



EU High Level Group on combating racism, xenophobia and other forms of intolerance

November 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

The purpose of this guidance document is to facilitate the practical application on the ground of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.¹ This document is also intended to assist the Member States to have a common understanding of the provisions contained in the Framework Decision, with a view to the effective implementation of national transposition measures.

This document is the result of a process of mapping and consultations carried out in the context of the work of the EU High Level Group on combating racism, xenophobia and other forms of intolerance in cooperation with the relevant stakeholders, including Member States' authorities, civil society and relevant EU and international organisations and bodies.

This document is not legally binding and is intended for guidance only. It will not serve as a checklist for assessing Member States' compliance with the provisions of Council Framework Decision 2008/913/JHA.

The authoritative interpretation of EU law remains within the sole remit of the European Court of Justice (CJEU) in accordance with the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU).

This document can therefore neither provide a formal interpretation of EU law, nor provide legal advice on issues of national law.

¹ OJ L 328, 6.12.2008, p. 55-58

1. INTRODUCTION

All forms and manifestations of racism, xenophobia and intolerance are incompatible with the values upon which the EU is founded.

As part of a comprehensive legal and policy framework aimed at tackling discrimination, racism and xenophobia, and at ensuring a high level of security through measures to prevent and combat crime², Council Framework Decision 2008/913/JHA (hereinafter '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.

In 2014 the Commission issued a report on the implementation of the Framework Decision (hereinafter 'the 2014 Commission Report')³. The report concluded that a number of countries have not fully and/or correctly transposed all provisions, namely in relation to the offences of denying, condoning and grossly trivialising certain crimes. The report also concluded that while most Member States have provisions on incitement to racist and xenophobic violence and hatred, these do not always seem to fully transpose the offences covered by the Framework Decision. Gaps were also observed in relation to the racist and xenophobic motivation of crimes, the liability of legal persons and jurisdiction. To ensure the full and correct legal transposition of the Framework Decision the Commission has been holding bilateral talks at both technical and political level with almost all the Member States.

The 2014 Commission Report also stressed the importance of strengthening the implementation of the Framework Decision, highlighting the need for the authorities to have sufficient knowledge of relevant legislation and clear guidelines, practical tools and skills to be able to identify and deal with the offences covered by the Framework Decision, and to interact and communicate with victims.⁴

In order to ensure the effectiveness of the whole enforcement chain, the Commission has been assisting Member States in their efforts to ensure effective application of the law and improve responses to hate crime and hate speech by fostering discussions, good practice exchange and informal guidance through the EU High Level Group on combating racism, xenophobia and other forms of intolerance established in 2016. A number of practical guidance tools have already resulted from this work, in key areas such as hate crime training, access to justice, support and protection for victims of hate crime and hate speech and hate crime recording.⁵

Notwithstanding the progress made, the collaborative process set in place has shown that gaps remain in terms of ensuring that instances of hate speech are promptly detected, investigated and prosecuted, and that any alleged racist motive associated with a crime is unmasked and inquired upon as from a very early stage of the investigation, and effectively taken into account by the judicial authorities throughout criminal proceedings, until the moment a decision is handed down by a prosecutor or a judge. There is therefore a call for further assistance to guide Member States enforce the law on the ground and ensure effective investigation, prosecution and sentencing of hate crime and hate speech, which is a prerequisite to ensure the right of victims to access remedies and get redress for breaches of their rights.

This guidance note responds to this call and provides objective, practical information and advice addressed to national authorities (mainly, police, prosecutors, judges) on common issues of practical application, for a better enforcement of the Framework Decision, in order to assist Member States in the application and enforcement on the ground of national hate crime and hate speech legislation.

² Article 67(3) TFEU.

³ Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, COM(2014)27 final.

⁴ See also, in this respect, findings and opinions from the EU Agency for Fundamental Rights, as compiled in particular in the report "*Making hate crime visible in the European Union: acknowledging victims' rights*".

