the analysis does not address the possibility of the EU adopting measures to address hate crimes which are committed on grounds which are not listed in Article 19 TFEU.

1) Overall legal framework

This section examines in turn:

- a) the legal framework concerning the jurisdiction of the Court of Justice (section 1.1);
- b) the legal effect of EU criminal law measures adopted before and after the Treaty of Lisbon (section 1.2);
- c) the use of the institutional framework after the entry into force of the Treaty of Lisbon to date (section 1.3); and
- d) the implementation of the Framework Decision on racism and xenophobia, as the only EU measure in the field of hate crimes adopted to date (section 1.4).

1.1) The Court of Justice

The jurisdiction of the Court of Justice over criminal law and policing matters was limited before the entry into force of the Treaty of Lisbon, and these limitations still apply to pre-Lisbon measures until 2014.

Before the entry into force of the Treaty of Lisbon (on 1 December 2009) the jurisdiction of the Court of Justice as regards EU criminal law and policing ('third pillar') measures was set out in Article 35 of the Treaty on European Union ('TEU'). Article 35 provided that it was up to each Member State to opt in to the possibility for its national courts to send questions to the Court of Justice on the validity and interpretation of third pillar measures. If a Member State opted in, it could decide either that all of its national courts would have this power, or that only its final courts would have this power.

In practice, over two-thirds of Member States (19) opted in to the Court's jurisdiction: the eight exceptions were the UK, Ireland, Denmark, Estonia, Poland, Slovakia, Malta and Bulgaria.¹ Until the entry into force of the Treaty of Lisbon, the Court of Justice received references on third pillar acts from national courts as follows:

2001 - 2²

2002 - 0

2003 - 3³

2004 - 2⁴

2005 - 5⁵

2006 - 0

2007 - 3⁶

2008 - 4⁷

2009 - 4⁸

The jurisdiction of the Court of Justice was limited also in that it was not possible for the Commission to bring infringement actions against Member States which fail to comply with their obligations to apply third pillar acts. It

¹ See the notification in OJ 2010 C 56/7. Only Spain limited the right to refer to final courts only.

² Cases C-187/01 and C-385/01 *Gozutok and Brugge* [2003] ECR I-1345.

³ Cases C-105/03 *Pupino* [2005] ECR I-5285, C-469/03 *Miraglia* [2005] ECR I-2009 and C-491/03 *Hiebeler* (withdrawn).

⁴ Cases C-436/04 *Van Esbroek* [2006] ECR I-2333 and C-467/04 *Gasparini* [2006] ECR I-9199.

⁵ Cases C-150/05 *Van Straaten* [2006] ECR I-9327, C- 272/05 *Bowens* (withdrawn), C-288/05 *Kretzinger* [2007] ECR I-6441, C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, C-367/05 *Kraaijenbrink* [2007] ECR I-6619 and C-467/05 *Dell'Orto* [2007] ECR I-5557.

⁶ Cases C-297/07 *Bourquain* [2008] ECR I-9425, C-404/07 *Katz* [2008] ECR I-7607 and C-491/07 *Turansky* [2008] ECR I-11039.

⁷ Cases C-66/08 *Koslowski* [2008] ECR I-6041, C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307, C-388/08 PPU *Leymann and Pustovarov* [2008] ECR I-8993 and C-123/08 *Wolzenburg* [2009] ECR I-9621.

⁸ Cases C-205/09 *Eredics* (judgment of 21 Oct. 2010, nyr), C-261/09 *Mantello* (judgment of 16 Nov. 2010, nyr), C-306/09 *IB* (judgment of 21 Oct. 2010, nyr) and C-403/09 *Gueye*, pending.

was possible for Member States to sue each other before the Court of Justice as regards disputes on the application of third pillar measures, but none did so in practice.

These jurisdictional rules have continued relevance even after the entry into force of the Treaty of Lisbon, in that they continue to apply for a five-year transitional period (up until 1 December 2014) to the third pillar measures adopted before the entry into force of the Treaty of Lisbon, unless those measures are amended in the meantime.⁹ After that point – or before that point, for measures amended or adopted after the Treaty of Lisbon entered into force – the Court’s ordinary jurisdiction will apply: this will mean that all national courts in all Member States will be able to request preliminary rulings from the Court of Justice, and that the Commission can sue Member States for their failure to apply the legislation concerned.

In 2010, after the entry into force of the Treaty of Lisbon, the Court of Justice received four references from national courts on third pillar matters, and it has received three more third pillar references in 2011 so far.¹⁰ So far, there have been no cases on measures which were amended or adopted after the entry into force of that Treaty, but to date there have only been a modest number of such measures (see section 1.3 below).

The position is different as regards criminal law measures adopted within the framework of the European Community before the entry into force of the Treaty of Lisbon. For these measures, the usual jurisdiction of the Court of Justice (references from all national courts, infringement actions against Member States) applied from the outset. So far, however, no cases have reached the Court of Justice concerning these measures, presumably because they were adopted quite recently (see section 1.3 below).

1.2) Legal effect

Third pillar measures adopted before the entry into force of the Treaty of Lisbon are not directly effective, but are indirectly effective. It remains to be seen whether the principles of supremacy and damages liability apply to them.

According to the Court of Justice, EU third pillar Framework Decisions (which were the legal form for most EU measures harmonising criminal law before the Treaty of Lisbon) were subject to the principle of ‘indirect effect’, meaning that national law had to be interpreted consistently with the EU measure to the extent possible.¹¹ The TEU expressly ruled out any ‘direct effect’ (ie immediate application of EU measures in the national courts).¹² The case law of the Court of Justice has not yet ruled on the question of whether the principle of supremacy (ie the obligation to set aside conflicting national law) and the right to damages against Member States for failure to implement their European Community (EC) law obligations apply to third pillar measures.¹³

⁹ See Art. 10 of the protocol on transitional provisions.

¹⁰ Cases: C-1/10 Salmeron Sanchez (pending); C-105/10 PPU Gataev and Gataeva (withdrawn); C-264/10 Kita (withdrawn); C-507/10 Bernardi (pending); C-27/11 Vinkov (pending); C-42/11 Lopes da Silva Jorge (pending); and C-79/11 Giovanardi (pending).

¹¹ Pupino, n. 3 above.

¹² Art. 34 TEU.

¹³ The pending case of Bernardi (n. 10 above) could be relevant to the supremacy issue. The Treaty of Lisbon merged the European Community and the European Union. References to the EC are retained in this analysis where the historical distinction between the EC and the EU is still potentially relevant.

The Treaty of Lisbon provides that the prior rules on the legal effect of third pillar measures continue to apply until they are amended. There is no time limit on the application of this transitional rule.¹⁴

As for EU measures on criminal law adopted or amended after the entry into force of the Treaty of Lisbon, or criminal measures adopted by the EC before the entry into force of that Treaty, the EC law principles of supremacy, direct effect and damages liability apply (as well as indirect effect), but the Court of Justice has ruled that these principles cannot mean that the criminal liability of an individual is created or aggravated by EU or EC law alone, ie a person can be prosecuted for breach of the criminal law only on the basis of offences which have been set out in national law.¹⁵

1.3) Practice to date after the entry into force of the Treaty of Lisbon

To date, the EU has been active in adopting and considering criminal law legislation since the Treaty of Lisbon. In addition to the Commission, a key role is held by the rotating Council Presidency. The role of the EP and (in future) the EU citizens' initiative is also potentially important.

The legal bases for adopting criminal law measures after the entry into force of the Treaty of Lisbon are Articles 82 and 83 TFEU. Article 82 provides for the adoption of measures on mutual recognition in criminal matters (Article 82(1)) and on criminal procedure measures relating to evidence, suspects' rights, and victims' rights (Article 82(2)). Article 83 concerns substantive criminal law, and confers power to adopt measures either as regards ten specific crimes, not including hate crimes (Article 83(1)), or as regards crimes linked to EU harmonisation in other areas, as follows (Article 83(2)):

If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

Measures pursuant to Article 82(1), 82(2) and 83(1) are to be adopted pursuant to the 'ordinary legislative procedure', previously known as 'co-decision', ie with a qualified majority vote in the Council and joint powers for the European Parliament (EP).¹⁶ However, Article 83(2) provides for a different rule:

Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

The reference to Article 76 makes clear that measures in this area can be proposed, like other EU criminal law measures, either following a proposal from the Commission, or following the initiative of at least a quarter of the Member States (ie, at least seven Member States at present). The reference to a special or ordinary legislative

¹⁴ Art. 9, Protocol on transitional provisions.

¹⁵ See generally *Pupino*, n. 3 above. The same principle limits the 'indirect effect' of Framework Decisions as well. The reason for this rule is to respect the obligations set out in Art. 7 ECHR as regards clarity and non-retroactivity of criminal law.

¹⁶ For details of this procedure, see Art. 294 TFEU.

procedure means that the decision-making procedure which applied to the underlying harmonisation legislation would also apply to the criminal law rules connected to it. So, for instance, if the criminal law measures were linked to internal market harmonisation legislation, the ordinary legislative procedure would apply for the adoption of the criminal law measures, since that is the decision-making rule which applies to the adoption of internal market legislation (Article 114 TFEU). However, in about thirty cases, the Treaty provides for use of a 'special legislative procedure' which allows for the adoption of legislation primarily by the Council or the EP, with a more limited role for the other legislative body.¹⁷ These special procedures vary, but usually involve unanimous voting of the Member States in the Council, coupled with consultation of the EP.¹⁸ But the legal base conferring power on the EU to adopt legislation relating to non-discrimination on grounds of race, sex, sexual orientation, disability, age and religion (Article 19(1) TFEU), which is the legal base most relevant to the possible adoption of EU hate crimes legislation,¹⁹ provides for a special legislative procedure consisting of unanimity in the Council and *consent* of the EP.

To date the EU has adopted only two criminal law measures since the Treaty of Lisbon entered into force: a Directive on suspects' rights to interpretation and translation in criminal proceedings, based on Article 82(2) TFEU,²⁰ and a Directive on trafficking in persons, based on Articles 82(2) and 83(1) TFEU.²¹

Several further measures have been agreed in principle:

- a) a Directive on suspects' right to information on criminal proceedings, agreed in the Council;²²
- b) a Directive on sexual abuse of children, agreed within the Council;²³ and
- c) a Directive on a European protection order, agreed between the Council and the EP.²⁴

It should be noted that the measures on trafficking in persons and on sexual exploitation of children contain detailed rules on the protection of victims, an issue which could be relevant if the EU were to consider the adoption of hate crimes legislation.

Two further measures have been proposed:

- a) a Directive on attacks on information systems;²⁵
- b) a Directive on a European investigation order;²⁶
- c) a Directive on crime victims' rights;²⁷ and
- d) a Directive on suspects' rights to access to a lawyer and communication.²⁸

¹⁷ See Art. 289 TFEU.

¹⁸ See for instance, Art. 113 TFEU, which concerns the adoption of legislation on indirect taxation.

¹⁹ See further section 3 below.

²⁰ Directive 2010/64, OJ 2010 L 280/1. Member States must apply this Directive by 27 Oct. 2013 (Art. 9(1)).

²¹ Directive 2011/36, OJ 2011 L 101/1. Member States must apply this Directive by 6 Apr. 2013 (Art. 22(1)).

²² Council doc. 17503/10, 6 Dec. 2010. The EP still has to agree to this text with the Council.

²³ Council doc. 17583/10, 15 Dec. 2010. The EP still has to agree to this text with the Council.

²⁴ Council doc. 17750/10, 20 Dec. 2010. However, several Member States object to the 'legal base' of this measure, so are blocking its adoption by the Council.

²⁵ COM (2010) 517, 30 Sep. 2010.

²⁶ [2010] OJ C 165/22.

²⁷ COM (2011) 275, 18 May 2011.

²⁸ COM (2011) 326, 7 June 2011.

There are plans for proposals in 2011 on asset recovery and financial penalties, and for future proposals on anti-fraud measures, identity theft and vulnerable suspects.²⁹ As regards victims' rights in particular, it should be noted that the EU already has legislation on this subject,³⁰ which has been the subject of frequent references to the Court of Justice.³¹ Again, this proposal could be relevant to hate crime issues, since it could potentially contain specific rules relating to victims of particular crimes.

It is notable that none of the proposed or agreed measures to date have had the legal base of Article 83(2) TFEU. When the Treaty of Lisbon entered into force, there were two outstanding proposals which arguably fell within the scope of that provision:

- a) a proposed Directive on fraud against the EU's financial interests;³² and
- b) a proposed Directive on criminal law enforcement of intellectual property rights.³³

The Commission's communication on the impact of the Treaty of Lisbon on the legal bases of pending proposals³⁴ stated that the former proposal was still based solely on Article 325(4) TFEU,³⁵ while the latter proposal was now based solely on the EU's powers concerning European intellectual property legislation.³⁶ In any event, the latter proposal was withdrawn shortly afterward,³⁷ although the Commission plans to propose a new measure on this issue in 2011,³⁸ while discussions have not been resumed on the former proposal. On the former issue, the Commission released a Green Paper on protection of the EU's financial interests in 2011, with a view to making legislative proposals on this issue in 2013.³⁹

As noted already, as regards EU criminal law, the agenda can be set (in the sense of formally making legislative proposals) in two ways: either by a proposal from the Commission or by the initiative of a group of Member States (at least one-quarter).⁴⁰ It is therefore possible to lobby either the Commission to make proposals as regards criminalising violence against the groups listed in Article 19, and/or to encourage a group of Member States to table an initiative on this issue. It should be noted that three of the measures proposed since the entry into force of the Treaty of Lisbon were proposed by Member States.⁴¹

²⁹ See the Commission's 2011 work programme (COM (2010) 623, 27 Oct. 2010).

³⁰ A Framework decision (OJ 2001 L 82/1).

³¹ See the judgments in *Pupino*, *Dell'Orto*, *Katz* and *Eredics* (ns. 3 to 8 above), and the pending cases of *Salmeron Sanchez*, *Gueye*, *Bernardi* and *Giovanardi* (ns. 8 and 10 above).

³² COM (2001) 272, 22 May 2001, revised after EP vote (COM (2002) 577, 16 Oct. 2002).

³³ COM (2005) 276, 12 July 2005, revised in COM (2006) 168, 26 Apr. 2006.

³⁴ COM (2009) 665, 2 Dec. 2009.

³⁵ This is the legal base for measures concerning fraud against the EU budget. Legislation is to be adopted by means of the ordinary legislative procedure. The Treaty of Lisbon dropped a limitation which previously applied to this legal base (Art. 280 EC) which had specified that '[t]hese measures shall not concern the application of national criminal law or the national administration of justice.'

³⁶ Art. 118 TFEU, first paragraph. The ordinary legislative procedure applies. The proposal had previously been based on the EC's internal market powers (Art. 95 EC).

³⁷ COM (2010) 135, 31 Mar. 2010, Annex IV.

³⁸ COM (2010) 135, 31 Mar. 2010, Annex II.

