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# The legal framework to combat antisemitism in the European Union

Including summary

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*European Commission*
*B-1049 Brussels*

EUROPEAN COMMISSION

# The legal framework to combat antisemitism in the European Union

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2024

Directorate-General for Justice and Consumers

2024

Detailed information on the 27 Member States was provided by the country experts in the non-discrimination field in the form of 'country briefs' based on a standardised questionnaire.
This report has been coordinated by Isabelle Chopin and Catharina Germaine from the Migration Policy Group, for the European network of legal experts in gender equality and non-discrimination.

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Luxembourg: Publications Office of the European Union, 2024.

ISBN 978-92-68-13785-7
doi: 10.2838/502307
Catalogue number DS-05-24-043-EN-C

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# Executive summary

The experience and perceptions of the Jewish community and wider European population, recorded antisemitic incidents, the increasing level of antisemitic content online and sociological research show the persisting presence of antisemitism in the European Union. A 2021 survey on the prevalence and intensity of anti-Jewish prejudices in 16 European countries found that on average, 20 % of the population in the countries under scrutiny can be regarded as (strongly or moderately) antisemitic, whereas the proportion of latent antisemites was 14 %, with six countries where the aggregate proportion of strongly, moderately and latently antisemitic people was above 50 %.[1] Research has also shown[2] – and it has also been reported from a number of Member States in the context of the current report – that the consecutive crises of the Covid-19 pandemic and the Russian aggression on Ukraine have intensified antisemitic sentiments across Europe.[3] The cut-off date of the research on which the report is based was 7 July 2023, therefore, the study does not reflect the unprecedented spike in antisemitism and antisemitic incidents in Europe and across the world following the horrific terrorist attacks by Hamas on Israeli civilians on 7 October 2023. Thus, the impact of the attacks and their aftermath could not be taken into account in this study.

With a view to combating racial and/or religious hatred, including antisemitism, the European Union has not only adopted policies and commitments, but it has also put in place numerous legal instruments that can be used to counter different forms of antisemitism, including but not limited to the Framework Decision on combating certain forms of expressions of racism and xenophobia,[4] the Racial Equality Directive,[5] the Employment Equality Directive,[6] and the Victims' Rights Directive.[7] The importance of effectively applying this legislation to fight antisemitism is emphasised in the EU Strategy on combating antisemitism and fostering Jewish life (2021-2030),[8] in which the European Union pledged to 'step up action to actively prevent and combat' the phenomenon in all its forms.

This thematic report provides a comparative overview of how these legal instruments have been complied with in the 27 EU Member States, and aims to establish how and to what extent the legal framework and its practical application in the different Member States provide protection against antisemitism in three main areas: (i) non-discrimination; (i) hate crimes; and (iii) hate speech. It identifies gaps in the existing legal protections and/or their enforcement across the EU Member States and makes recommendations on mechanisms for the provision of effective protection against acts motivated by antisemitism.

1 Kovács, A. and Fischer, Gy. (2021) Antisemitic Prejudices in Europe: Survey in 16 European countries, Ipsos SA and Inspira Ltd, Budapest, p. 59, available at: https://archive.jpr.org.uk/object-2408.

2 See for instance: European Commission, Directorate-General for Justice and Consumers, Comerford, M., Gerster, L. (2021), *The rise of antisemitism online during the pandemic: a study of French and German content*, Publications Office of the European Union.

3 For an overview, see: Reuters (2023), How the surge in antisemitism is affecting countries around the world, available at: https://www.reuters.com/world/how-surge-antisemitism-is-affecting-countries-around-world-2023-10-31/.

4 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

5 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive).

6 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive).

7 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Victims' Rights Directive).

8 European Commission (2021), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030), COM(2021) 615 final.

## The area of antisemitic discrimination

In spite of the undeniable prevalence of antisemitism and the existence of a legal framework that could be used to effectively counter it, jurisprudence in the area of antisemitic discrimination is scarce due to a number of reasons, including the reluctance of victims to report instances of antisemitic acts, the failure of authorities to adequately recognise the hate/discriminatory motive, and their reluctance to investigate and sanction such cases, or the absence of the tools and methods that are necessary to do so effectively.

The degree of scarcity of relevant jurisprudence differs in the three areas: with regard to the principle of non-discrimination there seem to be very few cases (and the number of successful ones, where the complaint is upheld is even smaller), whereas with respect to hate crimes and hate speech, it has been reported that while the issues of underreporting and underqualification (i.e. qualifying a criminal offence without recognising and looking into its bias motive) are undoubtedly traceable, there are still some cases that are recorded, prosecuted and for which convictions are handed down.

The reasons for this difference are manifold, as reflected in the Fundamental Rights Agency's 2018 survey on perceptions of antisemitism,[9] which concluded that although the vast majority of the Jewish respondents are aware of anti-discrimination legislation as well as of organisations that can offer support in cases of discrimination, a large majority of those who said that they had experienced antisemitic violations in the period preceding the survey did not report the most serious incident to any authority or organisation (77 %, 79 % and 49 % in the case of antisemitic discrimination, harassment and hate crimes respectively).[10] The proportions of the decisions not to report differ significantly between those who survived hate crimes on the one hand (49 %) and the victims of discrimination and harassment on the other (77 % and 79 %), which is most probably due to the outstanding severity of hate-motivated physical attacks, but there is also a great degree of divergence in the reasons for non-reporting. Distrust in the authorities (or more generally, the legal framework's ability to address such problems) is present in all three cases ('nothing would change as a result' was given as a reason by 52 %, 48 % and 64 % of the respondents regarding discrimination, harassment and hate crimes respectively, and lack of trust was mentioned expressly by 25 % of hate crimes victims).[11] However, there was one specific response that was prevalent regarding instances of discrimination but was not mentioned in relation to the other two types of antisemitic behaviour: 33 % of those victims of discrimination who chose not to report it said that they had no proof of discrimination.[12] This reason was not typically mentioned regarding hate crimes and harassment.

In part, that is related to the very nature of discrimination in general, i.e. the informational/evidentiary asymmetry that is characteristic of many discrimination cases where the (alleged) discriminator is in possession of important evidence (e.g. the documentation of all the applicants for a particular job) or has power over persons who could provide such evidence (e.g. when co-workers could testify against the employer in a discrimination lawsuit filed by an employee). However, a specificity of antisemitic discrimination lies in the 'latency pressure' surrounding antisemitism, i.e. the fact that despite the prevalence of antisemitism, antisemitic prejudices are among the views whose open acceptance in European societies is an open violation of the mainstream consensus.[13] As a result, persons who treat others unfavourably for being Jewish are likely to be more cautious and less revealing of the motivations of their actions than those who commit discrimination against other groups of society, in respect of whom such social consensus is weaker.

9 European Union Agency for Fundamental Rights (FRA) (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, available at: https://fra.europa.eu/sites/default/files/fra_uploadsfra-2018-experiences-and-perceptions-of-antisemitism-survey_en.pdf.

10 FRA (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, pp. 12, 13 and 55.

11 FRA (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, pp. 12, 13 and 55.

12 FRA (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, p. 59.

13 Kovács, A. and Fischer, Gy. (2021), *Antisemitic Prejudices in Europe*, Ipsos SA and Inspira Ltd, Budapest, p. 14.

This particular situation has a number of consequences with respect to the practical implementation of legal norms aimed at combating antisemitism. One such consequence is that penal norms intended to provide protection against discriminatory behaviours (including those instances of discrimination that are based on the victim's being Jewish) appear to be even more heavily underutilised than civil or administrative law norms having the same purpose (although in close to half of the Member States, discrimination is penalised in one form or another). The specific features of criminal law that contribute to this phenomenon include: (i) the lack of the shifted burden of proof (and thus the difficulty of offsetting the evidentiary asymmetry that characterises discrimination cases); (ii) the requirement of proving intent for criminal liability to be established (which makes it impossible, or at least very difficult to address through penal law certain scenarios, such as instances of indirect discrimination, where a particularly important aspect of the effects-based concept of indirect discrimination lies in the fact that intention on the side of the discriminator is not part of the definition);[14] (iii) the very high standard of proof set by the *in dubio pro reo* principle of the criminal procedure;[15] and (iv) those institutional disincentives that criminal justice authorities (whose performance is often measured in statistical terms of success rates) may have against pursuing cases of penalised discrimination. These indispensable features of criminal law stemming from the fundamental requirements of a fair criminal procedure put penal responses to discrimination at an inevitable disadvantage to responses provided by non-criminal branches of law. At the same time, in some jurisdictions, there are financial or other barriers (e.g. the 'loser pays' principle or the lack of adequate legal assistance) to persons seeking non-criminal remedies against antisemitic discrimination that they do not have to face in criminal procedures.[16]

The extensive underreporting of instances of antisemitic discrimination also has a problematic impact on the attention that equality bodies give to the issue. Despite the prevalence of antisemitism, it has been reported from over two thirds of the Member States that their respective equality bodies place no specific emphasis (in terms of research, campaigns, or other activities) on antisemitism. In the case of equality bodies with quasi-judicial functions, this stems from the fact that their 'portfolio' is to a large degree determined by the complaints that they receive, especially because in such bodies, the decision-making function often takes up time and human resources to the detriment of the other functions, such as awareness raising, cooperation, participation in policy making, and research.[17] Furthermore, unless there is conscious strategic planning within a multi-ground equality body, the distribution of incoming complaints can easily misinform (about the prevalence of a certain type of discrimination) internal decision making regarding other functions of promotion and prevention, support and litigation. This is true even for those equality bodies that do not perform quasi-judicial activities. The research undertaken for this thematic report seems to suggest that in general, of those equality bodies that focus on antisemitism despite the scarcity of reporting and complaints, most apply a more strategic approach to their work, suggesting a certain degree of correlation between this type of more conscious approach and the recognition of the problem of antisemitism.[18]

Furthermore, while no definitive conclusions can be drawn in this regard from the present research, the available information seems to suggest that – most probably not independently from the lack of focus on antisemitism by many equality bodies described above – the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism is applied much more frequently in criminal law than in (non-criminal) non-discrimination law, and equality bodies rarely rely on the definition in their work.

The research has found that in a number of countries where there is a gap due to the equality bodies' lack of focus on antisemitism, either Government-created structures or civil society actors have taken

14 Tobler, C. (2022), *Indirect discrimination under Directives 2000/43 and 2000/78*, European network of legal experts in gender equality and non-discrimination, p. 64.
15 *In dubio pro reo* – when in doubt, favour the accused.
16 This was reported as an example from Sweden.
17 C.f. Crowley, N. (2018), *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination, p. 72.
18 C.f. Crowley, N. (2018), *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination, p. 108.

over some of the tasks that equality bodies could be performing with regard to antisemitism, such as coordination, data collection, research or the formulation of policy measures. An example of the former is the **Netherlands**, where in response to a request made by two members of Parliament, who pointed at the high numbers of reported incidents of discrimination and violence against Jewish persons, the role of a 'National Coordinator for Combating Antisemitism' was created to advise the Minister of Justice and Security on the handling of antisemitism cases in the entire enforcement chain.[19] In other countries, such as **Bulgaria**, **Hungary** and **Italy**,[20] non-governmental organisations have undertaken certain relevant functions, primarily those of monitoring and reporting on antisemitic incidents, but also research, educational and communication tasks.

Finally, although in the absence of relevant case law it is difficult to assess its importance, one potential gap in the system of protection against antisemitic discrimination has been identified in the research: how being Jewish is categorised. Whether being Jewish falls under the category of 'religion or belief' or 'racial or ethnic origin' may be relevant to the depth of the protection in jurisdictions (i) where there is a difference regarding the material scope of protection depending on the ground of discrimination (e.g. in countries, such as **Estonia**, which have implemented the directives narrowly, and provide protection against discrimination based on religion or belief only in employment, but not in the other fields – education, healthcare, housing and access to goods and services – covered by the Racial Equality Directive); (ii) where the remedial forums to which victims of discrimination can turn have limitations of jurisdiction regarding certain grounds of discrimination (e.g. in **Denmark**, where outside the field of employment, the equality body can only deal with discrimination complaints based on race, ethnic origin, gender and disability, but not religion or belief); or (iii) where there are some other differences in the efficiency of the protection system against discrimination depending on the ground on which it is based (e.g. whether the burden of proof is shifted or not, which is the case in **Czechia**).

On the basis of the above, the report makes the following recommendations. It could be beneficial for Member States:

- to consider the introduction of non-criminal measures to address all instances of (antisemitic) discrimination that fall under the two directives, regarding which at the moment only criminal sanctions are available, and to review and remove financial and other barriers preventing or potentially discouraging victims of discrimination from seeking non-criminal remedies against discrimination;
- to facilitate a more proactive approach by their equality bodies in relation to antisemitism (e.g. by providing the necessary resources for stepping up their strategic planning activities and devising more effective reporting tools to address the issue of underreporting), and to encourage these bodies to rely on the IHRA definition of antisemitism in the course of this work;
- to find solutions that guarantee that victims of antisemitic discrimination are adequately protected in – at least – all the areas covered by the Racial Equality Directive and the Employment Equality Directive, irrespective of whether being Jewish is perceived to fall under 'religion' or 'racial or ethnic origin'.

## Antisemitic hate crimes

The study (in which antisemitic hate crime is understood as any criminal offence that is neither hate speech, nor criminalised discrimination, which is committed with an antisemitic bias motive and which may comprise any form of ordinary offence, such as violent attacks on persons as well as damage to property or other acts that are criminalised) has confirmed the conclusions of previous research regarding

19 Netherlands country brief.
20 Shalom, the Organisation of Jews in Bulgaria, the Action and Protection Foundation in Hungary, and in Italy, the Observatory on Antisemitism of the CDEC Foundation (Contemporary Jewish Documentation Centre).

the main systemic problems in the investigation, prosecution and adjudication of hate crimes,[21] including underreporting of such offences (see above) that predominantly stems from distrust in the authorities.

The study identifies two factors that have an important role in this lack of trust: the underqualification of hate crimes (i.e. when a hate crime is investigated, prosecuted and adjudicated in a way that the bias motive is not taken into account in the procedure) and the lack of an enabling environment that would encourage the victims to report such offences.

The prevalence of underqualification has been reported in several Member States. There are several reasons for underqualification, including law enforcement's biases regarding minority groups, or – the related phenomenon of – victim devaluation (where the allocation of efforts and resources by the law enforcement authorities varies according to the status of the parties in individual cases).[22]

However, other, more readily addressable factors also play an important role in underqualification, such as the institutional pressures and problematic measurement indicators that (paired with the issues of evidentiary difficulties) can push law enforcement, prosecutors and the courts in the direction of setting aside the bias motive and focusing only on the base criminal offence,[23] as this approach guarantees a less complex procedure and offers 'easier success'.[24] Underqualification is problematic not only because it creates distrust in the victims of hate crimes and distorts data collection efforts aimed at realistically assessing the prevalence of the phenomenon, but also because it negatively impacts additional factors that contribute to the underreporting of hate crimes: for instance, it may contribute to a low level of awareness among (potential) victims and the general public.

One way in which some Member States[25] have chosen to address this problem is through the creation of specialised units dealing with bias-motivated offences, or designating hate crime focal points within the law enforcement and prosecutorial organisations, in order to create an institutional-organisational focus with the potential to offset the tendency to avoid the evidentiary difficulties often leading to underqualification. If an organisational unit's expressly assigned task is to investigate or prosecute hate crimes, the fundamental perspective for the evaluation of its work will not be the number of cases closed in general, but the number of hate crimes investigated (or prosecuted). This shift, if the importance of the function is properly internalised, will necessarily lead to an improvement in the handling of cases where a bias motivation exists.

The setting up of specialist units is also conducive to the willingness of law enforcement authorities to cooperate with third-party actors, such as civil society organisations with a mandate of combating (antisemitic) hate crime. Whereas in general, external 'interference' with their work is often seen as unwelcome by criminal justice authorities, the specific task of specialised units has the potential to make personnel much more receptive to inputs from 'outside' actors with a mandate and expertise in working for the same purpose, i.e. the more effective countering of bias-motivated criminal offences. This creates a gateway for these civilian actors that would otherwise be absent. However, the experts from a number of Member States[26] caution that CSOs need resources to be able to perform the monitoring and signposting functions that enable them to usefully augment the activities of specialised law enforcement units in this area.

21 See for example: European Union Agency for Fundamental Rights (2021), *Encouraging Hate Crime Reporting - The Role of Law Enforcement and Other Authorities*; and European Union Agency for Fundamental Rights (2022), *Antisemitism - Overview of Antisemitic Incidents Recorded in the European Union 2011–2021*.

22 See: Uszkiewicz, E (2020) 'Anomalies in the application of law related to hate crimes', Hungarian Journal of Legal Studies 61 (2020) 3, p. 329.

23 I.e. the underlying offence for which the perpetrator is punishable even if the hate motive is not taken into account (e.g. simple vandalism when a Jewish cemetery is vandalised, or bodily harm, when the reason for the attack is the victim's Jewish descent).

24 See: Bárd, P. (2020) 'Prerequisites for the effective fight against hate crimes', Hungarian Journal of Legal Studies 61 (2020) 3, pp. 264-265.

25 Examples include France, Hungary, Sweden, Slovakia, and the Netherlands.

26 E.g. Hungary, Sweden, Poland, Lithuania

Similarly, the positive impacts of more specificity have been reported from a number of Member States in relation to the adoption of guidelines and protocols regarding hate crimes in order to provide bias indicators that police officers can use to classify the reported offence and start the process of gathering evidence, which can be even more effective if the recording of the potential motive is prescribed as part of the protocol for each reported offence.

While no direct correlation can be demonstrated between the existence of guidelines and/or specialised hate crime units or experts within the law enforcement and prosecutorial bodies on the one hand and improved reporting on the other, it seems that in those countries where this kind of guidance and/or specialisation exists, problems of underreporting and underqualification are less prevalent. Examples of this include **Denmark**, **Finland**, **France** and **Germany**.

Hate-crime focused specification has been identified as a good practice in other contexts as well. One example is the specific codification of the hate or bias motive as an aggravating factor in the criminal code (instead of assessing it under the general heading of a 'reprehensible motive'), which, in addition to the symbolic function of the use of such a specific reference can have positive impacts on reporting and data collection. This approach can also better orient the work of the criminal justice authorities, which inevitably organise their operations and decision making around the constitutive elements of the criminal offences that they are mandated to deal with.

The treatment of victims by law enforcement authorities (including instances of secondary victimisation) is one of the other well-known and widely researched factors that can have a detrimental impact on the victims' trust and thus their willingness to report the hate crime suffered.[27] The Victims' Rights Directive addresses this issue by requiring Member States to ensure that victims receive a timely and individual assessment of their needs to determine whether and to what extent they would benefit from special protection measures in the course of criminal proceedings due to their particular vulnerability to – among other things – secondary and repeat victimisation. In the context of the individual assessment, particular attention must be paid to victims who have suffered a crime committed with a bias or discriminatory motive, which could, in particular, be related to their personal characteristics.

The Commission has found that the Victims' Rights Directive has brought about significant improvements in the Member States, and therefore, almost all the infringement proceedings for incomplete transposition of the Directive have been closed.[28] However, in the current study, some country experts have reported that the transposition of the Directive into domestic legislation has to be further improved so that it is correctly applied.[29] In some Member States, the rights of 'particularly vulnerable' victims are regulated in a general manner without specifically prescribing the obligation to take into account the bias motive of the offence,[30] whereas some jurisdictions[31] expressly stipulate the obligation to pay particular attention to victims of hate crimes among the provisions pertaining to particularly vulnerable crime victims. This has been identified as a practice with the potential of contributing to more effective protection of victims of hate crimes.

Resistance to change is a well-known phenomenon in the sociology of organisations. The introduction of individual assessment of victims to identify their specific protection needs has been a significant change

27 See for instance: Union Agency for Fundamental Rights (2021), Encouraging Hate Crime Reporting - The Role of Law Enforcement and Other Authorities, p. 36; OSCE (2021), Model Guidance on Sensitive and Respectful Treatment of Hate Crime Victims in the Criminal Justice System, p. 12.; and Uszkiewicz, E (2020), Anomalies in the application of law related to hate crimes, In: Hungarian Journal of Legal Studies 61 (2020) 3, p. 328.

28 European Commission (2023), Impact Assessment Report accompanying the document Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, p. 3, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023SC0246.

29 Examples include Belgium and Romania.

30 Examples include Hungary and Portugal.

31 Examples include Croatia and the Netherlands.

for many law enforcement bodies, not only requiring the allocation of substantial resources in terms of time and human capacity (to be spent on the development of protocols, training and the actual exercise of assessing the needs of victims), but also bringing into the focus of their activities the enhanced protection of members of minority groups that are often the subject of biases in both the wider society and the law enforcement authorities themselves, the personnel of which inevitably share the prejudices of the general public.

Under such circumstances, there is a risk that if the conditions for qualifying victims as particularly vulnerable are formulated in general terms, allowing the criminal justice actors a relatively wide margin of discretion as to who is to be regarded as falling into this category, the special needs of those persons with regard to whom prejudices are strong in a given society will be disregarded. Drawing on the conclusions of the evaluation of the Victims' Rights Directive, in July 2023, the Commission adopted a proposal for the revision of the Directive.[32] The proposal aims to further strengthen the rights of victims in the EU, including the rights of the most vulnerable victims, such as victims of hate crime. Particularly relevant for this group of victims is the proposal to improve the individual assessment of victims' needs and to strengthen support for the most vulnerable victims by adding physical protection measures. Other amendments that are highly relevant for victims of hate crime include the facilitation of crime reporting, the strengthening of the right to support (including psychological support), and the improvement of victims' participation in criminal proceedings (including the right to be assisted at the court and the right to a review of decisions taken during court proceedings).

The experts from a number of Member States have also reported that, especially in the face of the reluctance by law enforcement and prosecutorial authorities to investigate (the bias motive of) hate crimes (whether because they give in to organisational pressures or out of prejudice), legal assistance provided to the victim can be even more important than in 'ordinary' criminal proceedings. Accordingly, initiatives providing hate crime victims with professional procedural assistance has been identified as a good practice. For instance, in **Austria**, victims of bias-motivated crimes have recently been vested with the right to state-funded psychosocial and legal assistance throughout the criminal procedure.

On the basis of the above, the report makes the following recommendations. It could be beneficial for Member States:

- to explicitly regulate the hate and/or bias motive as an aggravating factor in their respective criminal justice systems;
- to set up – if they do not exist yet – specialised units within the law enforcement and prosecutorial authorities to deal with bias-motivated criminal offences;
- to create formal platforms of cooperation between law enforcement and prosecutorial authorities and CSOs active in combating antisemitism. Funds for supporting CSOs performing such tasks should be secured at both the domestic and the EU level;
- to provide police officers with detailed guidance regarding bias indicators and a monitoring definition of hate crime;
- to expressly codify bias and hate motives of criminal offences as qualifying crime victims as being particularly vulnerable;
- to support the adoption of the Commission proposal for a revision of the Victims' Rights Directive with a view to improving the situation of all victims of crime, including the most vulnerable victims in the EU.

32 European Commission (2023), Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; COM(2023) 424 final.

## Antisemitic hate speech

Public incitement 'to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin' is rendered punishable under Article 1 of the Framework Decision. The Framework Decision also requires Member States to penalise the public condoning, gross trivialisation or denial of (i) war crimes, genocides, crimes against humanity as regulated in Statute of the International Criminal Court, and also of (ii) war crimes, crimes against peace and crimes against humanity committed by persons acting in the interests of the European Axis countries during the Second World War, provided, in both cases, that such conduct is carried out against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin 'in a manner likely to incite to violence or hatred'.

An overview of recent legislative changes and debates in the Member States highlights that one recurring issue in relation to hate speech is the degree of generality or detail with which behaviours amounting to a criminal offence must be defined so that on the one hand, the clarity and foreseeability required by criminal law be respected, but on the other, that no dangerous instances of hate speech fall through the gaps of the legislative framework.

One area where the multiplicity of approaches to this issue is highlighted acutely is that of the public display of antisemitic symbols, including Nazi memorabilia. In some Member States,[33] there is very specific legislation concerning such symbols, while at the other end of the scale, there are countries[34] that render the use of Nazi symbols and insignia punishable under the general anti-hate speech legislation, but do not specifically ban their public use or display. A review of case law suggests that sometimes the more general approach can be equally (or even more) conducive to efficient countering of antisemitism, and in any case, it seems justified to conclude that if a legislature decides to outlaw the public use and dissemination of antisemitic symbols (which can have an advantage for a number of reasons, including the symbolic message conveyed through the use of criminal law), a certain degree of flexibility needs to be retained so that the relevant criminal provisions remain effectively applicable and capable of fulfilling their intended role in countering antisemitism.

This thematic report shows that the systemic problems related to hate speech in the different Member States present a rather diverse picture. In some countries,[35] the ineffective legal framework results in a very low number of prosecuted cases of hate speech (in some of these, amendments are being debated at the moment), in others,[36] the text of the law would allow effective implementation, but reluctance by the prosecution and/or judicial interpretations prevent the adequate application of the relevant legislation. In some Member States, problems of practice have been overcome through specialisation and the training of prosecutors,[37] whereas in others[38] the legislature had to amend the legal framework due to the persistently restrictive judicial interpretation of the existing laws that removed their potential to be effectively applicable against hate speech.

One way in which actors without such authorisations (concerned individuals, but primarily CSOs with a mandate to combat antisemitism or hate speech in general) have reacted to the failure to prosecute hate speech in some of the countries where there are notable discrepancies between the numbers of hate speech reports, indictments and convictions, has been the use of alternative procedures in non-criminal legal procedures, with a view to securing the sanctioning of instances of hate speech. Civil lawsuits into the violation of the dignity of a Jewish person or the Jewish community are possible in several Member

33 For instance, in Austria.
34 Examples include Belgium, Cyprus, Czechia, Finland, the Netherlands and Portugal.
35 For instance, in Estonia and Ireland.
36 This has been reported, for example, in Cyprus.
37 For instance, in Slovenia.
38 For instance, in Hungary.

States, and recent ECtHR jurisprudence in the *Behar and Gutman* v *Bulgaria*[39] case suggests that under certain conditions, the signatories of the European Convention on Human Rights must provide members of certain social groups with the possibility of seeking non-criminal remedies for the violation of their dignity caused by virulently negative public statements concerning the community that they are affiliated with.

Another alternative route for sanctioning hate speech when either the authorities are reluctant to prosecute such instances with the full weight of the law or the violation does not or may not reach the level of criminality (e.g. because certain constitutive elements of the criminal offence are not in place or their existence is doubtful) is offered by anti-discrimination law in several jurisdictions, especially through the use of the concept of harassment.[40] The application of the concept of harassment falling under the scope of – administrative or civil – non-discrimination law has several advantages compared to the criminal law response. Due to the specific formulation of harassment, no proof of intent is needed: it is sufficient if the impugned speech has – independently of the intent of the perpetrator – the effect of creating a hostile or humiliating environment.

The use of such alternatives can have a number of further advantages: (i) the complainant is in charge of the procedure – initiating, continuing or dropping it is not subject to prosecutorial discretion; (ii) when time is an important factor (for example, there is a will to have a certain inciting statement removed from a website), an interim injunctive measure by a civil court can be a quicker solution than waiting for an indictment to be made and a criminal judgment handed down (this has been reported for instance in the **Netherlands**, where a civil claim made the removal of hateful posts and a ban from reposting them possible); (iii) sometimes specialised bodies may be willing to apply harsher measures (e.g. higher fines) than criminal courts (this has been reported in **France**, where the Regulatory Authority for Audiovisual and Digital Communication (ARCOM) tends to impose much higher fines than judicial bodies).

It has been reported that in many Member States, the anonymity of the internet poses a serious problem in relation to online hate speech. Furthermore, such anonymity is paired with the internet's capacity to convey hateful, inciting messages to a potentially very large audience in a very short time, making online hate speech particularly harmful. In spite of these specificities, there are very few jurisdictions where the online perpetration of hate speech triggers any specific penal regulation.[41] In most countries,[42] the criminal provisions treat offline and online hate speech identically, and in only a few countries is there a possibility for the court, when assessing the severity of the offence, to take into account the online nature of the perpetration and thus the potential reach of the inciting content, as an aggravating factor.[43]

Another recurring trend that stands out from the country briefs provided by the experts is the small number of criminal cases that are initiated compared to the immense amount of online hate speech. According to the reports, in addition to the difficulties of identifying the perpetrators, the approach of criminal justice authorities also contributes to the situation. The reluctance to investigate and prosecute online instances of hate speech may stem from prejudices and/or the lack of sufficient knowledge of the legitimate limitations of the freedom of expression and the ECtHR's relevant jurisprudence in this regard. However, as in the case of other problems related to the practice of criminal justice authorities, institutional pressures and incentives related to effectiveness (in terms of both results and resources) also play a part in the problem. All these factors seem to be an argument for creating special units within the criminal justice authorities on the basis of the hate element of such 'communications crimes' (or at least in a way that also takes that element into consideration when the organisational infrastructure is determined).

39 European Court of Human Rights, Behar and Gutman v Bulgaria, Application no. 29335/13, Judgment of 16/02/2021.
40 Examples include Hungary and Romania, but cases have been reported in Italy and Finland as well.
41 Examples include Bulgaria, Denmark and Portugal.
42 Examples include Belgium, Croatia, Cyprus, Finland, France, Greece, Latvia, Luxembourg, Malta and Slovenia.
43 Jurisprudence to that effect has been reported in the Netherlands.

It has also been highlighted that due to the scale of the problem, law enforcement bodies cannot be expected to effectively combat the phenomenon without the assistance of service providers. This led the European Commission in May 2016 to agreeing the 'Code of conduct on countering illegal hate speech online'[44] (Code of Conduct) with a number of IT companies. The Code of Conduct was adopted on the basis of the acknowledgement that even a robust system of enforcement of criminal law sanctions against the perpetrators of hate speech 'must be complemented with actions geared at ensuring that illegal hate speech online is expeditiously acted upon by online intermediaries and social media platforms, upon receipt of a valid notification, in an appropriate time-frame.'

At the same time, while it is unquestionable that notice-and-takedown procedures for internet service providers and social media platforms are extremely important mechanisms for combating online hate speech, they have been criticised for being 'ad hoc in nature, and for placing the primary responsibility to identify hateful content on users rather than on the companies themselves'.[45]

In light of the limited capacities (and often reluctance) of criminal justice actors to monitor and react to all instances of online hate speech, as well as the service providers' reliance on notifications, reporting plays a crucial role in combating the phenomenon. However, there are several factors working against reporting, including the abundance of online hate speech (which may suggest to the individuals that there is no point in reporting it, because the result will be minimal compared to the scale of the problem) and the feeling that this is a state task and individuals should bear no responsibility in fighting the phenomenon.[46] Therefore, the conscious and concerted efforts of civil society to monitor and report online hate speech is crucial in the efficiency of the system. Such initiatives have been reported in several Member States, including **Malta**, **Poland**, **Slovakia** and **Sweden**. However, this work is also highly dependent not only on the existence of accessible, quick and easy-to-use reporting platforms but also on adequate resources.

On the basis of the above, the report makes the following recommendations. It could be beneficial for Member States:

- to carry out (where there is a notable discrepancy between the number of hate speech reports, indictments and convictions), a review of the practice with a view to establishing whether amendments to the legal framework are necessary, or whether specialised training for criminal justice professionals may improve the efficiency of the prosecution of hate speech;
- to consider ways in which the specificities of online hate speech can be taken into account when criminal sanctions are imposed for such offences (e.g. through designating online perpetration as a potential aggravating factor in the criminal legal framework);
- to set up specialised units to investigate and prosecute online hate speech;
- to create a legal framework enabling CSOs and other bodies with a mandate to combat hate crime to apply non-discrimination law or other remedial routes to instances of incitement in situations where the application of such alternative routes have comparative advantages because of the authorities' reluctance to prosecute hate speech or other reasons;
- to create formal platforms of cooperation between law enforcement and prosecutorial authorities and CSOs active in combating antisemitism in order to facilitate the reporting and effective prosecution of online hate speech. Funds for supporting CSOs performing such tasks should be secured at both the domestic and the EU level.

44 See: European Commission, EU Code of conduct on countering illegal hate speech online, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

45 Irish Human Rights and Equality Commission (2019), Ireland and the Convention on the Elimination of Racial Discrimination, p. 48, https://www.ihrec.ie/app/uploads/2022/08/IHREC_CERD_UN_Submission_Oct_19.pdf. quoted by the Irish country brief.

46 See: Siapera, E., Moreo, E., and Zhou, J. (2018), *Hate Track: Tracking and Monitoring Racist Speech Online*, Dublin, Dublin City University.

# 1 Introduction

The European Union's Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030)[1] (the EU Antisemitism Strategy) emphasises that the Union 'stands unequivocally against all forms of hatred and discrimination on any ground' and that 'antisemitism is incompatible with Europe's core values' of respect for human dignity, freedom, equality, and respect for human rights, including the rights of persons belonging to minorities. It 'represents a threat [...] to an open and diverse society, to democracy and the European way of life', and hence 'the European Union is determined to put an end to it.'[2] In accordance with this solemn pledge, the EU has not only adopted policies and commitments aimed at combating antisemitism, but put in place numerous legal instruments prescribing the sanctioning of different forms of antisemitism.

This thematic report provides a comparative overview of how the 27 EU Member States have complied with these legal instruments, and assesses the states' national legal norms introduced to combat antisemitism.[3] The report aims to establish how and to what extent the legal framework in the different Member States and its practical application provide protection against antisemitism in three main areas: (i) non-discrimination; (i) hate crimes; and (iii) hate speech. Furthermore, it considers the implementation of the EU Victims' Rights Directive[4] in the context of the protection of victims of antisemitism, as well as the impact that the EU Antisemitism Strategy and the national strategies or action plans on combating antisemitism based on the Antisemitism Strategy might have on the development of the national legal frameworks.

The thematic report identifies gaps in the existing legal protections across the EU Member States and makes recommendations on mechanisms for the provision of effective protection against acts motivated by antisemitism.

Due to the limitations of time, length and the scope of activity of the European network of legal experts in gender equality and non-discrimination (on the research and country briefs on which the report relies), in certain areas, the report cannot reach definitive conclusions, but must limit itself to pointing out discrepancies and problems regarding which further research is needed.

The cut-off date for the report was 7 July 2023, therefore, it does not reflect the evolving trends in European antisemitism after the terror attack on Israel on 7 October 2023 and Israel's subsequent military operations targeting Gaza. For the same reason, the report does not contain an assessment of the implications of the coming into force of the Digital Services Act[5] on combating online antisemitic content.

## 1.1 Outline of the EU's legal toolbox to counter antisemitism

There are two directives at the centre of the EU system of countering antisemitic discrimination, which provide the basic framework of protection with which Member States must comply. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive) prohibits discrimination based on racial or ethnic origin in employment (interpreted widely), as well as in social protection, including social security and

1 European Commission (2021), EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030).
2 European Commission (2021), EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030), p. 1.
3 Detailed information on the respective jurisdictions was provided by the country experts in the non-discrimination field, whom the author wants to thank for their work, insights and ideas. The information provided by the experts on the basis of a standardised questionnaire will be referred to in the report as 'country briefs'.
4 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Victims' Rights Directive), Article 22.
5 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act).

healthcare, social advantages, education, and access to and supply of goods and services which are available to the public, including housing. Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive) contains the ban on discrimination based on, among other things, religion or belief in employment taken in the wide sense. Antisemitic discrimination (including harassment) committed in these areas may fall under one or the other depending on whether being (or being assumed to be) Jewish in the context of the given case is regarded as racial or ethnic origin, or religion.

In the area of criminal law, Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (the Framework Decision) 'defines a common criminal law approach to racist and xenophobic hate speech and hate crimes, which are among the most severe manifestations of racism and xenophobia',[6] in order to ensure that such behaviours would constitute an offence in all Member States under similar terms, and that 'effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences'.[7] The Framework Decision stipulates the obligation (i) to criminalise public incitement to 'violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin'[8] as well as the hate-motivated public condoning, gross trivialisation or denial of certain instances of war crimes, genocides, crimes against humanity and crimes against peace, including Holocaust denial, trivialisation and distortion (hate speech); and (ii) to ensure that, 'for any other criminal offence, the racist and xenophobic motivation is considered as an aggravating circumstance, or alternatively that such motivation may be taken into account in the determination of the penalties'[9] (hate crime).

These central elements of the *acquis'* legal framework addressing antisemitism are augmented by further norms, such as the Audiovisual Media Services Directive,[10] which obliges Member States to 'ensure that audiovisual commercial communications provided by media service providers under their jurisdiction' do not 'prejudice respect for human dignity', or 'include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation'.[11]

Another such augmentative element of the legal framework is the Victims' Rights Directive, which establishes minimum standards on the rights, support and protection of victims of crime. This stipulates that victims must receive a timely and individual assessment to determine whether and to what extent they would benefit from special measures due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation. In the context of the individual assessment, particular attention must be paid to victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics.[12]

In the context of legal responses to antisemitism, in addition to outlining the Commission's planned action in the area, the EU Antisemitism Strategy encourages Member States to complete the transposition of the Framework Decision and prosecute antisemitic hate speech and hate crime in line with EU and national legislation, with a special focus on strengthening the national authorities' capacity to prosecute online hate speech.[13] Furthermore, the strategy calls on Member States to address antisemitic discrimination in

6 EU High Level Group on combating racism, xenophobia and other forms of intolerance (2018), 'Guidance Note on the Practical Application of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law'.
7 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (Framework Decision), Recital 5.
8 Framework Decision, Article 1.
9 Framework Decision, Article 4.
10 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).
11 Audiovisual Media Services Directive, Article 9.
12 Victims' Rights Directive, Article 22.
13 European Commission (2021), EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030), pp. 8. and 10.

all areas covered by the directives, and for that purpose to adequately equip 'national equality bodies [...] to ensure that incidents of antisemitic discrimination are properly addressed and reported'.[14]

## 1.2 The working definition of antisemitism and its use in Member States in countering antisemitic discrimination

In order to ensure a coherent EU-wide response, the EU Antisemitism Strategy encourages the Member States to adopt the non-legally binding working definition of antisemitism of the International Holocaust Remembrance Alliance (the IHRA definition), emphasising that this step, which enables a concerted and consistent approach to the phenomenon, is necessary 'for effective action at national level'.[15]

The International Holocaust Remembrance Alliance (IHRA) is a network of Governments and experts aimed at strengthening, advancing and promoting Holocaust education, research and remembrance. Its membership consists of 35 member countries, 'each of whom recognizes that international political coordination is imperative to strengthen the moral commitment of societies and to combat growing Holocaust denial and antisemitism'.[16]

On 26 May 2016, the IHRA's plenary in Bucharest decided to adopt a non-legally binding working definition of antisemitism. The definition, which is augmented by a list of illustrative examples of manifestations of antisemitism in public life, the media, schools, the workplace, and in the religious sphere, runs as follows:

> 'Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.'[17]

Not long after its adoption, EU institutions started to rely on the definition. The European Commission has been using it since 2017[18] and the European Parliament adopted a resolution on combating antisemitism in June 2017, in which it calls on the Member States and the Union institutions and agencies to adopt and apply the IHRA definition 'in order to support the judicial and law enforcement authorities in their efforts to identify and prosecute anti-Semitic attacks more efficiently and effectively'.[19] The Council also adopted a declaration in December 2018 (on the fight against antisemitism and the development of a common security approach to better protect Jewish communities and institutions in Europe) with a very similar text, which also referred to the definition as 'a useful guidance tool in education and training, including for law enforcement authorities in their efforts to identify and investigate antisemitic attacks more efficiently and effectively'.[20]

These initial texts refer to the application of the IHRA definition in the context of criminal law and the more effective prosecution of antisemitic attacks, although the explanatory part of the IHRA definition does not only address 'antisemitic acts that are criminal' and 'criminal acts that are antisemitic', but also antisemitic discrimination, which it defines as 'the denial to Jews of opportunities or services available to others', and mentions that it is 'illegal in many countries'.[21]

14 European Commission (2021), EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030), p. 11.
15 European Commission (2021), EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030), p. 5.
16 IHRA website: https://www.holocaustremembrance.com/about-us.
17 IHRA definition available at: https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism.
18 European Commission (2021), EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030), p. 4.
19 European Parliament resolution of 1 June 2017 on combating anti-Semitism (2017/2692(RSP)).
20 Council of the European Union (2018), Council Declaration on the fight against antisemitism and the development of a common security approach to better protect Jewish communities and institutions in Europe – Council conclusion (6 December 2018).
21 IHRA definition: https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism.