⁵ For more information, see the dedicated page of the Register of European Commission's Expert Groups, <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3425> and the dedicated webpage ec.europa.eu/newsroom/just/item-detail.cfm?item_id=51025

This technical guidance document rests on a comprehensive synthesis of, and further builds on, the work of the EU High Level Group on combating racism, xenophobia and other forms of intolerance and existing standards and guidance on the matter developed by international bodies, in particular the Council of Europe European Commission Against Racism and Intolerance (ECRI)⁶ and the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (ODIHR)⁷. Due regard is given to other relevant EU standards, in particular on the rights of victims of crime, as well as international standards enshrined in relevant international and regional instruments⁸ and the obligations deriving from the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR).⁹ The document also takes into account research undertaken by the EU Agency for Fundamental Rights (FRA).¹⁰

This guidance note acknowledges that in many Member States, the scope of national law includes further grounds than those included in the Framework Decision, and recognise relevance of the guidance note for the application of relevant provisions of national law irrespective of their scope.

2. A BETTER UNDERSTANDING OF THE SCOPE OF THE OFFENCES TO ENABLE MORE COHERENT AND EFFECTIVE CRIMINAL JUSTICE RESPONSES

2.1. Preliminary considerations

The Framework Decision is aimed at defining a common, EU wide criminal law approach to certain racist and xenophobic conducts, in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences (recital 5 to the Framework Decision).

While the Framework Decision does not provide for full harmonisation of criminal laws in this field, it establishes the minimum approximation necessary to ensure that national legislation is sufficiently comprehensive.¹¹

The provisions of the Framework Decision are construed around the obligation to criminalise two types of offences, and namely:

- first, the obligation to criminalise the “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”, which shall also be punishable if committed by public dissemination or distribution of tracts, pictures or other material (Article 1 of the Framework Decision, hereinafter referred to as 'racist hate speech');
- second, the obligation 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” (Article 4 of the Framework Decision,

⁶ Including the standards compiled in the General Policy Recommendations elaborated by ECRI: <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/ecri-standards>

⁷ <https://www.osce.org/tolerance-and-nondiscrimination>

⁸ Particular reference goes to the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), to which all Member States are parties, as well as to the Additional Protocol to the Council of Europe Convention on Cybercrime, concerning criminalization of acts of a racist and xenophobic nature committed through computer systems, the Council of Europe Framework Convention for the Protection of National Minorities and Protocol No. 12 to the European Convention on Human Rights.

⁹ For a useful overview of the evolution of the case law of the ECtHR related to hate crime see EU Agency for Fundamental Rights, “*Unmasking bias motives in crimes: selected cases of the European Court of Human Rights*”, accessible at http://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-unmasking-bias-motives-paper_en.pdf

¹⁰ <http://fra.europa.eu/en/theme/hate-crime>

¹¹ See the explanatory memorandum accompanying the proposal for a Council Framework Decision on combating racism and xenophobia presented by the Commission, COM(2001)0664 final (hereinafter 'explanatory memorandum accompanying the Commission's proposal'), p. 6.

hereinafter referred to as 'racist hate crime').¹²

A correct framing of the provisions of the Framework Decision which relate to the scope and "definition" of the offences covered is key to a shared understanding and the effective application in practice of corresponding national laws, which in turn contributes to the effectiveness and appropriateness of criminal justice responses.

To that effect, the following sections will outline some considerations as regards, in particular, the grounds covered as "protected characteristics" in the Framework Decision (section 2.2); the conceptual and operational distinction between "hate speech" (section 2.3) and "hate crime" (section 2.4), which will also be reflected in the other sections of this guidance document – the two offences presenting specificities as regards their investigation, prosecution and sentencing; as well as some general considerations concerning offenders and victims (section 2.4).

2.2. Protected characteristics

The Framework Decision does not define what is meant by "racism and xenophobia". It does, nonetheless, explain that for the purpose of its interpretation and implementation, "hatred" should be understood as referring to hatred based on "race, colour, religion, descent or national or ethnic origin" (recital 9 to the Framework Decision). Indeed, the same list of grounds is used for the purpose of defining the offence of racist hate speech in Article 1. These can be regarded, therefore, as the "protected characteristics" which the Framework Decision takes into account for the purpose of defining a common criminal law approach to the conducts described therein.