³⁹ COM (2011) 293, 26 May 2011.

⁴⁰ Art. 76 TFEU.

⁴¹ The proposals for suspects' interpretation rights, the European protection order and the European investigation order.

Where Member States take the initiative as regards criminal law proposals, it is usually the Member State holding the Council Presidency (or which will shortly hold the Presidency) which takes the lead (although there is no legal requirement to this effect).⁴² The current Hungarian Presidency and the next Polish Presidency are not obviously promising, but Denmark will hold the Presidency in the first half of 2012. There is a particular problem with Denmark, however, in that it has an opt-out from most Justice and Home Affairs (JHA) matters, and while it will still hold the Presidency of the JHA Council,⁴³ it may be unwilling to take part in an initiative. It may even be argued that a Member State with an opt-out from JHA matters cannot take part in a joint initiative, although there is no express rule to this effect in the protocols governing the JHA opt-outs of the UK, Ireland and Denmark.⁴⁴ On the other hand, a Danish Presidency might at least be relatively sympathetic to a proposal on this issue made by the Commission or another group of Member States.

While the European Parliament cannot as such table a legislative proposal, it is open to the EP to request the Commission to submit a proposal, pursuant to Article 225 TFEU, or more informally (for example, the EP resolution of April 2011 on a policy concerning violence against women, which *inter alia* calls for an EU Directive on gender-based violence). It is also possible for the public to request the Commission to submit a proposal for a secondary EU act, pursuant to the legislation on a citizens' initiative which was adopted in February 2011.⁴⁵ This legislation, which will apply from 1 April 2012, provides for the process of collecting a million signatories from at least a quarter of Member States, subject to a minimum of signatures in each Member State (see Annex I to the citizens' initiative Regulation), following which the initiative concerned will be considered by the Commission.

1.4) Framework Decision on racism and xenophobia

The existing EU measure on racism and xenophobia could be amended to become a comprehensive EU measure also combating other forms of bias/hate crime, including crimes based on, *inter alia*, gender and sexual orientation.

This Framework Decision is the only EU measure to date in the field of bias/hate crime. It was adopted in 2008 and had to be implemented by 28 November 2010.⁴⁶ There is no available information yet on its implementation by Member States to date; a review of its implementation is due by 28 November 2013, on the basis of a report from the Commission.⁴⁷

The key provisions of the Framework Decision which could be relevant to bias/hate crimes against other listed groups are as follows:

⁴² I.e., the incoming Spanish presidency proposed the Directives on suspects' interpretation rights and the European protection order, while the incoming Belgian presidency took the lead in proposing the European investigation order.

⁴³ It did so in 2002 despite its opt-out on aspects of JHA matters.

⁴⁴ In practice none of these Member States has ever tabled (or co-tabled) an initiative in a JHA area which it had opted out of, i.e. JHA in general since the Treaty of Lisbon, or immigration, asylum and civil law (where Member States could table initiatives from 1999-2004).

⁴⁵ Art. 24 TFEU, first paragraph; see Reg. 211/2011, OJ 2011 L 65/1.

⁴⁶ Art. 10(1) of the Framework Decision (OJ 2008 L 328/55).

⁴⁷ Art. 10(2) of the Framework Decision.

- a) the incitement to ‘violence or hatred directed against a group of persons or a member of such a group defined by reference to’ one of the categories of persons listed in Article 19 TFEU;⁴⁸
- b) ‘the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material’;⁴⁹
- c) an option for Member States to ‘choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting’;⁵⁰
- d) criminalisation of instigation, aiding and abetting such acts;⁵¹
- e) a requirement to impose criminal penalties as regards all such acts, and in particular to impose a minimum penalty of between one and three years for the predicate offence;⁵²
- f) an obligation as regards all crimes to consider hate-based motivation as ‘an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties’;⁵³
- g) an obligation to provide penalties for legal persons;⁵⁴
- h) a ‘savings clause’ for fundamental rights, including freedom of expression;⁵⁵
- i) a requirement that the accusation by the victim would not be necessary for prosecutions to take place;⁵⁶ and
- j) provisions on jurisdiction over the offences.⁵⁷

As noted above, it would also be possible, by analogy with recent EU criminal law measures, to include detailed provisions on the position of victims of bias/hate crimes. This could include the following issues, which are addressed in the new Directive on trafficking in persons:

- a) assistance and support for victims;
- b) protection of victims of trafficking in human beings in criminal investigation and proceedings;
- c) general provisions on assistance, support and protection measures for child victims;
- d) specific rules on assistance and support to child victims;
- e) protection of child victims of trafficking in human beings in criminal investigations and proceedings;
- f) compensation to victims;
- g) prevention; and
- h) national rapporteurs.

As for revision strategies:

- a) the Framework Decision could be amended (by means of a Directive) simply to extend its

⁴⁸ Art. 1(1)(b) of the Framework Decision. Art. 1(1)(c) and (d) are only relevant to race-based hate crimes.

⁴⁹ Art. 1(2) of the Framework Decision. Art. 1(3) would be irrelevant in a combined hate crimes Directive, while Art. 1(4) is only relevant to race-based hate crimes.

⁵⁰ Art. 2 of the Framework Decision.

⁵¹ Art. 3 of the Framework Decision.

⁵² Art. 4 of the Framework Decision.

⁵³ Arts. 5 and 6 of the Framework Decision.

⁵⁴ Art. 7 of the Framework Decision.

⁵⁵ Art. 8 of the Framework Decision.

⁵⁶ Art. 9 of the Framework Decision.

- application to bias/hate crimes against the other groups listed in Article 19 TFEU, without any further substantive amendments to the Framework Decision;
- b) a Directive concerning bias/hate crimes against those other groups could be drawn up to parallel the Framework Decision, copying the relevant substantive provisions of the Framework Decision but without going further;
 - c) the substantive provisions of the Framework Decision could be incorporated into a Directive on bias/hate crimes against all groups listed in Article 19 TFEU, but without any amendments to the current substantive provisions;
 - d) a Directive on bias/hate crimes against all the groups listed in Article 19 TFEU, which would include and then go beyond the substance of the existing Framework Decision; or
 - e) a Directive on bias/hate crimes against all the groups listed in Article 19 TFEU, with the exception of bias/hate crimes based on race, which would still be covered by the existing Framework Decision; for the other groups, the Directive would include and then go beyond the substance of the existing Framework Decision.

Alternatives (a) and (c) would have the same result in practice, to the extent that amending the Framework Decision would automatically mean that the new rules on legal effect of EU measures and jurisdiction of the Court of Justice apply. However, these two approaches would probably differ as regards participation of Member States, ie the opt-out process (see discussion below). It should be noted that even if the substantive provisions of the Framework Decision are not amended, they will benefit from inclusion in any post-Lisbon legislation because they will be more easily enforceable.⁵⁸ Either alternative would therefore be an improvement upon the *status quo* for all groups listed in Article 19.

Alternatives (b) and (e) would leave race discrimination bias/hate crimes addressed by means of a less effective legal measure than other hate crimes, and so would invert the hierarchy of discrimination in EU law, rather than terminate it. Alternative (e) would moreover result in greater *substantive* protection for the other groups listed in Article 19 TFEU than for racial and ethnic minorities. Either alternative would be an improvement upon the *status quo* for all groups listed in Article 19 *except* for racial and ethnic minorities, which moreover be in a worse position than other groups. These alternatives are surely not politically viable, because perpetuating the hierarchy of discrimination cannot be justified in principle, they would alienate the groups left behind and they would undercut the potential argument that new hate crimes legislation (and the existing proposals for Article 19 anti-discrimination measures) are necessary in order to end the hierarchy of discrimination.

Alternative (d) is therefore preferable, because it would improve substantive protection for all groups covered currently by Article 19 TFEU, and simultaneously end the hierarchy of discrimination as regards hate crimes. Such a strategy should be attractive politically, because it would increase the number of groups in support of the planned or proposed legislation, and also the extent of their enthusiasm. It might also attract more opposition from conservative-minded Member States, however. As a fallback option, alternatives (a) and (c) at least would improve the enforceability of the rules regarding hate crimes on grounds of racial and ethnic origin, and introduce some basic rules protecting other groups listed in Article 19, while also ending the hierarchy of discrimination in this area.

⁵⁸ See sections 1.1 and 1.2 above.

If the substance of the existing Framework Decision is reopened, it would be an opportunity to revisit the 2001 proposal which was watered down considerably in an effort to get unanimous support for the legislation concerned.⁵⁹

As for the scope of any new initiative, it should be noted that EU legislation on gender discrimination also covers, at least partially, discrimination on the grounds of gender identity.⁶⁰ As a result, it is arguable that any legislation addressing bias/hate crime should apply equally to combating transphobic crime.

2) Human rights issues

The EU has general principles of law, incorporating human rights protection, which require national law to be set aside if it breaches non-discrimination rules set out in EU law. The EU's Charter of Rights now confirms that non-discrimination is a basic right protected by EU law, but it does not extent the EU's competence to act on non-discrimination issues.

Article 6 of the TEU provides that the EU's Charter of Fundamental Rights has the 'same legal value' as the Treaties (Article 6(1)), that the EU 'shall accede' to the ECHR (Article 6(2)), and that human rights, based on the ECHR and national constitutional traditions, form part of the general principles of EU law (Article 6(3)). The EU's accession to the ECHR is not yet completed,⁶¹ and in any event the equality rights in the ECHR are subsidiary to its other rights,⁶² so the issue of EU accession to the ECHR need not be considered further. As for the general principles, they include non-discrimination on the grounds of sex and age,⁶³ but it is not yet clear if they include non-discrimination on other grounds.⁶⁴

The focus should therefore on the Charter, which has moreover taken centre-stage in the human rights case law of the Court of Justice since the entry into force of the Treaty of Lisbon.⁶⁵ The key provision of the Charter as regards non-discrimination is Article 21(1), which provides that:

1. 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 shall be prohibited.

The Charter needs to be understood also in light of the limitations on its scope, as set out in Article 51:

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the

⁵⁹ See COM (2001) 664, 28 Nov. 2001.

⁶⁰ See Cases C-13/94 P v S [1996] ECR I-2143; C-117/01 K.B. [2004] ECR I-541; and C-423/04 Richards [2006] ECR I-3585.

⁶¹ Negotiations began in mid-2010 but are not yet concluded. The accession will take the form of an accession treaty which would then have to be ratified by the EU and all 47 ECHR contracting parties.

⁶² Art. 14 ECHR. Protocol 12 to the ECHR goes further in requiring equality as regards all rights which exist in national law, but it remains to be seen if the EU ratifies this Protocol when it accedes to the ECHR, given that most of its Member States have not.

⁶³ See particularly Cases 43/75 Defrenne II [1976] ECR 455, C-144/04 Mangold v Helm [2005] ECR I-9981, and C-555/07 Seda Küçükdeveci v Swedex GmbH & Co. KG, judgment of Jan. 19, 2010, not yet reported.

⁶⁴ On sexual orientation in particular, see Case C-249/96 Grant [1998] ECR I-621 and now the opinion of 15 July 2010 in Case C-147/08 Romer, judgment of 10 May 2011, not yet reported.

⁶⁵ For details of this development, see S. Peers, 'Supremacy, Equality and Human Rights: Comment on Küçükdeveci', 35 ELRev. (2010) 850.

Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

It is clear from Article 51(2) that the Charter does not give the EU any extra competence as regards the adoption of legislation on issues falling within the scope of the Charter. In turn, Article 51(1) makes clear that the Charter only applies to the EU institutions, and to the Member States when implementing EU law. So the Charter is certainly relevant when Member States implement Directive 2000/78,⁶⁶ but it does not give the EU powers to adopt hate crimes legislation. The question of whether the EU has competence on this (or any other) issue must be assessed separately from the Charter.

An interesting question is whether, where the EU does have competence to act, the Charter obliges it to *use* that competence in order to ensure that human rights are adequately protected. This obligation would arise from the requirement in Article 51(1) to ‘promote the application’ of the rights and principles in the Charter. Arguably this obligation would either override the principle of subsidiarity, or at least constitute a factor to consider when assessing whether, in accordance with that principle, EU action would add value as compared to the Member States acting individually.⁶⁷ So far the Court of Justice has not ruled on this issue as such, although it has recognised that ‘horizontal obligations’ play a role in the substance of human rights law.⁶⁸ Moreover, the general principles of EU law (and presumably the Charter) are hierarchically superior to at least some other rules of EU primary law,⁶⁹ although it is not yet established whether they are superior to the rules on subsidiarity. The obligation to promote human rights could be raised as a political argument in debates, or in the context of a lawsuit against the EU for a ‘failure to act’.⁷⁰

The case law of the Court of Justice on the Charter to date has confirmed that, as regards discrimination law, Article 21(1) of the Charter applies, along with the new binding legal effect of the Charter, to all cases decided by the Court of Justice after the entry into force of the Treaty of Lisbon.⁷¹ The requirement that the Charter only applies where there is a link to EU law is satisfied wherever a case falls within the temporal and material scope of the framework equality Directive.⁷² The general principle of non-discrimination on grounds of age, in conjunction with the

⁶⁶ See in particular the *Kücükdeveci* judgment, as discussed *ibid.* Equally the general principles of law apply when Member States implement the Directive: see again *Kücükdeveci* and earlier *Mangold* (n. 63 above).

⁶⁷ Legally, it is hard to argue that the obligation to ‘promote’ Charter rights overrides the principle of subsidiarity entirely, given that the principle of subsidiarity is expressly referred to in Art. 51(1).

⁶⁸ Case C-540/03 *EP v Council* [2006] ECR I-5769. See also the ambiguous wording of the judgment of 1 Mar. 2011 in Case C-236/09 *Test-Achats*, not yet reported.

⁶⁹ See Joined Cases C 402/05 P and C 415/05 P *Kadi and Al Barakat International Foundation v Council and Commission* [2008] ECR I 6351.

⁷⁰ Such an action can be brought by the Member States and the institutions of the EU (including the EP): see Art. 265 TFEU. An action can also be brought by a natural or legal person, where the act concerned should have been addressed to them; the Court of Justice has confirmed that the same strict rules on standing to bring annulment actions apply to such cases, although national courts can refer questions about failure to act which are raised in national proceedings to the Court of Justice: Case C-68/95 *T. Port* [1996] ECR I-6065.

⁷¹ See, implicitly, *Kücükdeveci*, n. 63 above, paras. 22-23.

⁷² See *ibid.*, paras 23-27.

supremacy of EU law, requires a national court to set aside national legislation which conflicts with the Directive, even if the litigation in question is between private parties, which means that the principle of direct effect is not applicable.⁷³ The Court has not yet clarified whether this rule applies to the Charter as distinct from the general principles,⁷⁴ and whether it applies to other rights recognised by the Charter and/or the general principles, including any other non-discrimination rights.⁷⁵

Also, the Court has stated that the general non-discrimination rule in Article 20 of the Charter ('[e]veryone is equal before the law') affirms the general principles of EU law, and is 'all the more important' when applied in conjunction with a social right expressly set out in the Charter.