The December 2020 Council Declaration on mainstreaming the fight against antisemitism across policy areas[22] mentions the IHRA definition in a wider context, which can pertain to criminal and non-criminal responses alike:

> 'Consistent use of the non-legally binding working definition of antisemitism [...] can help government agencies and non-governmental organisations alike to respond more sensitively and identify and address antisemitism more reliably. [...] The systematic reporting and recording of antisemitic incidents, including those that do not constitute a criminal offence prima facie, has proven to be an appropriate measure to obtain a comprehensive picture of the situation and be able to respond to new developments.'

But even this declaration places an emphasis on criminal law in relation to the definition, when it states: 'Fact-based policy-making and collection of comparable data are essential to develop, implement and monitor progress on tailored comprehensive strategies and education instruments, which *must be accompanied by systematic prosecution of crimes with an antisemitic motive*' (emphasis added).

This emphasis on the application of the IHRA in the criminal context rather than in the non-criminal context of non-discrimination can also be traced in the *Handbook for the practical use of the IHRA Working Definition of Antisemitism*[23] (IHRA Handbook) published in January 2021 by the European Commission in cooperation with the IHRA. While the IHRA Handbook contains examples of good practice in applying the IHRA definition from several countries, these concern law enforcement bodies, criminal courts[24] and civil society, but not equality bodies. This is the case in spite of the fact that under the Racial Equality Directive such bodies are seen to have an important role in the promotion of the equal treatment of all persons without discrimination on the grounds of racial or ethnic origin, which can obviously encompass antisemitic discrimination, and most of the Member States have extended the mandate of their equality bodies to cover other relevant grounds, including religion or belief.[25]

The research underlying this report reveals a diverse picture of where the different Member States stand regarding the adoption and application of the IHRA definition. Some countries (such as **Czechia**, **Finland**, **Ireland** and **Malta**) have not adopted the definition, whereas in others (e.g. **Belgium**), there is an ongoing debate on its adoption and/or application.

In most countries that have adopted the definition, it is relied on in the educational-cultural context, and only a few countries have reported that it has had a tangible impact on the application of legal norms aimed at countering antisemitism. In most cases, this impact also concerns criminal law (primarily hate speech and hate crimes).

**Romania** is the only country where the definition was codified as a binding norm: Emergency Governmental Ordinance 31/2002 on the prohibition of fascist, legionary, racist or xenophobic organisations, symbols and deeds and the promotion of the cult of persons guilty of genocide against humanity and war crimes,[26] as amended by Law No. 157/2018 defines antisemitism as 'the perception of Jews expressed as hatred

22 Council of the European Union (2020), Council Declaration on mainstreaming the fight against antisemitism across policy areas.

23 European Commission, Directorate-General for Justice and Consumers, Steinitz, B., Stoller, K., Poensgen, D. et al. (2021), *Handbook for the practical use of the IHRA working definition of antisemitism* (IHRA Handbook), https://data.europa.eu/doi/10.2838/72276.

24 The judiciary can obviously have a role in the non-criminal countering of antisemitic discrimination as well, however, the IHRA Handbook clearly focuses on the role of courts in criminal cases. For example, Chapter 3.2 on good practice regarding the judiciary starts as follows: 'The judiciary has a critical role in determining the antisemitic character of crimes as well as effectively trying and sanctioning them.' See: IHRA Handbook, p. 24.

25 See: Crowley, N. (2018), Equality bodies making a difference, European network of legal experts in gender equality and non-discrimination, p. 7.

26 Romania, Emergency Governmental Ordinance 31/2002 on the prohibition of fascist, legionary, racist or xenophobic organi zations, symbols and deeds and the promotion of the cult of persons guilty of genocide against humanity and war crimes (*Ordonanță de urgență nr. 31/2002 privind interzicerea organizațiilor, simbolurilor și faptelor cu caracter fascist, legionar, rasist sau xenofob și a promovării cultului persoanelor vinovate de săvârșirea unor infracțiuni de genocid contra umanității și de crime de război*), of 13.02.2002, published in the Official Journal No. 214/28.03.2002.

against them, as well as verbal or physical manifestations, motivated by hatred against Jews, directed against Jews or non-Jews or their property, against the institutions of Jewish communities or their places of worship'. This law sets out strict criminal penalties (up to five years of imprisonment) for different antisemitic behaviours (including publicly disavowing or denying the Holocaust or the effects thereof, or threatening a person or a group of persons, on grounds of, among other things, race, ancestry or national or ethnic origin). In contrast, in **Slovakia**, the Ministry of Justice found that the introduction of the IHRA definition into legislation would be problematic because Slovak criminal law does not use separate concepts such as racism, antisemitism and xenophobia, but provides protection against criminal acts of extremism in general.[27]

In other countries, the definition is applied to orient the practice of authorities – yet again, mostly in criminal contexts. For instance, in **Latvia**, the definition has already been used in the work of the State Police to identify manifestations of antisemitism and related crimes. In the **Netherlands**, in a response to a question by two Members of Parliament, the Minister for Justice and Security said that although the IHRA was legally non-binding and could not be used to draw automatic conclusions regarding criminal liability, in the context of assessing hate speech, it allowed the police, the public prosecution office and courts to remain alert to facts and circumstances that could be indicative of discriminatory motives.[28]

There are even fewer countries, where, based on the country briefs provided by the experts, it could be assumed that the IHRA definition has a tangible impact on the actions and jurisprudence of bodies and authorities with a role in countering antisemitism in areas outside criminal law. This is the case, for instance, in **France**, and in **Germany**, where the definition 'serves as a compass in the areas of […] justice, police […] where it is utilized to reliably assess antisemitic patterns in […] various expressions. […]. The Federal Government has explicitly recommended law-enforcement and *other public officials* to take the expanded […] "IHRA definition" into account in full' (emphasis added).[29]

In **Croatia**, the Government adopted a 'conclusion' on the IHRA definition.[30] Such conclusions are binding for state bodies when interpreting and applying relevant regulations and making decisions.[31] Therefore, although the definition is not a formal source of law, it serves as an orientation for all other bodies, including courts when applying legal norms aimed at combating antisemitism. In **Italy**, the National Strategy for Combating Antisemitism envisages the insertion of the IHRA definition or at least a specific reference to antisemitism into public administration codes of conduct, with special regard to the Code of Conduct of Public Employees pursuant to Presidential Decree No. 62/2013. Article 3(5) of that code states that 'in relations with recipients of administrative action, the employee ensures fully equal treatment under equal conditions, moreover refraining from arbitrary actions which have negative effects on the recipients of administrative action or which entail discrimination based on sex, nationality, ethnic origin, genetic characteristics, language, religion or creed, personal or political beliefs, membership in a national minority, disability, social or health conditions, age and sexual orientation or other different factors'.[32]

A potential reason for this imbalance in the prevalence of the IHRA definition in the criminal field on the one hand and in non-criminal areas of anti-discrimination law on the other, lies in certain sociological factors of European antisemitism, which will be dealt with below, and which make criminal manifestations

27 See: Slovak Ministry of Justice (2019) 'Analysis of the compliance of the legal order of the Slovak Republic with a working definition of antisemitism developed by the International Holocaust Remembrance Alliance (IHRA)', available online in Slovakian at: https://rokovania.gov.sk/RVL/Material/24033/1.

28 See: Parliamentary documents of the Dutch House of Representatives: Kamerstukken II, 2018-2019, 35 164, no. 2, https://zoek.officielebekendmakingen.nl/kst-35164-2.html; Kamerstukken II, 2019–2020, 35 164, no. 10, https://zoekofficielebekendmakingen.nl/kst-35164-10.html.

29 German country brief.

30 Government of the Republic of Croatia (2023), *Zaključak o usvajanju pravno neobvezujuće Radne definicije antisemitizma Međunarodnog saveza za sjećanje na Holokaust (IHRA)* (Conclusion on the adoption of the non-legally binding working definition of antisemitism of the International Holocaust Remembrance Alliance), Official Gazette 8/2023, available in Croatian at: https://narodne-novine.nn.hr/clanci/sluzbeni/2023_01_8_162.html.

31 Croatia, Act on the Government of the Republic of Croatia, Official Gazette 150/11, 119/14, 93/16, 116/18, 80/22.

32 Italy, Presidency of the Council of Ministers (2021), National Strategy for Combating Antisemitism, p. 23.

of antisemitism (primarily hate crimes and hate speech) more visible than discrimination (which is addressed in most Member States through non-criminal legal responses). However, it is important to remember that the IHRA definition also has the potential to be a useful guidance tool in the non-discrimination work of equality bodies, courts and other state authorities, as well as non-state actors outside the field of criminal law.

**Recommendation:**

In the context of adopting and/or reviewing their action plans and national strategies on combating antisemitism, it would be advisable for Member States to devise steps encouraging their respective equality bodies to apply the IHRA working definition in their work on antisemitism.

## 1.3 Recent trends in antisemitism, with special regard to the impacts of the Covid-19 pandemic

Despite the numerous legal instruments and policies aimed at countering antisemitism, antisemitism did not, as the EU Antisemitism Strategy itself points out, disappear with the end of the Second World War. Generations after the end of the Holocaust, 'antisemitism is worryingly on the rise, in Europe and beyond'.[33]

This conclusion has been substantiated by several sociological research efforts. A special Eurobarometer survey conducted in December 2018 in all the Member States, found that half of Europeans (50 %) considered that antisemitism was a problem in their country, and more than a third of Europeans said that antisemitism had increased in their country over the preceding five years.[34]

The 2018 survey of Jewish people's experiences and perceptions of hate crime, discrimination and antisemitism, undertaken at the initiative of the European Union Agency for Fundamental Rights (2018 FRA Perceptions Survey)[35] found that among Jewish people themselves, the proportion of those who perceived an increase in the degree of antisemitism is even higher: 'nine in 10 (89 %) respondents in the 2018 survey feel that antisemitism increased in their country in the five years before the survey'.[36] The survey also found that '[m]ore than one in four (28 %) of all respondents experienced antisemitic harassment at least once [... in the 12 months preceding the survey]. Those who wear, carry or display items in public that could identify them as Jewish are subject to more antisemitic harassment (37 %) than those who do not (21 %)'[37]. The survey report concludes that 'antisemitism pervades the public sphere, reproducing and engraining negative stereotypes about Jews'.[38]

A 2021 sociological survey on the prevalence and intensity of anti-Jewish prejudices in 15 EU countries[39] and the United Kingdom (2021 Prejudices Survey) found that on average, 12 % of the population in the countries under scrutiny can be regarded as strongly antisemitic, 8 % as moderately antisemitic, and the proportion of latent antisemites was 14 %. However, in six countries under scrutiny, the combined proportion of strongly, moderately and latently antisemitic people was above 50 % (Poland: 66 %; Greece: 64 %; Hungary: 59 %; Austria: 56 %; Romania and Slovakia: 53 %).[40]

33 European Commission (2021), EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030), p. 1.
34 European Commission (2019), *Special Eurobarometer 484, Perceptions of antisemitism*, Kantar Public Brussels on behalf of Kantar Belgium, pp. 6 and 10.
35 European Union Agency for Fundamental Rights (FRA) (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-experiencesand-perceptions-of-antisemitism-survey_en.pdf.
36 FRA (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, p. 11.
37 *FRA (2018), Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU,* p. 12.
38 *FRA (2018), Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU,* p. 11.
39 Austria, Belgium, Czechia, France, Germany, Greece, Hungary, Italy, Latvia, the Netherlands, Poland, Romania, Slovakia, Spain and Sweden.
40 Kovács, A. and Fischer, G. (2021), *Antisemitic Prejudices in Europe*, Ipsos SA and Inspira Ltd, Budapest, p. 59.

These trends seem to have been reinforced by the Covid-19 pandemic. As a 2021 study on the proliferation of Covid-19-related online antisemitic content in French and German on certain social media platforms concluded, 'the Coronavirus pandemic has ushered in a new wave of antisemitic conspiracy theories and hate in Europe'.[41] The study found that, 'Comparing the first two months of 2020 (pre-pandemic) and 2021 (during the pandemic), a seven-fold increase in antisemitic posting could be observed on the French language accounts, and over a thirteen-fold increase in antisemitic comments within the German channels studied'.[42] The Swedish Action Programme to Combat Antisemitism quotes the Swedish Defence Research Agency's 2021 report, *Antisemitism in Social Media – Conspiracies, Stereotypes, and Holocaust Denial*, which notes that 'discussions about a global Jewish conspiracy have increased since 2017 and that the Covid-19 pandemic has given rise to new antisemitic conspiracy theories.'[43]

The reports of the country experts also confirm that the pandemic has had this kind of negative impact on trends in antisemitism in several Member States. By way of example, in **Germany**, the Covid-19 pandemic 'had a major impact on the recent trends of antisemitism and antisemitic incidents in Germany in the sense that both extremist and conspiracy theorists have adopted antisemitic rhetoric to deny the existence of the virus and manifest their resistance against the recommended vaccinations.'[44] The main antisemitic rhetoric in Germany was based on the conspiracy theory 'that the global "elites" who were mainly identified as famous Jewish individuals were deceiving the general public about the existence of a pandemic as means to undermine civil liberties by ordering restrictions and lockdowns, compromising data protection by introducing vaccine certificates and relevant applications'.[45] In **Croatia**, a similar narrative appeared, based on conspiracy theories claiming that Jews were responsible for the pandemic and earning money from vaccines.[46] Millennium-old antisemitic propaganda serving political polarisation and extremist radicalisation has also been repackaged using the Covid-19 pandemic in **Belgium**.[47]

The **Netherlands** expert reports that 2020 showed a steep rise in the prevalence of conspiracy theories in which 'Jews were portrayed as the cause and/or beneficiaries of the coronavirus'.[48] In **Italy**, according to the report of the CDEC Foundation's Observatory on Antisemitism (*Osservatorio Antisemitismo*), Covid-19 continues to be the main source of inspiration for antisemitism, with Judeophobic trend topics always embedded in a conspiratorial dimension.[49] Similarly in **Poland**, the pandemic, like many crises in the country's history, has 'provoked xenophobic sentiments in parts of society, contributing to an increase in behaviours that are considered hate-motivated crimes under the Criminal Code'.[50]

One of the very specific themes related to the pandemic was Holocaust relativisation, which has taken the form of comparing lockdown and vaccination measures to the suffering of the Jewish population under Nazi rule. In **Germany**, the Berlin Labour Court ruled that a teacher had been lawfully dismissed without notice for distributing on YouTube a picture with the gate of a concentration camp and the inscription 'Vaccination sets you free'. According to the reasoning of the Court, the teacher using the particular picture and text went far beyond the level of permissible criticism of the vaccination policy in Germany during the Covid-19 pandemic. The court ruled that the particular criticism expressed was not covered by the freedom of expression or freedom of art, but constituted an unacceptable trivialisation of

41 European Commission, Directorate-General for Justice and Consumers, Comerford, M., Gerster, L. (2021), *The rise of antisemitism online during the pandemic: a study of French and German content*, Publications Office of the European Union, p. 8.
42 European Commission, Directorate-General for Justice and Consumers, Comerford, M., Gerster, L. (2021), *The rise of antisemitism online during the pandemic: a study of French and German content*, Publications Office of the European Union, p. 8.
43 Swedish Regeringskansliet (2021), Action Programme to Combat Antisemitism, p. 6.
44 Rose, H. (2021), *Pandemic Hate: COVID-related Antisemitism and Islamophobia and the Role of Social Media, Institute for Freedom of Faith & Security in Europe (IFFSE)*, pp. 9-17, quoted by the German country brief.
45 European Commission, Directorate-General for Justice and Consumers, Comerford, M., Gerster, L. (2021), *The rise of antisemitism* online during the pandemic: a study of French and German content, Publications Office of the European Union, p. 17.
46 Croatian country brief.
47 Networks Overcoming Antisemitism (NOA) (2022), 'National Report Card on Government Measures to Counter Antisemitism and Foster Jewish Life', as quoted by the Belgian country brief.
48 Centrum Informatie en Documentatie Israel (Centre for Information and Documentation Israel, CIDI) (2022), *Monitor Antisemitische Incidenten 2021* (Monitor of antisemitic incidents 2021) as quoted by the Netherlands country brief.
49 Osservatorio Antisemitismo, Guetta, B. (2023), *Annual report on Antisemitism in Italy 2022*, p. 45.
50 Polish country brief, summarising recommendations of the Ombud from 2020.

the Holocaust.[51] In the **Netherlands**, a Dutch politician, Thierry Baudet, posted content on social media comparing the Government's coronavirus policy to the situation in the Buchenwald concentration camp. The court handed down a preliminary injunction, ordering Baudet to remove the posts and refrain from reposting them. One of the reasons adduced by the court was that they would contribute to a climate that could encourage antisemitic speech. According to the appeals court, which upheld the injunction, there was evidence of an increase in antisemitic speech on the internet after Baudet's post. Even though the expressions themselves were not antisemitic in nature, it could be assumed that they did lead to a spread of antisemitism on the internet. Moreover, the court of appeal held that there were sufficient grounds for the rights and feelings of Holocaust survivors and relatives to prevail over freedom of expression in this case.[52]

This role of crises in the surge of manifestations of antisemitism can also be seen in relation to the Russian aggression against Ukraine. The experts from **Czechia**, **Italy** and **Lithuania** report that the war in Ukraine has become an important theme in antisemitic discourse. For instance, in **Italy** one of the conspiracy themes connecting the pandemic with the war is that the same Jewish-American bacteriological weapons laboratories that allegedly created the Covid-19 virus are now active in Ukraine.[53] Instances of Holocaust trivialisation also took place in relation to the war against Ukraine.[54]

The impact of these crises and the conspiracy theories related to them on the actual reported number of antisemitic incidents of discrimination, hate crime and hate speech shows a diverse picture in the different Member States. For instance, in **Ireland**, 2020 brought a spike in hate speech directed at Jewish people,[55] which 'may be attributable to the COVID pandemic',[56] and in **Lithuania**, recent years have also seen 'an increase in antisemitic incidents due to the COVID pandemic'.[57] An increase in antisemitic incidents between 2019 and the two successive pandemic years is also shown by FRA's 2022 report, *Antisemitism – Overview of Antisemitic Incidents Recorded in the European Union 2011–2021*[58] (2022 FRA Antisemitic Incidents Research) regarding, among other countries, **Austria**,[59] **Czechia**[60] and **Germany**.[61]

In some countries, a decrease in the number of reported incidents was reported. For instance, in **France**, according to the reports of the National Consultative Commission on Human Rights (CNCDH), the number of antisemitic actions and threats fell from 687 in 2019 to 339 in 2020. As pointed out by the 2022 FRA Antisemitic Incidents Research, according to the CNCDH, 'the measures adopted to prevent COVID-19 infections in France may have had an impact on the number of recorded antisemitic actions and threats, particularly in 2020', even though the CNCDH notes that at the same time, 'there was a resurgence of antisemitic discourse online and elsewhere in the public sphere in 2020 and 2021'.[62]

As a third variation, in some countries the pandemic did not cause a tangible change (either increase or decrease) in the number of legally sanctionable manifestations of antisemitism. This was the case in **Belgium**, **Cyprus**, **Greece** and **Portugal**.

51 Labour Court Berlin (AG Berlin) 22 Ca 223/22 (12 September 2022) as summarised by the German country brief.
52 Amsterdam Court of Appeal, 23 May 2023, ECLI:NL:GHAMS:2023:1139 as summarised by the Netherlands country brief.
53 Italian country brief.
54 See for example: EEAS Press Team (2023) 'Ukraine: Statement by High Representative on Russia's misuse of the Holocaust in its current aggression', available at: https://www.eeas.europa.eu/eeas/ukraine-statement-high-representative-russia%E2%80%99s-misuse-holocaust-its-current-aggression_en.
55 Michael, L. (2021), *Reports of racism in Ireland: Data from iReport.ie. - Annual Report 2020*. Dublin: Irish Network Against Racism, as quoted by the Irish country brief.
56 Irish country brief.
57 Lithuanian country brief.
58 European Union Agency for Fundamental Rights (FRA) (2022), *Antisemitism - Overview of Antisemitic Incidents Recorded in the European Union 2011–2021*, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2022-antisemitism-overview-2011-2021_en.pdf.
59 FRA (2022), *Antisemitism - Overview of Antisemitic Incidents Recorded in the European Union 2011–2021*, pp. 29. and 32.
60 FRA (2022), *Antisemitism - Overview of Antisemitic Incidents Recorded in the European Union 2011–2021*, pp. 42 and 44.
61 FRA (2022), *Antisemitism - Overview of Antisemitic Incidents Recorded in the European Union 2011–2021*, pp. 56. and 60.
62 FRA (2022), *Antisemitism - Overview of Antisemitic Incidents Recorded in the European Union 2011–2021*, p. 51.

In addition to the potential impact of the epidemiological measures, one possible explanation for the difference may be that, in countries where antisemitic prejudices are traditionally strong already, crises cause antisemitic feelings to flare up and trigger conspiracy theory-based explanations for the pressing issues a society must face, whereas in countries where such biases are not so deeply rooted, antisemitic explanations are not resorted to in such situations to the same extent. This reasoning seems to be valid for **Cyprus** for example, where 'there was no marked or recorded rise in anti-Semitic hate speech during COVID-19 and no references to "Jewish world conspiracy", which is not commonly used in Cyprus in any case'.[63]

However, similarly, no significant change in the statistics of antisemitic incidents were reported from **Greece**, which, according to the 2021 Prejudices Survey is one of the countries with the strongest antisemitic biases in Europe, and with regard to which the Racist Violence Recording Network, a network of over 50 Greek civil society organisations, emphasised in its 2022 report that antisemitic rhetoric 'permeates wide sections of the population and social structure'.[64]

With regard to countries characterised by a stronger prevalence of antisemitism, a more plausible explanation for the lack of increase in the number of reported incidents of an antisemitic nature is offered by two phenomena around antisemitism that have been indicated by several reports, including the 2022 FRA Antisemitic Incidents Research and the 2018 FRA Perceptions Survey: namely underreporting and the problems of data collection.

## 1.4 Underreporting and problems of data collection

Problems in obtaining a clear picture of the prevalence of and trends in legally sanctionable bias-motivated actions have been pointed out repeatedly. The 2022 FRA Antisemitic Incidents Research calls attention to the fact that 'hate crime incidents, including those of an antisemitic nature, are inadequately reported. This is coupled with a great hesitancy among victims to report incidents to the authorities or other bodies.'[65]

The 2018 FRA Perceptions Survey concludes that although the vast majority of the respondents were 'aware of anti-discrimination legislation (85% in the area of employment, for example), as well as of organisations that can offer advice or support in cases of discrimination (71%), including Jewish community organisations and national equality bodies', 77 % of those who said that they had experienced discrimination in the 12 months preceding the survey in employment, education, health or housing because they are Jewish, 'did not report the most serious incident to any authority or organisation.' According to the survey, 'The main reasons given for not reporting are the perception that nothing would change as a result (52%); the incident is not serious enough (34%); and not having any proof of discrimination (33%).'[66] Regarding harassment, 79 % of respondents who had been subjected to antisemitic harassment in the five years preceding the survey did not report the most serious incident to any authority. 'The main reasons given for not reporting incidents are the feeling that nothing would change as a result (48%); not considering the incident to be serious enough to be reported (43%); or because reporting would be too inconvenient or cause too much trouble (22%)'.[67]

The research for this thematic report has confirmed the existence of the same issue with regard to antisemitic incidents. That underreporting is a problem is confirmed by the experts from several countries, including **Czechia**, **Finland** and **Spain**. In **Ireland**, the NGO Irish Network Against Racism (INAR) hosts

63 Cyprus country brief.
64 Racist Violence Recording Network (2022), Ετήσια Έκθεση *2022* (Annual Report 2022) as quoted by the Greece country brief.
65 FRA (2022), *Antisemitism - Overview of Antisemitic Incidents Recorded in the European Union 2011–2021*, p. 6.
66 FRA (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, p. 13.
67 FRA (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, p. 12. Underreporting regarding physical violence motivated by antisemitism was also noted by the survey. See section 3.2.1 on the underreporting of hate crimes.

an online racist incident reporting system called iReport.ie, and repeatedly highlights the fact that most victims who have recorded an incident using the iReport online tool, did not report the incident to any official body. For example, in 2022, 69 % of the instances of racial discrimination (112 cases) and 64 % of other racist incidents not amounting to a criminal offence (27 cases) were not reported to anyone except iReport.ie.[68]

One important reason for underreporting given by the experts from the countries under scrutiny is a lack of trust in the authorities and in the ability of the legal framework to provide adequate protection against antisemitic incidents. In **Sweden**, for example, while it is the perception of Swedish Jews that antisemitism increased between 2014 and 2019, 'almost eight out of ten believe that the government and state do not provide the Jewish congregations with adequate protection.'[69] This may be due to the fact that, according to the Swedish expert, reporting has 'little effect',[70] even for those incidents that are currently reported.

In **Poland**, as proven by the studies commissioned by the Ombud, acting as Poland's equality body, it is not possible to verify the real number of antisemitic incidents, due to methodological problems of data collection and underreporting. In the Ombud's opinion, the phenomenon of underreporting persists,[71] because the lack of publicly available information (data regarding such incidents became unavailable on the website of the National Prosecutor's Office as of 2018) and the lack of an 'adequate reaction of the relevant authorities to incidents […] may discourage victims from sending notices and create a feeling of impunity of perpetrators'.[72] One example is the case of a judge (a court president), who was found by an investigation to have incited hatred against the Jewish people on an internet forum in 2015, under a pseudonym, calling Jews a 'vile, rotten nation'. In 2019, when the proceedings still had not been completed after four years, the Ombud decided to intervene. Following that, the Ombud made several subsequent interventions in the case, including a petition to the National Council of the Judiciary (of which the judge was a member at the time), emphasising that the protracted proceedings into such a serious breach of law on the part of a sitting judge 'undermine public trust in the state'.[73] The judges of the court over which the judge concerned presides unanimously demanded his resignation from all his positions. Currently, the investigation has still not been concluded and his appointment as court president has not been revoked, which is a sanction that the Minister of Justice could apply.[74]

Such a case almost inevitably exerts a chilling effect on victims' willingness to report antisemitic incidents by not only demonstrating the authorities' reluctance to effectively prosecute antisemitic violations, but also by highlighting the existence of antisemitic biases within the authorities themselves, thus questioning the effectiveness of any protection that a victim may hope for from the state.

A similar case has been reported from **Greece**, where in February 2022, two prominent human rights defenders were sentenced to suspended prison sentences for initiating legal proceedings against an Orthodox bishop for racist hate speech.[75] The Orthodox bishop had a long record of making antisemitic statements. In 2015, he attributed new legislation giving same-sex couples expanded civil rights to the

68 Michael, L., Reynolds, D., and Omidi, N. (2023), *Reports of racism in Ireland: Data from iReport.ie. - Annual Report 2022*, Dublin, Irish Network Against Racism, p. 19, as quoted by the Irish country brief.

69 Sieracki, F. (2019), 'Oroväckande ökning av antisemitism i Sverige' (Alarming increase in antisemitism in Sweden), as quoted by the Swedish country brief.

70 Swedish country brief.

71 Polish Ombud (2021): 'Jak ściga się propagowanie i pochwalanie faszyzmu. Prokuratura Krajowa w końcu ujawniła RPO statystyki za 2020 r'. (How propagation and praise of fascism are prosecuted. The National Prosecutor's Office has finally revealed the 2020 statistics to the RPO), available in Polish at: https://bip.brpo.gov.pl/pl/content/jak-sciga-sie-propagowanie-i-pochwalanie-faszyzmu-prokuratura-krajowa-w-koncu-ujawnila-rpo.

72 Polish Ombud (2022), *Annual report for 2021*, pp. 604-607. Quoted by the Polish country brief.

73 Polish Ombud (2019), 'Antisemitic posts on the web – the Commissioner's intervention' (available at the Ombud's webpage: https://bip.brpo.gov.pl/en/content/anti-semitic-posts-web-commissioners-intervention).

74 Poland country brief.

75 Alexandris, P. (2022), 'Καταδίκη ακτιβιστών για «ψευδή καταμήνυση» κατά του Μητροπολίτη Πειραιώς για ρητορική μίσους' (Activists convicted for 'false accusation' against the Bishop of Piraeus for hate speech), *Antivirus Magazine*.

'international Zionist monster' supposedly controlling the leftist government then in power. Five years earlier, he told a local TV station that Jews had orchestrated the Holocaust and were to blame for Greece's debilitating debt crisis.[76] After such antecedents, in April 2017, the two human rights defenders working for the NGO Greek Helsinki Monitor, filed a complaint against the bishop on a count of public incitement to violence and hatred for 'issuing a statement described by the country's Central Board of Jewish Communities (KIS) as being replete with "well-known antisemitic stereotypes, conspiracy theories and traditional Jew-hating attitudes"'. After a prosecutor dismissed the complaint more than two years later – arguing that the statement should be seen in the context of the doctrine of the Christian Orthodox Church – the bishop responded by filing his own complaint against the activists for allegedly making false statements against him. The Athens court sentenced the activists to 12 months of imprisonment suspended for three years. The verdict, which was characterised by one of the accused as 'indicative of the institutionalised antisemitism that exists in Greece',[77] is likely to have a severe chilling effect on the willingness of those concerned to report manifestations of antisemitism and take legal action against them.

There are, however, promising developments in this regard as well. For example, there have been efforts in **Austria** to improve the recording of antisemitic incidents, and although underreporting remains an unsolved issue, 'the more or less constant rise in numbers in official reports [...] points to an increased willingness to report and enhanced access to and trust in the institutions'.[78] In **France**, the Defender of Rights, the French equality body, created an anti-discrimination internet platform (www.antidiscrimination.fr) and mobile app in order to disseminate information, facilitate contact and receive complaints from victims of discrimination, including in cases where the discrimination is motivated by antisemitic bias.

In **Ireland**, where 'there are problems with underreporting and the disaggregation of data in relation to hate crime, hate speech and discriminatory incidents in general',[79] in recent years, 'the police have taken measures to address the acknowledged underreporting of hate incidents. The Garda Síochána *Diversity and Integration Strategy 2019-2021* was published in October 2019.'[80] The strategy committed to the development of an online reporting mechanism, which was launched in July 2021.[81] Most probably, as a result of this, there was a 29 % increase in reported hate crimes and hate-related (non-crime) incidents in 2022, compared with 2021.[82] The Irish National Action Plan Against Racism (NAPAR),[83] which encompasses the measures aimed at combating antisemitism also envisaged further actions to improve the situation, including the setting up of 'new mechanisms to facilitate third-party and online reporting of racist incidents' as well as the 'development of a standard civil society national framework to monitor and respond appropriately to racist incidents and hate crimes.'

The 2022 FRA Antisemitic Incidents Research has also shown that even when reports of antisemitic incidents are filed, these are often recorded in a way that makes it difficult or even impossible to use them for the systematic monitoring of the phenomenon: 'authorities do not always categorise incidents motivated by antisemitism under that heading. In some cases, statistics are collected under broad categories that do not allow disaggregation of the data to examine antisemitic incidents specifically.'[84] In two countries (**Hungary** and **Portugal**), no official data sources on antisemitic incidents could be identified at all.[85]

76 Announcement of the Piraeus Diocese made in *Parakatathiki*, a bimonthly printed edition of the religious association.
77 Wichmann, A. (2022), 'Activists Falsely Accused Greek Bishop of Hate Speech, Court Rules', *Greek Reporter*.
78 Austrian country brief.
79 Irish country brief.
80 An Garda Síochána (2019), *Diversity & Integration Strategy 2019-2021*.
81 Hunt, C. (2021), 'New service launched for people to report hate crimes', *RTÉ News*. The online reporting facility is available here: https://www.garda.ie/en/about-us/online-services/online-hate-crime-reporting/.
82 An Garda Síochána (2023), '2022 Hate Crime Data and Related Discriminatory Motives', 22 March 2023.
83 Government of Ireland (2023), *National Action Plan Against Racism*.
84 FRA (2022), *Antisemitism - Overview of Antisemitic Incidents Recorded in the European Union 2011–2021*, p. 6.
85 FRA (2022), *Antisemitism - Overview of Antisemitic Incidents Recorded in the European Union 2011–2021*, p. 5.

As this thematic report shows, this problem has been recognised by several Member States, and therefore, they have included in their national strategies or action plans on combating antisemitism the need to improve monitoring and data collection systems. For example, the **Danish** Government's action plan against antisemitism from 2022 notes that it is difficult to get an overview of all antisemitic incidents in Denmark. The action plan therefore acknowledges the general need to strengthen the monitoring of antisemitic incidents in Denmark, and on that basis, resources are granted to reinforce the existing monitoring capacities, as well as to map the knowledge about and research into antisemitism.[86] The **French** national action plan against racism, antisemitism and discrimination for 2023-2026 anticipates a major national survey on the issue of antisemitism,[87] whereas the **Romanian** National Strategy on the prevention and combating of antisemitism, xenophobia, radicalisation and hate speech for 2021-2023, which was adopted in May 2021,[88] stipulates that the Romanian Police under the guidance of the National Institute of Statistics will develop a methodology for identifying hate crimes and collecting hate crime data.

## 1.5 Scarcity of case law in the non-discrimination field

Although – as shown above – antisemitism is a pervasive problem in Europe, its manifestations are often covert and latent. As the 2021 Prejudices Survey points out, antisemitic prejudices

> 'are among the views whose open acceptance in European societies is an open violation of the consensus condemning such views. One of the biggest problems in empirical research on prejudice is that [...] prejudiced people are often reluctant to voice their prejudices publicly. Research on prejudice, and antisemitism in particular, clearly reports that this phenomenon, called latency pressure, is also strong among subjects of sociological surveys, meaning that many refrain from supporting antisemitic attitudes and opinions not only in public but even in personal interviews.'[89]

This latency pressure is present not only in sociological research, but also in areas of life regulated by the law, and has an impact on instances of discrimination and their provability. Discriminators who treat persons unfavourably for being Jewish are likely to be more cautious and less revealing about the motivations for their actions in the face of the disapproval of antisemitism, which, despite the worrying trends in the rise of antisemitism, still seems to be the prevailing social consensus in Europe.

Those antisemitic offences that are traditionally penalised (hate speech and hate crimes, i.e. verbal and physical attacks against members of the target group and/or their property) usually come from perpetrators who are not constrained to the same extent by such social norms and disapproval (as their actions are carried out against the clear penalisation of such actions, and very often in the public domain: instances of hate speech, in almost all jurisdictions, must be committed publicly to be punishable by law). Yet, even in such cases (e.g. regarding instances of hate speech) it might be a problem for the state authorities to clearly identify and demonstrate the antisemitic intent. As the IHRA Handbook notes: certain traditional forms of antisemitism are 'more easily recognised than some contemporary forms, such as present-day conspiracy myths or Israel-related antisemitism. A challenge might occur when the perpetrator's antisemitic motivation is neither explicit nor apparent but is expressed through antisemitic codes or otherwise camouflaged'.[90]

86 Danish Government (2022), *Action plan against antisemitism*, p. 10.
87 French country brief.
88 Romanian Government (2021), National Strategy on the prevention and combating of antisemitism, xenophobia, radicalisation and hate speech, for the period 2021-2023 and its Plan of action, action point 1.2.1. Adopted by Government Decision No.539/2021(*Hotararea Guvernului nr. 539/2021 privind aprobarea Strategiei naționale pentru prevenirea* și *combaterea antisemitismului, xenofobiei, radicalizării* și *discursului instigator la ură, aferentă perioadei 2021-2023* și *a Planului de acțiune al Strategiei naționale pentru prevenirea* și *combaterea antisemitismului, xenofobiei, radicalizării* și *discursului instigator la ură, aferentă perioadei 2021-2023*), of 13 May 2021, published in the Official Journal 517 of 19.05.2021.
89 Kovács, A. and Fischer, G. (2021) *Antisemitic Prejudices in Europe*, Ipsos SA and Inspira Ltd, Budapest, p. 14.
90 IHRA Handbook, p. 24.

The problems of proving discrimination are obviously even more prevalent regarding manifestations of antisemitism that do not fall under the categories of hate speech and hate crime (and are often, although not always, addressed through non-criminal legal means).

Along with the other problems identified by the 2018 FRA Perceptions Survey (including mistrust in the authorities and the highly related scepticism regarding whether taking action would have an impact on the problem), this has led to a situation whereby in several Member States (e.g. **Austria**, **Bulgaria**, **Croatia**, **Cyprus**, **Czechia**, **Estonia**, **Finland**, **Latvia**, **Luxembourg**, **Malta**, **Poland**, **Portugal**, **Romania**, **Slovakia** and **Slovenia**), the experts could not present any court judgment or binding equality body decision regarding antisemitic discrimination in the fields covered by the Racial Equality Directive, the Employment Equality Directive or beyond. Even in the remaining countries, only a few cases could be identified, many of which were closed without a binding conclusion regarding the existence of antisemitic discrimination.

In most of these cases, the reason was the lack of sufficient evidence. For instance, in **Denmark**, a Jewish doctor was dismissed from a hospital due to a drop in the number of orthopaedic surgery patients. He later applied for a position at the same hospital, but was rejected. On that basis, the doctor believed that he had been subjected to discrimination because of his Jewish origin. The Board of Equal Treatment rejected the complaint, as it found that there was no information that gave reason to suspect that the doctor had been discriminated against.[91] Also in Denmark, the Board of Equal Treatment concluded that it could not deal with the complaint of a Jewish man who claimed to have been harassed in his workplace on the grounds of his Jewish background. There was disagreement as to when the complainant had informed his employer, a museum, about the harassment, and since this could have only been clarified through oral party and witness statements, which the Board is not entitled to acquire, the complaint had to be dismissed.[92] In a third case (described in detail below, under section 2.1), the same inability of the Board to take oral evidence was the reason for dropping a case where the victim complained about harassment he experienced from a shop owner when he wanted to return a faulty item.[93]

Among the very few identified cases of alleged antisemitic discrimination, there are also some that seem to at least substantiate complainants' lack of trust in the competent authorities' willingness to deal with the issue thoroughly. By way of example, a **Lithuanian** applicant's claim that during a visit to the doctor, he suffered harassment on the basis of his Jewish origin (due to the physician's unwanted insistence on him revealing whether he was Jewish) was rejected by the Office of the Equal Opportunities Ombudsperson on the basis that the healthcare services were actually not denied to the complainant,[94] although the complaint was not about direct discrimination taking the form of the denial of access to the services, but about harassment. In a **Belgian** case, two observant Jewish students submitted a complaint because the high school that they attended held examinations on Saturday. However, in January 2022, the Court of First Instance of East Flanders (*Tribunal de Première instance de Flandre orientale*) found[95] that the practice of the high school did not violate the requirement of equal treatment, justifying this decision with essentially practical and organisational reasons, including the limited availability of premises and personnel, the limited duration of the examination period, and the need to provide several examination questionnaires. Although being only indirectly related to the issue of non-discrimination, a **Dutch** case

91 Danish Board of Equal Treatment, Decision No. 9782 of 17 December 2014. See: https://www.retsinformation.dk/eli/accn/W20150978225.

92 Danish Board of Equal Treatment, Decision No. 10511 of 21 May 2014. See: https://www.retsinformation.dk/eli/accn/W20141051125.

93 Danish Board of Equal Treatment, Decision No. 10000 of 9 October 2019. See: https://www.retsinformation.dk/eli/accn/W20191000025.

94 Supreme Administrative Court of Lithuania, 18 December 2019 (*T. G.* v. *Office of the Equal Opportunities Ombudsperson*; third parties: Lietuvos Respublikos sveikatos apsaugos ministerija). Reference number: eA-1489-415/2021, https://www.e-tar.lt/portal/lt/legalAct/d6ceea7059da11ec862fdcbc8b3e3e05. The Supreme Administrative Court of Lithuania upheld the applicant's appeal and ordered the Ombudsperson to re-examine the applicant's complaint. The Office re-examined the complaint, contacted the applicant and the health clinic again, and rejected the complaint on the basis that it had been submitted late. The applicant appealed this decision again before the Vilnius Regional Administrative Court, and the case is still pending.