The recognition and understanding of the notion of "protected characteristics" is important to achieve the necessary awareness, on the part of the authorities within the criminal justice system, but also the general public, that hate speech and hate crime are "identity" or "message" crimes. Indeed, these crimes not only violate the individual rights of the victim, but also violate the principle of equality and constitute a manifestation of discrimination, prejudice, hostility and hatred against the victim as well as against those sharing the characteristics of, or the characteristics which are attributed to, the victim, or against the group or community to which the victim belongs, is perceived to belong or is associated, connected or affiliated by the offender. The motive of the offender is what distinguishes these offences from ordinary criminal offences, making them particularly serious due to the specific impact that these crimes have on the victim as well as on the community or group to which the victim belongs or is perceived to belong – and, in turn, the potential consequences of such crimes for the society more broadly, which can lead to an exacerbation of social divisions and intergroup or interethnic tensions. This is what makes these crimes as particularly reprehensible and deserving specific condemnation and punishment due to the harm caused both to the victim and the society (ECtHR, *Menson and Others v United Kingdom*).¹³

It is due to this specific nature, that hate speech and hate crime are to be recognised and treated as a special category of crimes, to be dealt with having due regard of the protected characteristic(s) on grounds of which they are perpetrated. Failure to do so can negatively impact on the effectiveness of the criminal justice responses to these crimes, with the bias or hate component being disregarded at the moment of the identification and recording of the crime, during investigations and for the purpose of the legal qualification of the offence by prosecutors and, as a result, not being taken into account at the moment of sentencing.¹⁴ This, in turn, affects the fundamental right of victims to access remedies and obtain redress, which Member States are under a positive obligation to ensure (see ECtHR, *X and Y v. the Netherlands* and *Aksu and Karaahmed v. Bulgaria*).

Protected characteristics have been referred to as relating to "an aspect of a person's identity that is

¹² 2014 Commission Report, p. 3.

¹³ See also ODIHR, "Hate crime laws – A practical guide", p. 23.

¹⁴ See also ODIHR, "Hate crime laws – A practical guide", p. 21.

unchangeable or fundamental to a person's sense of self".¹⁵ The choice of protected characteristics for the purpose of criminal law provisions on hate crime and hate speech is made by the legislator on the basis of a number of considerations, which should relate to manifestations, trends, incidence and experiences of discrimination and victimisation in the social, cultural, historical and geographical context considered.

For the purpose of minimum harmonization, and taking into account the legal basis on which it was adopted, the Framework Decision defines racist and xenophobic hate speech and hate crime by reference to a combination of (alternative) grounds which relate to instances of both historical and contemporary racial oppression and discrimination, which can be regarded as common or widespread across the EU.

At the same time, the Framework Decision leaves Member States free to include in their national legislation other protected characteristics; so that in the majority of the Member States national legislation variably includes a number of other protected characteristics such as sexual orientation, gender identity, disability, sex/gender, social status, etc. (see also, in this respect, relevant case-law of the ECtHR, such as *Identoba and others v Georgia* and *Vejdeland and Others v Sweden*, as regards offences with a homophobic nature; or *Dordevic v Croatia*, concerning harassment on grounds of disability).

In any event, the recognition of the protected characteristics should be consistent throughout all relevant criminal law provisions (for example, in the case of hate crimes, provisions should operate all on the basis of the same list of protected characteristic, irrespective of the 'base' criminal offence).

The reference to generally identified protected characteristics rather than to specific groups (i.e., a reference to "religion" as a protected characteristic, rather than to specific religious groups or communities such as Christians or Muslims), ensures that protection is equal for victims from both majority and minority populations"¹⁶

As to the specific meaning of the protected characteristics referred to by the Framework Decision, it should be noted that there is no universally accepted definition of the terms used. While for some of these grounds, in particular "descent" and "religion", the Framework Decision contains some explanations as to their intended meaning (recitals 7 and 8 to the Framework Decision, respectively), the interpretation of the other characteristics is tacitly left to the Member States. Such interpretation may vary across jurisdictions, and has led to different transposition solutions.¹⁷

In the context of the practical application of relevant national criminal law provisions, authorities should be able to identify the protected characteristic(s) on account of which the crime was perpetrated, including where these may be multiple or intersectional. Due regard shall be given to the perception of the victim as well as of the offender and to the nature and circumstances of the crime: it is particularly important to bear in mind, in this context, that the identification of the protected characteristic often cannot be based on the actual membership of a victim to a particular group – which is a factor that, in many cases, cannot be objectively determined, or is, in fact, not decisive, for example where the victim is targeted by the offender not on the basis of his or her own characteristics, but on the basis of his or her association, connection or affiliation with a protected group (so called "victims by association", see ECtHR, *Škorjanec v Croatia*); but rather on the perception of the offender. Authorities shall, on the one hand, take into account the objective pursued by the legislator as well as the practical implications of the relevant qualification in terms of, for example, recording and evidence gathering (see below, sections 3.2 and 3.3). The identification of protected characteristics for recording purposes may, on the other hand, go beyond the characteristics protected by relevant hate crime and hate speech provisions, in particular where recorded offences are used for the collection of data for statistical purposes.