As regards criminal law, the Court has confirmed that the right to a fair trial must be respected when applying EU legislation on victims' rights,⁷⁷ and that the principles of equality, non-discrimination and legality of criminal penalties, which were part of the EU's general principles of law, were reaffirmed by the Charter and could be used to assess the validity of EU legislation.⁷⁸

As regards the horizontal rules in the Charter, the Court has noted that Article 51 of the Charter means that EU legislation cannot alter national law (in particular, national law decisions as to whether an unmarried parent can have custody of a child) unless EU legislation has addressed the particular issue.⁷⁹ The Court has also confirmed that where rights in the Charter correspond to those in the ECHR, the 'meaning and scope' of the rights is the same as that of the ECHR, taking account of the case law of the ECHR,⁸⁰ and that the explanatory memorandum to the Charter needs to be taken into account when interpreting it.⁸¹

The explanations to Article 21 of the Charter state as follows:

Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it.

There is no contradiction or incompatibility between paragraph 1 and Article 19 of the Treaty on the Functioning of the European Union which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and

⁷³ See generally *ibid.*

⁷⁴ On the importance of this distinction, see Protocol 30, discussed below.

⁷⁵ See the doubts in the opinions in Cases C-104/09 *Roca Álvarez* (judgment of 30 Sep. 2010, not yet reported) and Case C-73/07 *Tietosuoja- ja valtuutettu v Satakunnan Markkinapörssi Oy* [2008] ECR I-9831. However, see the opinion (and implicitly the judgment of 11 Nov. 2010, not yet reported) in Case C-232/09 *Danosa*, as regards sex discrimination.

⁷⁶ Case C-149/10 *Chatzi* (judgment of September 16, 2010, not yet reported), para. 63.

⁷⁷ See *Pupino*, n. 3 above, referring to the general principles, rather than the Charter.

⁷⁸ *Advocaten voor de Wereld* (n. 5 above), paras. 45-47.

⁷⁹ Case C-400/10 PPU *McB*, judgment of 5 Oct. 2010, not yet reported.

⁸⁰ Art. 52(3) of the Charter: see *McB* (*ibid.*) and Case C-279/09 *DEB*, judgment of 22 Dec. 2010, not yet reported.

⁸¹ Art. 52(7) of the Charter and Art. 6 TEU: see *DEB*, *ibid.*

regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article.

As regards Article 51(2), the explanations state as follows:

Paragraph 2, together with the second sentence of paragraph 1, confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.

Paragraph 2 also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties. The Court of Justice has already established this rule with respect to the fundamental rights recognised as part of Union law (judgment of 17 February 1998, *C-249/96 Grant* [1998] ECR I-621, paragraph 45 of the grounds). In accordance with this rule, it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be 'implementation of Union law' (within the meaning of paragraph 1 and the above-mentioned case-law).

The explanations therefore confirm the interpretation above, that the obligation to 'promote' Charter rights only applies within the scope of the EU's competences. Moreover, Article 21 of the Charter in particular does not create any new competence to act.

The Court of Justice has not yet expressly addressed the legal effect of the Charter, except to refer to the Treaty provision which states that the Charter has the 'same legal value' as the Treaties. As noted already, the question of whether the Charter obliges national courts to set aside national law was evaded by the Court, which ruled instead that the EU general principles have that effect. However, the Court of Justice has ruled that EU legislation can be invalid in light of the Charter, and duly set it aside for breach of the Charter.⁸²

Finally, it should be noted that Protocol 30 to the Treaties limits the legal effect of the Charter (although *not* the general principles) as regards the United Kingdom and Poland.⁸³ In particular, the Protocol states that the Charter

⁸³ Joined Cases C-92/09 and C-93/09 *Volcker and Schecke*, judgment of 9 Nov. 2010, not yet reported., and the judgment in *Test-Achats* (n. 68 above), which ruled invalid a provision of a Directive for breach of the principle of sex equality.

⁸⁴ The October 2009 European Council agreed to extend this Protocol also to the Czech Republic, on the occasion of the next enlargement of the European Union. The next Accession Treaty (with Croatia) is likely to be signed in 2011 and enter into force in 2013.

‘does not extend the ability of the Court of Justice’ or national courts to rule that national laws ‘are inconsistent with the fundamental rights, freedoms and principles that it reaffirms’; ‘[i]n particular’, nothing in Title IV of the Charter (setting out social rights) ‘creates justiciable rights applicable to’ those countries ‘except in so far as’ each of those countries ‘has provided for such rights in its national law’. The Protocol also states that ‘[t]o the extent that a provision of the Charter refers to national laws and practices, it shall only apply to’ those countries ‘to the extent that the rights or principles that it contains are recognised in the law or practices of’ those countries.

However, the Protocol does not limit the legal effect of the general principles. So the Protocol is only relevant to the extent that the Charter in some way *adds value* to the general principles, either because it recognises *additional rights* as compared to the general principles, is *wider in scope* than the general principles, or allows for *fewer limitations* of rights than pursuant to the general principles. If the Charter adds no value or is of lesser value than the general principles, then the Protocol is irrelevant because the general principles will in any event apply. The case law of the Court of Justice has not yet addressed these issues, but as mentioned already, one early judgment after the entry into force of the Treaty of Lisbon relied on the *general principles*, rather than the Charter, to conclude that national law which breached the employment equality Directive had to be set aside. So it seems *prima facie* clear that the general principles have the precise legal effect which Protocol 30 seeks to preclude, in two (and soon three) Member States, as regards the Charter. In any event, a UK court has already asked the Court of Justice to confirm the precise legal status of the Charter in the UK, in light of the Protocol.⁸⁴

3) Competence issues

It is arguable that the EU could adopt legislation on hate crimes pursuant to Article 83(2) TFEU (if it first adopts legislation concerning non-discrimination on grounds of gender and sexual orientation, et al, covering areas other than employment), or failing that, Article 352 TFEU.

The issue of competence to adopt hate crimes legislation applies not only as regards possible legislation concerning hate crimes committed on grounds of sex, sexual orientation, age, disability and religion, but also as regards any amendments to the existing Framework Decision on race-related crimes.

Given that hate crimes are not listed among the specific crimes on which the EU can adopt legislation in Article 83(1) TFEU, there are two ways in which hate crime legislation could be adopted by the EU.

First of all, the EU’s competence to adopt legislation on this issue could be extended, pursuant to Article 83(1) TFEU, third sub-paragraph:

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

⁸⁴ Case C-411/10, N.S., pending.

The criteria referred to are that the acts in question constitute ‘particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.’⁸⁵ Since this provision falls within the scope of the JHA Title of the Treaty, Denmark could not participate in any Council decision and the UK and Ireland would be free to decide whether to opt in or not; if they opted in and blocked decision-making as regards the Council decision in question, they could be excluded from participation.⁸⁶ It is also arguable that the enhanced cooperation procedure could apply here, ie a group of Member States (at least nine) that wished to extend competence in this manner could do so, subject to various procedural and substantive rules.⁸⁷

There might be greater difficulties in practice as regards the use of this provision (for example, national parliamentary approval requirements) than as regards the adoption of hate crimes legislation on the basis of the EU’s current powers. It should also be noted that Article 48(6) TEU (the power to adopt minor Treaty amendments, first used as regards a Treaty amendment for a monetary union stabilisation fund) could not be used to extend competence on this issue, because the Treaty rules out its use as regards the extension of EU competence. It might also be argued that the extension clause cannot be used where the EU either already has some competence on the issue pursuant to Article 83(2) (see the discussion below), or where it *could* have some competence on this issue pursuant to Article 83(2) if it more fully harmonised national laws on a particular topic pursuant to other Treaty provisions.⁸⁸

Secondly, EU legislation on hate crimes could be adopted pursuant to Article 83(2) TFEU, which was already discussed above briefly.⁸⁹ This would most likely entail application of the decision-making rules set out in Article 19 TFEU as regards non-discrimination legislation – unanimity in the Council and consent of the EP.

Conversely, Article 84 TFEU cannot be used to adopt legislation harmonising national law as regards ‘crime prevention’, since this legal base specifically ‘exclud[es] any harmonisation of the laws and regulations of the Member States’. However, Article 84 can be compared to Article 19(2) TFEU, which provides for the adoption of measures supporting the exchange of information and experience, etc between Member States. Article 19(2) (or its predecessor, Article 13(2) EC) has been used wholly or partly as regards EU programmes relating to anti-discrimination law, which support Member States’ actions in that field.⁹⁰ It follows that Article 84 TFEU could be used, if necessary in conjunction with Article 19(2) TFEU, to adopt legislation establishing an EU programme concerning the exchange of best practice, etc as regards prevention of hate crimes. Alternatively it may be simpler to amend the legislation establishing the existing ‘Progress’ programme to this effect.

⁸⁵ Art. 83(1) TFEU, first sub-paragraph.

⁸⁶ For more detail on the opt-outs, see section 4.2 below.

⁸⁷ For more detail on this process, see section 4.1 below. Note that the special fast-track procedure described there which is applicable to enhanced cooperation as regards criminal law does not apply to the use of Art. 83(1), third sub-paragraph, since Art. 83(3) refers to a ‘draft directive’ (emphasis added), whereas Art. 83(1), third sub-paragraph confers power to adopt a decision.

⁸⁸ The underlying political and/or legal argument would be that the EU could or should not use the extension clause in Art. 83(1), which would entail the use of the ordinary legislative procedure for the subsequent adoption of legislation on the topic concerned, where the decision-making rule for the underlying harmonisation legislation remained a special legislative procedure (ie, unanimity in the Council, as regards anti-discrimination law).

⁸⁹ Section 1.3 above.

⁹⁰ See the legislation establishing the ‘Progress’ programme (OJ 2006 L 315/1), as amended (OJ 2010 L 87/6). See also the gender equality funding legislation: OJ 2004 L 157/18, as amended (OJ 2005 L 255/9).

But before embarking on a further discussion of the current competence issues, it is necessary to survey the background to the question of competence prior to the entry into force of the Treaty of Lisbon, since it is potentially relevant to interpreting Article 83(2).

Prior to the entry into force of the Treaty of Lisbon, there was no express provision of the TEU or the EC Treaty which concerned the powers of the Community (as is then was) to adopt criminal law legislation, except for some ambiguous provisions limiting the EC's criminal law powers to some extent as regards customs and fraud legislation.⁹¹ The issue of whether the EC had any criminal law competence finally came to a head in a case involving a Framework Decision on environmental crime, which the Commission sued to annul on the grounds that a third pillar act could not be adopted in an area in which the EC *could* have acted, pursuant to its powers over environmental law.⁹² The Commission was successful, on the grounds that:

- a) Article 47 TEU (since repealed by the Treaty of Lisbon), which provided that nothing in the TEU can affect the EC Treaty, meant that third pillar measures could not 'encroach upon' Community powers;
- b) in light of the scope of the EC's environmental powers, including the reference to the environment in the tasks and objectives of the EC, the horizontal requirement that EC policies must respect the environment, the specific EC powers over the environment and the requirement that the correct 'legal base' of a measure must be interpreted in light of its aim and its content, the Framework Decision had the aim of environmental protection and its content essentially concerned harmonisation of national criminal law;
- c) although there was a 'general rule' that 'neither criminal law nor the rules of criminal procedure fall within the Community's competence', that 'does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective'; and
- d) although the Framework Decision required Member States to establish criminal offences, it left to 'Member States the choice of the criminal penalties to apply'.

The Court of Justice also rejected a contrary argument based on the prior Articles 135 and 280 EC, because the specific restrictions regarding criminal law in relation to those legal bases did not mean that such restrictions applied as regards environmental law. So the provisions of the Framework Decision concerning criminal liability for natural persons and criminal or administrative liability for legal persons for specified offences encroached upon EC law. The Court did not rule on whether the provisions of the Framework Decision concerning jurisdiction and prosecution fell within the scope of EC powers.

This judgment left open two key questions: did EC criminal law powers extend beyond environmental law, and did the EC have the power not just to define offences, but also to define specific sanctions that Member States had to apply to punish the conduct concerned? These issues came back to the Court of Justice two years later, in a case concerning the validity of a Framework Decision concerning shipping pollution.⁹³ This judgment answered only one

⁹¹ Arts. 135 and 280 EC. These specific limitations were removed by the Treaty of Lisbon (see Arts. 33 and 325 TFEU).

⁹² Case C-176/03 *Commission v Council* [2005] ECR I-7879.

⁹³ Case C-440/05 *Commission v Council* [2007] ECR I- 9097.

of the two key questions. The Court ruled that the EC had no competence to define sanctions in relation to criminal offences, because 'the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence'. However, the Court did not rule on whether the EC had competence to define criminal offences in all areas of EC competence, deciding only that the EC's power to define criminal offences with a view to protecting the environment could be integrated into a transport law measure, as in this case. The Court also did not rule on whether the EC had competence to adopt measures as regards other aspects of criminal law (such as jurisdiction).

Following this judgment, the Community adopted Directives on environmental crime and shipping pollution.⁹⁴ These measures were limited to obliging Member States to impose criminal liability for specified acts, without addressing the content of sanctions or other issues such as criminal jurisdiction. The Community also adopted a Directive imposing criminal liabilities as regards the employment of unauthorised migrants;⁹⁵ again this measure did not define specific sanctions or address the issue of jurisdiction. There is no information yet available on the implementation of these measures, since the deadline to implement them has not yet passed or has passed only very recently.

With the entry into force of the Treaty of Lisbon, Article 83(2) can be regarded in part as an entrenchment of this case law, given that it refers to the 'effective implementation of a Union policy in an area which has been subject to harmonisation measures'. However, the general reference to 'Union policy' means that the debate over whether the EC's powers concerned environment-related measures only is now moot. Moreover, the express power to adopt legislation as regards 'criminal offences *and sanctions*' (emphasis added) must mean that unlike the prior EC competence, the power conferred by Article 83(2) extends to the power to set out minimum rules as regards specific criminal penalties. Furthermore, it can be argued that the power to set out rules relating to criminal jurisdiction is intrinsic in the power to define criminal offences, and by analogy with the agreed Directives on trafficking in persons and sexual exploitation of children, that ancillary rules on protection of victims can, where relevant, be included in legislation adopted on the basis of Article 83(2). This issue might obviously be relevant as regards hate crimes.

The competence under Article 83(2) is triggered where two cumulative conditions are satisfied: there must have been 'harmonisation measures', ie the EU cannot adopt the criminal law rules unless it has *already acted* to harmonise national law in an area; and the criminal law rules must be 'essential to ensure the effective implementation of a Union policy' which has been the subject of such measures. On the first point, Directives 2000/43 and 2000/78 (and, as regards sex discrimination, the overall corpus of legislation) can surely be regarded as harmonisation measures, even though Article 19 TFEU and the Directives adopted in 2000 do not expressly state that they 'harmonise' national law.⁹⁶ On the second point, only sex discrimination in employment falls within Part Three of the TFEU,⁹⁷ which is titled 'Union Policies and Internal Actions'. However, it seems strained to argue that Article 83(2) refers to such a technical meaning of 'Union policy', given that when the drafters of the Treaty of Lisbon intended a Treaty Article to apply to Part Three of

⁹⁴ Directives 2008/99 ([2008] OJ L 328/28), which Member States had to apply by 26 Dec. 2010 (Art. 8(1)) and 2009/123 ([2009] OJ L 280/52), which Member States had to apply by 16 Nov. 2010 (Art. 2).