95 Court of First Instance of East Flanders, 20 January 2022, n°21/45/C, unpublished. There was an appeal in this case, but the appeals court upheld the first instance decision (Court of Appeal of Ghent, 27 April 2023, n°2022/AR/1376, unpublished).

can also be quoted here, in which a company terminated its sponsorship contract with the football club Feyenoord after the club's fan base engaged in antisemitic chanting during a match. In this case both the arbitration tribunal and the Court of Appeal of The Hague found against the company and obliged it to uphold the sponsorship contract.[96]

Unsuccessful complaints with less conspicuously problematic argumentations have also been reported from **Ireland** (where the complaint of a woman who claimed that she had suffered harassment in the form of antisemitic comments and exclusion on the grounds of her religion at her workplace was not upheld by the Workplace Relations Commission on the basis that the fact that the person investigating the complaint on behalf of the respondent did not rely on the definition of antisemitism that the complainant considered to be applicable, does not render the result of the investigation questionable, as the investigator's knowledge of antisemitism had been sufficient to reach the conclusion that the complaint was unfounded)[97] and **Germany** (where the court found that the refusal to transport an Israeli citizen to Sri Lanka via Kuwait could not be sanctioned, as this is a potential case of indirect discrimination – since most Israeli citizens are Jewish – but the relevant Kuwaiti regulations serve as an objective reason justifying the differentiation based, indirectly, on ethnic origin).[98]

Even in those instances when the complainant obtained redress, the antisemitic motive could not always be established with sufficient certainty. For instance, this was the situation in the **Swedish** case, where the hospital admitted that it had dismissed the doctor submitting the complaint without any factual basis, but denied that the dismissal had antisemitic motives. In this case, the Labour Court annulled the dismissal, obliged the employer to pay the employee his lost salary and also damages, but could not draw conclusions regarding the motives for the violation,[99] although in a non-binding opinion related to the source of the conflict, the Equality Ombudsman concluded that during the period June 2017-December 2018, the hospital had breached its obligation to investigate perceived antisemitic harassment allegedly committed against the doctor.[100] In addition, in this case, the Swedish Medical Association – the trade union for physicians – offered legal representation to the complaining doctor only after the Equality Ombudsman concluded that the association had failed to represent the doctor in an adequate manner and that the reason for this was antisemitism or at least a failure to understand antisemitism.[101]

Against this background of serious evidentiary difficulties and problematic practices, it comes as no surprise that the application of criminal provisions aimed at countering certain forms of antisemitism, namely hate speech and hate crime, is much more prevalent than non-criminal legal responses addressing antisemitism. In the case of hate speech, the actions are highly visible due to their public nature of perpetration, whereas in the case of hate crimes, the offences are often those that are regarded as the most serious violations of the fundamental norms of social coexistence (e.g. physical attacks on the life or limb of the victim), or they also contain an element of publicity (such as racist attacks against property, including Jewish cemeteries or places of worship).

It is interesting to note that among the numerically few reported cases when the violation of the requirement of equal treatment was established by the authorities upon a complaint of a victim of antisemitic discrimination, there are some that have strong hate speech elements to them, and it is mainly due to the specificities of the legal framework of the country where they arose that they were adjudicated under what can be regarded as 'non-discrimination legislation'. For instance, in **France**, the Labour Tribunal found an employer to be at fault for failure to intervene and protect from harassment an employee of North African descent with disability. Part of the complaint was the presence of swastika

96 Court of Appeal of The Hague, 10 October 2017, ECLI:NL:GHDHA:2017:2813.
97 Irish Workplace Relations Commission, *A Worker* v. *A Charity*, ADJ-00024672, 7 March 2022, https://www.workplacerelations.ie/en/cases/2022/march/adj-00024672.html.
98 Munich Higher Regional Court (OLG München), 20 U 6415/19, 24 June 2020.
99 Swedish Labour Court Case 2022 no. 39 as reported in the Swedish country brief.
100 Swedish Equality Ombudsman, non-binding opinion in case TIL 2018-506Pdf.
101 Swedish Equality Ombudsman, non-binding opinion in case TIL 2019-268Pdf.

drawings within the employer's premises (the existence of which the complainant proved with written affidavits from his co-employees). The Tribunal's decision discussed the swastika drawings as constituting an expression legitimately perceived as antisemitic, and as such offensive and hurtful on both grounds of origin and religion.[102] In another French case, the Administrative Court rejected the petition of two police officers against their dismissal for having repeatedly exchanged racist, misogynist and antisemitic statements and comments on an online platform between November and December 2019.[103] In **Greece**, a doctor was convicted in relation to discrimination in the provision of health services for placing an antisemitic sign ('Jews are not welcome' written in German) in the medical office allocated to him under a contract with a municipality.[104]

In the remaining reported successful cases there was either readily available evidence or the facts of the case did not make any evidentiary substantiation necessary. An example comes from **France**, where during the probationary period a company manager terminated the contract of a sales person for being Jewish, on the basis that work on Saturdays was forbidden to Jews, regardless of their opinion and actual religious practice. In this case, the complainant recorded his telephone call with the manager, whose comments during the conversation made it clear that the reason for the termination was the complainant's being part of the Jewish community. The manager was found guilty by the penal court for discrimination in employment on the ground of the religious faith of the victim and sentenced to pay EUR 5 000 in damages to the victim and a EUR 2 700 fine.[105] A case where the facts are sufficiently clear without further evidence is that of a **Hungarian** language school that organised English language exams only on Saturdays, preventing a religious Jewish student from sitting for the exam.[106] The case ended in a friendly settlement with the language school agreeing to organise an exam for the complainant on a day other than Saturday.

The problems of proving antisemitic discrimination and the relatively high proportion of unsuccessful complaints in the few cases that are reported are the likely reasons why – despite the problems of underreporting and inadequate data collection that are also characteristic of the criminal field (see above) – there is a much more considerable body of case law regarding antisemitic hate speech and hate crimes in most Member States, whereas there are hardly any cases from the legal fields that offer protection against antisemitic discrimination through non-criminal means.

This kind of difference in prevalence might also be the reason why in several jurisdictions, in addition to the authorities with a function in the criminal procedure, it is not so much the equality bodies, but rather additional structures (such as alliances and networks of NGOs and state bodies) that are vested with, or undertake the task of collecting information on antisemitic incidents, thus enhancing the protection against antisemitic discrimination (see more on this in section 2.3 below).

102 France, Decision of the Equality Body DDD 2020-086 observations before the Court / Labour Tribunal, (CPH) Avesne sur Helpe 07/06/2021 no. 19/00038: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=39751&opac_view=-1.

103 Rouen Administrative Court, October 2021, decision no 2004524, http://rouen.tribunal-administratif.fr/content/download/185428/1791236/version/1/file/2004524.anon_compl.pdf.

104 Tsarnas, V. (2019), 'Καταδικάστηκε γιατρός που ανάρτησε επιγραφή: «Ανεπιθύμητοι Εβραίοι εδώ» (Doctor sentenced for posting a sign "Jews unwanted here"', *Racist Crimes Watch*, available at: https://racistcrimeswatch.wordpress.com/2019/04/18/3-54/ (reference number of the court decision not published in the article).

105 France, Decision of the Equality Body MLD 2014-199, observations before the Court; TGI Paris 15/12/2015 no 13066000980: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=13616&opac_view=-1.

106 Hungarian Equal Treatment Authority, Case EBH/91/2020 (not available online).

# 2 The role of non-discrimination legislation in combating antisemitism

In all of the Member States, protection against antisemitic discrimination in the areas covered by the Racial Equality Directive and the Employment Equality Directive is provided within the general antidiscrimination framework, and no specific measures and forms of protection are envisaged for acts of discrimination motivated by antisemitic sentiments.

Furthermore, non-discrimination legislation providing protection against discrimination in the areas covered by the Racial Equality Directive and the Employment Equality Directive does not contain any specific reference to antisemitism or the Jewish community in any of the Member States, with the exception of **Romania**, where, as outlined above, Emergency Governmental Ordinance 31/2002 defines antisemitism in line with the IHRA definition.

The provision of protection against antisemitic discrimination as an integral part of the larger non-discrimination framework in the states under scrutiny obviously means that those gaps that can be identified in the national systems of general protection are also pertinent when one seeks protection against discrimination motivated by antisemitism. Such gaps have been pointed out by the annual comparative analyses of the European network of legal experts in gender equality and non-discrimination (EELN)[107] including in relation to the personal scope (such as the lack of protection provided for legal persons in a number of countries, including **Czechia**, **Denmark**, **Estonia**, **Ireland**, the **Netherlands** and **Sweden**),[108] the material scope (regarding which gaps have been identified in relation to countries including **Latvia**, **Lithuania**, and **Spain**),[109] or the effectiveness of sanctions (see below). This thematic report does not wish to repeat these findings and focuses instead on the specific issues and protection gaps that might arise with regard to antisemitism in the areas covered by the two directives.

## 2.1 The qualification of 'being Jewish' as a source of potential gaps in the protection system

One potential gap related to combating antisemitism through non-discrimination norms emerges as a result of the fact that, in a number of legal systems, it seems to be undecided whether for the purposes of providing protection against antisemitic discrimination, 'being Jewish' is to be regarded as falling under the ground of 'racial or ethnic origin' or the ground of 'religion or belief'.

This problem stems from the specificities of the ground itself. With regard to large segments of different Jewish communities across not only Europe, but also in other parts of the world, self-identification is not so much ethnic or religious, but rather cultural (and in some cases even related to the experience of persecution). By way of example, a 2020 study on Jewish people in the United States of America, found that 'when asked whether being Jewish is mainly a matter of religion, ancestry, culture or some combination of those things', only 1 in 10 said that it was 'only a matter of religion', and many respondents prioritised 'cultural components of Judaism over religious ones'. According to the study, 'Most Jewish adults say that remembering the Holocaust, leading a moral and ethical life, working for justice and equality in society, and being intellectually curious are "essential" to what it means to them to be Jewish'.[110]

107 See the annual comparative analyses at: https://www.equalitylaw.eu/publications/comparative-analyses.
108 Chopin, I. and Germaine, C. (2023), *A comparative analysis of non-discrimination law in Europe 2022*, European network of legal experts on gender equality and non-discrimination (EELN), European Commission, p. 53.
109 Chopin, I. and Germaine, C. (2023), *A comparative analysis of non-discrimination law in Europe 2022*, p. 55.
110 Pew Research Center (2021), *Jewish Americans in 2020*, p. 56.

The 2018 FRA Perception Survey[111] also approached the issue in a multifaceted way. The questionnaire used in the survey stated the following: 'We are interested in the views and experiences of all people who consider themselves Jewish in any way (this could be based on religion, culture, upbringing, ethnicity, parentage or any other basis) […]'. To the question 'On what basis would you say you are Jewish?', of those who identified a single answer (24 % of the sample), 'Religion attracted the higher preference with 35%, followed by Parentage (26%), Culture (11%), Heritage (10%), Ethnicity (9%), Upbringing (3%) and Other (6%)',[112] (all the other respondents provided two or more answers).

Many of these identities could be best grouped under the term 'descent'. The concept of descent is, however, not used in the non-discrimination *acquis*, although it is defined in a piece of secondary EU law regulating another area: Recital 7 of the Framework Decision describes descent 'as referring mainly to persons or groups of persons who descend from persons who could be identified by certain characteristics (such as race or colour), but not necessarily all of these characteristics still exist', where the past identifying characteristic is most probably religion. Interestingly, this aspect of the ground 'descent' has been emphasised by the **Irish** Government regarding a bill that proposes the regulation of hate crimes under Irish law for the first time.[113] The protected characteristics in the proposed new legislation include 'race', 'religion', 'national or ethnic origin', and 'descent'.[114] Section 3(2) of the Bill provides that 'references to "descent" include references to persons or groups of persons who descend from persons who could be identified by certain characteristics (such as race or colour), but not necessarily all of those characteristics still exist […]' As the Irish country expert reports, the Government's press release notes that '[d]escent is distinct from race and would be relevant, for example, in the context of the Jewish community, where a person may have Jewish ancestry but does not practice the religion.' [115]

**Italy's** National Strategy for Combating Antisemitism raises the potential need to amend the Criminal Code, 'which currently do not adequately cover the reasons or purposes of antisemitic discrimination or hatred or antisemitic prejudice', as the concepts 'of "ethnic, racial, religious discrimination / hatred" do not fully express the reality of antisemitism', since being Jewish 'cannot be characterised either as a "race" […] or ethnicity (uniform cultural community) or nationality (Jews may be of various nationalities) or religion (Jews are targeted because they are Jews and not due to the religion professed – moreover not by all of them).'[116]

However, in spite of the fact that 'descent' may be a more accurate concept, neither of the two directives offer protection on the basis of descent, and only two Member States have anti-discrimination legislation implementing the directives that contains 'descent' as an explicitly protected ground (**Belgium** and **Greece**). In **France** the list of protected grounds includes some concepts that can have a similar meaning (such as 'origin' or 'nation'), and in **Ireland**, the court-approved definition of the term 'ethnic origin' is broad enough to cover secular Jewish people. The two main constitutive elements of the definition of 'ethnic group' set out by the **British** House of Lords in *Mandla* v *Dowell-Lee*[117] correspond to the concept of descent in the Framework Decision. In that case, it was found that such a group must regard itself and be regarded by others as a distinct community by virtue of certain characteristics, including 'a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive' and 'a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance'.

111 European Union Agency for Fundamental Rights (FRA) (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*.
112 DellaPergola, S. and Staetsky, L.D. (2021), *The Jewish identities of European Jews*, Institute for Jewish Policy Research, pp. 21-22.
113 Ireland, Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022. On 7 July 2023 (the cut-off date of the report), the bill was still being debated before the Irish Parliament.
114 Ireland, Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022, Section 3.
115 Irish Department of Justice (2022), 'New Bill to tackle hate crime and hate speech includes clear provision to protect freedom of expression'.
116 Italy, Presidency of the Council of Ministers (2021), National Strategy for Combating Antisemitism, pp. 20-21.
117 United Kingdom, House of Lords, *Mandla v Dowell Lee* [1983] 2 AC 548, 24 March 1982.

In **Greece**, where Equal Treatment Law 4443/2016 on the transposition of Directives 2000/43/EC and 2000/78/EC and on the application of the principle of equal treatment[118] provides for equal treatment on the basis of descent, too (in addition to grounds including race, national or ethnic origin and religion or belief), 'being Jewish' would still be considered to fall under the ground 'religion or belief' for the purposes of providing protection against discrimination as required by the directives.

The situation in this respect is particularly interesting in **Belgium**, where it is reported that the relevant pieces of legislation offer protection against discrimination in the areas covered by the directives on the basis of, among other things, (alleged) race, descent, national or ethnic origin, and religious belief, but 'being Jewish' for the purposes of the legislation implementing the directives would fall under the ground 'racial or ethnic origin' and 'religion or belief'. At the same time though, under the Federal Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia, which is applicable to discrimination in access to and participation in any kind of 'exercise of an economic, social, cultural or political activity accessible to the public', discrimination against a Jewish person would be regarded as 'based on descent'.

In other jurisdictions, 'being Jewish' comes under the category of 'religion or belief' (e.g. in **Finland**, **Luxembourg** and **Sweden**) or 'racial or ethnic origin' (e.g. in **Germany**, **Latvia** and **Malta**) or can come under both depending on the context (e.g. **Austria**, the **Netherlands** and **Romania**).

In several legal systems (e.g. in **Croatia**, **Hungary**, **Romania**, **Slovakia**, **Slovenia** and **Spain**) the differentiation bears no practical relevance, because there is no difference in the scope of protection depending on how 'being Jewish' is categorised, and therefore, in the cases regarding antisemitism, no need to very specifically distinguish between these categories arises on the side of the authorities in order to be able to decide a legal dispute.

This sometimes leads to inconsistent jurisprudence or cases where although the differentiation is very clearly based on one aspect of being Jewish, the other is used as the trigger for protection. For instance, in a 2019 **Lithuanian** case that concerns a field outside the directives' scope but is illustrative of the issue, the complainant was a Jewish inmate, and while the other detainees (of mainly Catholic faith) were allowed to meet a priest outside of their family visitation hours, he was only allowed to see a rabbi within the time assigned for family visits. Although the differentiation in this case was very clearly connected to the religious aspect of being Jewish, the identified ground of discrimination was still the complainant's ethnic origin.[119] At the same time, in a very similar case (when the complainant demanded remedy because he was not provided with food in accordance with his religious beliefs while serving his prison sentence), religion was used as a protected ground.[120]

Similarly, in **Hungary**, both the above quoted case of a language school that organised language exams only on Saturdays,[121] and another case in which the complainant visited the medical on-call service managed by the respondent, and the doctor on duty allegedly addressed hateful, antisemitic remarks to him because of his assumed Jewish origin, were categorised as instances of (suspected) discrimination based on religion or belief, although nothing in the second case suggests that the complainant was religious and that the incident was in any way related to religion.[122] Since both cases ended in a friendly settlement (in the first case, the language school agreed to organise an exam on a day other than

118 Greece, Law 4443/2016 on the transposition of Council Directive 2000/43/EC on the application of the principle of equal treatment irrespective of race and ethnic origin, and the transposition of Council Directive 2000/78/EC on the configuration of the general framework of equal treatment in employment and work and Council Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers and other provisions (JO 232 A/09.12.2016).

119 Described by the Lithuanian country brief on the basis of: https://e-teismai.lt/byla/145434622979523/eA-2433-575/2019.

120 Lithuanian country brief.

121 Hungarian Equal Treatment Authority, Case EBH/91/2020 (not available online).

122 Hungarian Equal Treatment Authority, decision no. EBH/117/2020, 2020 (no more accurate date is available), available at: https://www.ajbh.hu/documents/10180/4041368/EBH_HJF_117_2020_+vall%C3%A1s_vil%C3%A1gn%C3%A9zet_+eg%C3%A9szs%C3%A9g%C3%BCgy.pdf/88c8bb1f-5718-2660-fe92-f641f86584ea?version=1.0&t=1664891843242.

Saturday, in the second, the physician apologised, although refused to acknowledge that he had made antisemitic remarks), no closer scrutiny of the ground of discrimination was carried out.

Another example is that of **Croatia**, where, although members of Jewish community have the constitutional status of a national minority, the People's Ombudsperson in her annual reports classifies cases concerning discrimination against members of the Jewish community as religious discrimination. For example, in her 2022 annual report, she gave an account of an incident regarding the swastika symbol being spray-painted on the ground in front of a hotel where about 60 Jewish children from France were staying, presenting it as an example of discrimination on the basis of religion and freedom of religion.[123]

In **Germany**, due to the German historical past, antisemitism is regarded as discrimination on the ground of race, not of religion.[124] As the German expert points out, this approach

> 'strengthens the protection against antisemitism as the prohibition against racial discrimination is in parts stricter in areas beyond employment law, where Directive 2000/43 but not Directive 2000/78 applies. This includes a prohibition of any discrimination on the ground of race when founding, executing or terminating other civil-law obligations'.[125]

This raises the issue of potential gaps in the protection system on the basis of how being Jewish is categorised: as falling under the category of 'religion or belief' or 'racial or ethnic origin'. This can have a relevance in the jurisdictions (i) where there is a difference regarding the material scope of protection depending on what the ground of discrimination is; (ii) where the remedial forums to which victims of discrimination can turn have limitations of jurisdiction regarding certain grounds of discrimination; or (iii) where there are some other differences in the scope and efficiency of the protection system against discrimination depending on the ground on which it is based.

As far as the first issue is concerned, the Employment Equality Directive provides protection against discrimination based on religion or belief only in the field of employment (in the wide sense), whereas the Racial Equality Directive bans discrimination based on racial or ethnic origin not only in relation to employment, but also with respect to 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). In jurisdictions where the material scope of protection against discrimination reflects this differentiation (i.e. where the directives have been implemented narrowly), if 'being Jewish' is regarded as religion, it may mean that no sufficient protection against unlawful differentiations in social protection, social advantages, education, and access to and supply of goods and services is readily available. This is the case in **Estonia**, where the Equal Treatment Act prohibits discrimination on grounds of nationality (ethnic origin) and race in employment, in social welfare, in education and with regard to access to and supply of goods and services, including housing, but if the victim relies on the ground of religion or belief the scope of protection is narrower – limited only to employment. In the absence of relevant case law, it cannot be known how the Estonian authorities would qualify being Jewish, which may leave a Jewish victim unprotected in the areas not covered by the Employment Equality Directive.

The situation is similar in **Portugal**, where it is unclear whether antisemitism would fall under belief or religion or under racial or ethnic discrimination, given the lack of relevant judicial precedents on the issue. However, according to the expert, given that Law 93/2017 of 23 August 2017, which establishes the legal regime for the prevention, prohibition and combating of discrimination within the scope of social protection, including in social security and healthcare, social benefits, education, access to and the supply of goods and services that are available to the public, including housing and culture,

123 Croatian People's Ombudsperson (2022), *Izvješće pučke pravobraniteljice za 2022* (Report of the People's Ombudsperson for 2022).
124 There is also an ongoing debate on whether the term 'race' should be replaced by another, less controversial term in legal terminology.
125 Germany, General Equal Treatment Act (AGG), Article 19(2), quote from Germany country brief.

> 'does not apply to religion and belief and [...that] the Portuguese Nationality Law includes the possibility to award Portuguese nationality to Sephardic Jews of Portuguese origin [...], we would incline ourselves to the qualification of racial or ethnic origin and descent (therefore, being under the umbrella of Directive 2000/43)'.[126]

An example of limitations of protection by a remedial forum comes from **Denmark** where the Danish Board of Equal Treatment (*Ligebehandlingsnævnet*), the body that deals with discrimination complaints, oversees a different list of protected grounds in relation to the labour market (where the Board deals with discrimination complaints based on gender, race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, age, disability or national, social or ethnic origin), and outside the labour market (where the Board deals with complaints related to discrimination based on race, ethnic origin, gender and disability, but *not religion or belief*).

For that reason, in a 2019 case concerning access to goods and services, the Board had to find an alternative legal ground to be able to investigate the complaint of a Jewish customer who wanted to return an item he was dissatisfied with, and claimed that when he phoned the store in connection with this, the shop owner had stated that he had assumed that the complainant was Jewish because of his surname and that his business had no room for Jews. The customer complained that he had been discriminated against based on his religion or belief and ethnic origin. The Board stated that it could not deal with complaints of discrimination based on religion or belief outside the labour market, however, since the owner of the store had referred to the foreign-sounding last name of the customer, it could deal with the complaint as a case of possible discrimination because of ethnic origin. However, since the shop owner denied that he had made the statements, the Board eventually dismissed the complaint as, according to the Board, the parties' disagreement about the telephone conversation could have only been resolved by taking oral statements, and such evidence cannot be taken by the Board.[127] The case however highlights the problem that the Board could only investigate the case of discrimination for being Jewish under the ground of ethnicity due to the fact that the shop owner's assumption regarding the complainant was based on the latter's foreign-sounding name.

Finally, in **Czechia**, the shifted burden of proof – according to which after the claimant demonstrates that they faced a difference in treatment, the respondent needs to prove that they have not committed discrimination – applies to discrimination on grounds of religion only in relation to employment and occupation, whereas when it comes to discrimination on grounds of race or ethnic origin, the shifted burden of proof is also applied in relation to discrimination complaints in the fields of healthcare, education, housing, and goods and services. In the Czech legal system, being Jewish could theoretically fall under both grounds ('religion' or 'racial or ethnic origin'), but there is no practice in this regard, so whether the difference in the applicability of the shifted burden of proof would cause problems in practice is yet to be seen.

What can be concluded on this basis is that while in the absence of relevant case law it is difficult to predict how Member States' authorities would categorise Jewish identity if that was decisive regarding the type and scope of protection against discrimination in the areas covered by the directives, this lack of clarity carries certain risks concerning the efficiency of anti-discrimination measures in those areas against discriminatory acts motivated by antisemitism.

126 Portugal country brief.
127 Danish Board of Equal Treatment, Decision No. 10000 of 9 October 2019. See: https://www.retsinformation.dk/eli/accn/W20191000025.

**Recommendation:**

It would be advisable in each Member State to find solutions (either through legislation, legislative guidance or the development of jurisprudence) that guarantee that victims of antisemitic discrimination are adequately protected in – at least – all the areas covered by the Racial Equality Directive and the Employment Equality Directive irrespective of whether being Jewish is perceived to fall under 'religion' or 'racial or ethnic origin'.

## 2.2 Criminal versus non-criminal responses to antisemitic discrimination

### *2.2.1 The underuse of criminal sanctions penalising discrimination*

While the Framework Decision obliges Member States to criminalise certain acts motivated by racism and xenophobia, rendering them punishable by 'effective, proportionate and dissuasive criminal penalties' (Article 3), the EU's non-discrimination *acquis* prescribes the introduction of 'effective, proportionate and dissuasive' sanctions applicable for the infringements of the requirement of equal treatment (Article 15 of the Racial Equality Directive and Article 17 of the Employment Equality Directive) without specifying whether these sanctions must be civil, administrative or criminal in nature.

General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI General Policy Recommendation No. 7)[128] suggests combined, complementary regulation and emphasises that 'appropriate legislation to combat racism and racial discrimination should include provisions in all branches of the law, i.e. constitutional, civil, administrative and criminal law'. With regard to the fight against racial discrimination, ECRI recommends that 'the member States of the Council of Europe adopt constitutional, civil and administrative law provisions, and that, in certain cases, they additionally adopt criminal law provisions', since 'civil and administrative law often provides for flexible legal means, which may facilitate the victims' recourse to legal action', whereas 'criminal law has a symbolic effect which raises the awareness of society of the seriousness of racism and racial discrimination and has a strong dissuasive effect, provided it is implemented effectively'.[129] ECRI General Policy Recommendation No. 7 recommends a criminal response in relation to the fight against racial discrimination with regard to only one specific offence (racial discrimination in the exercise of one's public office or occupation).[130]

A preference for non-criminal sanctions is also reflected in the Office of the United Nations High Commissioner for Human Rights' 'Practical Guide to Developing Comprehensive Anti-Discrimination Legislation'[131] (OHCHR Guide) which holds that 'it is increasingly acknowledged that civil and administrative law provide the most effective remedies and sanctions for direct and indirect discrimination and failure to make reasonable accommodation. […] Indeed, criminal law provides both an inappropriate and an inadequate means to remedy these forms of discrimination, for a number of reasons', including the necessity to have and prove intent or malicious motive; the high standard of proof; the rules of evidence and the absence of the shifted burden of proof; and criminal law's incompatibility with an open-ended list of grounds.[132]

An additional consideration is the adequacy of the applicable sanction. In its Communication No. 17/1999 handed down in the *B.J.* v *Denmark* case (concerning the discrimination complaint of a petitioner who was

128 ECRI, General Policy Recommendation No. 7 (revised) on national legislation to combat racism and racial discrimination, adopted on 13 December 2002 and revised on 7 December 2017.
129 Explanatory Memorandum to ECRI General Policy Recommendation No. 7, para 3.
130 ECRI General Policy Recommendation No. 7, para. 18.
131 Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Equal Rights Trust (2023), *Protecting Minority Rights. A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, United Nations, https://www.ohchr.org/sites/default/files/documents/publications/2022-11-28/OHCHR_ERT_Protecting_Minority%20Rights_Practical_Guide_web.pdf.
132 OHCHR and the Equal Rights Trust (2023), *Protecting Minority Rights. A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, pp. 77-78.

not allowed to enter a discotheque on the basis that he was the member of a group where four out of six persons were deemed 'foreigners' by the discotheque' doorman), the UN Committee on the Elimination of Racial Discrimination held that victims' claim for compensation

> 'has to be considered in every case, including those [...] where the victim has suffered humiliation, defamation or other attack against his/her reputation and self-esteem. Being refused access to a place of service intended for the use of the general public solely on the ground of a person's national or ethnic background is a humiliating experience which, in the opinion of the Committee, may merit economic compensation and cannot always be adequately repaired or satisfied by merely imposing a criminal sanction on the perpetrator.'[133]

In the context of the Racial Equality Directive and the Employment Equality Directive, '[m]ost countries have transposed the directives through civil or labour law, with a minority having also maintained, introduced or amended criminal law provisions (e.g. Belgium, Denmark, Estonia, France and Luxembourg).'[134] According to a 2021 study on the possibility of extending the list of EU crimes in Article 83 of the Treaty on the Functioning of the EU to hate speech and hate crime (2021 EU Crimes Study), '10 Member States criminalise the act of discriminating with a bias motive'.[135] The countries listed in the study are: **Denmark**, **Finland**, **France**, **Latvia**, **Lithuania**, **Luxembourg**, **Romania**, **Slovenia**, **Spain** and **Sweden**. In the country briefs produced for this thematic report, the national experts reported that criminal or criminal-type sanctions (e.g. regulated in misdemeanour laws) penalising discrimination are also in place in **Austria**, **Belgium**, **Croatia**, **Estonia** and the **Netherlands**, which means that the criminal sanctioning of discrimination exists in one form or another in more than half of the Member States.

There are different solutions regarding the criminal responses to discrimination in the Member States. In some of them, discriminatory behaviours fall under criminal, administrative or civil law depending on the field concerned, e.g. in **Denmark**, where direct and indirect discrimination in the labour market on the ground of religion is covered by civil law, while discrimination in other societal areas is covered by a penal norm.

In other countries, certain behaviours can be sanctioned under both criminal law and other branches of law, e.g. in **Croatia** where under the Anti-discrimination Act,[136] a victim of discrimination can seek protection through civil proceedings (including the possibility of claiming damages) in a very wide range of areas (as the Act applies to both the public and private sectors and to all areas without any limitation), but with regard to certain areas, discrimination can also be prosecuted under criminal law as the criminal offence of 'violation of equality', which is committed by the person who on the basis of differences in characteristics including race, ethnicity, skin colour, religion, national or social origin, 'denies, limits or conditions another person's right to acquire goods or receive services, the right to perform activities, the right to employment and promotion, or who based on this difference gives privileges or benefits to another person'.[137]

133 United Nations (2012), *Selected Decisions of the Committee on the Elimination of Racial Discrimination*, Volume I, Geneva, p. 74.
134 Chopin, I. and Germaine, C. (2023), *A comparative analysis of non-discrimination law in Europe 2022*, European network of legal experts in gender equality and non-discrimination, 2023, p. 11.
135 European Commission, Ypma, P., Drevon, C., Fulcher, C. et al. (2021), *Study to support the preparation of the European Commission's initiative to extend the list of EU crimes in Article 83 of the Treaty on the Functioning of the EU to hate speech and hate crime – Final report*, Publications Office of the European Union, p. 58. The countries listed in the study are: Denmark, Spain, Finland, France, Lithuania, Latvia, Luxembourg, Romania, Slovenia and Sweden. In the current study, experts reported that criminal or criminal-type (e.g. misdemeanour) sanctions are envisaged for discrimination are also in place in Croatia, Austria, and the Netherlands, which means that the criminal sanctioning of discrimination exists in one form or another in almost half of the Member States.
136 Croatia, Anti-discrimination Act, 9 July 2008, Official Gazette 85/2008, 112/2012, *Zakon o suzbijanju diskriminacije*.
137 Croatia, Criminal Code, Official Gazette no. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, Article 125.

Yet another approach is applied in the **Netherlands**, where discrimination that is prohibited by the General Equal Treatment Act[138] may also have a penal consequence (depending on the choice of forum by the victim)[139] if intentional discrimination on the ground of racial or ethnic origin is committed by persons 'acting in the exercise of their office, employment or enterprise'.[140] This kind of differentiation depending on who commits the discrimination and in what capacity, also exists in other countries. Thus, while in **Luxembourg** discrimination is defined broadly 'to encompass any discriminatory treatment between natural persons', in **Sweden**, 'an individual must be discriminated against by a business operator for it to be a criminal offence'.[141]

In some of those countries where criminal responses are also provided for actions falling under the non-discrimination directives, the pertaining penal provisions often address these offences in a certain proximity with incitement-type behaviours, i.e. hate speech and its equivalents. For instance, in **Austria**, the same article of administrative criminal law[142] penalises (with a fine of a maximum of EUR 1 090) the act of discriminating or hindering someone in entering spaces or using services accessible for the public, on the grounds of race, skin colour, national or ethnic origin, religious faith or disability (under subparagraph 3) and renders the dissemination of national socialist ideas as prohibited by the National Socialism Prohibition Act of 1947 (*Verbotgesetz*) punishable (under subparagraph 4) with an administrative fine (of a maximum of EUR 2 180).[143] In **Lithuania**, Article 169 of the Criminal Code penalises discrimination based on nationality (as in 'ethnicity'), race, gender, origin, religion or other group affiliation, while Article 170 prescribes criminal liability for mocking, insulting, inciting discrimination or hatred against a person or a group of people on the basis of, among other grounds, nationality (as in 'ethnicity') or ethnic origin. In the **Netherlands**, Article 137d of the Criminal Code prohibits incitement to hatred, discrimination or violence including on the grounds of racial or ethnic origin and religion, Article 137e Criminal Code prohibits the publication of statements that are known to be insulting for a group of people because of their racial or ethnic origin or religion, whereas Article 137g penalises intentional discrimination.

This legislative proximity within the respective penal codes/norms indicates an assessment on the part of the legislature that these behaviours have connected root causes and also warrant similar approaches with respect to how they are addressed and sanctioned.

However, if we look at the practice of the application of norms penalising discrimination and compare it to either the jurisprudence regarding the non-criminal remedies of discrimination or the practice of addressing incitement-type behaviours through criminal law, we see that their application is much more scarce (almost non-existent in most Member States) than that of the latter two remedial routes, which are applied in practice from time to time (even though, as outlined in the Introduction, underreporting is a problem and the number of cases seems to be much lower than that of the actual incidents regarding those too).

For instance, the **Estonian** expert reports that the criminal sanctioning of discrimination has no case law and the **Romanian** expert described criminal protection against discrimination as 'theoretical/illusory'. In

138 Netherlands, General Equal Treatment Act (*Algemene wet gelijke behandeling*), adopted on 2 March 1994, Staatsblad 1994, 230 (hereafter: GETA).

139 In cases which are sanctionable under both the GETA and the Criminal Code (*Wetboek van Strafrecht*), adopted on 3 March 1881, Staatsblad 1881, 35., it is up to the victim to decide which remedy they wish to pursue. This can be a request for a non-binding opinion by the Netherlands Institute for Human Rights (the national equality body) establishing whether there has indeed been discrimination under the GETA, or a complaint to the police which may result in criminal prosecution. In the latter case, it will be up to the public prosecutor to decide whether or not prosecution takes place.

140 Netherlands, Criminal Code, Article 137g.

141 European Commission, Ypma, P., Drevon, C., Fulcher, C. et al. (2021), *Study to support the preparation of the European Commission's initiative to extend the list of EU crimes in Article 83 of the Treaty on the Functioning of the EU to hate speech and hate crime – Final report*, Publications Office of the European Union, p. 59.

142 Austria, Introductory Act to the administrative procedure laws (*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen*) (EGVG), BGBl. I Nr. 78/2008, as amended by BGBl I Nr. 61/2018, Article III/1/3-4.

143 Austria, National Socialism Prohibition Act 1947 (*Verbotsgesetz 1947*), StF: StGBl. Nr. 13/1945. For an English translation of the Act see: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1945_13/ERV_1945_13.pdf; Article III/1/3-4, EGVG.

**Slovenia**, while the number of discrimination cases dealt with by the equality body on the basis of the Protection Against Discrimination Act is generally rising (in 2022, the Advocate dealt with 410 cases),[144] data on the application of Article 131 of the Criminal Code (penalising discrimination based on, among other things, race, religion, ethnicity or any other circumstance) shows that there are very few registered cases, and even these usually end with the dismissal of the indictment, 'meaning that these cases never go to trial'.[145]

The reasons for this most probably lie in the specificities of criminal law, and the obstacles that these specificities pose in discrimination cases, as pointed out by the OHCHR Guide. After analysing some of these specificities, which generally pertain to the penalisation of discrimination irrespective of the protected ground concerned, the report will outline how and why these specificities can be particularly problematic in the context of antisemitic discrimination.

### *2.2.2 The burden of proof in criminal and non-criminal approaches*

The most obvious issue in relation to the applicability of penal norms in addressing discrimination is the shifted burden of proof. Both directives oblige Member States 'to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment' (Racial Equality Directive, Article 8; Employment Equality Directive, Article 10). This is the response of the *acquis* to the informational/evidentiary asymmetry that is characteristic of many discrimination cases where the (alleged) discriminator is in possession of important evidence (e.g. the documentation of all the applicants for a particular job) or has power over persons who could provide such evidence (e.g. when co-workers could testify against the employer in a discrimination lawsuit filed by an employee).

Due to this asymmetry, protection against discrimination cannot be truly effective unless the ordinary burden of proof (whereby the claimants bear the onus of proving the factual basis of their claim) is adapted. This consideration lies beneath the ECJ's *Danfoss* judgment, in which the Court emphasised that '[t]he concern for effectiveness which thus underlies the [equal pay] directive means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality'.[146] Similarly, the Recitals of both directives expressly state that the need for shifting the burden of proof in discrimination cases arises 'for the principle of equal treatment to be applied effectively'.[147]

However, in criminal law, no shift of the burden of proof is conceivable due to the presumption of innocence. As the European Court of Human Rights summarised in its *Telfner* v *Austria* judgment, the presumption of innocence 'requires, inter alia, that [...] the burden of proof is on the prosecution, and any doubt should benefit the accused [...]. Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence [...]'.[148] In accordance with this principle, the directives make it clear that the obligation to shift the burden of proof does not apply to criminal procedures, and in none of the Member States is the burden of proof adapted in any way when criminal liability is at stake.

This however does not render the problem of proof and the difficulties of finding and presenting evidence irrelevant in such procedures and in jurisdictions where protection against discrimination, including those

144 Slovenian Advocate of the Principle of Equality (2023), *Annual Report for 2022 – Part I* (*Redno letno poročilo za leto 2022 – 1. del*), p. 42.
145 The SIStat portal (available at: https://pxweb.stat.si/) publishes data on the number of charged and convicted persons per criminal offence: e.g. all 4 cases in 2022, all 9 cases in 2020, and the single case in 2019 that ended without an indictment.
146 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* (acting on behalf of Danfoss), C-109/88, ECLI:EU:C:1989:383, para. 14.
147 Racial Equality Directive, Recital 21 and Employment Equality Directive, Recital 31.
148 European Court of Human Rights, *Telfner* v *Austria* (Application no. 33501/96), judgment of 20 March 2001, para. 15.

instances that are motivated by antisemitism, is envisaged to be provided through penal means. This is substantiated by the 2018 FRA Perception Survey, which, as pointed out in the Introduction, concluded that although the vast majority of the respondents were aware of anti-discrimination legislation and organisations that can offer support in cases of discrimination, 77 % of those respondents who had been subjected to antisemitic discrimination in the preceding 12 months did not report the most serious such incident(s) to any authority or organisation. One third of these respondents said that the main reason for non-reporting was that they did not have any proof of the discrimination.[149] (It is particularly noteworthy that reference to the inability to prove the incident as a reason for non-reporting was not at all significant with regard to other manifestations of antisemitism, such as harassment and physical attacks, regarding which other factors, including mistrust in the authorities, fear of reprisal, and the feeling that nothing would change as a result played an important role in the decision not to file a complaint.)

The problem regarding the effectiveness of protection against discrimination through criminal law in relation to the burden of proof is also touched upon in the CJEU's *Diskrimineringsombudsmannen* v *Braathens Regional Aviation AB* judgment. In this case, an air passenger of Chilean origin was subjected to an additional security check because he was associated with an Arabic person. The **Swedish** Equality Ombudsman brought a case before the court seeking an order that the airline pay the passenger compensation for discrimination. The airline agreed to pay the compensation, but refused to recognise the existence of any discrimination. Under Swedish civil law, in such a case, the court would have been obliged to order the payment without drawing any conclusion regarding the alleged discrimination. The question before the CJEU was whether such a procedural solution was in compliance with the Racial Equality Directive's articles regarding the defence of rights and effective sanctions. The CJEU concluded that Article 7 of the Racial Equality Directive aims to permit the enforcement of rights derived from the principle of equal treatment, therefore 'where the defendant does not recognise the discrimination alleged that person [the complainant] must be able to obtain from the court a ruling on the possible breach of the rights that such procedures are intended to enforce'.

To the argument of the Swedish Government that criminal proceedings brought by the complainant would permit a victim of discrimination to have that discrimination found and punished by a criminal court, the CJEU responded that 'Such criminal proceedings, due to the specific purposes that they pursue and the constraints inherent therein, do not make it possible to remedy the failure of civil law remedies to comply with the requirements of that directive', in particular because such criminal proceedings are based on rules regarding the burden of proof and the taking of evidence which do not correspond to those, more favourable to the victim, that are laid down in Article 8 of Directive 2000/43.[150]

### *2.2.3 The standard of proof and the role of intent in criminal and non-criminal approaches*

Closely related to the burden of proof is the issue of the standard of proof and the question of intent. In several legal systems, there is a difference between the criminal and non-criminal responses to discrimination not only with regard to who bears the onus of proving the different elements of discrimination, but also the standard of proof regarding these different elements. In all the Member States, 'beyond reasonable doubt' is the standard of proof in criminal cases (i.e. the prosecution must convince the court that the evidence presented at trial leaves no doubt as to the defendant's guilt), whereas in other branches of law, a lower level of certainty may be sufficient for a discrimination claim to be successful. By way of example, in **Hungary**, the Equal Treatment Act[151] requires only that the allegedly injured party substantiates, rather than proves, his or her claims. Substantiation involves a lower level of

149 FRA (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, p. 63.
150 CJEU, Judgment of 15 April 2021, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, C-30/19, ECLI:EU:C:2021:269, paras. 46-51.
151 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, (*2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról*), 28 December 2003, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV.

certainty: if the injured party establishes facts from which it may be presumed that a disadvantage was suffered and that the party possesses a protected feature (or the other party must have assumed so), then the burden of proof is shifted. Similarly, in **Slovenia**, whereas in criminal procedures the principle of 'beyond reasonable doubt' applies, in administrative proceedings 'the standard of proof is likelihood'.[152]

Furthermore, a criminal approach to discrimination also entails a focus on the intent of the perpetrator (negligent behaviour can also be rendered criminally punishable, but in all of the Member States where there is criminal protection against discrimination, only intentional discrimination is penalised). This has an impact on the forms of discrimination that penal law can address and has further implications regarding the provability of discrimination for the purposes of triggering a legal response.