2.3. Racist and xenophobic hate speech: a fundamental rights driven interpretation

¹⁵ ODIHR, "Hate crime laws – A practical guide", p. 38.

¹⁶ See also ODIHR, "Hate crime laws – A practical guide", p. 32.

¹⁷ See 2014 Commission Report, p. 4. Further advice on the interpretation of the protected characteristics covered by the Framework Decision may be found, among others, in the Explanatory Report to the Additional Protocol to the Council of Europe Convention on Cybercrime – the list of grounds provided therein being identical to the one used in the Framework Decision.

Article 1 of the Framework Decision generally defines the notion of racist hate speech as the public incitement to violence or hatred against a group of persons or member of such group based on “race, colour, religion, descent or national or ethnic origin”. The dissemination of the hatred may be made publicly or through the distribution of other material, such as tracts or pictures.

While the interpretation of this notion is not further defined under Article 1 of the Framework Decision, it shall, as a general principle, respect the fundamental right to freedom of expression under Article 11 of the Charter of Fundamental of the EU. It is also important to recall that according to its Article 7, the Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

The Commission pays particular attention to ensuring that the transposition of the Framework Decision fully respects all fundamental rights as enshrined in the Charter of Fundamental Rights of the EU, which result also from the constitutional traditions common to the Member States. As established by Article 52(1) of the Charter, any limitation on the exercise of fundamental rights and freedoms must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may only be made if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. National courts are responsible to interpret and apply national provisions transposing the Framework Decision accordingly. In doing so, they should have due regard of the main case-law standards developed by the ECtHR in this respect, considering that, as the Framework Decision also makes clear (recital 14 to the Framework Decision), Article 1 of the Framework Decision shall be interpreted in accordance with Articles 10 and 11 ECHR and the corresponding case-law of the ECtHR.¹⁸

The ECtHR has recognised that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. Furthermore it has held that remarks directed against the Convention’s underlying values could not be allowed to enjoy the protection afforded under Article 10 ECHR. Whereas the ECtHR has not provided a precise definition of hate speech, its case law have defined the limits between freedom of expression and those expressions that can legitimately be restricted. On the one hand, the ECtHR has clarified that Article 10 ECHR is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (ECtHR, *Handyside v the United Kingdom*). On the other hand the ECtHR has considered it necessary to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance, provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued” (ECtHR, *Erbakan v. Turkey*).

It is to be noted that in order to qualify a particular expression within or outside of the limits of freedom of expression, the ECtHR has established the existence of a “margin of appreciation” which requires that a specific case-by-case analysis is conducted of the particular circumstances of case and the alleged hate speech expression. Amongst other the ECtHR has established guiding factors such as, amongst other, (i) the purpose of the applicant (ECtHR, *Jersild v Denmark*) and whether the statements could concern a matter of public interest (ECtHR, *Gündüz v Turkey*); (ii) the addressee and context in which the expression is made, and the truthfulness of the remarks in question making a distinction between statements of fact and value judgments (ECtHR, *Garaudy v France*); (iii) the context of the expression, particularly in light of the special protection given to public debate and political discourse (ECtHR, *Féret v Belgium* and *Le Pen v France*) or journalism (ECtHR, *Sürek (no.1) v Turkey*) and the status of the person targeted (ECtHR, *Castells*

¹⁸ Useful guidance drawn from the ECtHR’s case-law can also be derived in the standards developed by ECRI: see in particular ECRI General Policy Recommendation No. 7 (revised) on National legislation to combat racism and racial discrimination, paragraph 18, and the related explanatory memorandum.

v Spain); (iv) the nature of the sanction, criminal or not, and the seriousness of the interference (ECtHR, *Perinçek v Switzerland*).