⁹⁵ Directive 2009/52 (OJ 2009 L 168/24), which Member States must apply by 20 July 2011 (Art. 17(1)).

⁹⁶ The same can be said about EU legislation banning nationality discrimination, and arguably to a certain extent as regards third-country nationals, pursuant to EU immigration and asylum legislation which includes some non-discrimination obligations. It follows, however, that in the absence even of any competence to adopt measures combating discrimination against groups not mentioned in Arts. 18 and 19 TFEU, Art. 83(2) TFEU cannot be satisfied as regards such groups.

⁹⁷ Art. 157 TFEU.

the TFEU only, they did so expressly.⁹⁸ Furthermore, such a technical interpretation would undermine the obligation to apply non-discrimination principles to the whole of the EU Treaties.⁹⁹

The more difficult question is whether measures on hate crimes are necessary to ensure ‘effective implementation’ of EU anti-discrimination legislation. On this point, it may be noted that the legislation on shipping pollution and irregular migration integrates the criminal law obligations within the general prohibitions set out in the legislation concerned, and the environmental crimes directive applies to certain breaches of specific Community legislation.¹⁰⁰ It therefore seems that the EU can only adopt criminal law rules pursuant to Article 83(2) to the extent that it has harmonised the underlying subject-matter. If the EU has not harmonised some aspect of the underlying subject-matter, how can it be argued that criminal law penalties are necessary to ensure the effective implementation of a Union policy as regards the non-harmonised issues?

This point is highly relevant to the issue of EU competence over hate crimes because, of course, as regards discrimination on the grounds of sexual orientation, religion, age and disability, the EU has only harmonised national anti-discrimination law as regards *employment*. On the other hand, as regards race, the EU has also harmonised national anti-discrimination law as regards: ‘social protection, including social security and healthcare’; ‘social advantages’; ‘education’; and ‘access to and supply of goods and services which are available to the public, including housing’.¹⁰¹ There has also been harmonisation as regards sex discrimination as regards some of these issues, and the relevant legislation at least partially covers discrimination on the grounds of gender identity.¹⁰² As regards these latter two categories, there is a strong argument that violence against women or hate crimes connected to the racial or ethnic origin of a person will necessarily impact in particular upon the equal access of the persons belonging to the groups concerned to healthcare, education and public goods and services in general, including housing. The latter concept presumably includes access to transport, restaurants and public parks, and even if it does not (for instance) apply to use of public streets, one can hardly enjoy equal access to public goods and services while fearing to travel outside, even if that fear is limited to certain times and locations.

On the other hand, violence against the other four groups in the context of employment or self-employment is certainly connected to the legislation concerned, since (for example) an employee who feared violence at the workplace on the grounds of his or her religion could hardly be said to enjoy equality in employment. It would not matter whether the source of the violence was work colleagues, customers or member of the public, as long as equal access to employment was affected. While violence in public places might to some extent impact upon travel to work it would be difficult to argue that it did so in all cases, considering that such violence would likely also manifest itself (and should also be combated) where the persons concerned were (*inter alia*) unemployed or retired (or too young to be employed), shopping, performing religious ceremonies or studying in educational institutions. While the horizontal provisions of Articles 8 and 10 TFEU support the idea that the EU has competence as regards

⁹⁸ See Art. 48(6) TEU, which expressly applies to Part Three of the TFEU only. See also Art. 48(7) TEU, which only applies to the TFEU and a specific Title of the TEU.

⁹⁹ See Arts. 8 and 10 TFEU.

¹⁰⁰ The proposal on criminal enforcement of intellectual property rights (n. 31 above) would have applied also to rights which had not been the subject of harmonisation by EU legislation, but this aspect of the proposal was controversial.

¹⁰¹ See Arts. 3(1)(e) to (h), Directive 2000/78.

¹⁰² Council Directive 2004/113, OJ 2004 L 373/37

hate crimes where necessary to ensure the effective implementation of anti-discrimination legislation, they cannot have the effect of overriding the limits on competence set out in Article 83(2).

It follows that for the Union to be able to use Article 83(2) as regards all groups listed in Article 19, the EU would first (or simultaneously) have to adopt legislation banning discrimination as regards those groups outside the workplace. Such legislation has, of course, been proposed, but has not been adopted.¹⁰³ It is arguable, however, that the limit of the proposed legislation to access to goods and services in a commercial or professional context would limit the competence the EU could exercise pursuant to Article 83(2) to adopt hate crimes legislation.¹⁰⁴

Having said that, some other options for the adoption of hate crimes legislation could be examined. First of all, if legislation on this issue is to be confined to the workplace, at least at first, it is arguable that the EU's powers over workplace health and safety could be used.¹⁰⁵ The advantage of using these powers is that the ordinary legislative procedure, including qualified majority voting in Council, would apply. While legislation specifically concerning violence against the groups listed in Article 19 TFEU should arguably fall within the scope of that legal base, rather than the social policy legal base, legislation directed against violence at work more generally, which either includes a separate section on hate crimes in the workplace or does not specifically address that issue in detail, would correctly fall within the scope of Article 153 TFEU. Of course, such legislation could only address violence directly related to the workplace.

Another possibility is that at least the position of persons who have been subjected to hate crimes (but not the substantive criminal law on this issue) could be addressed in the context of legislation on crime victims' rights. The EU already has legislation on this issue, which is due to be revised this year, and it should be possible, if desired, to include specific provisions on the victims of hate crimes (and other specific crimes, if desirable) within this legislation, by analogy with the specific provisions on victims of sexual exploitation of children and trafficking in persons in the relevant legislation on these issues.

Finally, another possibility for the adoption of legislation in this area is Article 352 TFEU, which provides as follows:¹⁰⁶

1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.

¹⁰³ COM (2008) 426, 2 July 2008.

¹⁰⁴ Art. 3(1)(d) of the proposal (*ibid.*). See, however, the latest available wording of this text, limiting it to goods and services which 'are offered outside the context of private and family life' (Council doc. 15174/10, 28 Oct. 2010).

¹⁰⁵ Art. 153 TFEU.

¹⁰⁶ Art. 352(2) (not reproduced) provides that the Commission shall inform national parliaments about proposals based on this Article, while Art. 352(4) (also not reproduced) rules out the application of Art. 352 to foreign policy.

The case law of the Court of Justice on the predecessor provision of the Treaty (Article 235 EC, later Article 308 EC) made clear that it could not be used if a more specific legal base existed in the rest of the Treaty.¹⁰⁷ So it is arguable that Article 352 could be used if Article 83(2) is not considered sufficient to adopt hate crimes legislation, in light of the limited scope of the criminal law measures that could presently be adopted in relation to the EU's current non-discrimination legislation. The 'objectives' set out in the Treaties arguably include the broad objectives set out in Article 3 TEU, which include 'combat[ing] social exclusion and discrimination' and 'promot[ing] social justice and protection' and 'equality between women and men'.¹⁰⁸ The requirement to act within the 'framework' of EU policies replaced a prior requirement that the action must be necessary 'in the course of the operation of the common market', and so should be understood widely. As for the rule that Article 352 cannot be used where the Treaties rule out harmonisation, this only applies where the Treaties *expressly* rule out harmonisation,¹⁰⁹ for example as regards crime prevention or human health.¹¹⁰

It follows that Article 352 TFEU could potentially be used to adopt EU hate crimes legislation, if Article 83(2) TFEU is considered insufficient. The use of this Article would be subject to the same political constraints (in particular, unanimity of Member States) as Article 83(2), in conjunction with Article 19 TFEU. The next part of this paper examines the possibilities of escaping from those political constraints, by means of adopting hate crimes legislation with the participation of some Member States only.

4) Non-participation of some Member States

The EU Treaties provide for various means of non-participation for certain Member States as regards participation in EU legislation. First of all, there are general rules on enhanced cooperation. Secondly, there are two sets of specific rules as regards JHA law: (a) special opt-out rules for the UK, Ireland and Denmark; and (b) a fast-track to the general enhanced cooperation rules, as regards (*inter alia*) substantive criminal law and victims' rights legislation.

4.1) Enhanced cooperation

It is arguable that the EU rules on enhanced cooperation could be used to facilitate the adoption of EU hate crimes legislation applying to some, but not all, Member States.

As regards the general rules on enhanced cooperation, they could apply whenever several conditions are met:

- a) the enhanced cooperation must fall within the scope of the EU's 'non-exclusive competences' (Article 20(1) TEU, first sub-paragraph);
- b) the enhanced cooperation 'shall aim to further the objectives of the Union, protect its interests and reinforce its integration process' (Article 20(1) TEU, second sub-paragraph);

¹⁰⁷ See, for instance, Joined Cases C 402/05 P and C 415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I 6351.

¹⁰⁸ Art. 3(3) TEU, second sub-paragraph. See also Arts. 8 and 10 TFEU.

¹⁰⁹ See Case C-376/98 *Germany v EP and Council* [2000] ECR I-8419, para. 57.

¹¹⁰ Arts. 84 and 168(5) TFEU. See Art. 2(5) TFEU.

- c) the enhanced cooperation must be open to other Member States 'at all times' (Article 20(1) TEU, second sub-paragraph; see further Articles 328 and 330 TFEU);
- d) the enhanced cooperation must 'comply with the Treaties and Union law' (Article 326 TFEU, first paragraph);
- e) the enhanced cooperation 'shall not undermine the internal market or economic, social and territorial cohesion', 'constitute a barrier to or discrimination in trade between Member States', or 'distort competition between them' (Article 326 TFEU, second paragraph);
- f) enhanced cooperation 'shall respect the competences, rights and obligations of those Member States which do not participate in it'; the latter 'shall not impede its implementation by the participating Member States' (Article 327 TFEU);
- g) the enhanced cooperation must be a 'last resort', when the Council has 'has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole' (Article 20(2) TEU);
- h) it must involve at least nine Member States (Article 20(2) TEU);
- i) the Member States which wish to participate in enhanced cooperation must request the Commission to make a request; the Commission 'may' do so; the request must then be authorised by the Council (with all Member States voting), by qualified majority vote, with the consent of the EP (Article 329(1) TFEU);
- j) new Member States are not obliged to apply the enhanced cooperation decision (Article 20(4) TEU);

Only the participants vote on the legislation concerned, but other Council members can take part in discussions (Article 20(3) TEU; see also Article 330 TFEU). It is implicit that after the authorisation of enhanced cooperation, then the discussions continue or restart on the proposed legislation in question, which is now regarded as a measure 'implementing' enhanced cooperation, and which is still subject to the decision-making rules which would otherwise have applied to it – except with fewer Member States voting.¹¹¹ However, the participating Member States may decide by means of a unanimous vote to change the decision-making rules applicable to the issue in question (Article 333 TFEU), ie from unanimity to QMV, or from a special legislative procedure to an ordinary legislative procedure.

In practice, enhanced cooperation has been approved twice by the Council, first of all as regards choice of law rules on divorce,¹¹² and secondly as regards unitary patent protection in the EU.¹¹³ The Commission has subsequently proposed measures to implement enhanced cooperation as the latter issue,¹¹⁴ although the authorisation and/or the implementation of enhanced cooperation on this issue is subject to pending legal challenges by dissenting Member States.¹¹⁵ Prior to the Treaty of Lisbon, however, it was not possible to get sufficient support for approval of

¹¹¹ Note that on the other hand, the MEPs from the non-participating Member States can still vote. This could be significant where the EP has power pursuant to the ordinary legislative procedure, or (as regards Article 19 TFEU) the power of consent over the legislation concerned.

¹¹² OJ 2010 L 189/12, adopted in July 2010. The Regulation implementing enhanced cooperation was then adopted by the Council (with fourteen participating Member States) in Dec. 2010: Reg. 1259/2010, OJ 2010 L 343/10.

¹¹³ OJ 2011 L 76/53, adopted in March 2011.

¹¹⁴ COM (2010) 215 and 216, 13 April 2011, under discussion in the Council and EP. The issue is complicated by a Court of Justice judgment of 8 Mar. 2011 (*Opinion 1/2009*, not yet reported) on the connected issue of patent litigation.

¹¹⁵ Case C-274/11 *Spain v Council*, pending. Italy has also announced that it has brought a legal challenge. The authorisation and implementation of enhanced cooperation as regards divorce law was not challenged by any Member State.

enhanced cooperation when it was proposed as regards legislation on suspects' rights.¹¹⁶ On other occasions, the threat of enhanced cooperation was sufficient to convince the dissenting Member States to vote in favour of the relevant measures.¹¹⁷ It is expected that enhanced cooperation might also be authorised as regards a third issue in the near future.¹¹⁸ Arguably, it would also be possible to escape the current deadlock regarding the 2008 proposal for non-discrimination rules outside the field of employment on grounds of religion, age, disability and sexual orientation by means of the enhanced cooperation process.

Examining the criteria for enhanced cooperation as regards bias/hate crimes legislation (and/or underlying legislation on non-discrimination outside employment),¹¹⁹ it would be necessary in the first place to have nine willing participants (point (h)). Those Member States would have to be willing to make a request to the Commission for enhanced cooperation, which would then have to suggest it; the Commission holds an important role here (point (i)). The enhanced cooperation would then need authorisation from the Council by QMV, which could be a difficult hurdle if relatively few Member States wish to participate (point (i)).¹²⁰ It seems likely, however, that the EP would consent to authorisation of enhanced cooperation in this area, given its history of support for legislation on this issue (point (i)). The question of whether a new Member State participates in future is not a barrier to the initial authorisation decision (point (j)), although if a new Member State joins before the authorisation is granted,¹²¹ then the voting rules regarding QMV have to be recalculated to include it, so its position would then be important.¹²² Equally the future participation of non-participating Member States (point (c)) is not a barrier to the initial authorisation of enhanced cooperation.

The 'last resort' requirement (point (g)) is presumably met when there is a deadlock in the Council as regards a legislative proposal, with any solution to the deadlock appearing to be impossible. This is how this rule was interpreted as regards the divorce law proposal, and how the Commission, the EP and the Council (although the Council's decision on this point has been challenged) interpret the rule as regards the patent proposal. It follows that a proposal would probably have to be on the table and subject to some discussion before the 'last resort' criterion was satisfied. It is not clear how much discussion would be necessary.¹²³ Of course, the 'last resort' criterion would be easier to satisfy as regards the underlying non-discrimination proposal, which has been on the table since 2008. This is nearly as long as the divorce law proposal was on the table before enhanced cooperation was proposed, and in fact there was a break in discussions on the divorce law proposal, whereas the

¹¹⁶ COM (2004) 328, 28 Apr. 2004. See the JHA Council conclusions of June 2007. In particular, there was not enough support in Council for approval of the proposed enhanced cooperation by QMV, even though there was a QMV in Council in support of the proposal itself (at that time, the Council had to be unanimous to adopt the legislation concerned).