With regard to the former issue, there are certain forms of discrimination where the victim's substantive and procedural position is facilitated by the fact that no intent is required on the part of the respondent for discrimination to be established and remedied. For instance, harassment under the directives is unwanted conduct related to a protected ground, which takes place with the purpose *or effect* of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. This significantly eases the situation of complainants, as they do not need to prove (or substantiate with a lesser degree of certainty) that there was discriminatory intent behind the unwanted conduct and the provability of the effect is sufficient for acquiring protection against such behaviours.

Similarly, as Tobler points out: 'a particularly important aspect of the effects-based nature of the concept of indirect discrimination lies in the fact that intention on the side of the discriminator is not part of the definition of the concept. Instead, what is decisive is the effect of the measure in question'.[153] Tobler quotes Advocate General Poiares Maduro's opinion on the *Coleman* case, where he emphasises this very feature as a key rationale behind codifying indirect discrimination:

> 'In fact, this is the whole point of the prohibition of indirect discrimination: even neutral, innocent or good faith measures and policies adopted with no discriminatory intent whatsoever will be caught if their impact on persons who have a particular characteristic is greater than their impact on other persons. It is this "disparate impact" of such measures on certain people that is the target of indirect discrimination legislation.'[154]

Criminal law is per se not able to address those instances of harassment or indirect discrimination where the intent is lacking, and the problems of proof that are already present in relation to instances of direct discrimination will obviously be even more severe when an apparently neutral provision is under scrutiny.

This leads to a situation whereby although indirect discrimination can also be intentional, some of the countries that give penal responses to discrimination exclude instances of indirect discrimination from the scope of criminal law. For instance, in **Denmark**, whereas religion-based direct and indirect discrimination on the labour market is covered by civil law, discrimination in other societal areas is covered by criminal law, which only prohibits direct discrimination. Similarly, in **France**, the Penal Code[155] covers only intentional direct discrimination in a number of areas, including education, housing, access to goods and services, certain aspects of employment and hindrance to activity (such as boycotts).

In **Belgium**, both direct and indirect discrimination can be punished through criminal sanctions, as long as the discrimination is 'intentional', which raises the second issue: the difficulty of proving intent.

152 Slovenian country brief.
153 Tobler, C. (2022), *Indirect discrimination under Directives 2000/43 and 2000/78*, European network of legal experts in gender equality and non-discrimination, p. 64.
154 CJEU, Opinion of AG Poiares Maduro, 17 July 2008, *S. Coleman* v *Attridge Law and Steve Law*, C-303/06, ECLI:EU:C:2008:61, paragraph 19.
155 France, Law No. 92-686 of 22 July 1992 adopting the new Penal Code, 22 July 1992, http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719, Article 225-1 et seq.

As the **French** country expert has pointed out in relation to the practical applicability of penal law in discrimination cases:

> 'criminal sanctions against discrimination are tightly circumscribed both by the definition of the offence itself and by the rules of criminal procedure, which require proof of racist intent for an act that would otherwise be entirely lawful (e.g. a choice of tenant or employee) to be declared unlawful. It is of the nature of such acts that intent cannot typically be inferred from the decision, and even when direct proof of [...] racist prejudice is available, its specific contribution to the questionable act is extremely difficult to assess, and often obscure even to the perpetrator.'[156]

The **Swedish** expert also reported that in cases of unlawful discrimination regulated by the Swedish Criminal Code, 'some sort of acknowledgement/admission/confession by the accused is essentially necessary for a prosecutor to file a criminal case, meaning that there are seldom any convictions in this field'.[157] For that reason, it might be more beneficial for a complainant to proceed on the basis of the Swedish Discrimination Act regarding instances that are covered by both this Act and the Criminal Code, since there is no requirement to prove intent under the Discrimination Act because it is sufficient to prove a *prima facie* case. According to the Swedish expert, proving intent is one reason why there are so few cases brought under criminal law.

In **Spain**, for a criminal response to be triggered, a very high threshold must be met. With a view to distinguishing between the sanctions derived from the provisions of Law 15/2022 (the Spanish anti-discrimination law) and the Penal Code, the State Attorney General's Office issued Circular 7/2019 of 14 May on guidelines for interpreting hate crimes under Article 510 of the Penal Code.[158] The circular stipulates that when dealing with matters of non-discrimination and hate crimes, prosecutors have to make an assessment of the motives of the concerned person's conduct. For a criminal response to be triggered, a difference in treatment is not sufficient, it is also necessary 'that the action or omission can only be understood from the point of view of contempt for the intrinsic dignity that every human being possesses' and must represent 'an attack on those who are different as a form of intolerance that is incompatible with peaceful coexistence'. For this reason, 'criminal prosecution will be applied to conduct that infringes the most fundamental rules of tolerance and coexistence affecting the values and principles common to all citizens, invading the sphere of dignity inherent to any human being and which, as such, must be considered an attack on the structural elements and backbone of the constitutional order and, ultimately, on the whole system of rights and freedoms intrinsic to a democratic society'.

### *2.2.4 Advantages and disadvantages of criminal and non-criminal responses to discrimination from the point of view of the complainant*

A final aspect in the assessment of criminal law responses to instances of discrimination is what advantages of the specificities of the different procedures offer for and what disadvantages they pose to the complainants.

With regard to almost all the Member States, where criminal protection is available against discrimination, the experts emphasised that criminal procedures impose serious limitations on the complainants, as the outcome of the proceeding is to a great extent in the hands of the prosecution. For instance, in **Cyprus**, the criminal prosecution is discretionary upon the Attorney General and the victim has no role other than as a witness. In **Slovenia**, if the prosecutor finds that there are no grounds for prosecution,[159] the

156 French expert's input into the legal expert network's 2022 compilation of information on court rulings on antisemitism.
157 Swedish country brief.
158 Spain, State Attorney General's Office (*Fiscalía General del Estado*), Circular 7/2019, on guidelines for the interpretation of hate crimes under Article 510 of the Criminal Code (*Circular 7/2019, sobre pautas para interpretar los delitos de odio tipificados en el art. 510 CC*), 14 May 2019.
159 Slovenia, Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994, Article 19, available at: http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO362.

victim may decide to take over the prosecution, however, 'this is often quite burdensome for the victims as they do not have the necessary resources to take on such a responsibility', therefore, administrative proceedings before the Advocate of the Principle of Equality may be more accessible for complainants.[160] Similarly, in **Hungary**, the possibility of acting as a supplementary private prosecutor is in place, but due to a number of factors, including the mandatory requirement of legal representation in such cases, that is not a realistic option for most victims of discrimination, who often come from vulnerable and low income social groups.

The complainants 'being exposed to the discretion of the prosecution is even more problematic in light of the pressure that prosecutors face regarding conviction rates. Quoting a South African study, the United Nations Office on Drugs and Crime warns that 'prosecutors' performance is measured predominantly by their conviction rate – the number of successful convictions as a proportion of prosecutions. Consequently, there is pressure on prosecutors to: (a) secure a conviction where a prosecution has been initiated, and (b) to decline to initiate a prosecution unless a conviction is assured (Du Plessis, Redpath and Schonteich, 2008, p. 359).'[161] Similarly, a **Hungarian** study has shown that 'focus on statistics and the pressure to deliver results when evaluating the performance of police officers and public prosecutors' has a detrimental effect on the willingness of law enforcement professionals 'to dwell into cases which require complicated pieces of evidence'. If professional performance is judged solely on the basis of how quickly a police officer closes a case, how effectively a public prosecutor can represent the charge before a judge, and what percentage of the suspects are ultimately convicted, this 'prompts police officers to focus on cases that can be proven more easily' and public prosecutors will also be 'motivated to stay on the safe side and press charges in respect of the base crimes [i.e. the crime without the bias motive], even if the competent authorities conducted a proper and fully detailed investigation covering the possible bias motive.'[162]

In the case of penalised instances of discrimination, this latter problem can be especially acute when the difficulties of proving a discriminatory intent beyond reasonable doubt (with the full burden of proof on the prosecution) is taken into account. As the **Slovenian** expert noted, 'both the police and the state prosecutor's office may prefer to focus on what will have the best chance for success in the criminal proceedings. If bias motive is more difficult to prove, it will be omitted from the case.'[163]

This tension between the expectations regarding high efficiency and conviction rates and the difficulties of proving discrimination in penal procedures might lie behind the criticism voiced by the **Dutch** NGO CIDI (Centre for Information and Documentation Israel; Centrum Informatie en Documentatie Israel), according to which even if there is sufficient proof to investigate alleged forms of antisemitism, it is currently is not done because of limitations of prosecutorial capacity.[164] Similarly, the Jewish Community of **Slovenia** reported in 2018 that they had filed several criminal reports on antisemitic incidents, but the state prosecutor's office had not prosecuted these cases.[165]

An additional organisational-sociological factor was pointed out by the **Swedish** expert, who called attention to the fact that whereas the usual perpetrators of hate crimes fit more easily into the profile of 'criminals' that law enforcement authorities are used to dealing with (e.g. young men between the ages 15-30), the potential suspects of the criminal offence of discrimination 'tend to be somewhat older

160 Slovenian country brief.
161 Du Plessis, A., Redpath, J. and Schonteich, M. (2008), 'Report on the South African Prosecuting Authority', *SA Crime Quarterly*, No. 50, p. 359, quoted in United Nations Office on Drugs and Crime: E4J University Module Series: Crime Prevention and Criminal Justice; Module 14: Independence of the Judiciary and the Role of Prosecutors; Topic 2. The role of public prosecutors; General issues. Public prosecutors as the 'gate keepers' of criminal justice.
162 Uszkiewicz, E. (2020), 'Anomalies in the application of law related to hate crimes', *Hungarian Journal of Legal Studies* 61 (2020) 3, p. 330.
163 Slovenian country brief.
164 See CIDI (2022), *CIDI Antisemitism Monitor 2021: summary*, available at: https://www.cidi.nl/wp-content/uploads/2022/04/CIDI-Monitor-Antisemitic-Incidents-summary.pdf.
165 Rak, P. (2018), 'Najstarejše in najtežje premagljivo sovraštvo' (The oldest and hardest hatred to overcome), *Delo*, https://www.delo.si/novice/svet/najstarejse-in-najtezje-premagljivo-sovrastvo/.

well-established community members such as merchants and landlords', which may be an obstacle to effective enforcement.

At the same time, Sweden was the only country regarding which the expert mentioned advantages of a criminal response. In the Swedish system, while the burden of proof rules under the Discrimination Act are fundamentally beneficial for a victim, this benefit is seriously undermined by the 'loser pays' rule, which means a great financial risk for the complainants. The losing party must bear their own legal costs and those of the other party, which are likely to be much higher than the usual amounts of compensation granted by the courts. This is a risk that does not arise when victims try to enforce their right to equality through the criminal procedure (although the Swedish expert still concluded that, on balance, it was more beneficial for a victim to use the Discrimination Act rather than the Penal Code).

One noteworthy example was reported for **Cyprus**, which illustrates how anti-discrimination provisions in different branches of law can augment each other. Whereas in Cyprus, discrimination itself is not penalised, it is a criminal offence to refuse to cooperate with the equality body and also to victimise persons who have given a testimony to the equality body,[166] (although it must be added that, according to the Cyprus country exert, these powers have never been used in practice).

### *2.2.5 Antisemitic discrimination and criminal responses to the violations of the right to equal treatment*

The problems regarding criminal protection against discrimination outlined above are characteristic of all discrimination cases, irrespective of the ground of discrimination. However, in the context of antisemitic discrimination, a specific issue adds to the general difficulties of proving discrimination: the social pressure against antisemitism is, as explained below, likely to make instances of antisemitic discrimination less overt than instances of discrimination against other groups.

When bias against a certain group is perceived to be widely shared and accepted by large segments of society, discriminators are less likely to be particularly cautious in 'covering their tracks', whereas if the existence of such a social consensus regarding a certain group is less certain and tangible, the instances of discrimination tend to be less conspicuous and detectable.

Although antisemitism is a pervasive problem, it is often covert and latent. As mentioned in the Introduction, the 2021 Prejudices Survey on antisemitism in 16 European countries calls attention to the latency pressure, as a result of which prejudiced people are often reluctant to voice their prejudices publicly (e.g. in the context of sociological surveys, even in personal interviews, they do not answer the questions even though they have an opinion, they do not say what they really think and give only expected answers, or they express their hidden attitudes and views by only agreeing with statements that they consider to be publicly acceptable, which, in the context of antisemitism, might be views based on a criticism of Israel).[167]

The **Hungarian** example of surveys regarding the Roma and the Jewish population illustrates this problem acutely. In the Special Eurobarometer 'Discrimination in the European Union' survey conducted in May 2019, to the question whether the respondent would feel comfortable if their child was in a relationship with a Roma or Jewish person, 44 % of the Hungarian respondents said that they would feel uncomfortable if that person was Roma, and 16 % gave this answer regarding a potential Jewish partner (the EU averages were 30 % and 13 % respectively).[168]

166 Cyprus, The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law of 2004 (Ο Περί Καταπολέμησης των Φυλετικών και Ορισμένων Άλλων Διακρίσεων (Επίτροπος) Νόμος του *2004*) N. 42(I)/2004, available at https://www.cylaw.org/nomoi/enop/ind/2004_1_42/section-sce220abc3-c0c8-c38b-6534-cc2265a17e12.html.

167 Kovács, A. and Fischer, G. (2021) *Antisemitic Prejudices in Europe*, Ipsos SA and Inspira Ltd, Budapest, p. 14.

168 European Commission (2019), *Special Eurobarometer 493, Discrimination in the European Union*, Kantar Public Brussels on behalf of Kantar Belgium, Country Fact Sheet, Hungary.

This result suggests a great degree of difference between the intensity of biases regarding the two different groups. At the same time, the 2021 Prejudices Survey tested the degree of antisemitism with questions designed to measure secondary and latent antisemitism, and showed that in Hungary, 59 % of the population can be regarded as antisemitic, with 24 % of the respondents strongly and 18 % moderately antisemitic, while 17 % could be regarded as latent antisemites (the European averages were 12 %, 8 % and 14 % respectively).[169]

However, most probably due to the latency pressure described above, in Hungarian society, a much greater degree of self-restraint seems to exist with regard to antisemitism than exists in relation to prejudice against the Roma community, considering which a 2016 research study concluded that anti-Roma sentiments within Hungarian society are practically independent from demographic variables, political orientation and national identity. The main conclusion of this research is that 'due to the general lack of communication taboos in the current political and public speech, blatant rejection of Roma people is so strongly socially accepted that none of the usual factors explaining prejudice bear a predictive power. Therefore, in the search for successful prejudice reduction methods, we need to take into account that there is no moral obstacle to expressing anti-Roma prejudices in nowadays Hungary, and consequently it is present in all segments of society including those who hold egalitarian values.' [170]

The latency pressure (or the lack thereof, which seems to be the case regarding the Roma community in Hungary) can also have an impact on bias-based behaviours, including instances of discrimination, and the awareness of the need as well as the willingness to hide the sentiments behind such instances, adding to the difficulties of proving discrimination motivated by antisemitism.

Due to the evidentiary problems outlined above, including the victims' inability to rely on the burden of proof as a form of evidentiary mitigation and the difficulty of proving direct intent, this inevitably poses additional obstacles in making use of criminal law to combat antisemitic discrimination, thus raising doubts as to whether solutions based on the criminal response meet the requirements of effectiveness as stipulated by Article 15 of the Racial Equality Directive and Article 17 of the Employment Equality Directive.

It is interesting to note in this regard that both the **Italian** National Strategy for Combating Antisemitism and the 2022 annual report of the **Romanian** Working Group on Antisemitism (established under Romania's National Strategy on the prevention and combating of antisemitism, xenophobia, radicalisation and hate speech 2021-2023) raise the issue of moving towards replacing or augmenting criminal law responses with sanctions provided by other branches of law. The **Italian** strategy states that 'with the conviction that [...] they perform a more effective educational prevention/deterrent function than criminal provisions, it is considered appropriate to introduce an integrated system of administrative offences [regarding antisemitic discrimination or hatred or antisemitic prejudice]',[171] whereas the annual report of the **Romanian** working group raises 'the need to enhance administrative sanctioning of antisemitic, xenophobic behaviours [...] to address under-reporting that is connected to lack of trust in public institutions for not enforcing the law.' [172]

169 Kovács, A. and Fischer, G. (2021) *Antisemitic Prejudices in Europe*, Ipsos SA and Inspira Ltd, Budapest, p. 59.

170 Keresztes-Takács, O., Lendvai, L., Kende, A. (2016) 'Romaellenes előítéletek Magyarországon: Politikai orientációtól, nemzeti identitástól és demográfiai változóktól független nyílt elutasítás' (Anti-Roma bias in Hungary: Open rejection irrespective of political orientation, national identity and demographic variables), *Magyar Pszichológiai Szemle* (Hungarian Review of Psychology), 71 (4), pp. 609-627.

171 Italy, Presidency of the Council of Ministers (2021), National Strategy for Combating Antisemitism, p. 20.

172 Romanian Government (2022), Annual Report on the progress in the implementation of the National Strategy on the prevention and combating of antisemitism, xenophobia, radicalisation and hate speech, for the period 2021-2023 (*Raportul anual cu privire la progresul* înregistrat în *implementarea Strategiei naționale pentru prevenirea* şi *combaterea antisemitismului, xenofobiei, radicalizării* şi *discursului instigator la ură, aferentă perioadei 2021-2023*).

**Recommendation:**

In light of the above it is recommended that Member States consider the introduction of non-criminal measures to address all instances of (antisemitic) discrimination falling under the two directives, regarding which at the moment only criminal sanctions are available.

Furthermore, it is recommended that an analysis of financial and other barriers preventing or potentially discouraging victims of discrimination from seeking non-criminal remedies against discrimination falling under the two directives be reviewed by the Member States.

## 2.3 The role of equality bodies in combating antisemitism

The EU Antisemitism Strategy expressly outlines the role of equality bodies in combating antisemitism. It envisages that national equality bodies will promote, analyse, monitor and support equal treatment in the context of antisemitism. In addition to calling on Member States to make sure that 'national equality bodies are adequately equipped to ensure that incidents of antisemitic discrimination are properly addressed and reported', the European Commission undertakes to 'cooperate with Equinet [...] and equality bodies to increase their knowledge about antisemitism'.[173]

However, the research has found that despite the increasing prevalence of antisemitism in Europe and the impact of the pandemic, which, in most Member States has led to an increase in the degree of antisemitic bias, there is a great degree of variation regarding the attention that equality bodies pay to antisemitism specifically.

For instance, no specific emphasis (in terms of research, campaigns, or other activities) is put on antisemitism in **Austria**, **Bulgaria**, **Cyprus**, **Czechia**, **Estonia**, **Hungary**, **Ireland**, **Italy**, **Latvia**, **Lithuania**, **Luxembourg**, **Malta**, the **Netherlands**, **Portugal**, **Slovakia**, **Slovenia** and **Sweden**.

In some of these countries, this lack of focus seems to be explicable, for instance in **Cyprus**, where traditionally, 'in light of the proximity to Israel and the regular presence of Israelis in Cyprus, antisemitism is not seen as an acute problem [...], compared to other forms of discrimination'.[174] In others, however, the trends in antisemitism do not warrant this lack of emphasis. By way of example, special attention to the issue of antisemitism would be justified in **Hungary**, which out of 16 European countries, had the third highest rate of antisemitism in the 2021 Prejudices Survey, or **Austria**, which was fourth out of the 16, and where, according to the Austrian country expert, antisemitism is a problem with 'information on antisemitic tendencies and incidents as well as criminal cases' being 'unfortunately plentiful'.[175]

The reasons for the absence of a specific focus on antisemitism in countries where the social trends would warrant it are not necessarily rooted in ignorance regarding the issue, but can be manifold. Crowley[176] outlines a number of factors that can lead to equality bodies neglecting certain themes and grounds in their work. One is the difficulty of managing multiple grounds, especially when the human and financial resources of the equality body are scarce. Crowley found that 'equality bodies tended to be multi-ground equality bodies. Of the 43 equality bodies reported [in his research], 33 cover multiple grounds.' In addition, many cover all six grounds set out in Article 19 of the Treaty on the Functioning of the European Union, or have a mandate that goes beyond the six grounds, with ten working on the basis of an open list or unspecified and unbounded grounds.[177] Crowley emphasises that while this wide mandate has several

173 European Commission (2021), EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030), p. 11.
174 Cyprus country brief.
175 Austrian country brief.
176 Crowley, N. (2018), *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination.
177 Crowley, N. (2018), *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination, p. 48.

advantages, the work of the equality bodies 'can be impeded by the potential scale of coverage and by a vagueness surrounding the definition and understanding of the protected characteristics'.[178]

Furthermore, Crowley's research found the 'there is limited evidence of the active management of multi-ground mandates required to ensure visibility for and relevance to all grounds in the work of equality bodies and to achieve the potential in a multi-ground agenda. The limited resources available to equality bodies are seen as one cause of this. Four equality bodies [...] evidenced no active management of the grounds covered. Twenty bodies, all with a decision-making function, were predominantly reactive in managing the multi-ground agenda by responding to cases filed for examination: [...] This reactive approach [...] can fail to secure adequate visibility for grounds subject to high levels of underreporting of discrimination and to ensure a relevance of the work of the equality body to the particular needs of different grounds.'[179]

In the light of Crowley's findings and taking into account, the high level of underreporting characterising instances of antisemitic discrimination (see above), it should come as no surprise that even in some societies where antisemitism is a pressing issue, the equality bodies remain inactive in this area.

Equality bodies with a quasi-judicial function are faced with a further difficulty in this regard. As Crowley puts it, 'the more immediate and reactive demands of the decision-making function tend to take up available staff time to the detriment of the exercise of other functions.'[180] This means that most of the resources are spent on the decision-making function, so less (or scarcely any) time, energy and other resources remain for awareness raising, cooperation, participation in policy making, research, and so on. Furthermore, unless there is conscious strategic planning, the quasi-judicial function may inform, or misinform the internal decision making regarding other functions of promotion and prevention, support and litigation: if no cases of antisemitic discrimination are filed with a quasi-judicial equality body due to the victims' tendency to underreport, it may give the equality body's staff the wrong impression that antisemitism is not a pressing issue, and when strategic areas of activity are chosen with regard to the other (often understaffed and underfinanced) functions, antisemitism may be easily disregarded.

This problem in the functioning of equality bodies with quasi-judicial functions seems to be confirmed by an overview of the equality bodies' levels of activity in relation to antisemitism. All of the equality bodies that are reported as being active in relation to antisemitism are entities that do not have decision-making functions. The next paragraph gives some examples of such bodies.

In its report for the year 2022 (published in May 2023),[181] the **Belgian** equality body, Unia announced the publication, in 2023, of a report on antisemitism. In **Germany**, the Federal Anti-Discrimination Agency, which has a mandate to combat discrimination, including antisemitism by means of publicity work, initiating measures to prevent discrimination, and academic studies into discrimination,[182] 'does important work and fulfils its duties'[183] in relation to countering antisemitism. The **Danish** Institute of Human Rights (DIHR) focuses on antisemitism in its work on both religious freedom and discrimination based on religion/belief.[184] The **Greek** Ombudsman has issued a special *Equal Treatment Guide*,[185] directed at public employees, which addresses issues related to the Jewish minority. In **Finland**, the Non-Discrimination Ombudsman has also been active in combating antisemitic discrimination, including

178 Crowley, N. (2018), *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination, p. 48.
179 Crowley, N. (2018), *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination, pp. 79-80.
180 Crowley, N. (2018), *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination, p. 72.
181 UNIA (2023), *Rapport annuel 2022, Discours et délits de haine* (2022 annual report, hate speech and hate crimes).
182 German Federal Anti-Discrimination Agency: https://www.antidiskriminierungsstelle.de/DE/startseite/startseite-node.html.
183 German country brief.
184 Danish country brief.
185 Greek Ombudsman (2017) *Equal Treatment Guide*, available at: https://www.ekdd.gr/images/synigoros_odigos.pdf.

harassment, and in **Croatia**, the Ombudsperson also regularly reports on antisemitic incidents in her annual reports, makes public statements, and raises awareness on antisemitism. The **Spanish** Council for the Elimination of Racial and Ethnic Discrimination (which acted as Spain's equality body between 2003 and 2022) produced several reports on antisemitism and created a network with various NGOs to advise and inform victims of such discrimination of their rights.[186]

In **France**, the Defender of Rights, which also does not have decision-making functions, receives very few complaints of antisemitic discrimination, as most French NGOs are active on hate speech and antisemitic violence, which are out of the competence of the Defender of Rights. However (as mentioned above), 'it created an antidiscrimination internet platform and phone application to disseminate information, facilitate contact and receive complaints that is connected to all legal actors including the public prosecution […].'[187] It also conducts surveys that are relevant for the issue of antisemitism, such as the annual survey on the experience of discrimination in employment,[188] a national survey on discrimination in access to rights, which specifically addressed discrimination on the ground of religion and origin,[189] and a study on the treatment of religion by judges in family law.[190]

Similarly, the expert from **Poland** reports that the Ombud, as an equality body without quasi-judicial functions, has been particularly active in the field of antisemitism. For instance, in 2019, it published a special report on Polish-Jewish affairs,[191] it also launched *ex officio* examinations into instances of antisemitism (e.g. when a client did not want to be served by a bank employee wearing Judaic religious symbols, and the Ombud formulated a stance that 'discreet manifestations of religious feelings do not violate the rights and freedoms of others').[192] Occasionally, the Ombud also joins (or intervenes) in legal proceedings regarding antisemitic incidents and/or monitors the development of such cases (see the example of the judge who made inciting statements on an online forum quoted above). Furthermore, the Ombud regularly prepares alternative reports and briefings for relevant international organisations, such as the UN Committee on the Elimination of Racial Discrimination (CERD)[193] and the European Commission against Racism and Intolerance (ECRI).[194] Finally, in 2019, the Ombud called for the development of the strategy to fight hate crimes and hate speech and made 20 recommendations on how to work towards solving the problem of hate speech. In the absence of a response, the Ombud repeated these recommendations in both 2020 and 2021.[195]

In the **Netherlands**, where the Netherlands Human Rights Institute has the double task of conducting research and providing advice on general matters related to fundamental rights (including non-discrimination) and adjudicating individual complaints related to equal treatment legislation, the problem that quasi-judicial equality bodies often face has been addressed by setting up a new, separate position with a specific focus on antisemitism. Antisemitic complaints are very rarely brought before the Netherlands Human Rights Institute, and 'a search of the advisory opinions and reports of the past ten

186 Spain country brief.
187 France country brief.
188 French Defender of Rights, ILO (2022), *Enquête - 15e baromètre sur la perception des discriminations dans l'emploi* (Annual barometer oon the perception of discrimination in employment).
189 French Defender of Rights (2020), *Inégalités d'accès aux droits et discriminations en France* (Inequality of access to rights and discriminations in France).
190 French Defender of Rights (2022), *Justice, familles et convictions: un silence religieux?* (Justice, families and convctions: a religious silence?).
191 Polish Ombud (2020), *Sprawy polsko-żydowskie w działaniach Rzecznika Praw Obywatelskich – lata 2015-2019* (Polish-Jewish affairs in the Ombudsman's activities - 2015-2019).
192 Polish Ombud (2021), *Dyskretne uzewnętrznianie przekonań religijnych w miejscu pracy nie narusza praw i wolności innych osób* (Discreet manifestation of religious beliefs in the workplace does not violate the rights and freedoms of others).
193 Polish Ombud (2021), *Observations and remarks of the Commissioner for Human Rights on Poland's implementation of recommendations contained in point 10 (a), point 12, point 16 (b), (c) and (d) and point 18 (a) of the Concluding remarks of the Committee on the Elimination of Racial Discrimination presented after examining the joint XXII and XXIV periodic report submitted by Poland* (CERD/C/POL/CO/22-24).
194 Ombud (2022), 'Delegacja Europejskiej Komisji przeciwko Rasizmowi i Nietolerancji (ECRI) w Biurze RPO' (ECRI delegation visits the Ombud's office).
195 Polish Ombud (2019), '20 rekomendacji RPO. Adam Bodnar o sposobach rozwiązywania problemu mowy nienawiściee' (20 recommendations of the RPO. Adam Bodnar on ways to address the problem of hate speech).

years show that no specific work has been done on antisemitism',[196] (which seems to confirm that there might be a relation between the subject matter of complaints and the themes chosen for research and advocacy work by those equality bodies that have quasi-judicial functions).

However, in response to a request made by two members of Parliament, who pointed at the constant but high numbers of reported incidents of discrimination and violence against Jewish persons,[197] in 2021, the Minister for Justice and Security created the role of a National Coordinator for Combating Antisemitism (*Nationaal Coördinator Antisemitismebestrijding*, NCAB)[198] to advise the Minister of Justice and Security on the handling of antisemitism cases in the entire enforcement chain. To this end, the NCAB liaises with the Jewish community, central Government bodies, civil society organisations, companies and Members of Parliament. The NCAB also supports educational, research and memorial projects on antisemitism and Jewish life by cultural organisations and educational institutions. Initially the NCAB was a temporary function, but it has been made permanent.[199]

A similar governmental response was reported in **Portugal**, where the equality body, the High Commissioner for Migrations has been focusing more on interreligious dialogue than antisemitic discrimination, but an Independent Observatory for Hate Speech, Racism and Xenophobia was created in 2000 (however, it has never become fully functional).

In other countries, where there is a gap due to equality bodies' lack of focus on antisemitism, it is not Government-created structures, but often civil society actors who take over some of the tasks that equality bodies could be performing with regard to antisemitism, such as data collection, research and the formulation of policy measures.

Examples include **Hungary**, where – despite the high prevalence of antisemitism in society – the equality body does not focus on antisemitism to any extent, but an NGO, the Action and Protection Foundation (Tett és Védelem Alapítvány, TEV)[200] has undertaken the task of monitoring and analysing antisemitism. TEV publishes monthly and annual reports on antisemitic incidents falling into the categories of attacks, threats, vandalism, hate speech and discrimination, and regularly surveys the degree of antisemitic prejudice in Hungarian society and in Europe (the 2021 Prejudices Survey covering 16 European countries was commissioned by TEV). Furthermore, it operates a reporting hotline and provides victims of antisemitic incidents with legal assistance if they decide to seek legal remedies. In the absence of official data on criminal offences committed out of antisemitic bias, data collected by TEV appears in the 2022 FRA Antisemitic Incidents Research.[201]

A similar role is played in **Italy**, by the CDEC Foundation's Observatory on Antisemitism (*Osservatorio Antisemitismo*), which operates a hotline, monitors and records antisemitic incidents across Italy and informs the public about these on its website under the categories of physical assaults; antisemitism in the mass media; online antisemitism; defamation and insults; discrimination; extreme violence against persons; graffiti and graphics; threats and vandalism. The Observatory also carries out educational activities in schools on antisemitism and other related subjects.[202]

196 Netherlands country brief.
197 See: Parliamentary documents of the Dutch House of Representatives: Kamerstukken II, 2018-2019, 35 164, no. 2, via https://zoek.officielebekendmakingen.nl/kst-35164-2.html; Kamerstukken II, 2019–2020, 35 164, no. 10, via https://zoek.officielebekendmakingen.nl/kst-35164-10.html.
198 *Stcrt.* 2021, 32515, via https://zoek.officielebekendmakingen.nl/stcrt-2021-32515.html. Eddo Verdoner was appointed the first NCAB on 1 April 2021.
199 Netherlands National Coordinator for Combating Antisemitism (2022), *Werkplan Antisemitismebestrijding 2022-2025* (Workplan on Antisemitism 2022-2025).
200 TEV website: https://tev.hu/.
201 FRA (2022), *Antisemitism - Overview of Antisemitic Incidents Recorded in the European Union 2011–2021*, p. 62.
202 For the Observatory's activities, see: https://www.osservatorioantisemitismo.it/chi-siamo/.

In **Bulgaria**, another NGO, Shalom, the Organisation of Jews in Bulgaria, has undertaken the task of monitoring and recording antisemitic phenomena, ranging from instances of online and offline hate speech to antisemitic marches and gatherings. The organisation's management also cooperates with state authorities, 'local governments and all institutions that are committed to the protection of people, events and places that are defined as Jewish'.[203]

Another aspect of the issue of equality bodies' focus on antisemitism (or the absence thereof) is related to the importance of strategic planning in the functioning of multi-ground bodies. Due to the problems outlined above regarding the difficulties stemming from the tendency of multi-ground bodies to deal reactively with issues in light of the incoming complaints, consciously strategising and seeing strategies through can be a key element in the bodies' efforts to effectively cover the totality of their mandates. In this regard it is important to observe that there seems to be a correlation between the focus of the different equality bodies on antisemitism and the fact that they apply a more strategic approach to their work: out of the equality bodies listed above as putting an emphasis on antisemitism in their work, the **Belgian**, **Croatian**, **Danish** and **Finnish** bodies all engage in strategic planning with associated annual workplans, whereas the **Spanish** equality body adopted annual workplans (although without extensive strategic planning), according to Crowley's research.[204]

This seems to be an important element in the addressing of antisemitic discrimination, especially in societies where the prevalence of antisemitism is less obvious than in countries where the dimensions of the problem are more likely to orient the equality bodies towards this issue (which seems to be the case in **France** and **Poland**, for example, where equality bodies consciously focus on antisemitism without receiving many complaints about instances of antisemitic discrimination or having strategic planning processes put in place).

**Recommendation:**

In the context of adopting and/or reviewing their action plans, it would be advisable for Member States (with special regard to those with a high prevalence of antisemitism but low levels of related activities by equality bodies) to facilitate a more proactive approach from these bodies, e.g. by providing the necessary resources for stepping up their strategic planning activities and devising more effective reporting tools to address the issue of underreporting.

## 2.4 Adaptable good practice examples in the field of non-discrimination

Taking into account the scarcity of complaints (and hence, of jurisprudence) as well as the lack of equality bodies' specific focus on antisemitism, it comes as no surprise that the national experts in **Austria**, **Belgium**, **Croatia**, **Cyprus**, **Czechia**, **Denmark**, **Estonia**, **Finland**, **Ireland**, **Italy**, **Latvia**, **Lithuania**, **Luxembourg**, **Malta** and **Romania** could not identify any adaptable (or in many cases, any) examples of good practice in the area of anti-discrimination motivated by antisemitic bias.

In other countries, such as **Germany**, **Greece**, **Slovakia**, **Slovenia** and **Spain**, the good practice that was identified mostly related to awareness raising and education about antisemitism and its devastating impacts; commemorations; Holocaust remembrance; and the promotion of racial and/or religious tolerance and diversity. One particular initiative that might be mentioned here is when the mayors of four **Polish** cities, Białystok, Gdańsk, Poznań and Warsaw signed an appeal calling for a zero tolerance policy on prejudice, xenophobia and antisemitism. The signatories expressed their opposition to any behaviour

203 Shalom's website: https://www.shalom.bg/en/fight-against-antisemitism/.
204 Crowley, N. (2018), *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination, p. 108.

motivated by prejudice, and declared their willingness to raise social awareness and educate the younger generation.[205]

In light of the severe underreporting of incidents of antisemitism not reaching the level of criminality, it might also be expected that in a number of countries, those initiatives and tools that were identified as examples of good practice are aimed at the improved reporting and recording of antisemitic incidents, thus addressing some of the gaps significantly hindering equality bodies and other competent authorities in assessing the dimensions of the problem and taking adequate measures.

For instance, the **Bulgarian** country expert pointed out the work of the NGO Shalom (see above). The **French** expert mentioned the creation of the antidiscriminations.fr platform by the Defender of Rights with a view to facilitating the complainants' access and connecting the bodies that play an important role in combating discrimination. Similarly, with respect to **Poland**, initiatives aimed at the recording of incidents and facilitating their reporting were identified, including the setting up of the zglosantysemityzm.pl platform, through which hate crimes, antisemitic incidents and hate speech motivated by antisemitism can be reported by members of the Jewish community and other concerned actors.[206] Also in Poland, the Never Again Association maintains the so called Brown Book, which is a documentation of racist and xenophobic incidents and acts of discrimination, including antisemitic incidents.[207] **Hungary** is also among those countries where civil society activities (especially those of the Action and Protection Foundation, see above) can be mentioned as instances of promising practice.

With respect to the **Netherlands**, the creation of the position of the National Coordinator for Combating Antisemitism (NCAB) was mentioned as a step that has the potential to grow into a good practice, although it was emphasised that the work of NCAB was still in its early stages.

In the area of the legal framework interpreted narrowly, two examples of potential good practice were mentioned in relation to **Sweden**. They are not specific to antisemitism, but can improve the level of protection against discrimination in general. One is situation testing, which has been applied successfully by students testing discrimination in Swedish nightclubs and can be potentially used by large employers to test their own equality plans.[208] The other is the Swedish Regulation (2006:260) on anti-discrimination clauses in public contracts, which requires specified Government agencies to include an anti-discrimination clause in all of their contracts for building and services if the contract has a certain duration and value. According to the Swedish expert, if the breach of such clauses is supported by 'meaningful sanctions such as retaining the right to cancel the contract if there is a violation of the clause, and meaningful follow-up possibilities are developed, this is clearly a measure that will encourage those with the power to discriminate to put a focus on proactive prevention of discrimination'.[209]

205 Polish country brief.
206 Czulent Jewish Association (2023), *Antysemickie incydenty w roku 2022. Badanie doświadczenia społeczności* żydowskiej (Antisemitic incidents in 2022: exploring the Jewish community experience).
207 For the organisation's website, see: https://www.nigdywiecej.org/en/. The Brown Book can be accessed at: https://www.nigdywiecej.org/brunatna-ksiega.
208 For more information, see Rorive, I. (2009), *Proving Discrimination Cases: the Role of Situation Testing*, Centre For Equal Rights and Migration Policy Group (MPG).
209 Swedish country brief.

# 3 The prosecution of antisemitic hate crimes

As explained by the Guidance Note on the Framework Decision published by the EU High Level Group on combating racism, xenophobia and other forms of intolerance (2018 Guidance Note), a hate crime is to be understood as 'a criminal offence committed with a bias motive', which reflects 'a definition commonly agreed by all EU Member States'.[210] The 2018 Guidance Note goes on to explain that '[t]his notion is comprised of two elements: a "base" ordinary criminal offence and the bias motivation of the offender', which is to be primarily understood as relating to the fact that 'the offender selected the target of the attack because of a protected characteristic.' This 'bias motivation is the element distinguishing the hate crime from the ordinary crime, and determining the greater gravity of the offence also having regard to its impact on individuals, groups and society at large.'[211]

Similarly, the 2021 EU Crimes Study defines hate crime as 'any other criminal offence that is not hate speech, committed with a bias motive', which means that the study also regards and discusses under the heading of 'hate crimes' discrimination that is criminalised under the national criminal frameworks.[212]

This thematic report follows that approach, although it discusses issues related to criminalised discrimination along with non-criminal sanctions envisaged to comply with Article 15 of the Racial Equality Directive and Article 17 of the Employment Equality Directive. Therefore, for the purposes of this study, antisemitic hate crime is understood as any criminal offence that is neither hate speech, nor criminalised discrimination, and which is committed with an antisemitic bias motive and which may comprise any form of ordinary offence, such as violent attacks on persons (murders, injuries, assaults), as well as damage to property or other acts that are criminalised.

The 2021 EU Crimes Study contains a detailed analysis and comparison of the hate crime legislation and policy measures of the EU countries. This thematic report, therefore, does not wish to repeat that exercise and focuses on new developments that have taken place since the cut-off date of the 2021 EU Crimes Study, as well as on the identification and analysis of gaps and good practice in the legislation and practice of the Member States.

## 3.1 Developments in legislation since 2021 and lessons learnt from them

The overview of legislative developments in the Member States since the cut-off date of the 2021 EU Crimes Study shows that there have been developments towards (or with the promise of) more focused protection against bias-based criminal offences in a number of countries.