Religious beliefs have been treated by the ECtHR as a special category. The Court has repeatedly reiterated that “those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith” (ECtHR, *Otto-Preminger-Institut v Austria*). However, the ECtHR recognised that States may adopt measures restricting the freedom of expression in attacks that are judged to be offensive and concern matters that are sacred to the holders of a belief.¹⁹

As already mentioned, the ECtHR has recognised hate speech in relation to other bias motivated grounds, such as sexual orientation (ECtHR, *Vejdeland and Others v Sweden*). Not every single instance of hatred, however, may be framed as hate speech, particularly where the targeted group does not share protected characteristics (see above, section 2.2).

Article 1 of the Framework Decision further describes two particular forms of hate speech, namely, the public condoning, gross trivialisation or denial of war crimes, genocides, crimes against humanity as well as crimes against peace committed by major war criminals of the European Axis countries, in a manner likely to incite to violence or hatred. Particularly, negationism can be considered as a specific manifestation of antisemitism²⁰ since it both constitutes a denial of crimes against humanity, meaning here the Nazi holocaust, and an incitement to hatred against the Jewish community.²¹ Denying crimes against humanity and disputing the existence of clearly established historical events do not constitute scientific or historical research and shall be considered incitement to hatred towards Jews (ECtHR, *Garaudy v France*), even when performed through comedy spectacles (ECtHR, *M'Bala M'Bala v France*).

Article 1 of the Framework Decision provides for a legal response not only to offline messages, but also to expressions committed by any means, including information systems, thus also criminalising the growing phenomena of cyberhate. In this regard, the ECtHR has condemned incitement to discrimination, hatred and violence on account of remarks made in YouTube videos concerning non-Muslim groups and Sharia (ECtHR, *Belkacem v Belgium*)

A number of Member States have put in place the optional qualifiers under Articles 1(2) and 1(4) of the Framework Decision, through which hate speech shall be punished only when (i) is carried in a manner likely to disturb public order, (ii) is threatening, abusive or insulting or (iii) in relation to the denying or grossly trivialising, only if the crimes have been established by a final decision of a national court of this Member State and/or an international court.²²

2.4. Racist and xenophobic hate crime: an "operational definition"

Article 4 of the Framework Decision refers to any other criminal offence, different than racist and xenophobic hate speech as defined in Article 1, committed with a racist and xenophobic motivation. With regard to such offences, Article 4 obliges Member States to ensure that such 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.

The construction of Article 4 of the Framework Decision is grounded in the notion of "hate crime", intended as "a criminal offence committed with a bias motive", reflecting a definition commonly agreed by all EU Member States.²³

¹⁹ See Council of Europe, "Manual on hate speech", p. 49.

²⁰ See 2014 Commission Report, p 5.

²¹ See Council of Europe, "Manual on hate speech", p. 29.

²² See 2014 Commission Report, p. 6.

²³ Such definition is included in the OSCE Ministerial Council Decision No. 9/09 on combating hate crimes of 2 December 2009, agreed by consensus by all OSCE States, including all EU Member States. The concept behind such definition and its practical implication are further

This notion is comprised of two elements: a "base" ordinary criminal offence and the bias motivation of the offender – the latter to be understood as relating to the fact that:

- (i) the offender selected the target of the attack because of a protected characteristic; or
- (ii) an otherwise ordinary offence is aggravated by expressions of hostility towards a protected characteristic in its course, before or immediately after being committed.

As explained above (section 2.2), the 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.

In principle, a racist or xenophobic hate crime, within the meaning of Article 4 of the Framework Decision, can be any act or behaviour qualified as criminal by the national law of a Member State, when it is committed with a motivation relating to the real or perceived race, colour, religion, descent or national or ethnic origin of the victim (see above, section 2.2). These may therefore include acts or behaviours targeting, indistinctively, persons as well as property associated with persons who share or are perceived to be sharing one of the protected characteristics, or be otherwise be associated, connected or affiliated to a protected group.²⁴

The obligation imposed upon Member States by Article 4 of the Framework Decision is "objective oriented" and is aimed, in essence, at ensuring that when a crime is committed with racist or xenophobic motives, such motives are duly considered, properly unmasked and adequately addressed. Pursuant to Article 4 of the Framework Decision, the racist and xenophobic motivation shall be reflected in the criminal justice response: Member States are, thus, required to specifically address such motivation in their criminal codes or, alternatively, ensure that their courts take such motivation into consideration in the determination of the penalties.²⁵ Such an approach reflects the principles established in ECtHR jurisprudence, according to which the national legal system should provide adequate protection against racially motivated offences (see ECtHR, *Angelova and Iliev v Bulgaria*) so as to enable State authorities to unmask and effectively investigate possible racist motives behind acts of violence. Failing to do so, and thereby treating racially induced violence and brutality on an equal footing with cases that have no racist overtones, "would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights" (see ECtHR, *Secic v Croatia*).