¹¹⁷ In particular, the European Arrest Warrant and the European Company Statute.

¹¹⁸ Namely the common consolidated corporate tax base; the Commission proposed a Directive on this subject in March 2011 (COM (2011) 121, 16 Mar. 2011).

¹¹⁹ Presumably the link made between criminal law and harmonisation made in Art. 83(2) TFEU would mean that only the Member States participating in the underlying legislation could participate in the relevant criminal law rules.

¹²⁰ Note that as regards divorce law, only fourteen Member States participate, but a very large majority of Member States voted for authorisation. As regards patent protection, eleven Member States requested enhanced cooperation, and 14 others then joined them – ensuring, as noted above, that enough Member States are participating to ensure a QMV in Council without having to convince any non-participants to vote in favour of authorisation.

¹²¹ Croatia is expected to join the EU at the start of 2013. Iceland (which is more likely to be in favour of legislation in this area) could join shortly afterward, although it seems unlikely that there will be sufficient public support for accession in that State. No other new Member States are likely for several years afterward.

¹²² The new Member State's MEPs would also have a vote on whether to authorise enhanced cooperation. As with MEPs from other non-participating States, they would also have a vote as regards the legislation implementing enhanced cooperation.

¹²³ The divorce law measure was proposed in 2006, and a deadlock was apparent in 2008, before the Commission proposed enhanced cooperation in 2010. The EU had adopted a patent law convention in 1976, amended in 1989, which was not ratified. The Commission then proposed legislation on the issue in 2000, which was subject to deadlock in 2003-04. The issue was then revived in 2007-08, with a new proposal on the most difficult issue (translation) in May 2010, which was blocked by the end of 2010. However, translation issues had also proved difficult in the past; they had been the main reason for the deadlock in 2003-04.

anti-discrimination proposal has been discussed during every Council Presidency since July 2008.

It seems clear that the interests, et al of non-participating Member States would not be affected by a measure on non-discrimination or bias/hate crimes in which they did not participate (point (f)), unless it might be argued that any provisions extending jurisdiction for such crimes beyond the territory of the Member States concerned affected the interests of the non-participants. This argument should be rejected since it would anyway have been open to the participating Member States to extend their criminal jurisdiction as a matter of domestic law, or by means of participating in other international treaties.¹²⁴ Anyway, the non-participants could reduce the impact of the participants' exercise of extra-territorial jurisdiction by invoking the exceptions to the EU's measures on mutual recognition in criminal law which permit Member States not to recognise other Member States' decisions where the act in question took place on the executing Member State's territory.¹²⁵

As for other substantive criteria, it seems hard to argue that enhanced cooperation on this issue would 'undermine the internal market or economic, social and territorial cohesion', 'constitute a barrier to or discrimination in trade between Member States', or 'distort competition between them' (point (e)), although there is a stronger argument that the authorisation of enhanced cooperation as regards the underlying non-discrimination proposal would have an effect on the internal market, to the extent that companies in the participating Member States might have higher costs than those in non-participating Member States. On this point, it might however be argued that the 'internal market' requirement as regards enhanced cooperation only aims to prevention of any direct or indirect trade barriers as between the participating or non-participating Member States; it does not preclude the participating Member States accepting the higher costs that might result from such participation.¹²⁶ But on the other hand, the participating Member States' economies might benefit from the legislation concerned, to the extent that they receive more tourism from the persons protected by the hate crimes legislation and/or there is some form of private economic boycott against the non-participating Member States.

The requirements to comply with the Treaties and EU law (point (d)) presumably amounts to a requirement to remain within the EU's competences, a point discussed already above. If the EU has competence on this issue, then there is no doubt that this competence would be non-exclusive, complying with the requirement of point (a).¹²⁷ Finally, it has been argued as regards furthering the EU's objectives, et al (point (b)) that the authorisation of enhanced cooperation normally meets this criterion because continuing integration with a smaller number of Member States within the EU framework is better than the alternatives of either no integration at all, or integration with a smaller number outside the EU framework – the 'half a loaf is better than none' argument.

However, it should be noted that there is a possible fast-track route to enhanced cooperation as regards certain criminal law provisions of the Treaties, including Article 83(2) TFEU.¹²⁸ This fast-track procedure would *not* apply as

¹²⁴ For example, by ratifying the Council of Europe domestic violence convention, which was opened for signature in 2011.

¹²⁵ For example, Art. 4 of the Framework Decision on the European Arrest Warrant (OJ 2002 L 190/1).

¹²⁶ Similarly, EU social policy and environment legislation can set only minimum standards, leaving Member States free to impose higher standards if they wish to accept the higher costs, as long as they do not restrict the free movement of goods, etc to or from the other Member States. See Arts. 153(4) and 193 TFEU. See also the case law on this point as regards the internal market, for instance Case C-1/96 CWF [1998] ECR I-1251. Logically this principle would apply mutatis mutandis to the authorisation of enhanced cooperation.

¹²⁷ The EU's exclusive competences are listed in Art. 3(1) TFEU, and concern: customs union; competition; monetary policy; fisheries conservation; and trade policy. Art. 4(1) TFEU makes clear that shared competence applies where the EU's competence is not exclusive or confined to a supporting rule (as set out in Art. 6 TFEU; there is no mention of issues related to hate crime in Art. 6). Art. 4(2)(j) mentions the 'area of freedom, security and justice' (ie JHA) as a shared competence, while Art. 4(2)(b) mentions social policy as a shared competence.

¹²⁸ The special rule also applies to Art. 82(2) TFEU, ie as regards legislation on victims' rights.

regards the underlying non-discrimination legislation, or any measure based on the social policy provisions of the TFEU or on Article 352 TFEU. Only the usual rules on enhanced cooperation would apply in those cases.

The fast-track rule, as set out in Article 83(3) TFEU, provides that:

Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended.

After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

As an initial point, it might be questioned whether this procedure could apply to hate crimes legislation at all, given that it provides for the suspension of the '*ordinary legislative procedure*' (emphasis added), whereas the adoption of hate crimes legislation pursuant to Article 19 in conjunction with Article 83(2) TFEU would entail the use of a *special* legislative procedure, as noted already. However, another way to read Article 83(3) is that the fast-track to enhanced cooperation could apply regardless of the relevant procedure; the distinction would be that while the ordinary legislative procedure would be suspended, a special legislative procedure would not be. It could be argued that such a distinction would make sense because there are no time limits in any special legislative procedures, and so there is no need to provide for suspension of that procedure.¹²⁹ If the drafters of the Treaty of Lisbon had meant to exclude the application of Article 83(3) completely to cases where the special legislative procedure applies, they would have worded that exclusion more clearly.¹³⁰ This interpretation is consistent with other provisions in the Treaty of Lisbon which provide for similar fast-tracks to enhanced cooperation where there is a deadlock as regards criminal law or policing measures subject to unanimous voting.¹³¹

Assuming that the fast-track route can apply as regards hate crime legislation, certain features of the process should be noted. First of all, the fast-track would only apply where a Member State (or perhaps more than one Member State) objected to a proposal on the grounds that, in its opinion, the measure 'would affect fundamental aspects of its criminal justice system'. This process is referred to informally as an 'emergency brake' procedure.¹³² There seems limited if any grounds to question the judgment of the Member State concerned as regards the use of the emergency brake.¹³³ However, since the Treaty provides that either the fast-track procedure or the general route to

¹²⁹ For the time limits applicable to the ordinary legislative procedure, see Art. 294 TFEU.

¹³⁰ For example, '[w]here a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 which has been proposed pursuant to an ordinary legislative procedure would affect fundamental aspects...'

¹³¹ See Arts. 86(1) and 87(3) TFEU.

¹³² Note that this procedure has never been used, whether in the context of criminal law or social security (Art. 48 TFEU), or as regards foreign policy, where it has applied since 1999 (Art. 31 TEU).

¹³³ For a discussion of this issue in further detail, see S. Peers, 'EU Criminal Law and the Treaty of Lisbon', 33 ELRev. (2008).

enhanced cooperation can apply as regards criminal law,¹³⁴ the opponents of proposed hate crime legislation might decide not to bother with pulling the emergency brake, but rather to block the adoption of the proposal via the normal means of a 'blocking minority' (where there are enough opponents or abstentions in the Council to stop adoption of the legislation).¹³⁵ The reason for this tactic would be to prevent the legislation from being adopted, even by means of enhanced cooperation – assuming that the Member States opposing the legislation would also oppose authorisation of enhanced cooperation.¹³⁶ This will not always be the case, however.¹³⁷

In the event that the 'emergency brake' is pulled, then either there is a consensus in the European Council, in which case the ordinary legislative procedure resumes,¹³⁸ or in the absence of consensus, then at least nine Member States can notify their intention to proceed with the proposal on the basis of enhanced cooperation,¹³⁹ and authorisation for enhanced cooperation is 'deemed' to be granted. This means that the basic procedural and substantive hurdles standing in the way of enhanced cooperation (other than the requirement of at least nine Member States' participation) would be circumvented: namely, a proposal from the Commission,¹⁴⁰ consent of the EP,¹⁴¹ authorisation from a qualified majority of all Council members, and consideration of whether the proposal falls within the scope of the EU's non-exclusive competences,¹⁴² furthers the objectives etc of the EU, complies with the Treaties etc,¹⁴³ undermines the internal market etc,¹⁴⁴ respects the competences etc of non-participants, and is a 'last resort'.¹⁴⁵

¹³⁴ Criminal law measures are not expressly excluded from the scope of the general rules, and Art. 83(3) does not exclude the possible application of the general rules either. It is assumed that since the issue of exclusions from the scope of the enhanced cooperation procedure was discussed in detail during the Treaty of Amsterdam negotiations and then the drafters of the Treaty of Nice had the clear intention of reducing those exclusions, there are no exclusions from the enhanced cooperation process other than those expressly referred to therein.

¹³⁵ The current Council voting rules are set out in Art. 3(3) of the transitional protocol to the Treaties. At least four Member States would have to be opposed. However, up to three Member States might opt out of such a proposal (see further below), and their votes would in that case not count either for or against the proposal. On the recalculation of votes due to the non-participation of some Member States, see Art. 3(3) of the transitional protocol. It should be noted that all MEPs have the right to vote, regardless of any opt-outs or enhanced cooperation.

¹³⁶ Note, however, that as noted above, the blocking minority must be calculated differently as regards authorisation of enhanced cooperation, since all Member States have a right to vote on that issue, whereas at least Denmark (and perhaps the UK and Ireland) would not be participating in the substance of the proposed measure on hate crimes, so would not have the right to vote on it. Furthermore, if the hate crimes legislation were proposed by a group of Member States instead of the Commission, there is a higher voting threshold as regards adoption of the measure (two-thirds of Member States, rather than a majority: see Art. 3(3) of the transitional protocol). This higher threshold would not apply as regards authorisation of enhanced cooperation, since such authorisation can only be proposed by the Commission.

¹³⁷ This assumption is not necessarily correct; as noted above, more Member States voted to authorise enhanced cooperation for divorce law than were willing to participate in the legislation concerned. Conversely it is possible that some Member States supporting the substantive proposal will not want to support the authorisation of enhanced cooperation: see the example of the procedural rights proposal (n. 113 above). Compare Art. 83(3) with Arts. 86(1) and 87(3) TFEU, where the Member States in favour of enhanced cooperation can simply trigger a fast-track to enhanced cooperation in light of the opposition to a proposal of any single Member State. It is anomalous that the drafters of the Treaty of Lisbon did not provide for the same procedure in the event that a single Member State vetoes a proposal which is subject to a special legislative procedure in accordance with Art. 83(2).

¹³⁸ As noted above, if the fast-track process applies to a special legislative procedure such as that applying to hate crime legislation, then the legislative procedure would never have been suspended in the first place.

¹³⁹ The Treaty does not specify what happens in the event that there is no consensus in the European Council and fewer than nine Member States want to proceed on the basis of enhanced cooperation.

¹⁴⁰ This point is particularly significant as regards criminal law, since the Commission shares the underlying power to propose legislation with groups of Member States. Note that the threshold of seven Member States to make a legislative proposal is close to the threshold of nine Member States to participate in enhanced cooperation.

¹⁴¹ But note that as regards hate crimes legislation, the EP would still have the power of consent over the substantive legislation concerned, pursuant to Arts. 19 or 352 TFEU.

¹⁴² As noted above, any JHA measure, if it is within EU competence at all, clearly falls within its non-exclusive competence anyway. Presumably the Treaty drafters took this point into account when providing for the fast-track to enhanced cooperation in criminal law.

¹⁴³ Although surely any measure adopted by the EU must comply with the Treaties and EU law regardless. It would presumably still be open to the Commission or a non-participating Member State to bring a legal challenge to EU hate crimes legislation on the grounds that the EU was not competent at all to adopt it.

¹⁴⁴ However EU legislation must still comply with the Treaties (see *ibid*), which includes the hierarchically superior Treaty rules guaranteeing free movement of goods, persons etc. Presumably the Treaty drafters considered that a fast-track to enhanced cooperation in criminal law was unobjectionable in this regard due to the limited connection between the internal market and criminal law. However, see the discussion below of the Declaration to the Treaty of Lisbon dealing with this issue.

¹⁴⁵ Given that a dispute settlement procedure in the European Council would have failed following the pulling of an emergency brake, the 'last resort' criterion would arguably be satisfied anyway.

The enhanced cooperation process then applies as regards the subsequent adoption of the proposed legislation, and the possible participation in future of other Member States (or, following enlargement, the optional participation of Member States joining the EU later).

From the point of view of promoting the adoption of EU hate crimes legislation, the enhanced cooperation would seem to be a desirable option to consider in the event that, as seems possible, some Member States have substantive and/or legal objections to the adoption of EU legislation on this subject. Politically speaking, it could be argued that (again) 'half a loaf is better than none' as the adoption of a hate crimes measure with the participation of only some Member States would be better in principle than no EU hate crimes measure at all. Equally, given the enhanced possibility for enforcement of EU legislation as compared to international treaties and the enhanced visibility of EU measures, the adoption of a measure within the EU framework by some Member States is preferable to the adoption of a measure outside that framework by some Member States.