In **Ireland**, the Government published a bill in October 2022 (currently under debate in the Parliament), which, when enacted, will provide for hate crimes under Irish law for the first time:[213]

210 EU High Level Group on combating racism, xenophobia and other forms of intolerance (2018), 'Guidance Note on the Practical Application of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law', p. 7.

211 EU High Level Group on combating racism, xenophobia and other forms of intolerance (2018), 'Guidance Note on the Practical Application of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law', p. 8.

212 European Commission, Ypma, P., Drevon, C., Fulcher, C. et al. (2021), *Study to support the preparation of the European Commission's initiative to extend the list of EU crimes in Article 83 of the Treaty on the Functioning of the EU to hate speech and hate crime – Final report*, Publications Office of the European Union, p. 37.

213 Ireland, Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022.

> 'It is envisaged that the new hate crime offences will be aggravated versions of existing crimes, for example offences against the person, criminal damage, or public order offences, where they are aggravated by hatred on account of the victim's membership or presumed membership of a group defined by reference to a protected characteristic. The protected characteristics in the new legislation include "race", "religion", "national or ethnic origin", and "descent"'.[214]

In **Estonia**, the relevant provision of the Criminal Code 'is currently under review'.[215]

Discussions are also underway in **Lithuania**, where it has been identified as a systemic problem in the prosecution of hate crimes that the required threshold for a criminal offence to be qualified as a hate crime is 'hatred' and the existence of 'bias' is not sufficient. Therefore, in some cases, hatred from the side of the perpetrator is required, which is even more difficult to prove than bias. According to the country expert, although there is no registered legislative proposal to this end, talks about introducing a bias motive have started.[216]

In **Belgium**, a new amendment was adopted in the context of the 2022 reform towards a more comprehensive and coherent framework for the repression of hate crimes, making a distinction between bias motive as an *aggravating factor* (which means that the judge must take into account the motive when imposing the sanction within the statutory limits) and an *aggravating circumstance* (which means that the maximum penalty for the offence is increased).[217]

In **Poland**, Article 53 of the Penal Code regulating sentencing directives for the courts was amended in July 2022 (with effect from 1 October 2023),[218] introducing a list of aggravating circumstances, which includes 'the commission of an offence motivated by hatred because of the victim's national, ethnic, racial, political or religious affiliation or irreligiousness'. In **Luxembourg**, the Law of 28 March 2023 amending the Penal Code introduced a general aggravating circumstance for crimes, misdemeanours and contraventions committed with a motive based on one or more of the elements referred to in Article 454 of the Penal Code (which includes – inter alia – origin, skin colour, membership or non-membership, real or assumed, of a particular ethnic group, nation, race or religion).

The list of grounds for bias motives was extended in 2022 in both **Spain** (where, for instance, anti-Roma and anti-poor sentiments have been added to the list of hate motives)[219] and in **Lithuania** (where certain articles of the Criminal Code, including the penalisation of homicide and the causing of bodily harm, were supplemented by the addition of hate motives such as 'skin colour' and 'ethnic origin').

The **Cyprus** national expert reports that while a provision making a bias motive an aggravating factor does exist in criminal law, its effectiveness is undermined by the fact that the courts are not obligated to take the bias motive into account in the course of sentencing, although they may do so at their discretion. At the time of debating the relevant bill, the proposal to create a duty on the court to take bias into account as an aggravating factor was seen as infringing the principle of the separation of powers.[220]

A noteworthy legislative debate was also conducted in **Slovenia** around the adoption of the 2023 Act Amending the Criminal Code, making an express reference to bias motive as an aggravating factor.[221] Previously, Article 49 of the Criminal Code only mentioned that the motive for the perpetration of the

214 Irish country brief.
215 Estonian country brief.
216 Lithuanian country brief.
217 The system is provided by Article 78bis and 78ter of the Belgian Criminal Code.
218 Poland, Act on the Penal Code (*Ustawa o Kodeks karny*), 6 June 1997 as amended by Article 1 of the Act of 7 July 2022 (Journal of Laws 2022.2600) (Article 53 of the Penal Code) in force as of 1 October 2023.
219 Spain, Reform of Article 510 of the Penal Code by Organic Law 6/2022 of 12 July, complementary to Comprehensive Law 15/2022 of 12 July for Equal Treatment and Non-Discrimination, amending Organic Law 10/1995 of 23 November.
220 Cyprus country brief.
221 Slovenia, Act Amending the Criminal Code (*Zakon o spremembah in dopolnitvah kazenskega zakonika*), 27 January 2023.

offence must be taken into account in the course of sentencing, without any additional specifications. A new third paragraph was added to Article 49, explicitly stating that bias motive is an aggravating circumstance, affecting the severity of sanctioning for any criminal offence. The provision stipulates that 'if the victim's national, racial, religious or ethnic origin, sex, colour, descent, property, education, social status, political or other opinion, disability, sexual orientation or any other personal circumstance was a factor contributing to the commission of the offence, it shall be taken into account as an aggravating circumstance.'

There are also other Member States where the bias motive is not specified as an aggravating factor, and while this is not an infringement of the Member States' obligation under the Framework Decision, it may cause difficulties as far as the practical consequences are concerned. The 2021 EU Crimes Study points out that '14 Member States may be able to criminalise hate crime through the introduction of an aggravating circumstance that allows national courts to take into account the motivation of the perpetrator, without referring to any specific form of intolerance. [...] For example, in Austria, the Criminal Code generally refers to "other particularly reprehensible motives" as aggravating circumstances'.[222] While it must be emphasised that in some of these countries, hate crimes are also penalised as self-standing offences (i.e. offences that include within the same provision the conduct constituting the offence and the bias motive), there are also Member States where – due to the general formulation of motives as aggravating factors and the absence of self-standing hate crimes – the hate motive in a hate crime case does not appear expressly in the legislation, only indirectly through the general regulation of aggravating circumstances.[223]

For that reason, the debate conducted in **Slovenia** has wider relevance. It is reported that the need for an amendment expressly specifying the bias motive was challenged by some actors of the criminal justice system. The Legislative and Legal Service of the Slovenian Parliament and the Supreme State Prosecutor's Office regarded the amendment to be redundant on the basis that the motive (and its discriminatory nature) could already be taken into account in the course of the adjudication on the basis of the old, general, text of the law.[224] The Supreme State Prosecutor's Office additionally pointed out that the proposed new provision is too broad, because it contains characteristics (e.g. political opinion or economic status) that do not constitute an intrinsic, non-changeable feature of the individual, and because of the use of the term 'any other personal circumstance', which opens the door to arbitrary application, and is thus not compatible with the requirements of criminal legislation.

Those arguing for the amendment, including the Minister of Justice and the Human Rights Centre at the Human Rights Ombudsman, pointed out that while it may be true that the provision is not inevitable from a normative point of view for hate crimes to be punishable under an aggravated regime (as required by the Framework Decision), however, the codification of this specific provision 'sends an important message about the reprehensibility of hate crimes'.[225]

222 European Commission, Ypma, P., Drevon, C., Fulcher, C. et al. (2021), *Study to support the preparation of the European Commission's initiative to extend the list of EU crimes in Article 83 of the Treaty on the Functioning of the EU to hate speech and hate crime – Final report*, Publications Office of the European Union, p. 60. The countries are: AT, BG, CZ, DE, DK, EE, FI, HR, HU, PL, PT, RO, SE, SI.

223 According to the 2021 EU Crimes Study, there are 18 Member States where hate crimes are regulated as self-standing offences, see: European Commission, Ypma, P., Drevon, C., Fulcher, C. et al. (2021), *Study to support the preparation of the European Commission's initiative to extend the list of EU crimes in Article 83 of the Treaty on the Functioning of the EU to hate speech and hate crime – Final report*, Publications Office of the European Union, p. 58.

224 RTV Slovenia (2023), 'Odbor za pravosodje podprl strožje kaznovanje zločinov iz sovraštva' (Justice Committee backs tougher punishment for hate crimes), RTVMMC, 11 January 2023, https://www.rtvslo.si/slovenija/odbor-za-pravosodje-podprl-strozje-kaznovanje-zlocinov-iz-sovrastva/653948.

225 Center za človekove pravice (2021), *Kazenskopravni pregon sovražnega govora v Sloveniji po 297.* členu *Kazenskega zakonika (KZ-1): Analiza tožilske prakse pregona kaznivega dejanja javnega spodbujanja sovraštva, nasilja in nestrpnosti v obdobju 2008-2018* (Criminal law enforcement of hate speech in Slovenia, Article 297 of the Criminal Code: Analysis of the prosecutorial practice regarding the prosecution of the offence of intolerance in the period 2008-2018), Ljubljana.

The symbolic importance is also acknowledged widely in academic literature. For instance, Bárd points out that 'Picking out a certain criminal motive by giving it an individual name is in itself a symbolic act. When they want to express a negative value judgment more emphatically, instead of leaving the assessment of the motive exclusively in the hands of the judiciary, [...] legislators have the option of singling out certain criminal motives and modes by giving them concrete names, which is typically done in the form of qualifying circumstances.'[226]

However, in addition to its symbolic function, making such a specific reference to the bias motive can have positive impacts on reporting and data collection. Specification can also better orient the work of law enforcement, prosecutorial and judicial authorities, which inevitably organise their operations and decision making around the constitutive elements of the criminal offences that they are mandated to deal with.

The research for the purposes of this thematic report offers a useful example highlighting the issue. When contributing to the 2021 EU Crimes Study, the **Estonian** country expert concluded that 'the Estonian legal framework does not criminalise hate crimes',[227] whereas the country expert for the non-discrimination network providing information for this thematic report takes a different view. Similarly, the Estonian Ministry of Interior Affairs, argues[228] that under Article 58 of the Penal Code (which stipulates that a 'reprehensible motive' is an aggravating factor), antisemitism (and bias motive in general) can be considered to be an aggravating circumstance, regardless of the fact that the words 'antisemitism', 'hate' or bias are not mentioned in this paragraph.

A provision stipulating that a reprehensible motive is an aggravating circumstance can indeed be used to secure harsher sentences for hate-based criminal offences, depending on the actual practice of criminal justice actors, however, the academic disagreement on whether, on this basis, hate crime can be regarded as penalised in the Estonian legal system, shows the kind of interpretative difficulties that law enforcement, prosecutorial and judicial authorities may face when having to apply the law. This, paralleled with the organisational tendencies of simplifying cases and trying to secure convictions by 'choosing the easier path' (see the comments on pressure on the prosecutorial services, in section 2.2.4, and below), may lead to a situation where the bias motive is overlooked or consciously set aside when a non-self-standing hate crime offence (e.g. disorderly public conduct, bodily harm, etc.) is investigated, prosecuted or adjudicated.

**Recommendation:**

It would be advisable for Member States to expressly regulate the hate and/or bias motive as an aggravating factor in their criminal justice systems in order both to give it a symbolic weight and better orient the work of law enforcement, prosecutorial and judicial authorities.

## 3.2 The underreporting of hate crimes and practices to reduce its prevalence

### *3.2.1 Underreporting*

The problems of the investigation, prosecution and adjudication of hate crimes have been known for a long time and have been covered by ample research. Bárd points out several reasons why hate crimes might be prosecuted inadequately regarding

226 Bárd, P. (2020) 'Prerequisites for the effective fight against hate crimes', *Hungarian Journal of Legal Studies* 61 (2020) 3, 255–268, p. 260.

227 European Commission, Ypma, P., Drevon, C., Fulcher, C. et al. (2021), *Study to support the preparation of the European Commission's initiative to extend the list of EU crimes in Article 83 of the Treaty on the Functioning of the EU to hate speech and hate crime*, Annex II – National legal framework and national country fiches, p. 269.

228 Estonian Ministry of Interior Affairs (2021), *Antisemitismivastaste meetmete kontseptsioon* (Concept for measures against antisemitism).

(i) the reporting phase: lack of knowledge of what constitutes a hate crime, or how and where to report the crime; a general distrust in authorities; fear of retaliation by perpetrators; fear of secondary victimisation during a criminal process; fear of victim-blaming and self-blame;
(ii) the phase of investigation and indictment: lack of knowledge of what constitutes a hate crime on the side of the police; lack of knowledge about minority groups and hate groups; inadequate recognition of the hate motive; lack of knowledge about dealing with vulnerable victims and witnesses; and
(iii) the trial phase: the high standard of evidence when proving guilt and the difficulties of proving the bias motive.[229]

At the beginning of the process, underreporting of hate crimes is the most conspicuous problem. The FRA's 2021 study, *Encouraging Hate Crime Reporting – The Role of Law Enforcement and Other Authorities*, (2021 FRA Hate Crime Reporting Study) finds that while 'the proportions of Roma and Travellers, Jews, Muslims, people of African descent, immigrants and descendants of immigrants, and LGBTI people across the EU who experience violations of their fundamental rights to non-discrimination and personal safety and integrity are continuously high',[230] the number of incidents of bias-motivated violence and harassment reported to any organisation, including the police remain consistently low: 'the vast majority of physical attacks still remain unknown to law enforcement.'[231] The 2018 FRA Perceptions Study found that 'only half (49%) of the respondents who were victims of antisemitic physical violence in the five years preceding the survey reported this to the police or any other organisation.'[232]

As pointed out in this thematic report, in **Ireland** in 2022, 69 % of bias-motivated crimes (153 cases) were not reported to anyone except using the anonymous online tool iReport.ie.[233] The problem of underreporting has also been mentioned by the experts in the context of antisemitic hate crime in relation to **Czechia**, **Greece**, **Hungary**,[234] **Lithuania**, **Romania**, **Slovakia**, **Slovenia** and **Spain**.

As far as the reasons are concerned, 64 % of those respondents to the 2018 FRA Perceptions Survey who chose not to report to the authorities the antisemitic attacks that they had experienced, 'felt that reporting the incidents would have changed nothing', and some of the respondents 'also noted that they did not trust the police (25%) or feared reprisals (22%)'.[235] Members of other concerned groups, including Muslims, Roma, LGBTIQ persons, reported similar proportions of and reasons for non-reporting.[236]

There are multiple reasons for this mistrust, two of which are considered in more detail below (along with potential ways to address them): the phenomenon of underqualifying hate crimes and the lack of an enabling environment capable of encouraging the victims to report such offences.

### *3.2.2 Underqualifying hate crimes and what can be done about it*

The underqualification of bias-motivated crimes means that when the offence is investigated, prosecuted and adjudicated, the bias motive is not taken into account, and the procedure focuses on the perpetrator's responsibility for the base crime. Underqualification not only creates distrust in the victims of hate crimes

229 Bárd, P. (2020) 'Prerequisites for the effective fight against hate crimes', *Hungarian Journal of Legal Studies* 61 (2020) 3, 255–268, pp. 264-265.
230 European Union Agency for Fundamental Rights (FRA) (2021), *Encouraging Hate Crime Reporting - The Role of Law Enforcement and Other Authorities*, p. 21.
231 FRA (2021), *Encouraging Hate Crime Reporting - The Role of Law Enforcement and Other Authorities*, p. 33.
232 European Union Agency for Fundamental Rights (FRA) (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, p. 55.
233 Michael, L., Reynolds, D., and Omidi, N. (2023), *Reports of racism in Ireland: Data from iReport.ie. - Annual Report 2022*, Dublin, Irish Network Against Racism, p. 19.
234 For the organisation's website, see: https://gyuloletellen.hu/en/about-us.
235 European Union Agency for Fundamental Rights (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, p. 55.
236 FRA (2021*), Encouraging Hate Crime Reporting - The Role of Law Enforcement and Other Authorities*, pp. 27-39.

and distorts data collection efforts aimed at realistically assessing the prevalence of the phenomenon, but will also negatively impact additional factors contributing to the underreporting of hate crimes. For example, it may contribute to a low level of awareness among (potential) victims and the general public, if hate-motivated offences triggering public attention are not investigated, prosecuted and adjudicated as such, leaving those following the developments of the case without proper information on the specificities of the crime and the authorities' responses.

Underqualification has been mentioned by several country experts in the country briefs as an issue in their countries, including in **Croatia**, **Czechia**, **Hungary**, **Lithuania**, **Poland**, **Romania** and **Slovakia**.

Unless the hate motive is clearly identified, the **Cypriot** police are also likely to treat such an attack as a common criminal law offence:

> 'a Greek Cypriot man attacking a Somali man in the street whom he had never seen before was not identified as a racist attack because the perpetrator did not admit the racist motive and the police refrained from collecting evidence that would lead to the conclusion that a hate motive was present.[237] An attack against a Turkish Cypriot woman in 2022 as soon as the perpetrator realised she was Turkish Cypriot was also termed as common criminal law.'[238]

While according to the **Croatian** expert, the available data is not sufficient to draw a conclusion as to whether the underqualification of hate crimes is a widespread systemic problem, individual cases of underqualifying can be quoted, such as the criminal procedure against a person who, in the context of an unresolved property dispute, repeatedly threatened his neighbour, a member of the Jewish community, with death. When the procedure was finally completed after seven years, the People's Ombudsperson of Croatia voiced criticism due to the fact that although the perpetrator was motivated by hatred towards members of the Jewish religious community, the offence continued for a long time and the accused had a previous conviction, the court did not take into account any aggravating circumstances and handed down a sanction (suspended imprisonment), which the Ombudsperson deemed inadequate.[239]

A specific problem related to antisemitism was mentioned in connection with the **Netherlands**, namely that there may be differences in opinion between police officers, public prosecutors and judges as to how to qualify the use of the word 'Jew' when people are swearing, which can lead to an inconsistency of the practice. Some regard this as a relatively common swear word, others consider it to constitute a punishable act.[240]

In order to demonstrate that the overlooking of sometimes very conspicuous hate motives also exists in **Sweden**, the country expert quotes the case of white racist serial killer Peter Mangs, who was convicted of several murders and attempted murders that were 'aimed at "igniting a race war" by shooting Black, Muslim, and Roma citizens to amplify racialized tensions, grievances, and anxieties in the increasingly segregated city. Yet, [...] Mangs' political motives were ignored by everyone [participating in the criminal procedure], except by people in the targeted communities and the white racist milieu.'[241]

Underqualification can have a number of reasons, including the law enforcement's biases regarding minority groups or – the related phenomenon of – victim devaluation (when the allocation of efforts and resources in individual cases from the law enforcement authorities varies according to the status of the

237 Christodoulou, D. (2022), 'Ο 73χρονος μαχαίρωσε τον 30χρονο χωρίς να τον γνωρίζει' (The 73-year-old man stabbed the 30-year-old man without knowing him), *Phileleftheros*, 13 April 2022.
238 Cyprus country brief.
239 Croatian People's Ombudsperson (2020), *Report for 2019*.
240 See Kruize, P. and Gruter, P. (2020), *Discriminatieaspect als strafverzwarende omstandigheid. Cijfers en praktijkervaringen* (Discriminatory aspects as aggravating circumstances. Data and experiences from practice), Den Haag: WOD.
241 Gardell, M. (2018), 'Urban Terror: The Case of Lone Wolf Peter Mangs', *Terrorism and Political Violence*, 30:5, pp. 793-811. Quoted by the Swedish country brief.

parties).[242] However, the issues of evidentiary difficulties paired with institutional pressures and problematic measurement indicators (see above, in section 2.2.4) can also push the law enforcement and prosecutorial bodies into the direction of setting aside the bias motive and focusing only on the base criminal offence.

Bárd mentions the institutional performance pressures regarding both the police and the courts: the fact that '[i]t is considerably easier to prove a base crime than a hate crime results in the crime possibly being under qualified in the investigation stage.' [243] Courts too 'frequently will not determine the bias motive, in lack of words spoken or written down or at least some symbols or graffities that might prove the hate motive. This again results in under-qualifying hate crimes as base crimes.'[244] Similar observations have been made by Cortez et al. regarding prosecution: 'Most prosecutors must prove the bias element, which adds complexity to hate crime offenses compared with other criminal offenses. This complexity often leaves prosecutors unwilling or reluctant to charge perpetrators with hate crimes [...].'[245]

The problems that the discretion of authorities in prosecuting hate crimes paired with such institutional pressures may cause are illustrated by **Cyprus**, where the expert notes that one of the most important systemic issues preventing the effective application of hate crime legislation (with special regard to self-standing offences) is the Attorney General's prerogative to authorise the prosecutions. According to the country expert, although the Attorney General's 'discretion must in theory be exercised "in the public interest", there are no guidelines as to what amounts to public interest and how this is to be distinguished from the interests of the government'. Furthermore, there is 'no obligation on the Attorney General to publicly justify his decision to prosecute or not'.[246] As mentioned above, the **Slovenia** expert also reports that both the police and the state prosecutor's office 'may prefer to focus on what will have the best chance for success in the criminal proceedings' and 'if the bias motive is more difficult to prove it will be omitted from the case'.[247]

A 2022 study by the Krakow-based Jewish Association Czulent, *Analysis of the Experiences of Victims of Criminal Offences and Incidents Motivated by Hate*, (2022 Czulent Research) also confirmed the existence of these problems. The research was based on in-depth interviews with 10 respondents representing the Jewish, Ukrainian and Muslim minorities in Poland, as well as women and CSO activists who had experience regarding bias-motivated crimes either as victims or as persons assisting victims. It found that:

(i) police officers sometimes modified the victims' statements to omit issues referring to the existence of the bias motive;[248]
(ii) they are often unwilling to receive complaints of this type, most probably due to considerations regarding crime statistics and their role in the evaluation of police work;[249]
(iii) public prosecutors conduct the proceedings along the line that is the easiest to resolve and prove (e.g. physical assault), often omitting the bias motivation or some of the members of the group committing the aggression;[250]
(iv) the court decisions often do not address the discriminatory motivations of the offenders, not all relevant matters are duly examined and detailed in the judgments.[251]

242 See: Uszkiewicz, E. (2020), 'Anomalies in the application of law related to hate crimes', *Hungarian Journal of Legal Studies* 61 (2020) 3, p. 329.
243 Bárd, P. (2020) 'Prerequisites for the effective fight against hate crimes', *Hungarian Journal of Legal Studies* 61 (2020) 3, pp. 264-265.
244 *Bárd, P. (2020) 'Prerequisites for the effective fight against hate crimes', Hungarian Journal of Legal Studies 61 (2020) 3*, pp. 264-265.
245 Cortez, C., Arzinos, J. and De la Medina Soto, C. (2021), *Equality of Opportunity for Sexual and Gender Minorities*, p. 123.
246 Cyprus country brief.
247 Slovenian country brief.
248 Czulent Jewish Association, Mazurczak, J. and Oracka, M. (2022), *Analysis of the Experiences of Victims of Criminal Offences and Incidents Motivated by Hate*, pp. 9 and 10.
249 Czulent Jewish Association, Mazurczak, J. and Oracka, M. (2022), *Analysis of the Experiences of Victims of Criminal Offences and Incidents Motivated by Hate*, p. 13.
250 Czulent Jewish Association, Mazurczak, J. and Oracka, M. (2022), *Analysis of the Experiences of Victims of Criminal Offences and Incidents Motivated by Hate*, p. 13.
251 Czulent Jewish Association, Mazurczak, J. and Oracka, M. (2022), *Analysis of the Experiences of Victims of Criminal Offences and Incidents Motivated by Hate*, pp. 11 and 14.

#### 3.2.2.1 The setting up of specialised units

One way in which the Member States have chosen to address the problem of institutional incentives and pressures standing in the way of the effective prosecution of hate crimes is the creation of specialised units dealing with bias-motivated offences, or designating hate crime focal points within the organisations, as such a measure will create an institutional-organisational focus with a potential of offsetting the tendency to avoid the evidentiary difficulties often leading to underqualification. If an organisational unit's expressly assigned task is to investigate or prosecute hate crimes, the fundamental perspective for the evaluation of its work will not be the number of cases closed in general, but the number of hate crimes investigated (or prosecuted). This shift, if the importance of the function is properly internalised, will necessarily lead to an improvement in the handling of cases where the existence of a bias motive is in place.

The existence of such specialised organisational structures within the police and/or the prosecution, has been reported by the national experts from **France**, **Hungary**, **Slovakia**, **Sweden**, and the **Netherlands** (although here it was also mentioned that there seems to be a shortage of specialised public prosecution officers).[252] According to the 2021 FRA Hate Crime Reporting Study, 'about one third of EU Member States have specialised hate crime officers'.[253]

An overview of the national action plans and strategies on combating antisemitism shows that a number of Member States are already considering the creation of such specialised structures to enhance the effectiveness of combating antisemitism.

For example, the **Irish** National Action Plan Against Racism foresees as one of its priority actions[254] the establishing of a specialist unit within each Garda (police) division for the purpose of developing and disseminating expertise and best practice in dealing with hate crime and racist incidents.

According to the **Swedish** Action Programme to Combat Antisemitism, one of the objectives formulated by the Swedish Police Authority in an interim report on its work is 'that all hate crimes shall be investigated by a special resource with in-depth knowledge in the field', so that 'it should feel meaningful for citizens to report crimes and contact the police irrespective of the outcome in the individual case […].'[255]

While it would be advisable to consider the setting up of similar units in the remaining countries as well, the example of **Austria** shows that a much lower key step in the direction of 'making it the job' of police officers to focus on motives, can have a significant impact. In Austria, the format of police protocols was changed as of November 2020. Under the new protocol, a new section on 'motive' has been included, and when a crime is reported to the police, bias motives are routinely specified and recorded. According to the expert, the recording of bias motives, paired with in-service police training on discrimination, bias and hate crime, 'has significantly improved the attention in this regard', and the bias motive 'does not as easily go unrecognised' as it did before the reform of the protocol. The adoption of this practice (along with the training) is also recommended, since, as Uszkiewicz puts it, it is of paramount importance to detect the potential bias motivation as early in the proceeding as possible, so that the supporting evidence could be gathered, which might be difficult or even impossible at a later stage of the investigation.[256]

Similarly, the **Greek** Police, as part of the 'Agreement on inter-agency co-operation on addressing racist crimes in Greece' have improved the electronic recording of incidents of racist violence through the PoliceOnLine network and the 'Significant Reports' application. The app includes the option 'Racist Crime'

252 Kruize, P. and Gruter, P. (2020), *Discriminatieaspect als strafverzwarende omstandigheid. Cijfers en praktijkervaringen* (Discriminatory aspects as aggravating circumstances. Data and experiences from practice), Den Haag: WOD.
253 FRA (2021), *Encouraging Hate Crime Reporting - The Role of Law Enforcement and Other Authorities*, p. 63.
254 Government of Ireland (2023), *National Action Plan Against Racism*, pp.17-18.
255 Swedish Regeringskansliet (2021), Action Programme to Combat Antisemitism, p. 7.
256 Uszkiewicz, E. (2020) 'Anomalies in the application of law related to hate crimes', *Hungarian Journal of Legal Studies* 61 (2020) 3, p. 330.

in the electronic process of the recording of crimes, which includes the obligatory choice of protected characteristic the racist motive has targeted (race, colour, national or ethnic origin, decent, religion, disability, sexual orientation, gender characteristic or gender identity of the victim).[257]

The objective of significantly improving the reporting and recording mechanisms for antisemitic incidents appears in the national action plans or strategies of several Member States, including **France**, **Ireland**, **Romania** and **Sweden**. In the **Netherlands**, the objective is also included in the workplan for the period 2022-2025[258] of the Dutch National Coordinator for Combating Antisemitism.

**Recommendation:**

It would be desirable for Member States where no such structures exist to set up specialised units within the law enforcement and prosecutorial authorities to deal with bias-motivated criminal offences.

#### 3.2.2.2 Cooperation with civil society organisations

The creation of specialised organisational units is also conducive to the law enforcement authorities' willingness to cooperate with third parties, such as civil society organisations. A good example of this has been highlighted with regard to **Hungary**, where in 2011, a network of professional hate crime experts was set up, with at least one such expert assigned to this task within in every Hungarian county police department. The experts' task is to oversee the investigation of criminal cases where there is a likelihood that a hate crime has occurred.[259] The network is headed by a national coordinator stationed at the National Police Headquarters, who is tasked with monitoring ongoing criminal proceedings, media coverage related to hate crimes and the activities of organised hate groups.[260]

The setting up of the network has granted the Working Group Against Hate Crimes (GYEM), an umbrella organisation of five Hungarian CSOs and individual experts aimed at combating hate crimes, with an effective platform for cooperation with the police, enabling GYEM to indicate when an offence seems to be underqualified or to refer cases reaching them to the police. Whereas this kind of 'interference' might be unwelcome in certain areas of police work (especially from human rights organisations that – due to the very nature of their mandate – often appear as critical towards law enforcement bodies), the specialised task of the expert network makes its members much more receptive to inputs from 'outside' actors with a mandate and expertise in working for the same purpose, i.e. the more effective countering of bias-motived criminal offences. This creates a gateway for these civilian actors that otherwise would not be present. Furthermore, having a clearly designated focal point within the police can also make sure that relevant information does not get lost in the administrative labyrinth of a large organisation.

One instance that illustrates the potential positive impacts of the creation of such structures and the cooperation that comes with it, is a 2013 case where two persons attacked and severely beat up an asylum seeker of African descent, after telling him the following: 'Black man go back to Africa, this is Hungary, it's not Africa'. In the case, the police started investigations on a count of public violence, however, after GYEM raised the issue with the hate crime expert network, the qualification was changed and the investigation was conducted into 'violence against the member of a community' of which the perpetrators

257 National Plan of Action against Racism and Intolerance 2020-2023 of Greece (Εθνικό Σχέδιο Δράσης κατά του Ρατσισμού και της Μισαλλοδοξίας 2020 – 2023).

258 National Coordinator for Combating Antisemitism (2022), *Werkplan Antisemitismebestrijding 2022-2025* (Workplan on Antisemitism 2022-2025).

259 See: Uszkiewicz, E. (2020) 'Anomalies in the application of law related to hate crimes', *Hungarian Journal of Legal Studies* (2020) 3, p. 333.

260 Instruction 30/2019. (VII. 18.) of the National Commander of the Police on the Implementation of Police Tasks related to Addressing Hate Crimes (*Az országos rendőrfőkapitány 30/2019. (VII. 18.) ORFK utasítása a gyűlölet-bűncselekmények kezelésével* összefüggő *rendőrségi feladatok végrehajtásáról*), available at: https://gyuloletellen.hu/sites/default/files/302019._vii._18._orfk_utasitas_0.pdf.

were eventually convicted.[261] Although the case does not come from the field of antisemitism, it shows the importance of having a specialised infrastructure, especially because such instances of underqualification also occur in relation to antisemitic offences as well. For example, according the GYEM database, in 2010, after someone threw stones through the window of the apartment in which a rabbi was holding a Passover ceremony, the police started an investigation into the offence of 'damage to property',[262] and in 2012, when the perpetrator verbally abused a person due to his belonging to the Jewish community publicly in a shopping mall, at first, the investigation was launched into the 'violation of dignity', an offence that does not take into account the bias-motive of the action. Ultimately the perpetrator was convicted for a hate crime on the basis of the petitions of the victim's legal counsel.[263]

In contrast, where there is no specifically designated unit within the criminal justice authorities, or there is no sufficient institutional focus on the issue of bias-motivated criminal offences, CSOs have difficulty gaining access to those who are vested with the task of investigating and prosecuting such offences. For instance, in **Romania**, the Elie Wiesel National Institute for Studying the Holocaust reported that of the ten cases of bias-motivated incidents they had sent in the last five years to the prosecutor's office, only two had reached the court.[264] The Institute also reported that police officers, prosecutors, but also judges do not seek expert support from the Institute and its specialists in order to improve their understanding of the evolution of antisemitic symbols and messages.

At the same time, for this thematic report, country experts identified as adaptable good practice the structured cooperation between CSOs and state bodies vested with the task of countering hate crimes in a number of countries. Examples include **Greece**, where in the first half of 2021, the National Council against Racism and Intolerance, in cooperation with the Ministry of Justice and in the context of developing actions against racism and intolerance, organised six training sessions aimed at building trust between prosecutors and civil society organisations (with altogether close to 200 participants).[265] Prosecutors provided information to communities on the rights of hate crime victims and crime reporting procedures, with the aim of increasing victims' access to justice and improving cooperation between victims, CSOs and law enforcement agencies.

In **Estonia**, the police have initiated bilateral cooperation with the Jewish community to better qualify crimes and acts of misdemeanour that are motivated by biases towards Jewish people.[266] In **Lithuania**, a cooperation platform, the 'Working Group to promote an effective response to hate crime and hate speech in Lithuania'[267] was mentioned as a promising practice. The working group, which is tasked with monitoring developments in the area, raising awareness of hate crimes and hate speech (including through annual reports), promoting dialogue with vulnerable communities, etc. is a useful platform for the exchange of experience between state bodies and CSOs with a mandate in the area. However, as the expert has pointed out, its level of activity has decreased since an EU-funded project implemented by a number of participating CSOs with the aim of countering hate crime has come to an end.

Similarly, the 2022 Czulent Research from **Poland** also called attention to the fact that while CSOs can play an important role in supporting the litigation activities of victims of hate crime, 'considering their current resources, [they] are not able to provide hate crime victims with broad support', and therefore sometimes it depends on personal connections or good luck whether a victim has access to such legal

261 For a Hungarian report on the case see: https://gyuloletellen.hu/node/37.
262 Origo (2010), 'Rongálásként kezeli a rendőrség a rabbi lakásába dobott köveket' (The Police investigate the stones thrown into the rabbi's apartment as damage to property). The network was not involved in providing legal assistance in this particular case, so no information on the outcome is available.
263 For a Hungarian report on the case, see: https://gyuloletellen.hu/node/9.
264 Interview with a representative of the Elie Wiesel National Institute for Studying the Holocaust in Romania, 2 September 2022.
265 Greece, the Ministry of Justice's Document addressed to civil society organisations, protocol number 144/2021 (3 June 2021), on the topic: 'Actions for prosecutors and NGOs in the context of the European REC Programme 2014 – 2020.'
266 Ministry of Interior (2021), *Antisemitismivastaste meetmete kontseptsioon* (Concept paper on fight against antisemitism).
267 For a detailed description of the mandate and activities of the Working Group, see: https://fra.europa.eu/en/promising-practices/working-group-promote-effective-response-hate-crime-and-hate-speech-lithuania.

assistance, which – in the face of the authorities' resistance – can have a decisive role in the success of legal procedures.[268]

The existence of standardised mechanisms for referrals of hate crime victims between police and CSOs was reported by FRA in 2021 from nine other countries besides Hungary,[269] but it was also pointed out that there are also many instances of informal cooperation between the police and CSOs, 'for example in France and the Netherlands, where there are referrals between LGBTI CSOs and Jewish organisations and police.'[270]

Some national action plans and strategies on combating antisemitism envisage the improvement of cooperation between CSOs and state bodies with a mandate in the fight against discrimination and bias-motivated offences. In **Spain**, the National Plan for the Implementation of the European Strategy to Combat Antisemitism (2023-2030)[271] sets out the encouraging of 'contacts between law enforcement agencies and Jewish organisations and associations involved in the fight against antisemitism, in order to better support victims of this type of hate crime'.[272] In **France**, the national action plan against racism, antisemitism and discrimination related to origin 2023-2026 proposes addressing underreporting by facilitating the filing of complaints by victims through 'delegating their reception to selected NGOs'.[273] In **Ireland**, the Irish National Action Plan Against Racism[274] suggests that the access of groups experiencing racism could be improved by creating links between community organisations and Legal Aid Board law centres. Finally, in **Romania**, the National Strategy on the prevention and combating of antisemitism, xenophobia, radicalisation and hate speech 2021-2023[275] contains plans to develop a unified methodology for identifying and reporting manifestations of antisemitism in cooperation with the Elie Wiesel National Institute for Studying the Holocaust.

**Recommendation:**

It would be desirable for Member States to create formal platforms of cooperation between law enforcement and prosecutorial authorities and CSOs active in combating antisemitism to facilitate the reporting and effective prosecution of antisemitic hate crimes. In this regard, the Member States are encouraged to ensure the smooth adoption of the Commission proposal on the revision of the Victims' Rights Directive, including the provisions requiring that Member States establish specific protocols to ensure cooperation and coordination of all authorities and other bodies coming into contact with victims.

Funds for supporting CSOs performing such tasks should be secured or continued to be provided at both the domestic and the EU level.

268 Czulent Jewish Association, Mazurczak, J. and Oracka, M. (2022), *Analysis of the Experiences of Victims of Criminal Offences and Incidents Motivated by Hate*, p. 15.
269 Austria, Italy, Estonia, Croatia, Slovenia, Slovakia, Poland, Romania, and Finland.
270 European Union Agency for Fundamental Rights (FRA) (2021), *Encouraging Hate Crime Reporting - The Role of Law Enforcement and Other Authorities*, p. 59.
271 Ministerio de la Presidencia (2023), *Plan Nacional para la Implementación de la Estrategia Europea de Lucha contra el Antisemitismo (2023-2030)* (National Plan for the Implementation of the European Strategy to Combat Antisemitism (2023-2030)).
272 Spanish country brief.
273 French country brief.
274 Government of Ireland (2023), *National Action Plan Against Racism*, https://www.gov.ie/en/publication/14d79-national-action-plan-against-racism/.
275 Romania, National Strategy on the prevention and combating of antisemitism, xenophobia, radicalisation and hate speech, for the period 2021-2023 and its Plan of action, adopted by Government Decision No.539/2021 (*Hotararea Guvernului nr. 539/2021 privind aprobarea Strategiei naționale pentru prevenirea* și *combaterea antisemitismului, xenofobiei, radicalizării* și *discursului instigator la ură, aferentă perioadei 2021-2023* și *a Planului de acțiune al Strategiei naționale pentru prevenirea* și *combaterea antisemitismului, xenofobiei, radicalizării* și *discursului instigator la ură, aferentă perioadei 2021-2023*), of 13 May 2021, published in the Official Journal No. 517 of 19.05.2021.

### 3.2.2.3 Defining bias indicators

Another good practice reported by a number of Member States is the adoption of guidelines and protocols regarding hate crimes in order to provide bias indicators that police officers can use to classify the reported offence and start the process of gathering evidence. According to the FRA 2018 study, *Hate crime recording and data collection practice across the EU*, (2018 FRA Hate Crime Recording Study), such guidance exists in 15 Member States, but varies 'both in terms of its comprehensiveness and its public availability', and only 13 guidelines contain lists of bias indicators orienting police work.[276]

The reports provided for this thematic report substantiate this conclusion: some countries have very detailed guidelines that are also publicly available (e.g. **Croatia**, **France**, **Hungary**), in others, the guidance is regarded as problematic by experts and CSOs for being outdated (e.g. **Latvia**) or not sufficiently detailed. For instance, the **Romanian** expert concludes that the General Prosecutor's Order 184/2020 approving the Methodology of investigating hate crimes[277] 'is a rather general, theoretical document', and that 'many practitioners are not aware of the existence of this Methodology'.[278] Nevertheless, the General Prosecutor's Office of Romania recently conducted a review of investigations into bias-motived criminal offences between 2017 and 2020, and recommended, among other things, the introduction of indicators regarding hate crimes investigations in the semester programme of activities of each prosecutor's office.[279] In other countries, such guidance is not provided, or at least not available for the public, including legal professionals (e.g. **Cyprus**, **Czechia**, **Estonia**, **Luxembourg**, **Poland**, **Portugal** and **Spain**).

While obviously no direct correlation can be demonstrated between the existence of guidelines and/or specialised hate crime units or experts within the law enforcement and prosecutorial bodies, it seems that in those countries where this kind of guidance and/or specialisation exists, problems of underreporting and underqualification are less prevalent. Examples include **Denmark**, **Finland** and **Germany**. This is also the case in **France**, where the expert emphasises that 'significant efforts are made to ensure that these crimes are systematically prosecuted'.[280] These efforts include the adoption and publication of detailed guidelines,[281] as well the setting up, as of 1 August 2020, of a unit explicitly dedicated to fighting hate crime within the Central Office for Combating Crimes against Humanity (Office central de lutte contre les crimes contre l'humanité), a law enforcement office located in Paris. This unit (Division de lutte contre les crimes de haine) is entrusted with the task of providing technical assistance (i.e. guidance and expertise) to all law enforcement officers in France in investigating hate crimes on the grounds of the race, ethnic origin, nation, religion, sexual orientation or gender identity of the victim. It is also in charge of investigating any online hate speech, incitement to hatred, violence or discrimination or apology for a similar crime.[282]

276 European Union Agency for Fundamental Rights (FRA) (2018), *Hate crime recording and data collection practice across the EU*, pp. 7 and 21. The countries with bias indicators at the time of the 2018 research, were the following: Cyprus, Croatia, Denmark, Germany, Greece, Spain, Finland, France, Hungary, Ireland, Latvia, Sweden and the United Kingdom.

277 The file is not public.

278 Romanian country brief.

279 Romania, Superior Council of Magistracy, Judicial Inspection, Report on the review of the investigation of cases under the criminal offence stipulated by Article 369 of the Criminal Code and the criminal offences stipulated by Emergency Govern mental Ordinance 31/2002, amended by Law 157/2018, 14.05.2021 (not available online).