On the other hand, the political judgment might be different if the comparison is made between a measure adopted by a number of EU Member States on the one hand, and a measure adopted within a *broader* multilateral framework on the other hand, given the high number of hate crimes which occur outside the Member States of the European Union.¹⁴⁶ But this comparison begs the question, because there is no legal reason that the two avenues could not be pursued in parallel. While the EU will gain some external competence over hate crimes issues if it adopts legislation on this issue, it presumably already enjoys some competence in this regard anyway, due to the adoption of the Framework Decision on racism and xenophobia.¹⁴⁷ The existence of EU competence does not necessarily make it less likely that the Council of Europe will act on this issue, or more difficult to agree on a text.¹⁴⁸ In practice, the Council of Europe might defer to the EU while it is actively considering the measure, or the other way around, but there are several examples of one institution acting shortly after the other has completed its work on an issue.¹⁴⁹

One legal question which would arise if an EU hate crimes measure were adopted by means of enhanced cooperation would be the legal status of the EU Framework Decision on racism and xenophobia, if the later EU hate crimes Directive incorporated its content (perhaps with amendments).¹⁵⁰ The Framework Decision could either be: left in force as regards all Member States; repealed as regards all Member States; or repealed only as regards relations between Member States participating in the Directive, but left in force as regards relations between non-participating Member States *and* relations between participating and non-participating Member States. Obviously, it would be highly undesirable politically to repeal that legislation as regards all Member States, thereby

¹⁴⁶ For details, see the ILGA submission to the Council of Europe committee on violence against women: <<http://www.coe.int/t/dghl/standardsetting/violence/ILGA-Europe%20VAW%20Convention%20submission%208%2009%2009.pdf>>.

¹⁴⁷ The case law of the Court of Justice has not yet addressed the question of whether the normal rules on EU external competence apply as regards third pillar measures adopted before the entry into force of the Treaty of Lisbon (on those rules, see Arts. 3(2) and 216(1) TFEU). Since the Framework Decision only sets minimum standards, and since any further EU hate crimes legislation could also only set minimum standards, the EU shares (or would share) the external competence on this issue with its (participating) Member States (Art. 3(2) TFEU).

¹⁴⁸ The European Commission would have to be given a mandate to negotiate on behalf of the EU (as regards the participating Member States): see Art. 218 TFEU. This would likely concern EU competence to sign and conclude the treaty concerned, as well as compatibility between the treaty and the adopted EU legislation, or at least a 'disconnection' clause (as found in several recent Council of Europe criminal law treaties) specifying that the (participating) EU Member States are free to apply the EU rules on the subject-matter among themselves.

¹⁴⁹ For instance, the EU's proposal to revise its rules on sexual exploitation, etc of children in 2009 followed soon after the agreement on the Council of Europe Convention on this issue in 2007. Equally the proposal for revision of the EU rules on trafficking in persons in 2009 took account of the Council of Europe Convention on this issue agreed in 2005, which in any event took account of EU measures adopted in 2002 (as regards criminal law) and 2004 (as regards immigration law).

¹⁵⁰ If the hate crimes Directive did not cover the issue of racist hate crimes, the issue of the status of the Framework Decision would not arise.

reducing the obligations which some Member States are subject to in this regard. The first option would lead to legal complications, since some Member States would be subject to two separate sets of obligations, although in principle there would not be a conflict between those obligations since they each set only minimum standards.¹⁵¹ The third option would be preferable since it would leave intact the existing obligations of non-participants in the hate crime legislation while avoiding overlapping obligations as between the participating Member States. There is an underlying question as to whether the EU institutions actually may choose between any of these three options, or whether one of these options is mandatory (or alternatively, whether there is a choice between only two of the options).

This issue has already arisen as regards the position of the UK, Denmark and Ireland in JHA measures pursuant to their specific JHA opt-outs.¹⁵² To date in practice the EU institutions have taken the third option, ie repeal of the prior legislation only as regards relations between the Member States participating in the new legislation. The Court of Justice has not yet been asked to clarify which position is correct. However, there are special rules in the various protocols relating to those Member States' opt-outs, so the legal position is not necessarily the same as regards other Member States.

There is a special declaration to the Treaty of Lisbon addressing the issue:¹⁵³

26. Declaration on non-participation by a Member State in a measure based on Title IV of Part Three of the Treaty on the Functioning of the European Union

The Conference declares that, where a Member State opts not to participate in a measure based on Title IV of Part Three of the Treaty on the Functioning of the European Union, the Council will hold a full discussion on the possible implications and effects of that Member State's non-participation in the measure.

In addition, any Member State may ask the Commission to examine the situation on the basis of Article 96 of the Treaty on the Functioning of the European Union.

The above paragraphs are without prejudice to the entitlement of a Member State to refer the matter to the European Council.

It is not clear whether this Declaration was meant only to apply to the specific opt-outs for the UK, Ireland and Denmark, or whether it applies also to the possible use of enhanced cooperation (on the one hand, it refers to a single Member State's non-participation, while on the other hand, the Declaration is not attached to the specific opt-out protocols). In any event, the Declaration has not been applied in practice.

¹⁵¹ It might be conceivable, however, that by analogy with the issue of conflict of human rights, some tension could arise as regards reconciling different non-discrimination rules, ie if a particular religious group practiced race discrimination. The more likely scenario is, however, tension between non-discrimination on grounds of sexual orientation and non-discrimination on grounds of religion, in which case a conflict with the prior Framework Decision would not arise.

¹⁵² See section 4.2 below.

¹⁵³ Title IV has been renumbered Title V, while Art. 96 has been renumbered Art. 116. This Art. provides that if the Commission finds that differences between national laws are 'distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.' In the absence of agreement, to eliminate the distortion, directives 'shall' be adopted by means of the ordinary legislative procedure. Also, '[a]ny other appropriate measures provided for in the Treaties may be adopted.' Of course, measures adopted pursuant to enhanced cooperation cannot 'distort competition' in the first place – except that the fast-track to enhanced cooperation would circumvent this rule.

This issue could also arise as regards enhanced cooperation in other fields, ie if a measure adopted by means of enhanced cooperation amended or repealed another measure in which more Member States participated. Any legal challenges on this issue would be relevant by analogy to the possible adoption of a bias/hate crimes measure that repealed the Framework Decision on racism and xenophobia. However, to date the issue has not arisen, since the divorce legislation adopted by means of enhanced cooperation and probably the patent legislation to be adopted by this route do not (or will not) amend or repeal prior legislation in which a greater number of Member States take part.¹⁵⁴

Another solution to the issue is to adopt separate acts relating to racism on the one hand, and other hate crimes on the other. But that approach would still raise questions about Denmark's participation in the anti-racism measure.

4.2) Specific opt-outs

The potential adoption of EU bias/hate crimes legislation is subject to special rules governing the possible non-participation of the UK, Ireland and Denmark.

The UK and Ireland on the one hand, and Denmark on the other, are subject to special rules concerning their possible non-participation in JHA legislation. Leaving aside the separate rules relating to the Schengen *acquis*, because they are not relevant to the possible adoption of bias/hate crimes legislation, the UK and Ireland decide (separately) within three months after a proposal for JHA legislation whether they wish to participate in that legislation.¹⁵⁵ If they do not opt in to the original proposal during this time, they may participate at any point after its adoption, subject to approval by the Commission or (failing that) the Council.¹⁵⁶ If they do opt in and then they block the proposal (either by vetoing it, if a veto applies, or by participating in a blocking minority, if qualified majority voting applies) the Council can decide to go ahead without them, after a 'reasonable time'.¹⁵⁷

There is a particular rule where the UK and/or Ireland refuse to participate in a measure which amends a measure which they already participate in. This could be relevant in the event that EU bias/hate crimes legislation amended or repealed the Framework Decision on racism and xenophobia. The rule provides that:¹⁵⁸

2. However, in cases where the Council, acting on a proposal from the Commission, determines that the non-participation of the United Kingdom or Ireland in the amended version of an existing

¹⁵⁴ In fact, it should be noted that the Commission's revised proposal on divorce rules (COM (2010) 105, 24 March 2010) left out the proposed amendments to other legislation binding 26 Member States which had appeared in the earlier proposal on this issue (COM (2006) 499, 17 July 2006).

¹⁵⁵ Art. 3(1), JHA protocol on the UK and Ireland.

¹⁵⁶ Art. 4, JHA protocol on the UK and Ireland, referring to Art. 331(1) TFEU, which applies equally to Member States which wish to join enhanced cooperation in progress. In practice, this provision has been applied five times to authorise the UK (twice) and Ireland (three times) to participate in JHA legislation. The UK has also announced its intention to participate in the Directive on trafficking in persons.

¹⁵⁷ Art. 3(2), JHA protocol on the UK and Ireland. This has only been considered once in practice, as regards the proposal for a European Protection Order (see the press release of the June 2010 JHA Council). However, the threat to exclude the UK at that time has not in fact been carried out.

¹⁵⁸ Art. 4a(2), JHA protocol on UK and Ireland.

measure makes the application of that measure inoperable for other Member States or the Union, it may urge them to make a notification under Article 3 or 4. For the purposes of Article 3, a further period of two months starts to run as from the date of such determination by the Council.

If at the expiry of that period of two months from the Council's determination the United Kingdom or Ireland has not made a notification under Article 3 or Article 4, the existing measure shall no longer be binding upon or applicable to it, unless the Member State concerned has made a notification under Article 4 before the entry into force of the amending measure. This shall take effect from the date of entry into force of the amending measure or of expiry of the period of two months, whichever is the later.

So far, this provision has not been applied in practice, even though (inter alia) the UK has opted out of three proposed asylum Directives repealing prior Directives and (initially) the Directive replacing the Framework Decision on trafficking in persons, and Ireland has opted out of two of the same asylum Directives and another proposed measure (the European Investigation Order) which would repeal the Framework Decision on the European evidence warrant and parts of several other EU measures. In two cases, the Council and EP have, as noted already, agreed to specify that the new legislation repeals the old legislation only as regards relations between Member States participating in the new legislation.¹⁵⁹ This means that the prior legislation continues to apply to those Member States which do not participate in the new legislation. Otherwise, the issue is still under discussion (or not discussed yet).¹⁶⁰

It should be noted that this rule can only apply when non-participation of one or both Member States would make the situation 'inoperable', which is *prima facie* a very high threshold.¹⁶¹ Even in such a case, there is no obligation to apply this rule (ie the Commission need not make a proposal, and the Council is not obliged to act on the proposal even if it does).

It might be argued that where a measure entirely *repeals* a prior act, the rules on 'amendments' do not apply, and the act is necessarily (or at least *could be*) repealed also as regards the Member States which do not participate in the later measure. This issue has not yet been settled by the Court of Justice, although as noted already, in practice the Council and EP have either expressly repealed the prior legislation only as regards the Member States participating in the new legislation,¹⁶² or have additionally expressly stated that the repeal constitutes an amendment of the prior legislation.¹⁶³ Any assertion by the UK or Ireland that a repealed act no longer applied to them could be challenged either by the Commission (in infringement proceedings) or by an individual or NGO in the national courts.¹⁶⁴

¹⁵⁹ See Art. 2 of Reg. 1231/2010 (OJ 2010 L 344/1), and Art. 21 and recital 30 of the Directive on trafficking in persons (Directive 2011/36, OJ 2011 L 101/1).

¹⁶⁰ For instance, Art. 22 of the agreed text of the Directive on sexual exploitation of children (Council doc. 17583/10, 15 Dec. 2010) is still in square brackets, due to the discussion on this issue (the opt-out issue as regards this Directive is only relevant to Denmark, however). On the Council legal service's view of this issue as regards the European Investigation Order, see: <<http://www.statewatch.org/analyses/no-112-eu-eio-update.pdf>>. The latest available drafts of two of the asylum proposals would expressly specify that the UK and Ireland will remain bound by the prior legislation: COM (2011) 319 and 320, 1 June 2011.

¹⁶¹ Even if the UK or Ireland did not challenge their exclusion, it could be challenged by the EP or a Member State which did not want them to be excluded. The validity of the decision could also be challenged in a national court by an individual or NGO, although the position is awkward as regards criminal law, since the UK and Ireland have not opted in to the Court's jurisdiction as regards pre-Lisbon third pillar measures. On the other hand, it could reasonably be argued that the measure being attacked (ie the decision to exclude the UK and Ireland from participation in the prior measure) is actually a post-Lisbon measure. However, there is no such jurisdictional constraint if the UK or Ireland were to be excluded from an asylum measure pursuant to the same rules.

¹⁶² See Reg. 1231/2010 (n. 159 above).

¹⁶³ See recital 30 in the preamble to the the Directive on trafficking in persons (ibid).

¹⁶⁴ The former scenario is only relevant for now to asylum issues, since the Court does not yet have jurisdiction over infringement proceedings as regards pre-Lisbon third pillar measures. As for the latter scenario, an argument relating to the applicability of prior criminal law acts could be raised in national courts but could not (yet) be referred to the Court of Justice from the UK or Irish courts as regards pre-Lisbon third pillar acts. It is conceivable that another Member State's courts could ask, for instance, whether Ireland is still covered by previous rules on transmitting criminal evidence or not, because they might wonder which rules applied to Irish requests for evidence.

The UK (but not Ireland or Denmark) also has an option to terminate its participation in all pre-Lisbon third pillar measures that have not been amended as of 1 December 2014, if it notifies this intention by 1 June 2014.¹⁶⁵ This decision would apply to the Framework Decision on racism and xenophobia, if it has not been amended in the meantime. The UK could apply to opt back in to some of the measures concerned if it wished,¹⁶⁶ ie this decision might amount in practice to renouncing only part of the pre-Lisbon third pillar acquis.

As for Denmark, it cannot opt in at all to EU criminal law measures adopted after the entry into force of the Treaty of Lisbon. While the Protocol on Denmark permits Denmark to decide either to relinquish its opt-out entirely or to switch to a system of ad hoc opt-ins very similar to the rules applicable to the UK and Ireland,¹⁶⁷ Denmark has not yet taken a decision to either end, which would require a referendum in Denmark in either case.

As for pre-Lisbon third pillar measures, the Protocol on Denmark specifies that:¹⁶⁸

...acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon which are amended shall continue to be binding upon and applicable to Denmark unchanged.

It follows that the power to exclude the UK and Ireland from participation in prior measures in the event that those Member States do not participate in acts amending those prior measures cannot apply to Denmark. Neither can it be claimed that pre-Lisbon third pillar acts which are repealed will cease to apply to Denmark, at least to the extent that a repeal constitutes an amendment.¹⁶⁹ As noted above, the early post-Lisbon EU practice is to repeal pre-Lisbon measures only as between the Member States which participate in a new measure, there leaving those pre-Lisbon measures in force for Denmark as well as (where relevant) Ireland and the UK.¹⁷⁰

For the UK, Ireland and Denmark, there is a fundamental question as to whether their JHA opt-out Protocols apply at all to measures based on Article 83(2) TFEU, given that the measures concerned will arguably be wholly or at least jointly adopted on the basis of other provisions of the Treaties.¹⁷¹ The Treaty and the relevant protocols are silent on this issue, and there is no case law or practice yet on this point. In any event, the enhanced cooperation rules would apply in the event that those Member States blocked the decision-making concerned.

¹⁶⁵ Art. 10(4), protocol on transitional provisions.

¹⁶⁶ Art. 10(5), protocol on transitional provisions.

¹⁶⁷ Arts. 7 and 8 and Annex, Protocol on Denmark.