280 French country brief.

281 France, OCLCH, Capt. Marine Rabasté, instruction for investigators dedicated to combating hatred and intolerance, Gendinfo 17 October 2020: https://www.gendinfo.fr/sur-le-terrain/immersion/oclch-des-enqueteurs-dedies-au-combat-contre-la-haine-et-l-intolerance; OCLCH, P.M Giraud, Consolidating means to fight hate crimes, 16 February 2021: https://lessor.org/operationnel/des-renforts-a-loclch-pour-lutter-contre-les-crimes-de-haine/#; Ministerial Instruction of the Minister of Justice to prosecution magistrates JUSD1712060C of 20 April 2017: *Circulaire JUSD1712060C du 20 avril 2017 de présentation des dispositions du droit pénal ou de procédure pénale de la loi* n° 2017-86 du 27 *janvier 2017 relative à l'égalité et à la citoyenneté* (Ministerial Circular JUSD1712060C of 20 Apr. 2017 presenting penal law and procedure provisions of Law No. 2017-86 of 27 Jan. 2017 on equality and citizenship), Official Bulletin of Ministry of Justice No. 2017-04 of 28 Apr. 2017, available at: https://www.legifrance.gouv.fr/circulaire/id/42123.

282 French country brief.

**Recommendation:**

Reiterating FRA's 2018 recommendation, it would be desirable for Member States to provide police officers with detailed guidance containing descriptions of bias indicators and a monitoring definition of hate crime to facilitate the detection of such crimes at the very beginning of the procedure.

### *3.2.3 Assisting victims of hate crimes – the impact of the Victims' Right Directive*

As mentioned above, according to the 2018 FRA Perceptions Survey, 79 % of respondents who experienced antisemitic harassment in the five years before the survey did not report the most serious incident to any authority, the main reasons being (i) the feeling that nothing would change as a result (48 %); (ii) not considering the incident to be serious enough to be reported (43 %); or (iii) because reporting would be too inconvenient or cause too much trouble (22 %).[283] In the case of physical attacks motivated by antisemitism, 64 % of those who chose not to file a report 'felt that reporting the incidents would have changed nothing', while some of the respondents referred to the lack of trust in the police (25 %) or fear of reprisals (22 %).[284] Practically all of these reasons are related to trust (or the absence thereof) in the police, or the system as a whole: they reflect doubts as to the authorities' ability to protect the victims from reprisal, their willingness to take the complaint seriously enough, and whether actions triggered by reporting the incidents are capable of leading to tangible change.

The experts interviewed in the 2021 FRA Hate Crime Reporting Study mentioned further reasons for the reluctance to report such offences, indicating that victims often 'suffer from feelings of fear, guilt or shame. […] Another significant factor, according to the professionals interviewed, is victims' lack of trust that the police will treat them in a sympathetic manner. More than two out of five experts interviewed rated the risk that police officers could share the discriminatory attitudes of hate crime offenders as fairly or even very high.'[285] Providing an overview of related literature, Uszkiewicz identifies similar problems:

> 'citizens often feel to be only "objects" in their own cases and not actors who can shape and organically transform the processes. They often have the well-founded perception that they are merely outside observers of events. […] The situation is much more serious if the party concerned is forced to suffer improper conduct by the authorities or, worse, discrimination. […] Research also suggests that victims may fear that the police sympathize with the offenders or that law enforcement will fail to empathize with them. […] Some victims may choose not to report hate crime because […] they believe that the police will be unable to do anything. […] Distrust in public institutions and the representatives of public power, has also a significant effect.'[286]

The OSCE's report 'Model Guidance on Sensitive and Respectful Treatment of Hate Crime Victims in the Criminal Justice System' also points out that 'one of the main reasons why hate crimes are under-reported is victims' fear of not being taken seriously by the authorities. […] Hate crime victims' accounts of reporting an alleged hate crime range from not being believed to being harassed or made fun of […].'[287] The 2022 Czulent Research provides telling examples from actual hate crime victims to substantiate these concerns. The interviewees reported among other things that police officers tried to actively discourage the reporting, and showed signs of bias, e.g. by making remarks about a Muslim interviewee, or belittling the complaint of a Jewish interviewee, telling him that 'You could just take some paint and paint it [the Star of David on the gallows] over, that would do it'.[288]

283 FRA (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, p. 12.
284 FRA (2018), *Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU*, p. 55.
285 FRA (2021), *Encouraging Hate Crime Reporting - The Role of Law Enforcement and Other Authorities*, p. 36.
286 Uszkiewicz, E (2020) 'Anomalies in the application of law related to hate crimes', *Hungarian Journal of Legal Studies* 61 (2020) 3, p. 328.
287 OSCE (2021) 'Model Guidance on Sensitive and Respectful Treatment of Hate Crime Victims in the Criminal Justice System', p. 12.
288 Czulent Jewish Association, Mazurczak, J. and Oracka, M. (2022), *Analysis of the Experiences of Victims of Criminal Offences and Incidents Motivated by Hate*, p. 10.

One of the instruments through which the EU *acquis* addresses this kind of secondary victimisation experienced by hate crime victims (i.e. the additional damage suffered by victims due to harmful conduct by individuals and institutions they come into contact with in the course of the proceedings launched into the criminal offence they survived)[289] is through the Victims' Rights Directive.[290] As Recital 55 of the Directive acknowledges, some crime victims are at particular risk of – inter alia – secondary victimisation, which might stem from the personal characteristics of the victim or the type, nature or circumstances of the crime. For that reason, Article 22 of the Directive requires Member States to ensure that victims receive a timely and individual assessment to determine whether and to what extent they would benefit from special protection measures in the course of criminal proceedings due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation. (Under Article 23, such special measures may include the carrying out of interviews with the victim by professionals trained for this specific purpose, or measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means, such as the use of communication technology.)

Under Article 22(3), in the context of the individual assessment, particular attention must be paid to victims who have suffered a crime committed with a bias or discriminatory motive, which could, in particular, be related to their personal characteristics. In this regard, victims of hate crime must be duly considered.

In addition, the EU Strategy on Victims' Rights (2020 – 2025)[291] pays particular attention to victims of hate crime. Among other things, it aims to encourage the reporting of hate crime, improve accurate investigation of bias motivations and support to victims of racism and xenophobia. The strategy recommends strengthening cooperation and coordination among all professionals who come into contact with victims of hate crime as well as the implementation of the guiding principles on ensuring justice, protection and support for victims of hate crime and hate speech produced by the Office for Democratic Institutions and Human Rights.[292]

This thematic report explores how Member States have complied with these requirements and recommendations in relation to bias-motivated crimes in general, and crimes motivated by antisemitism more specifically.

The European Commission's 2020 report on the implementation of the Victims' Rights Directive concluded that although 'Article 22 is particularly important, in several Member States the requirement to introduce this assessment is not implemented or is only partially implemented.' In addition, less than half of the Member States had not transposed Article 22(3) or had transposed it only partially: 'For instance, in some Member States the process of individual assessment does not take into consideration that a crime has been committed with a bias or a discriminatory motive.'[293]

Since 2020, the Member States have improved the situation to a great extent. As highlighted in the impact assessment accompanying the proposal for a revision of the Victims' Rights Directive,[294] the Commission has confirmed that all essential elements of the binding provisions of the Directive have been transposed in all Member States with the exception of one. In 2023, the Commission closed all but

289 See: European Union Agency for Fundamental Rights (FRA) (2016), *Ensuring justice for hate crime victims: professional perspectives*, p. 40.

290 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Victims' Rights Directive).

291 European Commission (2020), EU Strategy on Victims' Rights (2020-2025).

292 OSCE Office for Democratic Institutions and Human Rights (ODIHR) (2021), Model Guidance on Sensitive and Respectful Treatment of Hate Crime Victims in the Criminal Justice System.

293 European Commission (2020), *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, p. 8.

294 European Commission (2023), Impact Assessment Report accompanying the Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, p. 3, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023SC0246.

one of the infringement proceedings against Member States for incomplete transposition of the Victims' Rights Directive.

Some country experts have, however, reported under the current study that the transposition of the Directive into domestic legislation has to be further improved, so that it is correctly applied. For instance, according to the country expert, there is no specific legislation in **Belgium** to implement Articles 22 and 23 of the Victims' Rights Directive in general, or in particular, concerning antisemitic hate speech and hate crimes. 'This lacunae in the transposition of the directive has been recently criticised by the Council of State about the legislation preventing and combating feminicide, gender-based homicides and the violence that precedes them.'[295]

In **Romania**, Law 211/2004 on certain measures to ensure the information, support and protection of the victims of crimes[296] provides no legal definition of a 'vulnerable victim' and does not include additional support services for victims of hate crimes either.[297] Hate crime victims are treated like any other victims and no specific measures have been adopted to protect, support and empower them (such as measures to encourage the reporting of hate crimes or specialised and integrated victim support services). According to a focus group held with the participation of CSO representatives in August 2022, even if hate crime victims are provided with information regarding the criminal procedure, 'it is too general and formulated in legal terms, difficult to understand'.[298] Along with the low number of the convictions and the protracted proceedings, these shortcomings in the transposition have serious implications for the actual experience of hate crime victims in the Romanian criminal justice system, contributing to the reluctance of victims to report hate crimes and the corrosion of their trust in the law enforcement authorities.[299]

Several Member States have transposed Article 22(3) without specifically regulating the obligation to take into account the bias motive of the crime. In **Portugal**, for instance, 'in the definition of particularly vulnerable persons, there is no direct reference to discriminatory bias or motive. Article 67-A(1)(b) of the Procedural Criminal Code [...] defines especially vulnerable persons as "victims who are particularly vulnerable as a result of their age, state of health or disability, or because the type, degree and duration of victimisation result in injuries with serious consequences for their psychological balance or the conditions for their social integration"'.[300] Although victims of violent crimes that can be punished with up to five years of imprisonment or more are regarded as vulnerable, and hate crimes fall into this category, thus enabling the authorities to treat hate crime survivors as vulnerable victims, the bias motive of the crime is not expressly mentioned the pertaining legislation.

In **Hungary**, the statutory list of what might substantiate the vulnerability of the victim also does not contain a specific reference to the bias motive of the offence. The list contains (i) the victim's age; (ii) their mental or physical state, or health status; (iii) the excessively violent nature of the criminal offence; and (iv) the victim's relationship to other persons concerned by the criminal procedure.[301]

295 Belgian Council of State (2022), 'Avis 72.505/2 du 19 décembre 2022 sur un avant-projet de loi sur la prévention et la lutte contre les féminicides, les homicides fondés sur le genre et les violences qui les précèdent' (Advisory opinion of 19 December 2022 on a preliminary draft law on preventing and combating feminicide, gender-based homicides and the violence preceding them).

296 Romania, Law 211/2004 on certain measures to ensure the information, support and protection of the victims of crimes (*Legea 211/2004 privind unele măsuri pentru asigurarea informării, sprijinirii* şi *protecţiei victimelor infracţiunilor*), published in the Official Journal No. 505 of 27.05.2004.

297 Romanian country brief.

298 Focus group with the representatives of NGOs conducted on 18 August 2022 in the context of the FRANET research leading to the thematic analysis.

299 Romanian country brief.

300 Portugal country brief.

301 Hungary, Act XC of 2017 on the Code of Criminal Procedure (2017. évi XC. törvény - a büntetőeljárásról), Article 81, https://net.jogtar.hu/jogszabaly?docid=a1700090.tv.

At the same time, there are countries from which good examples have been reported with legislation that expressly takes into account the bias motive of the criminal offence, and its impact on the vulnerability of the victims.

For example, in **Croatia**, the law prescribes that special attention must be paid to victims of offences committed because of their personal characteristics. It is emphasised that individual assessment is needed in certain cases, including hate crimes.[302] In **Ireland**, Section 15 of the Criminal Justice (Victims of Crime) Act 2017[303] provides for individual victim assessments in line with Article 22 of the Victims' Rights Directive. Section 15(2) of the Irish Criminal Justice Act requires the determination of a victim's needs to be based on a consideration of a series of internal and external factors including the nature of the alleged offence, the circumstances of the commission of the alleged offence and the personal characteristics of the victim. The personal characteristics of the victim, include – inter alia – their ethnicity, race, religion. Account should be taken of 'whether the alleged offence appears to have been committed with a bias or discriminatory motive, which may be related to the personal characteristics of the victim'.[304]

Whether or not the legislation (and the protocols adopted in accordance with it) make an express reference to the impact of the bias motive on the victims' vulnerability, seems to be an important factor in the adequate practical implementation of the provisions prescribing individual assessment. The European Parliamentary Research Service's 2017 study into the implementation of the Victim' Rights Directive (2017 EPRS Report) found that in many of those Member States that were researched in depth for the study ('sample countries'),[305] 'the victims of hate crime still receive very little attention [...] despite the introduction of the directive.'[306] This most probably has roots in the traditional understanding of vulnerable victims, as a result of which most of the sample countries covered in the research 'already had special support systems in place for children, and victims of domestic and sexual violence. Other victim groups, such as victims of hate crime and victims of terrorism did not receive such special treatment'.[307]

Although the research found that as a result of the Directive's transposition, Member States that have developed a comprehensive approach to individual assessments became more capable of paying 'due attention to victims with vulnerabilities and/or in need of special protection. Nevertheless, in some countries (e.g. Austria, Lithuania), victims of sexual violence still receive faster special protection than other types of victims.'[308] A similar observation has been made in this thematic report regarding **Slovenia**, where the legislative framework has improved in the course of the transposition process, with the Criminal Procedure Act (CPA) now prescribing[309] that the individual assessment must examine in particular the personal characteristics of the victim, the nature, gravity and circumstances of the crime and that particular consideration must be given to (among other things) the circumstances of the criminal offences committed as a result of prejudice, discrimination, exploitation or hatred. The police carry out the assessment by asking the victim a set of questions based on a form, which was prepared by a working group established by the Ministry of Justice to develop measures for the effective transposition of the Victims' Rights Directive. However, as the country expert points it out, 'this set of questions is heavily adapted to circumstances relevant for domestic violence and is not adapted to cases involving bias motive'.[310]

302 Croatia, Criminal Procedure Code, Official Gazette 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017, 126/2019, 126/2019, 80/2022.
303 Ireland, Criminal Justice (Victims of Crime) Act 2017, Number 28 of 2017, https://www.irishstatutebook.ie/eli/2017/act/28/enacted/en/pdf.
304 Irish country brief.
305 Austria, Belgium, Czech Republic, Finland, France, Germany, Hungary, Italy, Lithuania, Poland, Spain and Sweden.
306 European Parliamentary Research Service (2017), *The Victims' Rights Directive 2012/29/EU, European Implementation Assessment*, p. 91.
307 European Parliamentary Research Service (2017), *The Victims' Rights Directive 2012/29/EU, European Implementation Assessment*, p. 85.
308 European Parliamentary Research Service (2017), *The Victims' Rights Directive 2012/29/EU, European Implementation Assessment*, p. 85. It is worth pointing out that the Lithuanian country expert of the non-discrimination network believes that the system of protection for victims of sexual violence is also problematic in several respects in Lithuania.
309 Slovenia, Criminal Procedure Act, Article 143č.
310 Slovenian country brief.

Resistance to change is a well-known phenomenon in the sociology of organisations. The introduction of individual assessment of victims to identify their specific protection needs has been a significant change for many law enforcement bodies, requiring not only the allocation of substantial resources in terms of time and human capacity (to be spent on the development of protocols, training and the practical exercise of assessing the needs of victims), but also a bringing into the focus of their activities the enhanced protection of members of minority groups that are often the subject of biases in both the wider society and the law enforcement authorities themselves, the personnel of which inevitably share the prejudices of the general public. Under such circumstances, if the conditions for qualifying victims as particularly vulnerable are formulated in general terms, allowing the criminal justice actors a relatively wide margin of discretion as to who is to be regarded as falling into this category, there is a not insignificant risk that the special needs of those persons with regard to whom prejudices are strong in a given society, or who are simply not the 'usual' vulnerable victims (such as children), will be disregarded.

As shown by some of the examples quoted in relation to the underqualifying of hate crimes, specific measures clearly vesting law enforcement bodies, or special units thereof with the performance of a certain task, can be a very important catalyst for improvement. Similarly, in relation to the individual assessment of the specific needs of victims of hate crimes, it would be advisable for Member States to expressly codify bias and hate motives of criminal offences as triggering this special type of protection for victims of crime.

This is all the more important, because the research for this thematic report shows that even in countries where the legislative framework is specific enough in this regard, a lot depends on the practical implementation. In the **Netherlands**, under the 2016 Victims of Crime Decree,[311] victims of prejudice or discrimination must be regarded as vulnerable and in need of special protection. This means that the police will have to discuss with the victim what individual support they need (an 'individual assessment' [*Individuele Beoordeling*, IB]), and this has to be duly registered.[312] However, the Scientific Research and Documentation Centre (WODC), which regularly reports on the protection of victims, concluded in 2020[313] that it was too early to tell whether or not these measures had lived up to the expectations, and emphasised that 'the IB could [...] contribute to the recognition of the discriminatory aspect, the selection of tailormade protection measures, and the use of more effective alternatives to prosecution' only if 'implemented properly and applied in practice in compliance with policy documents'.[314]

Furthermore, although the **Irish** regulation is compliant with the requirements set out in Articles 22 and 23 of the Directive, recent research concerning Traveller hate crime victims' experiences of the criminal justice process[315] (drawing on a survey of 326 Traveller individuals and 29 interviews with people working in Traveller organisations) finds that experiences of reporting crime to An Garda Síochána are 'generally negative, with victims feeling unprotected by the State.' The authors conclude that 'victims of hate crime and domestic violence are particularly under-served by the Gardaí, despite the provisions of the Victims Directive which provides that such victims deserve special protection. These victims remain unprotected by the criminal process, which should be of the deepest concern for all.'[316]

Similarly, in **Greece**, the legislative framework is sufficiently detailed, with Law 4478/2017 (which transposed the Victims' Rights Directive 2012/29/EU in the Greek legal order) prescribing that the

311 Netherlands, Victims of Crime Decree (*Besluit slachtoffers van strafbare feiten*), *Stb*. 2016/310.
312 Van der Aa, S., Claessen, J. and Hofmann, R. (2020), *Speciale behoeften van slachtoffers van hate crime ten aanzien van het strafproces en de slachtofferhulp* (Special needs of victims of hate crime regarding criminal process and victim support), p. 13.
313 Netherlands country brief.
314 Van der Aa, S., Claessen, J. and Hofmann, R. (2020), *Speciale behoeften van slachtoffers van hate crime ten aanzien van het strafproces en de slachtofferhulp* (Special needs of victims of hate crime regarding criminal process and victim support), the Hague, WODC, p. 29, as summarised in the Netherlands country brief.
315 Joyce, S., O'Reilly, O., O'Brien, M., Joyce, D. Schweppe, J., and Haynes, A. (2022), *Irish Travellers' Access to Justice,* Limerick: European Centre for the Study of Hate.
316 Joyce, S., O'Reilly, O., O'Brien, M., Joyce, D. Schweppe, J., and Haynes, A. (2022), *Irish Travellers' Access to Justice*, Limerick: European Centre for the Study of Hate, p. 73, as quoted by the Irish country brief.

individual assessment mainly must take into account the personal characteristics of the victim, including their race, colour, religion, nationality or ethnic origin, as well as the type and nature of the crime, in particular in relation to cases of racist violence or other hate crime. At the same time, in its 2022 report, the Racist Violence Recording Network criticises the practical implementation of the provisions aimed at the transposition of the Victims' Rights Directive, claiming that the actual access of victims of racist crimes to information, support and protection must be significantly upgraded for it to be regarded as truly effective.

The 2022 Czulent Research also lists a number of problems in the practical implementation of the **Polish** legislative framework put in place to transpose the Victims' Rights Directive. Issues pointed out by the interviewees are the following: (i) cases are dealt with by officers and prosecutors who are not specialised in hate crimes;[317] (ii) no special rooms are used for taking testimonies, the interviews are conducted in oppressive spaces, without adequate privacy, often in the presence of third parties;[318] (iii) police officers, and even judges made stereotypical, offensive remarks, sometimes belittling the incident;[319] (iv) it is very difficult for the victim to obtain information about where a case stands (for instance, when filing a report, victims often do not receive written acknowledgement of the report having been filed, they are not informed about the progress of the case, and it is very difficult for them to contact the prosecutor or the court if they wish to be informed about the progress of the case), and even when information is provided it is unclear and often too legalistic.[320]

Drawing on the conclusions of Directive's evaluation, in July 2023, the Commission adopted a proposal for the revision of the Victims' Rights Directive.[321] The proposal aims to further strengthen the rights of victims in the EU, including the rights of the most vulnerable victims, such as victims of hate crime. Particularly relevant for this group of victims is the proposal to improve individual assessment of victims' needs and to strengthen support for the most vulnerable victims by adding physical protection measures. Other amendments that are highly relevant for victims of hate crime include the facilitation of crime reporting, the strengthening of the right to support (including psychological support), the improvement of victims' participation in criminal proceedings, including the right to be assisted at the court and the right to a review of decisions taken during court proceedings.

As promising practices in relation to the transposition of the Victims' Rights Directive and the implementation of changes aimed at the enhancing of the position of hate crime victims, a number of country experts referred to the setting up of online platforms for reporting (**France**), the creation of specialised institutional structures or units (**France**), and the organisation of cooperation opportunities (**Greece**) that were also mentioned in relation to countering discrimination and reducing the underqualification of hate crime.

Some of the national action plans and strategies on combating antisemitism also focus on the assessment of victims' needs and/or measures aimed at facilitating an enabling environment for victims of antisemitic acts. For example, the **Irish** National Action Plan Against Racism[322] sets out the introduction and publicisation of safeguards 'so that all victims of and witnesses to racist incidents and crimes can feel safe in reporting to An Garda Síochána'. In **Spain**, the National Plan for the Implementation of the European Strategy to Combat Antisemitism (2023-2030) sets out the development of an individual

317 Czulent Jewish Association, Mazurczak, J. and Oracka, M. (2022), *Analysis of the Experiences of Victims of Criminal Offences and Incidents Motivated by Hate*, pp. 9 and 11.
318 Czulent Jewish Association, Mazurczak, J. and Oracka, M. (2022), *Analysis of the Experiences of Victims of Criminal Offences and Incidents Motivated by Hate*, pp. 9. and 17.
319 Czulent Jewish Association, Mazurczak, J. and Oracka, M. (2022), *Analysis of the Experiences of Victims of Criminal Offences and Incidents Motivated by Hate*, pp. 10 and 11.
320 Czulent Jewish Association, Mazurczak, J. and Oracka, M. (2022), *Analysis of the Experiences of Victims of Criminal Offences and Incidents Motivated by Hate*, pp. 10 and 17.
321 European Commission (2023), Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; COM(2023) 424 final.
322 Government of Ireland (2023), *National Action Plan Against Racism*, https://www.gov.ie/en/publication/14d79-national-action-plan-against-racism/.

needs assessment form for victims of antisemitic hate crime to be carried out immediately by the police to ensure full provision of services to the victim according to their specific needs, in particular the most immediate needs for safety and protection of the victim. With the aim of improving police performance in the area of antisemitic offences, it is also anticipated that victims of antisemitic hate crimes will be provided with the possibility to fill in a satisfaction evaluation form on the treatment and information that they received from law enforcement agencies.[323]

**Recommendation:**

Members States should support the adoption of the Commission proposal for a revision of the Victims' Rights Directive with a view to improving the situation of all victims of crime, including the most vulnerable victims in the EU.

With the aim of orienting the law enforcement and prosecutorial agencies and overcoming potential organisational resistance to changes brought about by the requirements set out in Article 22(3) of the Victims' Rights Directive, Member States should expressly codify bias and hate motives of criminal offences as qualifying crime victims as particularly vulnerable.

### *3.2.4 Legal assistance to victims of hate crimes*

Experience shows that, especially in the face of the reluctance of law enforcement and prosecutorial authorities to investigate (the bias motive of) hate crimes (whether because they give in to organisational pressures or out of prejudices), legal assistance provided to the victim can be even more important in such cases than in 'ordinary' criminal proceedings. The 2022 Czulent Research provides some important insights into this issue. The victims who were interviewed reported that due to factors such as the lack of specialisation on the part of the police officers working on such cases, the investigating authority's tendency to choose the 'easy way' and omit the hate motive and the evidence substantiating it, as well as the lack of adequate facilities for collecting and recording electronic evidence, they had to 'supervise' the procedure, 'so that its course is in the right direction, all evidence is properly collected and secured and the hateful motivation is not omitted',[324] which is very onerous without expert assistance.

This problem (aggravated by the fact that victims of hate crimes often come from underprivileged groups and are unable to afford to retain a lawyer) has been addressed in **Austria** through legal reform. BGBl I Nr. 148/2020 (the law counteracting online hatred) amended the Civil Procedure Code[325] (Section 66b) and introduced victims of incitement to hatred as new beneficiaries of 'procedural chaperonage' (*Prozessbegleitung*). They have the right to psychosocial and legal assistance, which entails the preparation for the legal procedure taking into account the related emotional challenges, being accompanied to interviews and hearings, as well as legal counsel and representation by a competent lawyer. The costs are borne by the Ministry of Justice. The services are provided by specialised NGOs and selected lawyers.

Similarly, with respect to **Sweden**, it was mentioned by the country expert as an important addition to victims' rights that if they meet certain conditions, it is possible to appoint a counsel for crime victims so that they would be assisted in asserting their rights. This possibility is also open for hate crime victims if they meet the requirements set by the law.[326] Assistance by a legal professional is also available for victims of crime in **Hungary** with the state bearing the costs of the service where the victim meets a certain financial threshold.[327]

323 Spanish country brief.
324 Czulent Jewish Association, Mazurczak, J. and Oracka, M. (2022), *Analysis of the Experiences of Victims of Criminal Offences and Incidents Motivated by Hate*, p. 11.
325 Austria, *Strafprozessordnung*, BGBl Nr. 631/1975, as last amended by BGBl I Nr. 148/2020.
326 Sweden, *Lag (1988:609) om målsägandebiträde* (Act on Counsel for Crime Victims).
327 Hungary, Act LXXX of 2003 on Legal Aid, Articles 9/A and 19.

In this context, to ensure more effective participation in criminal proceedings by victims, the revision of the Victims' Rights Directive proposes to establish in a new provision a right to assistance in court.

**Recommendation:**

Victims of hate crimes and other offences committed out of antisemitic bias motives should be provided with free or supported legal assistance in the course of reporting the offence to law enforcement and throughout the entire procedure. In addition, the Member States are encouraged to support a smooth adoption of the revision of the Victims' Rights Directive, including the provisions requiring Member States to enhance assistance provided to victims in court proceedings.

# 4 The prosecution of antisemitic hate speech

Under Article 1 of the Framework Decision, racist or xenophobic hate speech must be understood as public incitement 'to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin'. The dissemination of the hatred through 'public dissemination or distribution of tracts, pictures or other material' will also fall under the concept of 'public' perpetration, and is also understood to cover the committing of such acts through information systems, 'thus also criminalising the growing phenomena of cyberhate'.[328]

Furthermore, the Framework Decision requires Member States to penalise the public condoning, gross trivialisation or denial of (i) war crimes, genocides, crimes against humanity as regulated in Statute of the International Criminal Court, and also of (ii) war crimes, crimes against peace and crimes against humanity committed by persons acting in the interests of the European Axis countries during the Second World War, provided, in both cases, that such conduct is carried out 'in a manner likely to incite to violence or hatred'. As emphasised by the 2018 Guidance Note, this type of 'negationism can be considered as a specific manifestation of antisemitism [...] since it both constitutes a denial of crimes against humanity, meaning here the Nazi holocaust, and an incitement to hatred against the Jewish community'.[329]

Article 1(2) of the Framework Decision allows 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.

The 2021 EU Crimes Study contains a detailed analysis and comparison of the hate speech legislation and policy measures of the EU countries. Therefore, this thematic report does not wish to repeat that exercise and focuses on new developments that have taken place since the cut-off date of the 2021 EU Crimes Study and on the identification of certain particularities in the legislation and practice of the Member States from which wider and more systemic conclusions may be drawn.

## 4.1 Developments in legislation since 2021 and lessons learnt from them

In most of the Member States, no legislative amendments have taken place since the cut-off date of the 2021 EU Crimes Study, but changes have been implemented in some countries, and considered in others.

For instance, in **Sweden**, in response to the European Commission's letter of formal notice launching an infringement procedure for an 'incomplete and incorrect transposition' of the Framework Decision into Swedish legislation,[330] a Government inquiry was conducted, among other things, into whether specific criminal responsibility should be introduced for publicly condoning, denying or grossly trivialising genocide, crimes against humanity and war crimes, including Holocaust denial. The inquiry concluded that while the current Swedish provisions on agitation against a population group already cover such actions (when they are carried out in a manner likely to incite violence or hatred against a protected group), it is still advisable to amend the relevant provisions of the Swedish Criminal Code so that it specifically states that criminal responsibility covers denying, condoning and grossly trivialising genocide and certain other international crimes, for a number of reasons, including (i) a greater clarity of the penal prohibition; (ii) the fact that the denial of genocide 'can be seen as a continuation of the genocide itself, thus constituting a grievous insult to survivors and other affected parties'; (iii) the pedagogical power of criminalisation and

328 EU High Level Group on combating racism, xenophobia and other forms of intolerance (2018), 'Guidance Note on the Practical Application of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law', p. 7.
329 EU High Level Group on combating racism, xenophobia and other forms of intolerance (2018), 'Guidance Note on the Practical Application of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law', p. 7.
330 Infringement case INFR(2020)2324.

its potential impact in the education of the youth; (iv) and finally a greater clarity regarding the Swedish legislation's compatibility with the Framework Decision.[331]

As mentioned above, in relation to developments in hate crime legislation, a comprehensive legislative amendment is being debated in **Ireland**, where the Government has acknowledged that the Prohibition of Incitement to Hatred Act 1989[332] regulating certain forms of hate speech has been ineffective in general with 'very few prosecutions since its introduction'.[333] Therefore, as also mentioned in relation to hate crimes, in October 2022, the Irish Government published the Criminal Justice (Incitement to Violence of Hatred and Hate Offences) Bill 2022, providing protection on the basis of, among other grounds, 'race', 'religion', 'national or ethnic origin', and 'descent'. The draft law provides for the offences of (i) incitement to violence or hatred against persons on account of their protected characteristics (Section 7), and condoning, denying or grossly trivialising genocide, crimes against humanity and war crimes (Section 8).[334]

Actual changes took place in **Estonia**, where as of April 2022, Article 151(1) of the Penal Code criminalises the condoning and justification of international crime. The Code stipulates that publicly exhibiting a symbol relating to an act of aggression, genocide, crime against humanity or commission of a war crime in a manner that condones or justifies such acts is punishable by a fine of up to three hundred fine units or by deprivation of liberty. Under Article 151(2), the same act, if committed by a legal person, is punishable by a fine of up to EUR 32 000.

In **France**, the Press Freedom Act of 29 July 1881 (Article 24 of which imposes criminal penalties on 'those who [...] incite hatred or violence against a person or group of persons on account of their origin or membership or non-membership of a given ethnic group, nation, race or religion, or their true or supposed sexual orientation or gender identity'[335] with a view to causing those to whom the inciting communication is addressed to behave in a discriminatory way against the protected persons) was amended by Law No. 2021-1109 of 24 August 2021. The Act now provides for an aggravation of the maximum sanction of three years of imprisonment and a fine of EUR 75 000 if the act is committed by a person possessing public authority or carrying out a public service.

Recent changes were triggered by the European Commission's intervention in **Romania**. In October 2020, a letter of formal notice was sent to the Romanian Government because of the incorrect implementation of the Framework Decision due to the fact that the Romanian legislation in force at the time only criminalised hate speech directed against a group of persons, but not when addressed towards an individual member of such a group.[336] The amendment,[337] which was adopted by the Parliament in June 2021, was challenged before the Constitutional Court by the President of Romania[338] on the basis that the draft bill did not explicitly list the protected grounds, thus leaving room to arbitrariness and legal uncertainty by using the ambiguous formulation 'belonging to a certain category of persons'. In September 2021, the Constitutional Court decided that the proposed amendment was unconstitutional, because it breached the principle of clarity and predictability of criminal law,[339] opening the way to 'arbitrary interpretations and applications'.[340]

331 Sweden, *Kommittén om kriminalisering av förnekande av Förintelsen och av vissa andra brott (2023), En tydligare bestämmelse om hets mot folkgrupp* (A clearer provision on agitation against ethnic groups), pp. 30-31.
332 Ireland, Prohibition of Incitement to Hatred Act, Number 19 of 1989, https://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/print.html.
333 Irish Department of Justice (2020), *Legislating for Hate Speech and Hate Crime in Ireland Report on the Public Consultation 2020*, https://www.gov.ie/en/publication/85e7a-legislating-for-hate-speech-and-hate-crime-in-ireland-report/.
334 Irish country brief.
335 See: https://legislationline.org/taxonomy/term/17578.
336 European Commission (2020), 'October infringements package: key decisions'. Available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687.
337 Romanian Government, Decision no.E13/18.02.2021 and the Bill L33/2021.
338 Romanian President, Complaint of unconstitutionality regarding the Law for the amendment of Article 369 of the Law 286/2009 on the Penal Code (*Sesizare de neconstituționalitate asupra Legii pentru modificarea art. 369 din Legea nr. 286/2009 privind Codul penal*).
339 Constitutional Court of Romania, Decision No. 561/2021 of 15 September 2021, published in the Official Journal No. 1076 of 10 November 2021, available at https://www.ccr.ro/wp-content/uploads/2021/10/Decizie_561_2021.pdf.
340 Constitutional Court of Romania, Decision No. 561/2021 of 15 September 2021, para. 34.

Following this decision, the Parliament revised the text and adopted a new version, which was challenged again by the People's Advocate and a political party before the Constitutional Court, however, this application was rejected by the body, and the newly formulated Article 369 of the Criminal Code came into effect. Article 369 now defines 'incitement to violence, hatred or discrimination' as the act of 'inciting the public, using any means, to violence, hatred or discrimination against a category of persons or against a person based on his/her belonging to a category of persons defined by grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, political opinion or allegiance, wealth, social origin, age, disability, chronic non-transmissible disease or HIV/AIDS infection, considered by the perpetrator as causes of a person's inferiority in relation to other persons.' The offence is punishable by imprisonment from six months to three years or by a fine.[341] Following an additional letter of formal notice sent by the European Commission, Romania again amended Article 369 of the Criminal Code which now no longer requires the protected grounds to be considered by the perpetrator as causes of a person's inferiority in relation to other persons.

In **Poland**, the July 2022 amendment of the Penal Code (coming into force on 1 October 2023)[342] inserted a new paragraph into Article 256 of the Code (penalising the propagation of Nazism, communism, fascism or any other totalitarian regime), which adds (to the already existing ban on the propagation of totalitarian state systems and on incitement to hatred on the grounds of national, ethnic, racial, religious differences or on the grounds of irreligiousness) the prohibition of publicly promoting Nazi, communist or fascist ideologies or any ideology advocating the use of violence to influence political or social life. It also increases the maximum penalty for such actions from two to three years of imprisonment.

At the same time, referring to escalating tensions in Polish society and the increasing prevalence of hate speech, Poland's equality body, the Ombud, addressed the Prime Minister in February 2019,[343] indicating the need to create a comprehensive strategy to counter hate speech in public spaces. With regard to desirable legislative responses, the recommendations (which were repeated in 2020 and 2021 due to the lack of any substantial response) contained a number of potential measures to counter the phenomenon, including the criminalisation of membership of organisations promoting or inciting to racial hatred and the introduction of a unified statutory definition of hate speech instead of using multiple criminal offences covering different aspects of the phenomenon.

The debates around, and legislative changes aimed at, the proper implementation of the Framework Decision highlight a number of issues that recur around the penalisation of hate speech in general, and the prohibition of antisemitic hate speech in particular. One such issue is the degree of generality or detail with which behaviours amounting to a criminal offence must be defined so that the clarity and foreseeability required by criminal law be respected on the one hand, while no dangerous instances of hate speech fall through the gaps of the legislative framework on the other.

The **Swedish** thinking around the denial of genocide or the **Romanian** Constitutional Court's decision to quash the insufficiently clear hate speech provision (because the term 'belonging to a certain category of persons' was not sufficiently foreseeable) are illustrative of this problem of general versus casuistic regulation. One other area where the multiplicity of approaches to this issue is highlighted acutely is that of the public display of antisemitic symbols, including Nazi memorabilia.

341 Romania, Criminal Code of 2009 (Law 286/2009) (*Codul Penal din 2009 (Legea nr. 286/2009)*), of 17 July 2009, Article 369, as amended by Law 170/2022 of 3.06.2022, published in the Official Journal No. 548 of 6.06.2022.
342 Poland, Act of 7 July 2022 (Journal of Laws 2022.2600) amending the Penal Code as of 1 October 2023.
343 Ombud (2019), *Jak walczyć z mową nienawiści. 20 rekomendacji RPO dla premiera XI.518.50.2017* (How to fight hate speech. 20 recommendations from the RPO to the Prime Minister XI.518.50.2017).

In some of the Member States there is very specific legislation concerning such symbols. In **Austria**, there is a separate law: the Act on Insignia (*Abzeichengesetz*) prohibits the public wearing or showing of insignia or uniforms of organisations that are prohibited in the country.[344] In other countries, the prohibition of the use extremist symbols is placed in the penal code with a varying degree of specificity. Some contain strict exhaustive lists, others apply a more general, exemplificative approach. For instance, the Hungarian Criminal Code (Article 335) prescribes that whoever disseminates, publicly uses or presents (i) a swastika, (ii) an SS-badge, (iii) an arrow-cross (symbol of the Hungarian Nazi party during the Second World War); (iv) a sickle with the hammer; (v) a five-point star; or (vi) any symbol containing the above in a manner that is capable of disturbing public peace is punishable with confinement. This is an exhaustive list, and the use of any other symbol, no matter how closely it is related to the Nazi or communist past (e.g. a Hitler salute) is not punishable under this provision (although it may be in terms of the general prohibition of incitement to hatred).

As opposed to this, in **France**, Article R645-1 of the Criminal Code prescribes that the wearing or public display of insignia, uniforms, or emblems that are likely to remind the public of those characteristic of the perpetrators of crimes against humanity is an offence carrying a maximum fine of EUR 1 500, while Article 86a of the **German** Penal Code[345] renders the dissemination and public use of symbols of unconstitutional parties, in particular, flags, insignia, uniforms and their parts, slogans and forms of greeting, punishable with a penalty of imprisonment for a term not exceeding three years or a fine. It is also stipulated in the German legislation that symbols that are so similar as to be mistaken for those of unconstitutional parties are deemed to be equivalent to them. Article 524 of the Code of Administrative Offences of the Republic of **Lithuania** uses a combined approach by giving on the one hand a very exhaustive list of forbidden symbols, including the public use of the images of the leaders of the German National Socialist Party and the Soviet Communist Party, or the public performance of the anthem of Nazi Germany and the Soviet Union, while on the other also providing a more general formulation by adding that the use of the 'symbols of totalitarian or authoritarian regimes, which these regimes have used or are using for the purpose of promoting military aggression committed or being committed by them' is also punishable.

At the other end of the scale, there are countries that render the use of Nazi symbols and insignia punishable under the general anti-hate speech legislation, but do not set out specific prohibitions banning their public use or display. Examples include **Belgium**, **Cyprus**, **Czechia**, **Finland**, **Portugal** and the **Netherlands**.

For reasons that have been dealt with in previous sections of this thematic report (including the symbolic significance of criminalisation as well as the difficulties regarding the proving of the mindset and intents of the perpetrator), one might tend to assume that more specificity in the regulation is more effective in facilitating penal action against such instances of antisemitic communication, the available case law shows that sometimes the more general approach can be equally (or even more) conducive to efficient countering of antisemitism.

For instance, while in **Belgium** there is no specific legislation about the public display of antisemitic symbols, in a November 2022 judgment, the West Flanders Criminal Court imposed an EUR 800 fine on a defendant who performed an 'alternative Hitler salute' or Kühnen-salute (invented by German neo-Nazi Michael Kühnen, to circumvent the ban on the Hitler salute) at a demonstration where racist remarks were being chanted. The public prosecutor had prosecuted the defendant on the charge of incitement to hatred

344 Austria, *Bundesgesetz vom 5. April 1960 mit dem bestimmte Abzeichen verboten werden*, BGBl Nr. 84/1960 as last amended by BGBl I Nr. 113/2012. Under the Prohibition Act of 1947, the following are considered to be National Socialist organisations (and thus prohibited): the NSDAP, SS, SA, NSKK, NSFK, the NS Soldiers' Ring, the NS Officers' Association, all other groupings of the NSDAP and its affiliated associations as well as any other National Socialist organisations.