¹⁶⁸ Art. 2 of the Protocol on Denmark.

¹⁶⁹ It is obviously relevant to the Protocol on Denmark that the Directive on trafficking in persons indicates that it amends the prior Framework Decision (n. 159 above).

¹⁷⁰ In two cases, the UK and Ireland have both opted in to post-Lisbon measures which would repeal pre-Lisbon acts, so the issue of the status of the prior measures will only be relevant as regards Denmark. The measures concerned are the proposed Directive on sexual exploitation of children (n. 160 above) and the proposed Directive on attacks on information systems (COM (2010) 517, 30 Sep. 2010).

¹⁷¹ The JHA opt-outs would anyway apply to the extent that any proposals concern criminal law linked to immigration law. The UK and Denmark would also be able to invoke their opt-out from monetary union as regards any criminal law measures linked to the Treaty provisions on economic and monetary union.

5) Council of Europe measures

Measures at the level of the Council of Europe could possibly address hate crime issues.

The Council of Europe adopted a Convention on violence against women and domestic violence and opened it for signature on 11 May 2011 (CETS 210). This Convention comprehensively addresses the hate crimes issue as far as women are concerned, and is open to non-EU States and EU States alike (as well as to the EU as such) for ratification.¹⁷² There is still an argument that action by the EU on this issue would be desirable to ensure that the principles of the Convention are applied by EU Member States in a more enforceable form as early as possible. This is the principle that guided EU action as regards the adoption of legislation on (inter alia) cyber-crime and sexual exploitation of children.

One way forward on the bias/hate crimes issue is to work for possible protocol(s) to this Convention, which can be adapted to the specific features of bias/hate crimes against other groups.¹⁷³ There would be no need to limit this process to the protection of the specific groups listed in Article 19 TFEU, and obviously the process would not be limited to (some) EU Member States only. For the reasons discussed already, addressing bias/hate crimes by this route does not exclude dealing with them by means of the EU route simultaneously, or subsequently.

The specific features of the Council of Europe Convention which might be relevant to bias/hate crimes against other groups are:

- a) state responsibility (Article 5);
- b) discrimination sensitivity (Article 6);
- c) comprehensive policies (Article 7);
- d) financial resources (Article 8);
- e) non-governmental organisations (Article 9);
- f) coordinating bodies (Article 10);
- g) data collection (Article 11);
- h) general obligations (Article 12);
- i) awareness-raising (Article 12);
- j) education (Article 13);
- k) training of professionals (Article 14);
- l) preventive programmes (Article 15);
- m) the private sector and the media (Article 16);
- n) protection and support measures (Chapter IV);
- o) substantive law (Chapter V), as regards civil lawsuits, compensation, stalking, physical violence, harassment, aiding and abetting, honour crimes, the application of offences, jurisdiction, aggravating circumstances, penalties, the recognition of foreign sentences and the prohibition of mediation;
- p) investigative measures (Chapter VI);
- q) immigration and asylum (Chapter VII);
- r) international cooperation (Chapter VIII);
- s) the monitoring mechanism (Chapter IX); and
- t) the remaining provisions of the Convention (Chapters X to XII).

¹⁷² Thirteen States have signed the Convention: ten Member States (Austria, Finland, France, Germany, Greece, Luxembourg, Portugal, Slovakia, Spain and Sweden) and three non-Member States (Iceland, Montenegro and Turkey).

¹⁷³ While there is a protocol to the cyber-crime convention addressing racist material online, this does not address other forms of racist hate crime.

6) Possible political recommendations

a) At EU level, there is a good argument that the EU has competence on the basis of Article 83(2) TFEU to address bias/hate crimes against all of the groups listed in Article 19 TFEU, after the general anti-discrimination directive proposed in 2008 is adopted, and in the meantime already as regards race and sex discrimination. **Such a measure could therefore be advocated by a coalition of groups, as regards all of the groups listed in Article 19 TFEU.**

A discussion on a draft directive could get underway alongside discussions on the 2008 proposal. It could include the Framework Decision on racism and xenophobia, to improve its enforceability. The best way forward would be to adopt a Directive concerning bias/hate crimes as regards all groups listed in Article 19 TFEU, which would incorporate and strengthen the existing Framework Decision on racism and xenophobia, but other options are possible (see section 1.4 above);

b) A draft directive could be drawn up for discussion and advocacy (cf the race discrimination directive drawn up by NGOs in the 1990s). Such a draft is annexed to this report in order to facilitate further discussion.

c) Alternatively it is arguable that Article 352 TFEU could already be used to adopt such a measure, or that EU competence could be extended pursuant to Article 83(1) in order to adopt it. **Either of these routes could be advocated as an alternative.**

d) A Protocol to the Council of Europe convention on violence against women could be drawn up to address bias/hate crimes. Such a measure could also be advocated by a coalition of groups, which could extend outside the EU and outside the groups listed in Article 19 TFEU. There is no necessary conflict between the Council of Europe process and the EU process.

e) An alternative strategy in the short term (which could be combined with lobbying for hate crimes legislation in the longer term) would be to **lobby for specific provisions on hate crime victims in the forthcoming proposal on crime victims' rights.**

f) A further alternative strategy is to lobby for EU legislation on violence at work (which might attract broader support from trade unions as well); this also does not preclude lobbying for EU hate crimes legislation.

g) There is a need to identify a **lobbying strategy as regards Member States** (especially those holding the EU Council presidency in the near future) which might wish to make a joint proposal at EU level or place bias/hate crimes issues on the Council of Europe agenda, as well as regards the **EU Commission, the European Parliament, and the Assembly of the Council of Europe.**

h) The possible use of **enhanced cooperation to adopt hate crimes legislation** at EU level could be considered as a technique to avoid vetoes by Member States which are not interested in EU legislation on hate crimes. A lobbying strategy on this issue should keep this factor in mind.

i) Since the adoption of the general anti-discrimination directive proposed in 2008 will likely be necessary in practice before EU bias/hate crimes legislation is adopted (except as regards race and sex), it may be necessary to consider lobbying for the use of **enhanced cooperation to adopt the general anti-discrimination proposal, if adoption of this proposal** by all Member States does not seem likely for the foreseeable future.

Annex I

Relevant EU decision-making processes

Right of initiative

- under Articles 82 (as regards victims' rights) or 83(2) (as regards substantive criminal law) – by at least one-quarter of Member States or the Commission
- the EP can request the Commission to act
- the public can, from April 2012, use the citizens' initiative mechanism to suggest that the Commission make a proposal
- nb – the use of Article 83(2) for hate crimes legislation will require the prior adoption of some form of
- under Article 153 or 352 – only the Commission can make a proposal

Adoption of legislation

- under Articles 82 or 83(2), in connection with Art. 153 – by qualified majority in Council, with joint decision-making powers for the EP (ordinary legislative procedure)
- under Article 83(2), in connection with Article 19 - unanimity in Council, with consent of EP (special legislative procedure)
- under Article 352 – unanimity in Council, with consent of EP (special legislative procedure)

Emergency brake process

- applies to Articles 82 and 83(2), not to Arts 153 or 352
- any Member State can claim a threat to its criminal justice system
- in that case, decision-making suspended – discussions in the European Council
- in the event of a deal – discussions continue under the ordinary (or special?) legislative procedure
- if no deal – nine Member States can trigger fast-track to enhanced cooperation if they wish - usual substantive and procedural requirements for enhanced cooperation do not apply

Enhanced cooperation (normal route, ie where fast-track does not apply)

- a proposal has encountered a deadlock in the Council
- a group of Member States make a request to the Commission
- the Commission may propose authorisation for enhanced cooperation
- the authorisation may be granted by the Council, by qualified majority vote (of all Member States) after consent of the EP
- if enhanced cooperation is authorised, discussions continue on the original proposal, or a revised version of it, among the participating Member States
- the underlying decision-making rules apply as regards the substantive proposal – ie unanimity in the Council and consent of the EP as regards non-discrimination and/or hate crimes legislation
- only the participating Member States can vote on the substantive proposal, but all MEPs can vote
- some or all non-participating Member States can join in after adoption of the measure concerned

Annex II

Flow charts on decision-making

Article 84 – crime prevention

Initiative: either Commission or group of Member States

Procedure: need qualified majority in Council, joint power of EP (ordinary legislative procedure)

Opt-outs: Denmark cannot participate, UK and Ireland can choose whether to participate; also enhanced cooperation could apply (see below)

Article 352 – residual powers clause

Initiative: Commission only

Procedure: need unanimity in Council, consent of EP (special legislative procedure)

Opt-outs: none – although enhanced cooperation could apply (see below)

Article 83(2), with Article 19 – criminal law harmonisation

Initiative: Commission only (for Article 19); Commission or (probably) group of Member States (for Article 83.2)

Procedure: need unanimity in Council, consent of EP (special legislative procedure)

Opt-outs: none on Article 19 proposal – although enhanced cooperation could apply (see below); for Article 83 proposal, Denmark cannot participate, UK and Ireland can choose whether to participate; also enhanced cooperation could apply (see below)

Enhanced cooperation – authorisation

Initiative: Commission only, following request by a group of Member States

Procedure: qualified majority of all Member States in Council, consent of EP (non- legislative procedure)

Opt-outs: at least nine MS must participate in the enhanced cooperation

Note – decision-making on measures *implementing* enhanced cooperation would follow the procedures described above

Annex III

Draft Directive on bias/hate crimes

Article 1

Subject matter

This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of violence or hatred directed against a group of persons or a member of such a group defined by reference to sex (including gender identity), racial or ethnic origin, religion or belief, disability, age or sexual orientation ('hate crimes'). It also introduces common provisions to strengthen the prevention of these crimes and the protection of the victims thereof.

Comment: adapted from Art. 1 of the Directive on trafficking in persons. The scope of the Directive is defined in the same way as the scope of Art. 19 TFEU. The reference to 'gender identity' is based on the preamble to Directive 2006/54 on sex discrimination, which mentions "gender reassignment", and it confirms the application of EU sex discrimination law to this form of discrimination. Otherwise the grounds for discrimination are not further defined; this is consistent with the existing EU anti-discrimination legislation.

Article 2

Offences concerning bias/hate crimes

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

(a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex (including gender identity), racial or ethnic origin (including colour, descent or national origin), religion or belief, disability, age or sexual orientation, where the presumed inclusion of the victim in, or association of the victim with, one or more such grounds is reasonably suspected to have constituted a motive for the perpetrator;

(b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;

(c) 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, directed against a group of persons or a member of such a group defined by reference to racial or ethnic origin (including colour, descent or national origin) or religion or belief, when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of

persons or a member of such a group defined by reference to racial or ethnic origin (including colour, descent or national origin), religion or belief, when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

2. For the purpose of paragraph 1, Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

3. Any Member State may, on adoption of this Directive or later, make a statement that it will make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.

Comment: Art. 1 of the Framework Decision on racism and xenophobia, adapted to include all of the groups referred to in Article 19 TFEU. Religion is now a free-standing ground, so Art. 1(3) of the Framework Decision, which limited criminalisation of religious hatred to cases where it was a pretext for racial hatred, should be deleted.¹⁷⁴ In order to make sure that the obligations under the Framework Decision are not reduced, it is made clear that the concept of racial and ethnic origin still includes the concepts of descent, colour and national origin, as specified in the Framework Decision. The specific provisions relating to racial and religious discrimination in Art. 1(1)(c) and (d) of the Framework Decision are retained, to take account of the historical circumstances of Holocaust denial.

The definition of the key offence in Art. 2(1)(a) is amended to include the concept of a 'reasonable' suspicion of the perpetrator's grounds; this concept is taken from the Council of Europe's Committee of Ministers recommendation to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity (Rec (2010) 5 of 31 March 2010). The concept of 'association with' one of the prohibited grounds is included, based on the jurisprudence of the Court of Justice (Case C-303/06 Coleman [2008] ECR I-5603); this would cover, for instance, an attack upon a non-Muslim person on the grounds that they had a married or had relationship with a Muslim. The reference to the 'presumed' inclusion or association of the victim is based on Art. 10(2) of the EU's Directive on qualification for refugee status; it would ensure that the Directive would still apply if a person were attacked because his or her attacked had wrongly assumed (for example) that he or she was a Muslim, or gay or lesbian; the possibility of arguing a type of 'impossible attempt' defence would therefore be ruled out. As with Article 1, the reference to sex discrimination is confirmed to include discrimination on grounds of gender identity. Finally, the reference to inclusion in or association with 'one or more' such grounds addresses the issue of bias or hatred motivated by multiple grounds.

Article 3

Instigation, aiding and abetting, and attempt

1. Each Member State shall take the measures necessary to ensure that instigating, aiding and abetting or attempting to commit an offence referred to in Article 2 is punishable.

¹⁷⁴ Art. 1(3) reads: 'For the purpose of paragraph 1, the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin'.

2. Each Member State shall take the measures necessary to ensure that aiding and abetting in the commission of the conduct referred to in Article 1 is punishable.

Comment: Art. 2 of the Framework Decision on racism and xenophobia, adapted to include all of the groups referred to in Article 19 TFEU, to criminalise attempts (in line with most EU criminal law measures (see for instance Art. 3 of the Directive on trafficking in persons), and to criminalise instigation of the conduct concerned in all cases, not just those listed in Art. 1(1)(c) and (d) of the Framework Decision (now Art. 2(1)(c) and (d) of this Directive).

Article 4

Criminal penalties

1. Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by a maximum penalty of at least between 1 and 3 years of imprisonment.

2. Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by a maximum penalty of at least 5 years of imprisonment where that offence:

(a) was committed against a victim who was particularly vulnerable, which, in the context of this Directive, shall include at least child victims, which, for the purposes of this Directive, means any person below 18 years of age;

(b) was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime;

(c) deliberately or by gross negligence endangered the life of the victim; or

(d) was committed by use of serious violence or has caused particularly serious harm to the victim.

3. Member States shall take the necessary measures to ensure that the fact that an offence referred to in Article 2 was committed by public officials in the performance of their duties, in particular acts committed by law enforcement officials, is regarded as an aggravating circumstance.

4. Member States shall take the necessary measures to ensure that an offence referred to in Article 3 is punishable by effective, proportionate and dissuasive penalties, which may entail surrender.

Comment: Art. 3 of the Framework Decision, adapted to take account of elements of Art. 4 of the Directive on trafficking in persons. The 'basic' liability for criminal acts remains at 1-3 years (as in Art. 3(1) of the Framework Decision), but the idea of aggravated penalties is introduced, at the level of a possible minimum sentence of five years (the Directive on trafficking in persons provides for ten years). Such aggravated penalties are commonly provided for in EU criminal law measures. The proposal retains the list of aggravated circumstances provided for in the Directive on trafficking in persons, which are broadly similar to those in other EU measures. The definition of 'child' is taken from Art. 2(6) of the Directive on trafficking in persons. The idea of unspecified extra penalties for action by public officials is also retained from the Directive on trafficking in persons, and is supplemented by a particular reference to law enforcement officials (adapted from the

Council of Europe recommendation referred to above). Finally, the liability for inchoate offences (Art. 4(4) of this proposal, Art. 3(2) of the Framework Decision) is amended to clarify that the penalties concerned must at least entail surrender pursuant to the Framework Decision establishing the European Arrest Warrant.