345 Germany, Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 22 November 2021 (Federal Law Gazette I, p. 4906), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0933.

or violence towards a group, a community or their members, and the criminal court upheld the charges. The court held that performing the Hitler salute, or an alternative Hitler salute, is not an expression of opinion but a deliberate incitement to hatred, especially when it is performed at a demonstration where racist slogans are chanted.[346] Similarly, in a case where the defendant was accused of painting a swastika in a memorial garden next to a synagogue, the Hague Court of Appeal emphasised that the depiction of a swastika is inevitably insulting to the Jewish people, since it propagates the National Socialist ideology, which is pre-eminently characterised by racial doctrine and antisemitism, and it was on the basis of this ideology that millions of Jews in Europe were persecuted and murdered during the Second World War.[347] The case is also interesting as it highlights the importance of adequately defining the ground for the bias motive: the defendant was acquitted because in the appeal court's view, the impugned act was insulting to Jews in relation to race, and not in relation to their religion or religious beliefs, which was the ground upon which he had been charged.

At the same time, in **Hungary**, in the case giving rise to the European Court of Human Rights (ECtHR) *Fáber* judgment,[348] the applicant attended the counterdemonstration of a far-right party that was organised in response to a left-wing party's demonstration against racism and hatred. The applicant held up an Árpád-striped flag which could be regarded both as a historical flag of Hungary, but was also widely used by the Hungarian Nazi party during the Second World War. The applicant was told by police officers to put away the flag, and when he refused to do so, he was taken into custody and fined for the misdemeanour of disobeying an instruction of the police. The ECtHR's somewhat controversial judgment concluded that the applicant's freedom of expression had been violated, since 'ill feelings or even outrage, in the absence of intimidation, cannot represent a pressing social need for the purposes of Article 10 § 2, *especially in view of the fact that the flag in question has never been outlawed*' (emphasis added). While the ECtHR acknowledged that the expression of contempt for the victims of a totalitarian regime may amount to an abuse of Convention rights, in the absence of the prohibition of the Árpád-striped flag, it did not find the existence of the 'pressing social need' sufficiently substantiated. In a system where the prohibited symbols of Nazism are regulated less rigidly than by the Hungarian Criminal Code's exhaustive list, the ECtHR's conclusion might have been different (and the action of the police would also have had a firmer basis).

While it is understandable that in the face of the criminal law's strict requirements of foreseeability, the legislatures strive to regulate these issues as precisely as possible, due to the flexibility, adaptability and variability of symbols and symbolic gestures (of which the Kühnen-salute is an illustrative example), an approach that is too rigid may undermine the purpose of the regulation, thus continually forcing the legislature to try to keep up with those disseminating extremist ideas.

Another example comes from **Romania**, where in 2015, the scope of the Emergency Governmental Ordinance 31/2002 (penalising fascist, legionary, racist or xenophobic organisations, symbols and deeds and the promotion of the cult of persons guilty of genocide against humanity and war crimes) had to be expanded to include 'legionary' as a result of ongoing public demonstrations and activities promoting the essentially fascist ideology of the Legionnaire movement (a movement that existed in Romania between the two world wars and at the beginning of the Second World War). Such activities were thus circumventing prosecution because the term 'legionary' was not explicitly stipulated by the law, although according to the High Court of Cassation and Justice (Inalta Curte de Casație şi Justiție), 'the Legionnaire movement was, in essence, a paramilitary terrorist movement, of nationalist-fascist nature, with a mystic religious character, it was violently anti-communist, and it was also of an antisemitic character, among other aspects.'[349]

346 Belgium, Tribunal correctionnel de Flandre occidentale, division Bruges, 8 November 2022, available at: https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-correctionnel-de-flandre-occidentale-division-bruges-8-novembre-2022.
347 The Netherlands, The Hague Court of Appeal, 26 April 2023, ECLI:NL:GHSHE:2023:1390.
348 European Court of Human Rights, *Fáber v Hungary*, Application no. 0721/08, judgment of 24/07/2012, para. 56.
349 Romania, High Court of Cassation and Justice (Inalta Curte de Casație şi Justiție), Decision 1709 of 9 March 2012, quoted by the Romanian country brief.

It is of course not possible to determine in a generally valid manner which degree of specificity is desirable with regard to antisemitic symbols and other less direct forms of hate communication. A lot depends on the legal traditions, the social context, and also the actual practice of the authorities. For instance, in **Hungary**, the exhaustive list of forbidden Nazi and Communist symbols was introduced into the Criminal Code in 1993[350] because the courts at the time used such a high threshold for the punishability of hate speech (the clear and imminent danger of actual violence triggered by the speech – see below) that the display of antisemitic symbols would have practically never been punishable according to the contemporary jurisprudence.

However, it seems justified to conclude that if a legislature decides to outlaw the public use and dissemination of antisemitic symbols (which can have an advantage for a number of reasons, including the symbolic message conveyed through the use of criminal law), a certain degree of flexibility needs to be retained so that the relevant provisions of the Criminal Code remain effectively applicable and capable of fulfilling their envisaged role in countering antisemitism.

## 4.2 Systemic problems regarding the prosecution of hate speech and potential solutions

The responses to the question regarding the existence of systemic problems in the implementation of criminal hate speech legislation vary greatly between the Member States. It is reported that no such problems prevail in several countries, including **Croatia**, **Finland**, **France**, **Germany**, **Malta**, the **Netherlands**, **Portugal**, **Spain** and **Sweden**. In others, systemic issues obstructing the effective implementation of the criminal sanctions penalising hate speech are or used to be in place. It is worth looking into where such problems exist, what their sources are and how different actors have been attempting to overcome them.

### *4.2.1 Ineffective prosecution and sentencing of hate speech*

#### 4.2.1.1 Ineffective legal framework

An ineffective legal framework has been reported in **Estonia** and **Ireland**. In **Estonia**, Article 151(1) of the Penal Code provides that activities that publicly incite hatred, violence or discrimination on the basis of, among other things, nationality, race, colour, origin, religion, are punishable by a fine of up to 300 fine units or by detention, if it results in danger to the life, health or property of a person. According to the country report, due to fact that the qualifying condition (i.e. that hate speech is only punishable if it results in danger to the life, health or property of a person) is very difficult to prove in practice, which renders the provision mostly inapplicable before the courts. For that reason, the provision is currently under review.

The **Irish** Prohibition of Incitement to Hatred Act 1989 is also considered deficient in several respects, which is substantiated by the fact that there are no more than five recorded convictions under that legislation, according to the Irish Human Rights and Equality Commission (IHREC).[351] According to the IHREC's review of the legislation,

> '[o]ne key issue is the apparent reluctance of the Director of Public Prosecutions to prosecute or grant leave to prosecute complaints made under the 1989 Act, with reasons to not seek prosecution falling into the following four categories:

350 By Act XLV of 1993 on Amending Act IV of 1978 on the Criminal Code (*1993. évi XLV. törvény a Büntető Törvénykönyvről szóló 1978. évi IV. törvény módosításáról*).

351 Irish Human Rights and Equality Commission (2019), *Review of the Prohibition of Incitement to Hatred Act 1989*, https://www.ihrec.ie/app/uploads/2019/12/Review-of-the-Prohibition-of-Incitement-to-Hatred-Act-1989.pdf.

- insufficient evidence (e.g. evidence of intent to incite hatred);
- definitional difficulties in the 1989 Act (e.g. definition of "hatred", characterising the "general public" which is the intended audience of incitement);
- prosecutorial discretion (e.g. the [...] case could be proved more easily under another piece of legislation, such as a public order offence) and
- procedural issues (e.g. expiration of time limit for summary proceedings).' [352]

According to the Irish country expert, 'academics identify the requirement to establish intent to incite hatred as exceptionally difficult and the operative criminal offence provision as unacceptably vague.'[353] Furthermore, some important terms and phrases (such as 'threatening', 'abusive', 'insulting' or 'stir up') are not defined under the 1989 Act. The IHREC argues 'that this may be impeding effective prosecution of complaints under the legislation, referencing comments to that effect by the Director of Public Prosecutions in 2008'.[354] As mentioned above, (section 4.1), an amendment to the Irish legal framework is being debated at the moment.

#### 4.2.1.2 Jurisprudence and prosecutorial practice rendering the legal framework ineffective

In other cases, the text of the law would allow effective implementation, but reluctance from the prosecution and/or judicial interpretations prevent the adequate application of the pertaining legislation. For instance, the **Cyprus** expert reports that since the Attorney General (whose consent must be obtained as a prerequisite for a prosecution to be launched with regard to all legal instruments addressing hate speech) has the dual role of an independent officer and at the same time an advisor to the Government, there has been a tendency on the part of the Attorney General to refuse to prosecute public persons, such as politicians or church leaders, who openly engage in hate speech, despite numerous complaints against them. Since there are neither guidelines on how the Attorney General exercises this prerogative, nor a tradition of the Attorney General justifying a refusal to launch criminal proceedings, this practice is very difficult to challenge.[355]

There has been a conscious effort to change prosecutorial approaches and prevailing – restrictive – interpretations of the law in **Slovenia**, where for a long time, hardly any convictions were handed down for hate speech under Article 297 of the Criminal Code,[356] because of the jurisprudence according to which a concrete disruption of public order must be proven for hate speech to be punishable. This restrictive interpretation was paired with a certain prosecutorial reluctance to press charges in hate speech cases. This changed when a working group at the Supreme State Prosecution Office of the Republic of Slovenia was established in 2018 with the aim of improving the state prosecutors' competence in dealing with hate speech, and unifying the prosecutorial practice in this area.[357] The effort yielded results when the Supreme State Prosecutor challenged before the Supreme Court a second-instance court decision acquitting a defendant (who had incited online violence against the Roma) on the basis that hate speech in this case did not cause a concrete threat to public order. Agreeing with the prosecution's arguments, the Supreme

352 Irish Human Rights and Equality Commission (2019), *Review of the Prohibition of Incitement to Hatred Act 1989*, pp. 26-27. quoted by the Irish country brief.
353 Schweppe, J., Haynes, A., and Walters, M. A. (2018), *Lifecycle of a hate crime: Comparative report*, Dublin, Irish Council for Civil Liberties, pp. 51-53, https://www.iccl.ie/wp-content/uploads/2018/05/Hate-Crime-Report-LR-WEB.pdf. See generally the reports and statements issued by the civil society Coalition Against Hate Crime: https://www.iccl.ie/tag/coalition-against-hate-crime/.
354 Irish country brief.
355 Cyprus country brief.
356 Article 297 of the Slovenian Penal Code stipulates that anyone who publicly encourages or incites ethnic, racial, religious or other hatred or intolerance, or incites another type of intolerance, due to physical or intellectual disabilities or sexual orientation, shall be sanctioned with imprisonment of up to two years. The same punishment is foreseen for those who publicly spread ideas of the superiority of one race over another or cooperate with any racist activity, or deny, diminish the meaning of, approve of, ridicule or advocate genocide, holocaust, crimes against humanity, war crimes, aggression or other criminal acts against humanity. See: Kogovšek Šalamon, N. (2020) *Country report, Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, Slovenia*, European network of legal experts in gender equality and non-discrimination, p. 76.
357 Slovenian country brief.

Court 'clarified that concrete disruption of public order is not required in such cases; for a conviction, it is sufficient to prove that such hate speech had the ability and the potential to cause a disruption to public order, taking into account the content, nature, place and other circumstances of the use of hate speech'.[358] The Slovenian country expert emphasises that additional analysis is required for the assessment of the impact of this judgment, however, the direction of the change seems promising.

In **Hungary**, which was also characterised by practical impunity regarding hate speech due to the very high threshold applied by the courts for criminal hate speech legislation to be applicable and to the (most probably related) prosecutorial reluctance to press charges in such cases, it was not sufficient to try to influence the case law and the legal framework had to be amended to reorient the approach of the criminal justice authorities.

Although from a strictly grammatical perspective, the provisions of the successive Hungarian Criminal Codes[359] would have enabled the authorities to take action against public utterances capable of inciting very strong negative feelings against a specific group in society, judicial practice and the decisions of the Constitutional Court of Hungary concluded that for the hate speech provisions to be applicable, the expressions must be not only capable of, but also aimed at inciting others to take effective action directed against the given group, and the danger of violent acts triggered by the expression must be clear and present.[360]

This very restrictive approach made the criminal sanctions void in practice, as shown in the case giving rise to the ECtHR judgment in the *Király and Dömötör* v *Hungary* case.[361] In August 2012, an anti-Roma demonstration was held by a far-right party and paramilitary groups in a town where relations between the Roma and non-Roma residents were tense because of a personal conflict. Inflammatory, clearly racist speeches were made at the event, accusing the Roma minority of 'trying to exterminate Hungarians' with the approval of the state; mentioning a racial war and an ethnic-based conflict; and calling on the demonstrators to take up the fight and 'sweep out the rubbish from the country'. Following the speeches, hundreds of demonstrators marched between the houses inhabited by the local Roma, threatening them and engaging in acts of violence, such as throwing stones and bottles at the houses of the Roma. However, although not only the clear and imminent danger of violence was in place, but actual violence broke out, no charges were pressed against the speakers, on the basis that while their statements had been hateful and abusive but that they had not incited violence. The ECtHR concluded that the applicants – two Roma men who were present at the time of the events – 'could not benefit of the implementation of a legal framework affording effective protection against an openly anti-Roma demonstration, the aim of which was no less than the organised intimidation of the Roma community [...] by means of a paramilitary parade, verbal threats and speeches advocating a policy of racial segregation. The Court is concerned that the general public might have perceived such practice as legitimisation and/or tolerance of such events by the State.'[362]

Article 332 of the Criminal Code stipulated that 'any person who incites to hatred in public' against – *inter alia* – any national, ethnic, racial or religious group, or certain groups of the population, 'is guilty of a felony punishable with imprisonment for up to three years'. However, as outlined above, and as the legislature also acknowledged in the Reasons attached to the draft bill to amend the Criminal Code, although the text referred to 'incitement to hatred', the jurisprudence interpreted this provision as only rendering 'incitement to violence' punishable (with the further qualification that the threat of violence

358 Supreme Court of the Republic of Slovenia, judgment No. I Ips 65803/2012 of 4 July 2019. Quoted by Kogovšek Šalamon, N (2020) *Country report, Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, Slovenia*, pp. 76-77.

359 Hungary, Article 269 of Act IV of 1978 on the Criminal Code (*1978. évi IV. törvény a Büntető Törvénykönyvről; Old Criminal Code*) and Article 332 Act C of 2012 on the Criminal Code (*2012. évi C. törvény a a Büntető Törvénykönyvről ) in effect as of 1 July 2013*).

360 Hungary, Supreme Court, Bf. IV. 2211/1997.

361 European Court of Human Rights, *Király and Dömötör* v *Hungary*, Application no. 10851/13, Judgment of 17/01/2017.

362 European Court of Human Rights, *Király and Dömötör* v *Hungary*, Application no. 10851/13, Judgment of 17/01/2017, para. 80.

must be clear and imminent for the norm to be applicable). For that reason, the European Commission launched a pilot procedure against Hungary in December 2015.[363] To comply with its obligations under the Framework Decision, the Hungarian Parliament amended this provision as of October 2016,[364] which now prohibits 'incitement to hatred or violence' in order to make a clear distinction between the two and to signal to the criminal justice actors that incitement to hatred (a strong negative sentiment that must be definite and conscious) does not entail the imminent risk of violence or the realistic chance of a concrete offence of a violent nature (which is covered by the term 'incitement to violence').[365]

The change in the legal framework has had an impact on judicial practice. The precedent decision Bf.149/2019/33 of the Eger Regional Court interpreted Article 332 differently from the previous jurisprudence, while explicitly referring to the amendment of the Criminal Code and its Reasons. In this case, the defendant used hate speech against Jews, homosexuals and liberal-minded people in several articles and speeches, employing expressions such as, 'we are being attacked, destroyed, invaded, subjugated, threatened, murdered' and 'we will fight to the end'. According to the court's reasoning, 'the mere fact that the speeches do not contain a specific call to violence does not mean that they are not capable of actively provoking hatred and preparing the emotions for violence.' Furthermore, the decision also states that 'incitement may be considered to be not only a call to use violence against a group or its members, but also when the perpetrator aims at triggering a violent, hostile, irrational emotion which is an emotional preparation for violence.'

**Recommendation:**

In Member States where there is a notable discrepancy between the number of hate speech reports, indictments and convictions, a review of the practice should be carried out with a view to establishing whether amendments to the legal framework are necessary, or whether specialised training for criminal justice professionals may improve the efficiency of the prosecution of hate speech.

#### 4.2.1.3 The use of alternative remedial avenues – civil litigation based on the Civil Code's personality protection provisions

One way in which concerned persons, CSOs and other actors active in the field of combating antisemitism have reacted to the failures of prosecuting hate speech in some of the countries where there are notable discrepancies between the numbers of hate speech reports, indictments and convictions, is the use of alternative procedures in non-criminal legal branches with a view to secure the sanctioning of instances of hate speech.

One example is offered by **Hungary**, where, in 2001, the MP of a far-right party published an article in which he called on Hungarians to exclude 'the hordes of Galician newcomers […]. Because if you do not exclude them, they will do it to you!' Charges were pressed against him for 'incitement against a community' and at first instance he was sentenced to suspended imprisonment,[366] however, the court of second instance acquitted him on the basis that his article contained no instigation to any violent action.[367] Following this, a Jewish lawyer launched a lawsuit against the MP on the basis of the old Civil Code (Act IV

363 Under the number 8186/2015/JUST.
364 By Act CIII of 2016.
365 Hungary, Reasons attached to Act CIII of 2016 on the Amendment of Acts Regulating EU and International Criminal Cooperation and Certain Acts Pertaining to Criminal Justice with a View to Legal Harmonisation (*2016. évi CIII. törvény az európai uniós és a nemzetközi bűnügyi együttműködést szabályozó törvények, valamint egyes büntetőjogi tárgyú törvények jogharmonizációs célú módosításáról*) amending the Criminal Code.
366 HVG.hu (2002) 'Felfüggesztett börtönbüntetés ifjabb Hegedűs Lórántnak' (Suspended Imprisonment Imposed on Lóránt Hegedűs Jr.).
367 24.hu (2003), 'Felmentették ifjabb Hegedűs Lórántot – vállukon vitték hívei' (Lóránt Hegedűs Jr. was acquitted – his fans carried him on their shoulders).

of 1959 on the Civil Code),[368] which qualified discrimination as a violation of inherent personality rights[369] and listed several sanctions for such violations, including a court obligation to issue a public apology and the granting of moral damages.[370] However, after a long legal debate, the Supreme Court concluded[371] that, on the basis of the old Civil Code (according to which inherent personality rights can only be enforced by the person whose rights have been violated), only person(s) who can be individually identified as the target(s) of a degrading, discriminatory statement have legal standing in inherent personality rights lawsuits launched with a view to sanctioning such statements. Since general discriminatory statements about whole communities or social groups are not aimed at specific, identifiable individuals, no lawsuits could be initiated against the authors of such statements.

The judgment triggered legislative debates about the need to provide non-criminal protection to members of communities against inciting statements concerning the entire community group, and when, eventually, in 2013, the new Civil Code was adopted, this possibility was expressly introduced – yet again as a legislative response to restrictive legal interpretation that excluded the application of a legal norm that would in principle, on the basis of its actual grammatical formulation, be operational. Under the new norm (Article 2:54(5)), 'in the event of any severely injurious or unwarrantedly insulting statement made in public in relation to their affiliation with the Hungarian nation or a national, ethnic, racial or religious group, which is recognised as an essential part of their personality, any member of a community shall be entitled to enforce their inherent personality rights within 30 days from the violation.'[372] While there is no case law regarding the application of this provision in relation to antisemitic hate speech, one of the first cases in which it was successfully applied was launched by a Roma woman regarding a far-right politician's statement making a reference to the Roma Holocaust: 'If the Gypsies are Europe's unrecognised resources, then they should be deported so that they could fulfil their potential.' The first-instance court concluded that the statement amounted to a violation of human dignity, since in the case of an ethnic minority, and especially with regard to the Roma community, reference to the possibility of 'deportation' definitely reaches this threshold. The respondent was obliged to publish a public apology and pay the claimant moral damages of EUR 320 (HUF 100 000) (the amount the claimant originally claimed).[373]

In some of the Member States, civil law-based litigation aimed at sanctioning hate speech is also possible on the basis of the pertaining legal framework. For instance, a civil lawsuit for the violation of the dignity of a Jewish person or the Jewish community could take place under Article 57 of **Greek** Civil Code, which guarantees the protection of personality. At the same time, the national experts report that in some countries, obstacles to litigation may arise if the hate speech targets an entire community and not identifiable individuals. For example, civil protection under Article 70 of the **Portuguese** Civil Code (which protects individuals against any unlawful offence or threat of offence to their physical or moral personality) might be difficult to obtain for a violation of the dignity of the 'Jewish community', given the collective dimension of such an insult.[374]

Recent ECtHR jurisprudence in the *Behar and Gutman* v *Bulgaria*[375] case suggests that under certain conditions, the signatories of the European Convention on Human Rights must provide members of certain social groups with the possibility of seeking non-criminal remedies for the violation of their dignity caused by negative public statements concerning the community they are affiliated with. The case concerned a

368 Hungary, Old Civil Code (Act IV of 1959 on the Civil Code). The law was in force until 14 March 2014.
369 Hungary, Old Civil Code (Act IV of 1959 on the Civil Code), Articles 75-76. Article 75 of the code stipulated that inherent personality rights are protected by the Civil Code, while Article 76 set out an exemplifying list that stated that – among others – the following instances shall be regarded as violations of inherent personality rights: discrimination on the basis of gender, race, nationality or religion, violation of the freedom of conscience, the unlawful limitation of freedom, the violation of physical integrity, health, honour and human dignity.
370 Hungary, Old Civil Code (Act IV of 1959 on the Civil Code), Article 84.
371 Hungary, Supreme Court, Pfv.E.21.020/2004/2.
372 Translation by the authors.
373 Debrecen Regional Court, judgment no. 6.P.20.750/2015/9. of 14 September 2015.
374 Portugal country brief.
375 European Court of Human Rights, *Behar and Gutman* v *Bulgaria*, Application no. 29335/13, Judgment of 16/02/2021.

series or virulently antisemitic statements made by the leader of the extreme right-wing party Ataka in two books and public speeches, denying the Holocaust, accusing Jews of attempting to colonise Bulgaria, and of committing a genocide against the Russian, Bulgarian and other Orthodox peoples by means of 'direct extermination through wars, "revolutions" and terrorism' and 'of the calculated and consistent looting of the money and resources of the Christian peoples'. The applicants – two members of the Jewish community of Bulgaria – brought civil proceedings against the politician, alleging that the statements had constituted harassment of, and an incitement to discriminate against Jews, and arguing that each of them had been personally affected by those statements, as their dignity had been violated. However, their claim was rejected by the Bulgarian courts, on the basis that there was a collision between the right to honour and dignity of the complainants on the one hand, and the freedom of expression of the respondent on the other. There was no evidence that the politician had sought to infringe the applicants' honour or dignity owing to their ethnic identity, as his statements 'had expressed his beliefs about topics that were in his view of social importance, and had not been intended to stir up hatred, violence or tension'. Therefore, there were no sufficient reasons to limit his freedom of expression by deeming his statements to be unlawful even though they contained 'negative assessments that could shock or offend'. Furthermore, the court of second instance stated that 'only statements directed against a well-defined group of people or a specific person could be regarded as expression to the detriment of the rights of others. That was not the case with the impugned statements', as they had not targeted anyone in particular.[376]

The ECtHR did not accept this argumentation and found Bulgaria in breach of the applicants' right to private life under Article 8 of the Convention. Relying on its preceding jurisprudence, the Court made a number of very important points regarding when general negative public statements about an ethnic or social group are capable of impacting the sense of identity, self-worth and self-confidence of members of the given group to the extent that protection under Article 8 is triggered. The ECtHR concluded that the relevant factors for deciding whether Article 8 was applicable included, but were not necessarily limited to

> '1. the characteristics of the group (for instance its size, its degree of homogeneity, its particular vulnerability or history of stigmatisation and its position vis-à-vis society as a whole); 2. the precise content of the negative statements regarding the group (in particular, the degree to which they could convey a negative stereotype about the group as a whole, and the specific content of that stereotype); 3. the form and context in which the statements had been made, their reach (which might depend on where and how they had been made), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group's identity and dignity.'[377]

Applying these principles to the specific case, the ECtHR concluded that in light of (i) the historical persecution Jews had suffered, (ii) the virulently antisemitic nature of the statements, including Holocaust denial that has been consistently regarded by the Court as incitement to racial hatred and antisemitism, and (iii) the politician's status and position, it was unquestionable that the severity of the attack on the community reached the level where individuals belonging to the group were sufficiently concerned to invoke the protection of Article 8.[378]

The ECtHR recalled 'in relation to public statements alleged to have negatively stereotyped a minority ethnic group, [...] that since those statements could be seen as affecting the "private life" of the group's individual members, there was a positive obligation [on the part of the signatories of the Convention] to afford them redress with respect to those statements'.[379] In light of the factors also listed in relation to the applicants' standing as victims (the virulence of the statements; the clear intention to vilify Jews and stir up prejudice and hatred towards them; the use of timeworn antisemitic stereotypes, the Holocaust

376 European Court of Human Rights, *Behar and Gutman* v *Bulgaria*, Application no. 29335/13, Judgment of 16/02/2021, paras. 16-20.
377 Legal summary of the *Behar and Gutman* judgment, available at: https://hudoc.echr.coe.int/eng?i=002-13139.
378 European Court of Human Rights, Behar and Gutman v Bulgaria, Application no. 29335/13, Judgment of 16/02/2021, paras. 68-73.
379 European Court of Human Rights, *Behar and Gutman* v *Bulgaria*, Application no. 29335/13, Judgment of 16/02/2021, para. 99.

denial, etc.), the ECtHR concluded that 'by playing down the effect of those statements [of the politician] on the applicants as ethnic Jews living in Bulgaria [...], the Bulgarian courts failed to carry out the requisite balancing exercise in line with the criteria laid down in the Court's case-law', and hence, 'by refusing to grant the applicants redress in respect of [...the] discriminatory statements, the domestic authorities failed to respond adequately to discrimination on account of the applicants' ethnic origin and to comply with their positive obligation to secure respect for the applicants' "private life".' [380]

This decision may have far reaching consequences, as it can be seen as obliging states to provide members of vulnerable communities with a standing to claim remedies regarding negative public statements regarding their respective social groups (where the elements of the test set in the *Behar* case are in place) even if they are personally not targeted or identifiable. Whether the possibility of filing a criminal report with the police or prosecutor would satisfy that requirement is questionable due to a number of factors, such as the victim's very limited control over criminal procedures as opposed to civil litigation, or the fact that no monetary compensation is available for the victims in (most) criminal proceedings, and there is no possibility of obtaining a public apology in place in many criminal justice systems. Furthermore, criminal legislation that restricts the punishability to instances that are likely to disturb public order (as allowed by the Framework Decision) sets a higher threshold of punishability/sanctionability than what was determined by the ECtHR in the *Behar* case (where no threat of such disruption was actually raised).

#### 4.2.1.4 The use of alternative remedial avenues – based on anti-discrimination law

Another alternative route for sanctioning hate speech when either the authorities are reluctant to prosecute such instances with the full weight of the law or the violation does not or may not reach the level of criminality (e.g. because certain constitutive elements of the criminal offence are not in place or their existence is doubtful) is offered by anti-discrimination law in several jurisdictions, especially through the use of the concept of harassment.

Harassment under the Racial Equality Directive and the Employment Equality Directive (Article 2 in both) is an unwanted conduct related to the protected grounds that takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. As utterances made in public inciting strong negative sentiments against certain (often vulnerable) groups violate human dignity (as acknowledged by the ECtHR in the *Behar* judgment), and have the unquestionable effect of creating an intimidating, hostile, degrading, humiliating or offensive social environment for the members of the social group concerned, it is inevitable that the idea of applying the concept of harassment to instances of hate speech arises.

The application of the concept of harassment falling under the scope of – administrative or civil – non-discrimination law has several comparative advantages vis-à-vis the criminal law response, as outlined in section 2 above regarding the penalisation of discriminatory behaviours. Due to the specific formulation of harassment, no proof of intent is needed, rather it is sufficient for the impugned speech to have – independently of the intent of the perpetrator – the effect of creating a hostile or humiliating environment. Furthermore, the complainant is in charge of the procedure, its launch, continuation or dropping is not subject to prosecutorial discretion. On the other hand, the extent to which non-discrimination legislation may be put to use for the purposes of combating hate speech is of course dependent on the personal and material scope of such legislation: in countries where the directives have been implemented narrowly, its usefulness is obviously more limited. As the **Irish** country expert points out, 'The Directives' concept of harassment is actionable only under anti-discrimination legislation, that is, in the context of a complaint under either the Equal Status Acts or the Employment Equality Acts. There must be a service provision or employment/ occupation nexus to invoke those laws.'

380 European Court of Human Rights, *Behar and Gutman* v *Bulgaria*, Application no. 29335/13, Judgment of 16/02/2021, paras. 105 and 106.

As opposed to this in countries where the non-discrimination legislation's scope is wide, harassment can be applied to various instances of hate speech and to an extent can make up for the authorities' reluctance to prosecute hate speech. For instance, non-discrimination law has been utilised to this end in **Bulgaria** (regarding which a 2022 study into hate speech and Euroscepticism found that enforcement of legal prohibitions of hate speech by investigation and prosecution of infringements of this legislation would be needed along with a more efficient judiciary that could strengthen the sense of trust by affected minority groups).[381] The ECtHR's *Behar* judgment makes reference to two cases when persons using hate speech (against the Roma community) were sanctioned on the basis of Bulgaria's anti-discrimination code (the 2003 Protection from Discrimination Act). In a March 2009 judgment, the Supreme Administrative Court found that statements by a mayor in a radio interview (including a claim that 'a Roma neighbourhood would be ten times more dangerous than a rubbish dump [located] in the proximity of living quarters') 'had amounted to harassment within the meaning of the 2003 Act, as they had infringed the dignity of a large number of people and had created an insulting environment based on ethnicity'.[382] In a July 2009 judgment, the same court held that a television programme portraying Roma as being prone to anti-social behaviour could lead to negative stereotypes and thus also fell under the prohibition of harassment.[383]

In Hungary, it was also in relation to hate speech against the Roma community that the jurisprudence concluded that such instances of communication may be actionable under the concept of harassment in the anti-discrimination code. In November 2008, a young girl was raped and murdered in Kiskunlacháza. In relation to the murder (with regard to which it was later established that it had been committed by a non-Roma person), the town's mayor organised a public demonstration, at which he gave a speech, stating – among other things – that 'in Kiskunlacháza, there is no room for violence, no room for criminals. Kiskunlacháza has had enough of Roma violence! (…) We will not allow our valuables to be stolen, old people beaten and children raped. Today we are still the majority.'

Due to the restrictive prosecutorial and judicial practice of the criminal offence penalising hate speech, the CSO Hungarian Helsinki Committee decided to launch an *actio popularis* claim against the mayor, in the context of which it was concluded by the Equal Treatment Authority that he had committed harassment against the town's Roma community (the decision was upheld in the judicial review process). The case clarified a number of issues regarding the application of the concept of harassment (namely that harassment can be committed against a group and not only a person and that mayors also fall under the scope of the Equal Treatment Act not only in their official, but also in their representative functions too, e.g. when speaking at a demonstration). It also confirmed previous restrictive jurisprudence that a mayor can commit harassment in relation to the residents of their own settlement, as such residents are the ones that have an official relationship to the mayor, which is a precondition for the applicability of the Act.[384]

An example of the application of non-discrimination law to instances of communication that may also fall under provisions penalising hate speech can also be quoted from **Romania**, regarding which European Commission against Racism and Intolerance (ECRI) reported in April 2019 that 'the application of the provisions on incitement to hatred remains extremely limited, which in ECRI's view, sends a strong message to the public that hate speech is not a serious offence and can be engaged in with impunity' and recommended that 'the authorities take urgent steps to ensure that anyone who engages in hate speech as covered in Article 369 of the Criminal Code is duly prosecuted and punished'.[385]

381 Ivanova, B., Koleva, C. and Chafkarov, P. (2022), *Hate Speech and Euroscepticism in Bulgaria, National Report*, available at: https://ec.europa.eu/migrant-integration/system/files/2022-11/Hate_Speech_and_Euroscepticism_in_Bulgaria_2022.pdf, p. 35.
382 European Court of Human Rights, *Behar and Gutman* v *Bulgaria*, Application no. 29335/13, Judgment of 16/02/2021, para. 30.
383 European Court of Human Rights, *Behar and Gutman* v *Bulgaria*, Application no. 29335/13, Judgment of 16/02/2021, para. 31.
384 For a full description and analysis of the case see: Haller, I., Iordache, R. and Kádár, A. (2016), 'Using anti-discrimination remedies for discriminatory speech – the Hungarian and Romanian experiences', *European Equality Law Review*, 2/2016, pp. 1-21.
385 European Commission against Racism and Intolerance (2019), *Report on Romania, (fifth monitoring cycle)*, adopted on 3 April 2019, published on 5 June 2019, paras. 34 and 35.

In a recent decision, the national equality body, the National Council on Combating Discrimination (NCCD, Consiliul Național pentru Combaterea Discriminării) launched an *ex officio* investigation into a Covid-19-related Facebook message posted in June 2021: 'question of the evening – the Jews gassed in Auschwitz had comorbidities, isn't it so?'. In its decision (the NCCD fined the identified author of the post EUR 1 000 (RON 5 000)), the NCCD concluded that 'The statements analysed [...] are likely to undermine the dignity, to create a hostile, degrading, humiliating atmosphere directed against persons from the Jewish community. [...] Thus, the act of the respondent constitutes discrimination, since it created a distinction on the basis of ethnicity which had the effect of restricting the exercise, on equal terms, of the right to dignity'.[386] It should be added that upon the respondent's appeal, the Bucharest Court of Appeal quashed the fine on the basis of substantive analysis that goes diametrically against similar decisions from across Europe. The court was of the view that no harassment had taken place, as the statement did not target the Jewish community, their fate is only used as a comparison, and no incitement to violence or hatred towards the Jewish community can be traced in the communication; in fact, some Jewish people also share the criticism of the measures taken against the Covid-19 pandemic. The NCCD challenged the Court of Appeal decision before the High Court and the case is pending.[387]

In **Italy**, the case law regarding the criminal offence of incitement to hatred also sets strict limitations on applicability. For instance, in a 2005 case concerning a man sentenced by the lower courts to a EUR 3 000 fine for disseminating leaflets ahead of the June 2013 European Parliamentary elections with the slogan 'Enough of loan sharks – enough of foreigners' (a vague, but commonly understood reference to Jewish people) as well as graphic images depicting different other minorities in a humiliating manner, the Italian Supreme Court clarified some conditions for the application of the criminal norm. In relation to the necessary element of intent, the Supreme Court concluded that 'the dissemination of the message must be directly aimed at influencing the behaviour or psychological reaction of a vast public audience in order to attract followers and create the "concrete danger", immediately or in the short term, of discrimination towards the targeted group. [...T]he author/disseminator of the message must be aware of its controversial content and its potential effects and be willing to pursue them.'[388] In Italy, the concept of harassment has also been applied to inciting speech, most probably not meeting the high threshold set by the Supreme Court. It has been reported that the Court of Appeal of Brescia decided in 2019 that defamatory statements made by a politician of the Lega Nord party against asylum seekers and CSOs working in the reception system (accusing asylum seekers of illegal practices and the CSOs of having the illegal purpose of profiting from clandestine migration) qualified as harassment on the ground of race.[389]

### *4.2.2 Comparative advantages of alternatives to prosecution*

This report has shown that alternatives to making use of criminal law to respond to hate speech are also used in countries where the application of criminal hate speech legislation is not deemed problematic.

For instance, after the **Finnish** Supreme Court handed down a precedent judgment in 2012,[390] ruling that describing Islam as a paedophile religion and describing Somalis as thieves living parasitic lives on state revenues, was punishable as a crime of ethnic agitation and breach of the sanctity of religion, the jurisprudence has been mostly unproblematic, with many decisions by courts applying the prohibition of hate speech in the Criminal Code to racist, Islamophobic and antisemitic expressions. As an example in the context of antisemitism, the Finnish country report refers to a judgment by the Rovaniemi Court of Appeal,[391] confirming a first-instance judgment,[392] in which the district court decided that the owner of a department store chain had committed ethnic agitation by publishing and disseminating online and in

386 NCCD, *Hotărârea nr. 53 din 02.02.2022*, translated by Romanian country expert.
387 Information from the Romanian country expert.
388 Article 19 (2018), *Italy: Responding to 'hate speech'*, p. 24.
389 Court of Appeal of Brescia, judgment of 18 January 2019, *F.PE. v. ASGI and others*.
390 Finnish Supreme Court, Judgment no. KKO 2012:58.
391 Rovaniemi Court of Appeal, decision 17.10.2014, see https://yle.fi/uutiset/3-7534428.
392 Ylivieska-Raahe District Court, decision 21.10.2013, R13/58.

a print format antisemitic newspaper articles, claiming that Zionists had formed a worldwide conspiracy that controls the United States and the Western world and that caused wars and suffering to many countries and nations.

There are other examples of the use of non-discrimination legislation with a view to combating hate speech (or hate communication). For instance, the Finnish Non-Discrimination Ombudsman launched a case before the National Non-Discrimination and Equality Tribunal, claiming that hanging a flag with a swastika in the window of an apartment was harassment on the ground of religion, as the flag symbolised the persecution of Jewish people, and thus infringed their dignity. In its decision from December 2018,[393] the Tribunal upheld the complaint and prohibited the tenant from repeating the harassment (which, under Finnish law, is the deliberate or de facto infringement of the dignity of a person, provided that the infringing behaviour relates to a protected ground, and a degrading or humiliating, intimidating, hostile or offensive environment towards the person concerned is created by the behaviour). It can be known from the written statement of the chairperson of the Jewish Community of Helsinki (which the Ombudsman attached as evidence in the case), that the flag had been on display in the window for several months without the intervention of the authorities, which had caused fear and concern in the Jewish community. In such a situation, the use of an alternative remedial route was important for the community. As pointed out by the report describing the procedure,[394] the decision illustrates the versatility of the Non-Discrimination Act, which 'applies also to individuals and not just authorities, employers, providers of education and goods and services'. (At the same time, the author points out a problem in standing, namely that while the non-discrimination law that was in force until 2014 did not require the Non-Discrimination Ombudsman to identify an individual victim of harassment and obtain their consent for a case to be brought before the Tribunal, this changed in 2014, limiting the Ombudsman's ability to counter harassment, including in relation to public displays of Nazi symbols. The expert argues for an amendment of the new law restoring the pre-2014 situation in this regard.)

An example of the use of Civil Code-based litigation is reported by the expert from the **Netherlands** (where the application of criminal anti-hate speech legislation is also regarded as mostly unproblematic without severe systemic issues): the civil case decided by the Amsterdam Court of Appeal in relation to the Holocaust relativising posts of Thierry Baudet (see in section 1.3 above) was launched by two public interest groups (the Central Jewish Consultation External Interests, Centraal Joods Overleg Externe Belangen, and CIDI) and four individuals who felt affected by the messages comparing the anti-pandemic measures to the Holocaust. The national expert points out that such civil claims are usually brought to avoid having to await the decision by the public prosecution service to lodge criminal proceedings. The time factor may be important when an injunction seems necessary to avoid prospective or minimise already occurring harm (which was the case regarding Baudet's posts, where the complainants requested the court to oblige Baudet to withdraw the impugned posts and ban him from reposting them).[395]

The potential use of an alternative remedial route has also been reported in France, where in order to transpose the Audiovisual Media Services Directive, the Law of 30 September 1986 on Freedom of Communication was amended so as to entrust ARCOM (Regulatory Authority for Audiovisual and Digital Communication) with the task of ensuring that audiovisual commercial communications of media service providers do not incite hatred or violence based on any of the grounds referred to in Article 21 of the EU Charter of Fundamental Rights, as well as the protected characteristic of 'gender identity'. The power of the body in this regard includes investigation of claims and the power to impose administrative sanctions. As the French country expert points out, it imposes much higher fines than the judicial bodies, which may be an aspect to consider when victims decide whether to file a police report or a complaint.

393 National Non-Discrimination and Equality Tribunal, decision 393/2018, 19 December 2018.
394 Hiltunen, R. (2020), 'Displaying swastika flag in a window-opening found to be harassment prohibited in the Non-Discrimination Act', available at: https://www.equalitylaw.eu/downloads/4872-finland-displaying-swastika-flag-in-a-window-opening-found-to-be-harassment-prohibited-in-the-non-discrimination-act-pdf-81-kb.
395 Amsterdam Court of Appeal, ECLI:NL:GHAMS:2023:1139, 23 May 2023.

**Recommendation:**

In Member States where the scope of the legislation allows for it, CSOs and other bodies with a mandate to combat hate crime should consider the application of non-discrimination law or other remedial routes to instances of incitement in situations where, either because of the authorities' reluctance to prosecute hate speech or due to other reasons, the application of such alternative routes have comparative advantages (in terms of the severity of sanctions, evidentiary mitigations or the competent authorities' willingness to pursue the case).

## 4.3 Issues related to addressing of online hate speech

As Assimakopoulos et al. note, 'digital communication [through the internet] is marked by a number of particularities: the internet is a space that provides users with the capacity for expressing their views and communicating without limits, and typically (though not always) without control; the online setting makes it easy for users to hide their identity (in whole or in part) and, in some cases, even to hide their location and activity. [...] These characteristics of the worldwide web have encouraged a breeding ground for the phenomenon of cyberhate, understood (in a non-restrictive way) as *any use of electronic communications technology to spread anti-Semitic, racist, bigoted, extremist or terrorist messages or information*'.[396] The Explanatory Report to the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems notes that 'the emergence of international communication networks like the Internet provide certain persons with modern and powerful means to support racism and xenophobia and enables them to disseminate easily and widely expressions containing such ideas.'

That anonymity – or at least the difficulty of locating and identifying those who spread online hatred – poses a serious problem in relation to countering online hate speech, as has been specifically highlighted by many country experts, including in **Austria**, **Croatia**, **Czechia**, **Germany**, **Hungary**, **Italy**, **Lithuania**, **Romania** and **Sweden**. This anonymity is paired with the internet's capacity to convey hateful, inciting messages to a potentially very large audience in a very short time, making online hate speech particularly harmful. As the **Italian** National Strategy for Combating Antisemitism notes: 'the hate content posted on social media platforms risks going viral and acquiring unprecedented persistence'.[397] The dimensions of the problem are illustrated by the figures related to the PHAROS system, which was created by the **French** Government to enable citizens, service providers, CSOs and other stakeholders to quickly and anonymously report unlawful websites or written, photographic or video content. The system, which is overseen by the French cybercrime investigation unit, received over 188 000 reports in 2015, 14 % of which concerned racist content or incitement to violence, which means over 26 000 such reports.[398]

Furthermore, in the absence of vigilance and timely action on the part of internet service providers, online contents amounting to hate speech may remain online, and thus easily accessible for prolonged periods, as illustrated by the only **Irish** case where online hate speech has apparently ever been prosecuted. The Law Reform Commission reported on the case:

> 'In the so-called "Traveller Facebook case," the accused had created a Facebook page entitled "Promote the use of knacker babies for shark bait".[314] The accused was charged [...but] the case was dismissed [...] on the basis that there was a reasonable doubt that there had been intent to incite hatred against the Traveller community. The Court also took into account that the accused had only posted on the site once and had given an apology. However, while the accused only posted

396 Assimakopoulos, S., Baider, F.H., Millar, S. (2017), *Online Hate Speech in the European Union. A Discourse-Analytic Perspective*, Springer Open, Cham, p. 11.
397 Italy, Presidency of the Council of Ministers (2021), National Strategy for Combating Antisemitism, p. 23.
398 See: https://www.thalesgroup.com/en/critical-information-systems-and-cybersecurity/news/pharos-how-report-illegal-unwanted-and-harmful.

> on the page once and sent it to three others before forgetting about it until notified by Facebook to remove it, 644 people had joined the page and many others may have viewed the page.[315] Some of those who joined also contributed further abusive material to the page.'

The Commission concludes that '[t]his case illustrates the difficulties with online hate speech compared to its offline equivalents. Once an abusive comment is made it can spread very fast, be viewed by many people and remain accessible long after the content was posted.'[399]

In spite of these specificities, there are very few jurisdictions where the online perpetration of hate speech triggers any specific penal regulation in the Member States. In most countries, the criminal provisions treat offline and online hate speech identically. This is the case in countries including **Belgium**, **Croatia**, **Cyprus**, **Finland**, **France**, **Greece**, **Latvia**, **Luxembourg**, **Malta** and **Slovenia**. In some jurisdictions, making the inciting content available online is what makes the act criminal, in the sense that this makes it 'public', which is a constitutive element of the offence in most jurisdictions. This was mentioned in relation to **Austria**, and is the case in **Hungary**. According to a **French** court decision, 'the requirement of publicity of the act [...] is fulfilled where the content of the speech is freely accessible. Thus, a message only accessible by members of a closed-user-group on social media is not legally considered hate speech'.[400]

The possibility of taking into account the online nature of the perpetration, and thus the potential reach of the inciting content as an aggravating factor when the court assesses the severity of the offence has been mentioned in relation to **Bulgaria** and **Portugal**, while in **Denmark**, Section 266b(2) of the Criminal Code (which penalises hate speech) stipulates that an act of propaganda must be considered a particularly aggravating circumstance when determining the penalty for this offence. When evaluating whether propaganda has taken place, the court must assess whether the statements were made using a medium that implies wider dissemination, such as the internet. In the **Netherlands**, there is relevant case law regarding the issue. For instance, the Hague Court of Appeal, in a judgment from December 2022 in the case of a municipal councillor with around 31 000 followers on Twitter, who posted several tweets reading 'May Allah destroy the Zionists' and other antisemitic texts, took into account that the tweet was posted on a public Twitter account with many followers. Moreover, the tweet could be retweeted and thus could have reached an even larger group of people. Although this element played a small role in the overall reasoning, it can be seen that the reach of online speech is a contextual element that is taken into account by the Dutch courts.[401]

The **Portugal** example is particularly interesting, because while the Criminal Code contains no specific provision on perpetration via the internet (and it only may be taken into account as an aggravating factor), Law 27/2007 of 30 July transposing the Audiovisual Media Services Directive prescribed (Article 71) that when otherwise the criminal provisions do not regard the means of perpetration as an aggravating factor, criminal offences committed through television programme services or on-demand audiovisual services must be punished with the penalties established in the respective incriminating norms, increased by one-third in their minimum and maximum limits. This means that while the increased reach that contents may have is taken into account with regard to criminal offences committed through mass media, no similar provision exists for offences committed via the internet.

Another recurring trend standing out from the country briefs is the small number of criminal cases actually launched compared to the immense dimensions of online hate speech. For instance, a victim survey of the **Danish** Ministry of Justice[402] estimated that 21 000 people in 2020 were exposed to hate speech on the internet in relation to different grounds (such as ethnic origin, faith, sexual orientation,

399 Law Reform Commission (2016), *Report on Harmful Communications and Digital Safety*, LRC 116 - 2016, paras. 2.46-2.47, https://www.lawreform.ie/news/report-on-harmful-communications-and-digital-safety.683.html.

400 Court of Cassation, 11st civil chamber, 10 April 2013, n° 11-19.530 https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/344_10_26000.html, quoted by the French country brief.

401 Hague Court of Appeal, ECLI:NL:GHDHA:2022:2595, 22 December 2022, as summarised by the Dutch expert.

402 Justitsministeriets Forskningskontor (2021), *Offerundersøgelserne 2005-2020* (Victim Surveys 2002-2020), p. 127.

gender identity, gender expression, gender characteristics), however, the police only registered 122 cases of hate speech online or in public spaces in 2020. The Danish Jewish community has also pointed to the dark figure of unreported crimes as a problem in the specific context of antisemitism.[403]

According to the reports, in addition to the obvious and above-mentioned difficulties of identifying the perpetrators, the approach of criminal justice authorities also contributes to the situation. For example, the **Lithuanian** authorities often deny pre-trial investigations into online instances of hate speech with a reference to the lack of seriousness, or of the systemic nature of the incitement. An example is provided by the case leading to the ECtHR 2020 judgement *Beizaras and Levickas* v *Lithuania*,[404] where the applicants, two young men, announced their relationship by posting a photograph on Facebook, in which they were kissing. This triggered a series of virulent homophobic comments (such as 'Scum!!!!!! Into the gas chamber with the pair of them'; 'Hey fags – I'll buy you a free honeymoon trip to the crematorium.'[405]) The case was reported to the authorities by a CSO, however, the prosecution refused to initiate a pre-trial investigation on the basis that for negative comments to be of criminal nature (i.e. to be inciting to hatred or violence), 'systematic action' is required. In this case, however, 'that criterion had not been met because various individuals had written only one or two comments, which was not enough to be considered as constituting a systematic attempt to incite hatred or violence against people distinguishable by their sexual orientation. From this it followed that the objective element of a crime, as established under Article 170 §§ 2 and 3 of the Criminal Code, was absent.'[406] Although this approach (especially in the light of the inconsistent approach of the Lithuanian authorities) was criticised by the ECtHR,[407] according to a recent study, the argument continues to be applied by Lithuanian law enforcement bodies in similar cases.[408]

According to the national expert, there is a systemic problem in **Romania**, where legal professionals tend to invoke the freedom of expression in such cases, failing to grasp the abuse of free speech and the limitations that are justified in view of Article 10(2) of the Convention (an example being the case where the court quashed the NCCD's decision regarding Holocaust trivialisation, described above). Reliance on the 'expression of opinion' argument also came up in the *Beizaras* case,[409] and – in the civil law context – the *Behar* case.[410] The national expert reports that in **Hungary**, the right to freedom of expression is often applied as a reason for not sanctioning instances of incitement to hatred.

The national experts report good examples in jurisprudence recognising the limits of the freedom of expression and its applicability in defending problematic instances of communication in **France** and the **Netherlands**. In a good example from **Germany**, the Federal Constitutional Court ruled in relation to Holocaust denial that expressions can be subjected to limitations as prescribed by law and for legitimate purposes. The decisive aspect concerning interferences with freedom of expression according to the reasoning of the Court is whether the expression of opinion under examination is a violation of legal interests or poses an apparent threat, such as endangering public peace. The Court ruled that the statements according to which no mass murder of Jews had taken place under Nazi rule and no mass gassing could have been used in the Auschwitz-Birkenau extermination camp, pose such a threat, as they may lead to a hostile and violent political discourse, fulfil the constituent elements of inciting hatred and violence against segments of the population, and are thus punishable.[411]

403 See: https://mosaiske.dk/akvah-3/.
404 European Court of Human Rights, *Beizaras and Levickas* v *Lithuania*, Application no. 41288/15, Judgment of 14/01/2020.
405 European Court of Human Rights, *Beizaras and Levickas* v *Lithuania*, Application no. 41288/15, Judgment of 14/01/2020, para. 10.
406 European Court of Human Rights, *Beizaras and Levickas* v *Lithuania*, Application no. 41288/15, Judgment of 14/01/2020, para. 18.
407 European Court of Human Rights, *Beizaras and Levickas* v *Lithuania*, Application no. 41288/15, Judgment of 14/01/2020, paras. 125-128.
408 Guliakaitė-Danisevičienė, M. (2023), *Neapykantos Kalba Lietuvoje* (Hate speech in Lithuania).
409 European Court of Human Rights, *Beizaras and Levickas* v *Lithuania*, Application no. 41288/15, Judgment of 14/01/2020, para. 18.
410 European Court of Human Rights, *Behar and Gutman* v *Bulgaria*, Application no. 29335/13, Judgment of 16/02/2021.
411 German Federal Constitutional Court (BVerfG) 1 BvR 673/18 (22 June 2018) as summarised by the German country brief.

The reluctance to investigate and prosecute online instances of hate speech may stem from prejudices (as it can be assumed in the *Beizaras* case) and/or the lack of sufficient knowledge of the legitimate limitations of the freedom of expression and the ECtHR's relevant jurisprudence in this regard. However, as is the case for other problems related to the practice of criminal justice authorities, institutional pressures and incentives related to effectiveness (in terms of both results and resources) also play a part in the problem. In **Lithuania**, in the light of the difficulties of investigating online hate speech (e.g. the problems of identifying perpetrators if they are using a virtual private network (VPN) service, or if the person who wrote the comment lives abroad), law enforcement officials argue that 'this is contrary to the principle of cost-effectiveness'. In **Hungary**, a source working in law enforcement has confirmed that in light of the dimensions of the problem, the numbers of potential cases and the difficulties in identifying the perpetrators, the authorities cannot be expected to go after each instance of online hate speech reported to them and it makes more sense to focus on the particularly serious cases.[412]

Similarly, in **Cyprus**, complaints filed with the specialised cybercrime subdivision of the police in relation to online hate speech have often been met with the obstacle of national rules preventing the lifting of confidentiality to identify and locate the perpetrator 'where the offence is not [regarded] serious'.[413] An interesting aspect of the situation in Cyprus is related to specialisation. As this report has argued above (see section 3.2.2.1), in relation to the investigation of hate crimes, specialisation can create an institutional focus that offsets other institutional pressures acting against the effectiveness of combating a certain type of crime. However, according to the Cyprus country expert, the specialised cybercrime subdivision of the police prioritises in its work and chooses to use its resources for online crimes other than internet hate speech, focusing instead on hacking, child pornography and fraud committed via electronic communication channels. In this prioritisation, prejudices of the actors may again play a role, but it is also possible that the law enforcement officials' perception of the importance of the different types of cybercrimes is influenced by the fact in many cases, the individual victims of hate speech are less readily and easily identifiable (if at all) than those of other criminal offences committed via computer systems, and – in the absence of active violence stirred up by the instances of hate speech – the actual harm (such as the increased prevalence of prejudices) is less tangible.

All these factors seem to be an argument for a different type of specialisation: based not on the type of perpetration (online or offline), but on the hate element of the crimes (or also taking that element into consideration). This is the case in **France**, where a national prosecution office dedicated to the fight against online hate crime and hate speech (*Pôle national de la lutte contre la haine en ligne*) was put in place in early January 2021.[414] The country expert identifies this step as an adaptable good practice.

An additional problem indicated by actors of the criminal justice system is the difficulty of cooperating with internet service providers. This has been reported from **Romania**, where police officers investigating online hate speech and prosecutors mentioned in a series of interviews that there is no cooperation with Facebook or YouTube to support them in their investigations or to obtain the removal of the hateful content.[415] In **Sweden**, the authorities face a recurring issue of being unable to enforce the removal of hate content due to the server being operated in a different jurisdiction. The issue has also been recognised in **Denmark**: an analysis by the Danish Institute for Human Rights concluded that the disparity between the number of hate speech instances experienced and the number of cases registered with the police indicates that not only should the investigation and prosecution of such cases be strengthened, but the extent to which social media platforms bear a shared responsibility in addressing individual cases should be examined.[416]

412 Interview with law enforcement official who wished to remain anonymous.
413 Cyprus country brief.
414 France, Ministerial circular No. DP 2020/0082/A19 on the fight against online hatred (*Circulaire n° DP 2020/0082/A19 relative à la lutte contre la haine en ligne*), 24 Nov. 2020, available at: http://www.justice.gouv.fr/bo/2020/20201130/JUSD2032620C.pdf.
415 Romanian country brief.
416 See: Danish Institute for Human Rights (2022), *Ytrings- og forsamlingsfrihed* (Freedom of speech and assembly), available at: https://menneskeret.dk/status/ytrings-forsamlingsfrihed, as quoted by the Danish country brief.

This raises the responsibility of internet service providers in combating online hate speech. Due to the huge scale of the problem, it is obvious that not even a law enforcement response of improved efficiency can, in itself, sufficiently address the issue. In May 2016, this led the European Commission to reach agreement with a number of IT companies to adopt the 'Code of conduct on countering illegal hate speech online'[417] (Code of Conduct) to ensure 'that online platforms do not offer opportunities for illegal online hate speech to spread virally'. The Code of Conduct is based on the realisation that even a robust system of enforcement of criminal law sanctions against the individual perpetrators of hate speech 'must be complemented with actions geared at ensuring that illegal hate speech online is expeditiously acted upon by online intermediaries and social media platforms, upon receipt of a valid notification, in an appropriate time-frame.' The implementation of the Code of Conduct is evaluated through a regular monitoring exercise. The most recent (seventh) round of evaluation from November 2022 shows that 'the number of notifications reviewed within 24 hours (64.4%) has decreased as compared to 2021 (81%) and 2020 (90.4%). [...] The average removal rate (63.6%) is similar to 2021 (62.5%), but still lower than in 2020 (71%). Looking at the individual performance of the platforms, most of them [...] have removed less hate speech content than in 2021.'[418]

While it is unquestionable that notice-and-takedown procedures for internet service providers and social media platforms are extremely important mechanisms for combating online hate speech, they 'have been criticised for being ad hoc in nature, and for placing the primary responsibility to identify hateful content on users rather than on the companies themselves.'[419] As the **Irish** country expert points out, 'this perspective is reinforced by some empirical research findings. A report on online racist hate speech in the Irish context concluded [on the basis of focus group discussions] that people tend to under-report such speech.'[420] The expert continues, 'A further report on experiences of online hate speech, analysing a survey completed by 1,008 adults, found that "over half of the respondents chose not to take action and the main reason for this was that they preferred to ignore it or that they did not feel that it was serious enough. However, a third of respondents pointed to the fact that they did not know what to do – indicating that there is a need for better information to the public in terms of where and how to seek help."'[421]

A number of national action plans or strategies on combating antisemitism deal with the issue of how reporting can be made more effective and how service providers can be motivated to take a more proactive approach. Most of the adaptable promising practices identified by the country experts regarding hate speech are also related to these themes.

For example, the **Italian** national strategy argues for adding to the soft tools already in place, such as codes of conduct, normative requirements based on the model of the German Network Enforcement Act,[422] which obliges social media platform operators to remove hate content (posts, videos, images) within a specific period after having been reported by users. The strategy also envisages the introduction of administrative fines for operators that do not comply with these requirements.[423] In **Spain**, a Protocol for Combating Illegal Hate Speech Online was approved by the Spanish Government in 2021 as an instrument for effective collaboration between public administration institutions, CSOs, data hosting service providers and other bodies involved in the fight against illegal hate speech online. The Protocol stresses that internet service providers have an important role to play in combating illegal content

417 See: European Commission, EU Code of conduct on countering illegal hate speech online, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.
418 European Commission (2022), *7th evaluation of the Code of Conduct*.
419 Irish Human Rights and Equality Commission (2019), *Ireland and the Convention on the Elimination of Racial Discrimination*, p. 48, as quoted by the Irish country brief.
420 Siapera, E., Moreo, E., and Zhou, J. (2018), *Hate Track: Tracking and Monitoring Racist Speech Online*, Dublin, Dublin City University, p. 5.
421 Brandt Andreasen, M., and McCashin, D. (2023), *Understanding Adult Experiences of Online Hate in Ireland – an Exploratory Survey*, DCU Anti-Bullying Centre, Dublin City University, p. 37, https://antibullyingcentre.ie/wp-content/uploads/2023/02/Understanding-adult-experiences-of-online-hate-in-ireland-2023-Final.pdf.
422 Germany, Network Enforcement Act (*Netzwerkdurchsetzungsgesetz*, NetzDG), October 2017.
423 Italy, Presidency of the Council of Ministers (2021), National Strategy for Combating Antisemitism, p. 22.

disseminated online. The Protocol provides for the removal of content by service providers, who must also retain illegal content and make it available to public authorities. It also regulates – with a view to public order and public security – the procedure that service providers must follow when removing content or blocking access to it.[424]

An adaptable promising practice in this area can be seen in **Greece**, where, as part of the Directorate of Cybercrime Prosecution, there is a cyberalert centre that operates on a 24-hour basis. The centre's staff respond immediately to the complaints of citizens, which are submitted either through a designated telephone line or by email, or through the Greek Police portal.[425]

In addition to the existence of specialised units addressing (online) hate speech, the **French** expert mentioned the PHAROS online complaint platform, which allows anyone to report hateful content for investigation and prosecution. The personnel of the platform are in constant contact with internet service providers to impose control over online content and facilitate cooperation in the investigation of sources of online publications.

In **Malta**, the CSO SOS Malta launched a project aimed at tackling online hate speech in the country. It has produced a report on hate speech and hate crime, and its website contains a direct link to a hate crime/incident reporting form created by the CSO.[426]

In **Poland**, the Never Again Association[427] cooperates on the issue of online hate speech with the Allegro and OLX websites (online auctions and sales platforms). For instance, in cooperation with Allegro, the service removed over 12 000 auctions with items with fascist and antisemitic content from March 2018 to February 2021.[428] The Association closely monitors racism and discrimination on the ground and through its national network of voluntary correspondents and regular grass-roots contacts with various minority communities, Never Again has built an extensive register of racist incidents and other xenophobic crimes committed in Poland, the '*Brunatna Księga*' (Brown Book).[429]

Similarly, a CSO initiative has been identified as promising practice in **Slovakia**, where almost 20 CSOs, five law firms, various media and others launched a joint public campaign in 2023 under the title 'Let's Stop Hate'. It aims to raise awareness that freedom of speech has limitations, to stop the spreading of hate speech and incitement to violence through legal action as well as to provide legal, media and social assistance and support to victims of hate speech. The Slovak equality body has also joined this initiative.[430]

In light of the limited capacities (and often reluctance) of criminal justice actors to monitor and react to all instances of online hate speech, as well as the service providers' reliance on notifications, reporting plays a crucial role in combating the phenomenon. However, there are several factors working against reporting. In addition to those noted above in relation to the Irish research, such factors are the abundance of online hate speech (which may suggest to individuals that there is no point in reporting it, because the result will be minimal compared to the dimensions of the problem) or the feeling that tackling the issue is a state task and individuals should bear no responsibility in fighting the phenomenon.

Therefore, the conscious and concerted efforts of civil society to monitor and report online hate speech can indeed be crucial to the effectiveness of the system. However, this work – as any other – is highly

424 Spanish country brief.
425 Greek country brief.
426 The non-governmental organisation SOS Malta ran a campaign called 'Stophate Project', see: www.sosmalta.org/stophate.
427 Never Again Association website, see: https://www.nigdywiecej.org/en/.
428 See: https://www.nigdywiecej.org/komunikaty/rok-2021/4528-platformy-aukcyjne-kasuja-rasizm and https://www.nigdywiecej.org/komunikaty/rok-2019/4265-antysemickie-publikacje-znikaja-z-allegro.
429 See: https://www.nigdywiecej.org/en/brown-book.
430 Website of the initiative: https://zastavmenenavist.online/o-nas.

dependent on adequate resources. An example is provided by **Sweden**, where the Näthatsgranskaren organisation[431] was identified as a potential adaptable good practice. The organisation identified, reviewed and reported to the police online expressions of hate, thus creating, through civic activism, a pressure on the police to act. The expert, however, points out that due to issues of funding, the organisation has become less active recently. As noted in section 3.2.2.2, above, in relation to the monitoring of hate crimes, funds must be available for civil society to carry out this role.

**Recommendations:**

It is recommended that Member States consider ways in which the specificities of online hate speech can be taken into account when criminal sanctions are imposed for such offences (e.g. through designating online perpetration as a potential aggravating factor in the criminal legal framework).

It is recommended that Member States set up specialised units to investigate and prosecute online hate speech.

Furthermore, it is recommended that an analysis of financial and other barriers preventing or potentially discouraging victims of discrimination from seeking non-criminal remedies against discrimination falling under the two directives be reviewed by the Member States.

It would be desirable for Member States to create formal platforms of cooperation between law enforcement and prosecutorial authorities and CSOs active in combating antisemitism in order to facilitate the reporting and effective prosecution of online hate speech. Funds for supporting CSOs performing such tasks should be secured at both the domestic and the EU level. In this regard, the Member States are encouraged to ensure smooth adoption of the Commission proposal on the revision of the Victims' Rights Directive, including the provisions requiring that Member States establish specific protocols to ensure cooperation and coordination of all authorities and other bodies coming into contact with victims.

431 For the organisation's website, see: https://näthatsgranskaren.se.

# 5 Conclusions

Sociological research shows the persisting presence of antisemitism in the European Union. Research has also shown – and it has also been reported from a number of Member States – that the consecutive crises of the Covid-19 pandemic and the Russian aggression on Ukraine have intensified antisemitic sentiments across Europe. In its EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030), the European Commission pledged to 'step up action to actively prevent and combat' the phenomenon. To this end, the EU has not only adopted policies and commitments to counter antisemitism, but it has also put in place numerous legal instruments prescribing the sanctioning of different forms of antisemitism. Having investigated how these legal instruments have been complied with in the 27 EU Member States, and in assessing the states' national normative measures to combat antisemitic discrimination, hate crimes and hate speech, this report has come to the following conclusions.

## 5.1 Antisemitic discrimination

In spite of the undeniable prevalence of antisemitism and the existence of a legal framework that could be used to effectively counter it, jurisprudence is scarce for a number of reasons, including the reluctance of victims to report instances of antisemitic violations, the failure of authorities to adequately recognise the discriminatory motive, and their reluctance to sanction such cases, and/or the absence of the tools that are necessary to effectively do so.

The degree of scarcity of relevant jurisprudence differs in the three main areas: there are very few cases in the field of non-discrimination, whereas with respect to hate crimes and hate speech (despite the issues of underreporting and underqualification), there are some cases that are recorded and prosecuted.

There are multiple reasons for this difference, as reflected in the Fundamental Rights Agency's 2018 survey on the perceptions of antisemitism, which concluded that although the vast majority of the Jewish respondents were aware of anti-discrimination legislation as well as of organisations that can offer support in cases of discrimination, a large majority of those who said that they had experienced antisemitic violations in the period preceding the survey did not report the most serious incident to any authority or organisation. There is a great degree of divergence in the reasons for non-reporting regarding discrimination, harassment and violence. Distrust in the authorities is present in all three cases, however, there was one specific response that was prevalent regarding instances of discrimination, but was not mentioned in relation to the other two types of antisemitic activity: 33 % of those victims of discrimination who chose not to report it said that they had no proof of discrimination.

In part, this is related to the very nature of discrimination, i.e. the informational/evidentiary asymmetry that is characteristic of many discrimination cases where the discriminator is in possession of important evidence or has power over persons who could provide such evidence. However, a specificity of antisemitic discrimination lies in the latent pressure surrounding antisemitism, i.e. the fact that despite the prevalence of antisemitism, antisemitic prejudices are among the views whose open acceptance in European societies is still an open violation of the mainstream consensus. As a result, persons who treat others unfavourably for being Jewish are likely to be less revealing in the motivations for their actions than those who commit discrimination against other groups of society, regarding whom this kind of social consensus is weaker.

This particular situation has a number of consequences with respect to the practical implementation of legal norms aimed at combating antisemitism. One such consequence is that penal norms envisaged to provide protection against antisemitic discrimination appear to be even more heavily underutilised than civil or administrative law norms having the same purpose. The more specific reasons include the lack of the shifted burden of proof in criminal law, the requirement of proving intent, the very high standard of proof, and those institutional disincentives that criminal justice authorities (where performance is

often measured in statistical terms of success rates) may have against pursuing cases of penalised discrimination.

The extensive underreporting of instances of antisemitic discrimination also has a problematic impact on equality bodies' attention to the issue. Despite the prevalence of antisemitism, it has been reported from over two thirds of the Member States that their respective equality bodies place no specific emphasis on antisemitism. In the case of equality bodies with a quasi-judicial function, this stems from the fact that their portfolio is to a great degree determined by the complaints that they receive. Furthermore, unless there is conscious strategic planning within a multi-ground equality body, the distribution of incoming complaints can easily misinform (about the prevalence of a certain type of discrimination) the internal decision making regarding all the other functions. This thematic report suggests that most of the equality bodies that have a focus on antisemitism apply a more strategic approach to their work, suggesting a certain degree of correlation between this more conscious approach and the recognition of the problem of antisemitism.

Although in the absence of relevant case law it is difficult to assess its importance, one potential gap in the system of protection against antisemitic discrimination has been identified in the research: whether being Jewish is categorised as falling under the category of 'religion or belief' or that of 'racial or ethnic origin' may have a relevance to the depth of the protection in jurisdictions (i) where there is a difference regarding the material scope of protection depending the ground of discrimination; (ii) where the remedial forums have limitations of jurisdiction regarding certain grounds of discrimination; or (iii) where there are some other differences in the efficiency of the protection depending on the ground on which it is based (e.g. whether the burden of proof is shifted or not).

On the basis of the above, the following recommendations may be formulated. It could be beneficial for Member States:

- to consider the introduction of non-criminal measures to address all instances of (antisemitic) discrimination falling under the two directives, for which only criminal sanctions are currently available, and to review and remove financial and other barriers preventing or potentially discouraging victims of discrimination from seeking non-criminal remedies against discrimination;
- to facilitate their equality bodies in taking a more proactive approach to antisemitism (e.g. by providing the necessary resources for stepping up their strategic planning activities and by devising more effective reporting tools to address the issue of underreporting), and to encourage these bodies to rely on the IHRA definition in the course of their work;
- to find solutions that guarantee that victims of antisemitic discrimination are adequately protected in – at least – all the areas covered by the Racial Equality Directive and the Employment Equality Directive irrespective of whether being Jewish is perceived to fall under the ground of 'religion' or 'racial or ethnic origin'.

## 5.2 Hate crimes

The study has confirmed the conclusions of previous research regarding the main systemic problems in the investigation, prosecution and adjudication of hate crimes, including the underreporting of such offences, which predominantly stems from distrust in the authorities. It identifies two factors that have an important role in this lack of trust: the underqualification of hate crimes (i.e. when a hate crime is investigated, prosecuted and adjudicated in a way that the bias motive is not taken into account in the procedure) and the lack of an enabling environment encouraging victims to report such offences.

Underqualification has been reported from several Member States. It can have a number of reasons, including law enforcement biases regarding minority groups, but some more readily addressable factors also play an important role, such as the institutional pressures and problematic performance indicators

that (paired with the evidentiary difficulties) can push the law enforcement and prosecutorial bodies as well as the courts towards setting aside the bias motive and focusing only on the base criminal offence, as this approach guarantees a less complex procedure and offers 'easier success'.

One way in which some Member States have chosen to address this problem is the creation of specialised units dealing with bias-motivated offences, in order to create an institutional-organisational focus with a potential of offsetting the tendency to avoid the evidentiary difficulties often leading to underqualification. If an organisational unit's expressly assigned task is to prosecute hate crimes, the fundamental perspective for the evaluation of its work will not be the number of cases closed in general, but the number of hate crimes investigated (or prosecuted). This shift can lead to an improvement in the handling of cases where there is a bias motive.

The setting up of specialist units is also conducive to the law enforcement authorities' willingness to cooperate with third-party actors, such as CSOs with a mandate to combat (antisemitic) hate crime. Whereas external 'interference' with their work is often seen as unwelcome by criminal justice authorities in general, the specific task of specialised units has the potential of making their personnel much more receptive to inputs from 'outside' actors with a mandate and expertise in countering bias-motived criminal offences. However, a warning has been sounded from a number of countries that CSOs need sufficient resources to be able to perform the monitoring and signposting functions that enable them to usefully augment the activities of specialised law enforcement units in this area.

Hate-crime focused specification has come up as a good practice in other contexts as well. One example is the specific codification of the hate or bias motive as an aggravating factor in the criminal code (instead of assessing it under the general heading of a 'reprehensible motive'), which, in addition to the symbolic function of such a specific reference can have positive impacts on reporting and data collection. It can also better orient the work of the criminal justice authorities, which inevitably organise their operations and decision making around the constitutive elements of the criminal offences that they are mandated to deal with. Similarly, the positive impacts of more specificity have been reported from a number of Member States in relation to the adoption of guidelines and protocols regarding hate crimes in order to provide bias indicators that police officers can use to classify the reported offence.

The treatment of victims by law enforcement authorities (including instances of revictimisation) is another well-known factor that can have a detrimental impact on their trust and thus their willingness to report the hate crime suffered. The Victims' Rights Directive requires Member States to ensure that victims receive a timely and individual assessment of their needs to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation. Specifically, the Directive states that, 'In the context of the individual assessment, particular attention shall be paid to victims [...] who have suffered a crime committed with a bias or discriminatory motive, which could, in particular, be related to their personal characteristics [...] In this regard, victims of hate crime shall be duly considered.

This report has found that there are still countries that need to do further work to ensure that victims of hate crime can fully rely on their rights. In some Member States the rights of 'particularly vulnerable' victims are regulated in a general manner without specifically prescribing the obligation to take into account the bias motive of the offence, whereas some jurisdictions expressly stipulate the obligation to pay particular attention to victims of hate crimes among the provisions pertaining to particularly vulnerable crime victims, which has been identified as a practice with the potential of contributing to their more effective protection.

Resistance to change is a well-known phenomenon in the sociology of organisations. The introduction of individual assessment can be a significant change for many law enforcement bodies, requiring not only the allocation of substantial resources in terms of time and human capacity, but also bringing into the

focus of their activities members of minority groups that are often the subjects of biases in both the wider society and the law enforcement authorities themselves. Under such circumstances, there is a risk that if the conditions for qualifying victims as particularly vulnerable are formulated in general terms, allowing the criminal justice actors a relatively wide margin of discretion, the special needs of those persons with regard to whom prejudices are strong will be disregarded.

To tackle this problem, the Commission proposal for the revision of the Victims' Rights Directive includes a provision requiring the Member States to set up national protocols to improve the coordination and cooperation of the relevant authorities and bodies that come into contact with victims.

On the basis of the above, the following recommendations have been formulated. It could be beneficial for Member States:

- to expressly regulate the hate and/or bias motive as an aggravating factor in their respective criminal justice systems;
- to set up – if they do not already exist – specialised units within the law enforcement and prosecutorial authorities to deal with bias-motivated criminal offences;
- to create formal platforms of cooperation between law enforcement and prosecutorial authorities and CSOs active in combating antisemitism. Funds for supporting CSOs performing such tasks should be secured at both the domestic and the EU level;
- to provide police officers with detailed guidance regarding bias indicators and a monitoring definition of hate crime;
- to expressly codify bias and hate motives of criminal offences as qualifying crime victims as particularly vulnerable;
- to provide victims of hate-motivated crimes with free or supported legal (and preferably psychosocial) assistance in the course of the entire criminal procedure;
- to support the adoption of the Commission proposal for a revision of the Victims' Rights Directive, including the proposed amendments regarding individual assessment, and the provisions on improved crime reporting, the right to assistance at the court, as well as the requirement to adopt protocols to ensure cooperation and coordination of all authorities and other bodies coming into contact with victims.

## 5.3 Hate speech

An overview of recent legislative changes and debates in the Member States highlights a recurring issue in relation to hate speech, which is the degree of generality or detail with which behaviours amounting to a criminal offence must be defined so that, on the one hand, the clarity and foreseeability required by criminal law is respected, but that, on the other, no dangerous instances of hate speech fall through the gaps in the legislative framework. One area where the multiplicity of approaches to this issue is highlighted acutely is that of the public display of antisemitic symbols, including Nazi memorabilia. In some Member States there is very specific legislation concerning such symbols, while other countries render the use of Nazi symbols punishable under the general anti-hate speech legislation, without specifically banning their public use. A review of case law suggests that sometimes the more general approach can be equally (or even more) effective; if a legislature decides to outlaw the public use and dissemination of antisemitic symbols, a certain degree of flexibility needs to be retained so that the relevant provisions remain effectively applicable and capable of fulfilling their envisaged role in countering antisemitism.

The systemic problems related to hate speech that have been reported from the different Member States in this study paint a rather diverse picture. In some countries, the ineffective legal framework results in a very low number of prosecuted cases of hate speech (in some of these, amendments to the law are currently being debated), while in others, the text of the law would allow effective implementation, but reluctance on the part of the authorities prevents the adequate application of the legislation. In a number of Member

States problems of practice have been overcome through specialisation and the training of prosecutors, in others, the legislature had to amend the legal framework to overcome restrictive interpretations.

One way in which actors (primarily CSOs with a mandate to combat antisemitism or hate speech in general) have reacted to the failures of prosecuting hate speech in some of the countries, has been to use alternative procedures in non-criminal legal branches. Civil lawsuits on the violation of the dignity of a Jewish person or the Jewish community are possible in several Member States, and recent ECtHR jurisprudence in the *Behar and Gutman v Bulgaria* case[432] suggests that under certain conditions, the signatories of the European Convention on Human Rights must provide members of certain social groups with the possibility of seeking non-criminal remedies for the violation of their dignity caused by virulently negative public statements about their community.

Another alternative route for sanctioning hate speech when either the authorities are reluctant to prosecute such instances or the violation may not reach the level of criminality is offered by anti-discrimination law in several jurisdictions, especially through the use of the concept of harassment. The application of the concept of harassment under the scope of – administrative or civil – non-discrimination law has several advantages compared to the criminal law response. For instance, no proof of intent is needed and it is sufficient for the impugned speech to have the effect of creating a hostile or humiliating environment. The use of such alternatives can have a number of further advantages: e.g. the complainant is in charge of the procedure (its initiation, continuation or dropping is not subject to prosecutorial discretion); when time is an important factor (e.g. to remove a certain inciting statement from a website), an interim injunctive measure by a civil court can be a quicker solution than waiting for an indictment to be made and a criminal judgment to be handed down; and sometimes specialised bodies may be willing to apply harsher measures (e.g. higher fines) than criminal courts.

It has been reported from many Member States that the anonymity of the internet and its capacity to convey hateful, inciting messages to a potentially very large audience in a short time pose a serious problem to countering online hate speech. In spite of these specificities, there are very few jurisdictions where the online perpetration of hate speech triggers any specific penal regulation: in most countries, the criminal provisions treat offline and online hate speech identically.

Another recurring trend is the small number of criminal cases actually launched compared to the immense scale of online hate speech. In addition to the difficulties of identifying the perpetrators, the approach of criminal justice authorities also contributes to the situation. Reluctance to investigate and prosecute online instances of hate speech may stem from prejudices and/or the lack of sufficient knowledge of the legitimate limitations of the freedom of expression, however, as is the case for other problems related to the practice of criminal justice authorities, institutional pressures and incentives related to effectiveness (in terms of both results and resources) also play a part in the problem. All these factors are an argument for a specialisation in criminal justice bodies on the basis of the hate element of such 'communications crimes'.

It has also been highlighted that due to the scale of the problem, law enforcement bodies cannot be expected to effectively combat the phenomenon without the assistance of service providers. At the same time, while it is unquestionable that notice-and-takedown procedures for internet service providers and social media platforms are extremely important mechanisms for combating online hate speech, they 'have been criticised for being ad hoc in nature, and for placing the primary responsibility to identify hateful content on users rather than on the companies themselves'.[433]

In light of the limited capacities (and reluctance) of criminal justice actors to react to all instances of online hate speech, as well as the service providers' reliance on notifications, reporting plays a crucial role

432 European Court of Human Rights, *Behar and Gutman* v *Bulgaria*, Application no. 29335/13, Judgment of 16/02/2021.
433 Irish Human Rights and Equality Commission (2019), *Ireland and the Convention on the Elimination of Racial Discrimination*, p. 48, https://www.ihrec.ie/app/uploads/2022/08/IHREC_CERD_UN_Submission_Oct_19.pdf, quoted by the Irish country brief.

in combating the phenomenon. However, there are several factors working against reporting, including the overwhelming abundance of online hate speech and the feeling that tackling it is a state task. Therefore, the conscious and concerted efforts of civil society to monitor and report online hate speech are crucial to the effectiveness of the system. However, this work is highly dependent not only on the existence of accessible, quick and easy-to-use reporting platforms but also on adequate resources.

On the basis of the above, the following recommendations have been formulated. It could be beneficial for Member States:

- to carry out (where there is a notable discrepancy between the number of hate speech reports, indictments and convictions), a review of the practice with a view to establishing whether amendments to the legal framework are necessary, or whether specialised training for criminal justice professionals may improve the efficiency of the prosecution of hate speech;
- to consider ways in which the specificities of online hate speech can be taken into account when criminal sanctions are imposed for such offences (e.g. through designating online perpetration as a potential aggravating factor in the criminal legal framework);
- to set up specialised units to investigate and prosecute online hate speech;
- to create a legal framework enabling CSOs and other bodies with a mandate to combat hate crime to apply non-discrimination law or other remedial routes to instances of incitement in situations where, either because of the authorities' reluctance to prosecute hate speech or due to other reasons, the application of such alternative routes has comparative advantages;
- to create formal platforms of cooperation between law enforcement and prosecutorial authorities and CSOs active in combating antisemitism to facilitate the reporting and effective prosecution of online hate speech. In this regard, the Member States are encouraged to ensure the smooth adoption of the Commission proposal on the revision of the Victims' Rights Directive, including the provision requiring Member States to establish specific protocols to ensure cooperation and coordination of all authorities and other bodies coming into contact with victims. Funds for supporting CSOs performing such tasks should be secured at both the domestic and the EU level.

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DS-05-24-043-EN-C

Publications Office
of the European Union

ISBN 978-92-68-13785-7