Article 5

Bias/Hate-related motivation

For offences other than those referred to in Articles 2 and 3, Member States shall take the necessary measures to ensure that motivation based on bias or hatred on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties.

Comment: Art. 4 of the Framework Decision, adapted to take account of the enlarged scope of this Directive.

Article 6

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person can be held liable for the conduct referred to in Articles 2 and 3, committed for its benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- (a) a power of representation of the legal person;
- (b) an authority to take decisions on behalf of the legal person; or
- (c) an authority to exercise control within the legal person.

2. Apart from the cases provided for in paragraph 1 of this Article, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 of this Article has made possible the commission of the conduct referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 of this Article shall not exclude criminal proceedings against natural persons who are perpetrators or accessories in the conduct referred to in Articles 2 and 3.

4. 'Legal person' means any entity having such status under the applicable national law, with the exception of States or other public bodies in the exercise of State authority and public international organisations.

Comment: Art. 5 of the Framework Decision. This provision is standard in EU criminal law measures (see, for instance, Art. 5 of the Directive on trafficking in persons), so there is no need to suggest an amendment to it.

Article 7

Penalties for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties, such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order.

2. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(2) is punishable by effective, proportionate and dissuasive penalties or measures.

Comment: Art. 6 of the Framework Decision. This provision is standard in EU criminal law measures (see, for instance, Art. 6 of the Directive on trafficking in persons), so there is no need to suggest an amendment to it.

Article 8

Constitutional rules and fundamental principles

1. This Directive shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, including freedom of expression and association, as enshrined in Article 6 of the Treaty on European Union and the EU Charter of Fundamental Rights.

2. This Directive shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

Comment: adapted from Art. 7 of the Framework Decision, with the addition of a reference to the EU Charter of Fundamental Rights.

Article 9

Initiation of investigation or prosecution

1. Each Member State shall take the necessary measures to ensure that investigations into or prosecution of the conduct referred to in Articles 2 and 3 shall not be dependent on a report or an accusation made by a victim of the conduct, and that criminal proceedings may continue even if the victim has withdrawn his or her statement.
2. Member States shall take the necessary measures to enable, where the nature of the act calls for it, the prosecution of an offence referred to in Articles 2 and 3 for a sufficient period of time after the victim has reached the age of majority.
3. Member States shall take the necessary measures to ensure that persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 2 and 3 are trained accordingly, and undertake effective, prompt and impartial investigations into alleged cases of crimes and other incidents within the scope of this Directive.
4. Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases are available to persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 2 and 3.
5. Member States should take appropriate measures to ensure that victims and witnesses of the offences referred to in Articles 2 and 3 are encouraged to report these crimes and incidents; for this purpose, Member States should take all necessary steps to ensure that law enforcement structures, including the judiciary, have the necessary knowledge and skills to identify such crimes and incidents.

Comment: paras 1-4 adapted from Art. 8 of the Framework Decision, with the addition of provisions taken from Art. 9 of the Directive on trafficking in persons (paras 2-4, and amendments to para. 1 to provide for proceedings to continue even if a victim has withdrawn his or her statement, and to delete the restriction on the first part of para. 1 in the Framework Decision).¹⁷⁵ Paragraph 5 is based on the Council of Europe recommendation referred to above; para 3 also takes account of this recommendation.

Article 10

Jurisdiction

1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the conduct referred to in Articles 2 and 3 where the conduct has been committed:
 - (a) in whole or in part within its territory; or
 - (b) by one of its nationals; or
 - (c) for the benefit of a legal person that has its head office in the territory of that Member State.

¹⁷⁵ This restriction provides that the obligation to prosecute in the absence of a complaint by a victim only applies 'at least in the most serious cases where the conduct has been committed in its territory'.

2. When establishing jurisdiction in accordance with paragraph 1(a), each Member State shall take the necessary measures to ensure that its jurisdiction extends to cases where the conduct is committed through an information system and:

(a) the offender commits the conduct when physically present in its territory, whether or not the conduct involves material hosted on an information system in its territory;

(b) the conduct involves material hosted on an information system in its territory, whether or not the offender commits the conduct when physically present in its territory.

3. A Member State shall inform the Commission where it decides to establish further jurisdiction over the offences referred to in Articles 2 and 3 committed outside its territory, inter alia, where:

(a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;

(b) the offender is an habitual resident in its territory.

4. For the prosecution of the offences referred to in Articles 2 and 3 committed outside the territory of the Member State concerned, each Member State shall, in those cases referred to in point (b) of paragraph 1, and may, in those cases referred to in paragraph 3, take the necessary measures to ensure that its jurisdiction is not subject to either of the following conditions:

(a) the acts are a criminal offence at the place where they were performed; or

(b) the prosecution can be initiated only following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed.

Comment: adapted from Art. 9 of the Framework Decision, with the addition of a usual clause referring to acts carried out for the benefit of a legal person (para. 1) and provisions taken from Art. 10(2) and (3) of the Directive on trafficking in persons (paras 3 and 4). The distinct rule in the Framework Decision which further defines territorial jurisdiction is retained (Art. 9(2) of the Framework Decision, Art. 10(2) of this proposal). The possibility for Member States to refuse to apply extraterritorial jurisdiction in cases involving their own nationals (Art. 9(3) of the Framework Decision) is dropped; this is consistent with the Directive on trafficking in persons and the other criminal law Directives agreed or proposed since the entry into force of the Treaty of Lisbon.

Article 11

Assistance and support for victims of bias/hate crimes

1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set out in [Framework Decision 2001/220/JHA] [Directive 2011/xx], and in this Directive.

2. Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3.

3. Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial.

4. Member States shall take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations.

5. The assistance and support measures referred to in paragraphs 1 and 2 shall be provided on a consensual and informed basis, and shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate.

6. The information referred to in paragraph 5 shall cover, where relevant, information on the possibility of granting international protection pursuant to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status or pursuant to other international instruments or other similar national rules.

7. Member States shall attend to victims with special needs, where those needs derive, in particular, from whether they are pregnant, their health, a disability, a mental or psychological disorder they have, or a serious form of psychological, physical or sexual violence they have suffered.

Comment: there is no provision on victim protection in the Framework Decision. This provision has been adapted from Art. 11 of the Directive on trafficking in persons, with the deletion of cross-references to Directive 2004/81, which comprises immigration rules which are specific to victims of trafficking. The 2001 Framework Decision referred to is the general Framework Decision on the status of crime victims; the possibility of its replacement by a Directive proposed in May 2011 (COM (2011) 276) is also addressed. This proposal is more specific than the provision on victim support in the 2011 proposal (Art. 7 of that proposal). It should be noted that the explanatory memorandum and the preamble to that proposal expressly mention the need for specific victim support for victims of bias/hate crimes.

Article 12

Protection of victims of bias/hate crimes in criminal investigation and proceedings

1. The protection measures referred to in this Article shall apply in addition to the rights set out in [Framework Decision 2001/220/JHA] [Directive 2011/xx].

2. Member States shall ensure that victims of bias/hate crimes have access without delay to legal counselling, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources.

3. Member States shall ensure that victims of bias/hate crimes receive appropriate protection on the basis of an individual risk assessment, inter alia, by having access to witness protection programmes or other similar measures, if appropriate and in accordance with the grounds defined by national law or procedures.

4. Without prejudice to the rights of the defence, and according to an individual assessment by the competent authorities of the personal circumstances of the victim, Member States shall ensure that victims of hate/bias crimes receive specific treatment aimed at preventing secondary victimisation by avoiding, as far as possible and in accordance with the grounds defined by national law as well as with rules of judicial discretion, practice or guidance, the following:

(a) unnecessary repetition of interviews during investigation, prosecution or trial;

(b) visual contact between victims and defendants including during the giving of evidence such as interviews and cross-examination, by appropriate means including the use of appropriate communication technologies;

(c) the giving of evidence in open court; and

(d) unnecessary questioning concerning the victim's private life.

Comment: there is no equivalent provision in the Framework Decision. This provision has been adapted from Art. 12 of the Directive on trafficking in persons. Paragraph 4 could be replaced by a cross-reference to Art. 21(3) of the proposed Directive on crime victims' rights – if that Directive is adopted as proposed by the Commission.

Article 13

Compensation to victims

Member States shall ensure that victims of bias/hate crimes have access to existing schemes of compensation to victims of violent crimes of intent.

Comment: there is no equivalent provision in the Framework Decision. This provision has been adapted from Art. 17 of the Directive on trafficking in persons.

Article 14

Prevention

1. Member States shall take appropriate measures, such as education and training, to discourage and reduce bias/hate crimes.

2. Member States shall take appropriate action, including through the Internet, such as information and awareness-raising campaigns, research and education programmes, where appropriate in cooperation with relevant civil

society organisations and other stakeholders, aimed at raising awareness and reducing the risk of people, especially children, becoming victims of bias/hate crimes.

3. Member States shall promote regular training for officials likely to come into contact with victims or potential victims of bias/hate crimes, including front-line police officers, aimed at enabling them to identify and deal with victims and potential victims of bias/hate crimes.

4. Member States shall promote changes in social and cultural patterns of behaviour with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of any of the groups of persons falling within the scope of this Directive or on stereotyped roles for members of those groups.

5. Member States shall ensure that culture, custom, religion, tradition or so-called 'honour' shall not be considered as justification for any acts of violence covered by the scope of this Directive.

6. Member States should raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising bias or hatred which could lead to the offences referred to in Articles 2 or 3.

7. Public officials and other State representatives should promote tolerance and respect for the human rights of the persons who could be subject to the offences referred to in Articles 2 and 3 whenever they engage in a dialogue with key representatives of the civil society, including media and sports organisations, political organisations and religious communities.

Comment: there is no equivalent provision in the Framework Decision. Paras 1-3 of this provision have been adapted from Art. 18 of the Directive on trafficking in persons, except for Article 18(4), which concerns the possible criminalisation of the use of victims' services. Paras 4 and 5 have been adapted from Art. 12(2) and (5) of the Council of Europe Convention on violence against women. Paras 6 and 7 have been adapted from the Council of Europe recommendation referred to above.

Article 15

Exchange of information

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 Directive.

2. Each Member State shall inform the General Secretariat of the Council and the Commission of its operational contact points or operational structure for the purposes of paragraph 1. The General Secretariat shall notify that information to the other Member States.

3. Where a Member State has information relating to the storage in its territory of material containing expressions of hatred within the scope of this Directive for the purposes of distribution or dissemination in another Member State it shall provide that information to the other Member State to enable the latter to initiate, in accordance with its law,

legal proceedings or proceedings for confiscation. For that purpose, the operational contact points referred to in paragraph 1 may be used.

Comment: this provision is based on Art. 15 of the proposal for a Framework Decision on racism and xenophobia. It concerns operational cooperation, as distinct from the more general collection of statistics and their analysis referred to in Arts. 16 and 17.

Article 16

Collection of statistics

1 For the purpose of the implementation of this Directive, Member States shall:

(a) collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of this Directive;

(b) support research in the field of all forms of violence covered by the scope of this Directive in order to study its root causes and effects, incidences and conviction rates, as well as the efficacy of measures taken to implement this Directive.

2 Member States shall conduct population-based surveys at regular intervals to assess the prevalence of and trends in all forms of violence covered by the scope of this Directive.

Comment: there is no equivalent provision in the Framework Decision. This provision has been adapted from Art. 11 of the Council of Europe Convention on violence against women.

Article 17

National rapporteurs or equivalent mechanisms

Member States shall take the necessary measures to establish national rapporteurs or equivalent mechanisms. The tasks of such mechanisms shall include the carrying out of assessments of trends in hate crimes, the measuring of results of actions against hate crimes, including the assessment and analysis of the statistics referred to in Article 16, in close cooperation with relevant civil society organisations active in this field, and reporting.

Comment: there is no equivalent provision in the Framework Decision. This provision has been adapted from Art. 19 of the Directive on trafficking in persons, as amended to take account of the specific provision on statistics.

Article 18

Coordination of the Union strategy against bias/hate crimes

In order to contribute to a coordinated and consolidated Union strategy against bias/hate crimes, Member States shall cooperate closely with the European Union's Fundamental Rights Agency, in accordance with the provisions of Regulation 168/2007. In particular, Member States shall transmit to the Agency the information referred to in Articles 16 and 17, on the basis of which the Agency shall contribute to reporting carried out by the Commission every two years on the progress made in the fight against hate crimes.

Comment: there is no equivalent provision in the Framework Decision. This provision has been adapted from Art. 20 of the Directive on trafficking in persons, with the intention of reinforcing the current role played by the EU's Fundamental Rights Agency, rather than (in the case of trafficking in persons) creating a new coordinator.

Article 19

Replacement of Framework Decision 2008/913/JHA

1. Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law is hereby replaced in relation to Member States participating in the adoption of this Directive, without prejudice to the obligations of the Member States relating to the time limit for transposition of the Framework Decision into national law.

In relation to Member States participating in the adoption of this Directive, references to the Framework Decision 2008/913/JHA shall be construed as references to this Directive.

2. By way of derogation from paragraph 1, by 28 November 2013, the Council shall:

(a) assess the extent to which Member States have complied with the provisions of Framework Decision 2008/913, on the basis of a report established using the information transmitted by Member States to the General Secretariat of the Council and to the Commission concerning the text of the provisions transposing into their national law the obligations imposed on them under that Framework Decision, and of a written report from the Commission.

(b) review the application of Framework Decision 2008/913. 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) of Framework Decision 2008/913. In addition, the Council may request Eurojust to submit a report, on whether differences between national legislations have resulted in any problems regarding judicial cooperation between the Member States in this area.

Comment: paragraph 1 is adapted from Art. 21 of the Directive on trafficking in persons, with the intention of ensuring that the Framework Decision continues to apply to any Member States which do not participate in the Directive. Paragraph 2 is adapted from Art. 10(2) and (3) of the Framework Decision, and aims to ensure that the review of that Framework Decision is still carried out despite the replacement of that measure by this Directive.

Article 20

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [xx date 2013].
2. Member States shall transmit to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Directive.
3. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Comment: adapted from Art. 22 of the Directive on trafficking in persons, which takes more account of the EU institutional system than Art. 10 of the Framework Decision.

Article 21

Reporting

The Commission shall, by [xx date 2015], submit a report to the European Parliament and the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

Comment: adapted from Art. 23 of the Directive on trafficking in persons, which takes more account of the EU institutional system than Art. 10 of the Framework Decision. However, the references to specific issues raised by the anti-trafficking Directive have been dropped.

Article 22

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Comment: adapted from Art. 13 of the Framework Decision.

Article 23

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Comment: adapted from Art. 25 of the Directive on trafficking in persons.