As an instrument aiming at achieving a common, EU wide criminal law approach to certain racist and xenophobic conducts by means of a minimum approximation of Member States' criminal laws, the Framework Decision leaves Member States a wide margin of discretion as regards the manner by which this obligation is transposed into national legislation.

As illustrated in the 2014 Commission Report, the Member States generally opted for the so called "penalty enhancement" approach, and variably chose to transpose such obligation either by means of stipulating in their criminal codes that the racist and xenophobic motivation shall (or may) be considered an aggravating circumstance (a general one, applicable to all crimes; or a specific one, aggravating certain crimes, often identified among the particularly serious or violent ones); or by relying on general criminal law provisions, which courts would refer to in order to take into account the racist and xenophobic motivation in the determination of the penalties. A number of Member States whose framework mainly relies on general criminal law provisions chose to introduce targeted guidance for law enforcement, prosecution and/or judicial authorities. In other cases, Member States have introduced in their criminal codes specific offences incorporating the racist or xenophobic, and/or other types of bias, motivation (so called "substantive offence" approach). A limited number of Member States opted for a combination of the

explained by ODIHR, "*Hate crime laws – A practical guide*", p. 16.

²⁴ See also ODIHR, "*Hate crime laws – A practical guide*", p. 32.

²⁵ See also 2014 Commission Report, p. 6.

two approaches.²⁶

While all these approaches are acceptable (ECtHR, *Angelova and Iliev v Bulgaria*)²⁷, these legislative solutions entail different considerations as regards the operational guidelines which may support an effective implementation in practice of the obligation imposed by Article 4 at the various stages of the criminal justice process. Such considerations (see below, sections 3 and 4) may also point to the need for targeted and explicit guidance for national authorities – in particular, where the national criminal framework does not include any specific hate crime provisions.

It is, finally, important to note that the complex and twofold nature of the notion of hate crime is what distinguishes a hate crime from other types of offences motivated by prejudice, bias or discrimination, and in particular hate speech, which relates, as explained above (see section 2.3), to forms of expression of racism, xenophobia or other types of hatred which may be, as such, qualified as specific and standalone criminal offences, as it is the case with regards to the offence of public incitement pursuant to Article 1 of the Framework Decision. A correct and shared understanding of this conceptual distinction within and across national jurisdictions is key to avoid that, at operational level, the two concepts risk being conflated, with hate speech provisions being wrongfully used to address hate crime, as it is reported to often occur. This conflation can severely weaken the effectiveness of criminal justice responses, given that the different nature of these two types of offences raises very diverse issues as regards their investigation, prosecution, trial and sentencing, including the determination of effective, proportionate and dissuasive penalties (see below, section 4).

2.5. Offenders and victims

A full understanding by police, prosecutors and courts of the profile, attitudes and motivation of racist and xenophobic hate speech and hate crime offenders is very important to ensure that the crimes are dealt with effectively and are met with the appropriate criminal justice responses.

There is no single type of hate crime offender.²⁸ The procedures and tools guiding the assessment of hate crime offenders should be as much as possible flexible, allowing for the use of a standard or more tailor made methodology depending on the cases. Such an assessment will, furthermore, be more effective and comprehensive if it involves a multi-agency approach, with information drawn from a variety of sources, including not only, where relevant, intelligence services (for example to determine the existence of links between the offender and extremist groups), but also social services, for example in the area of health or housing. The involvement of psychosocial and psychological services can also provide value added, in particular in the most serious cases, and assist national authorities in gaining a better understanding of the offender's profile and motives.

Such an assessment is also important in order to establish the potential liability of legal persons with which the offender might have an affiliation, and which, in line with Article 5 of the Framework Decision, in certain circumstances defined therein, can be held liable where racist and xenophobic hate speech is committed for its benefit.

At the same time, it is equally important for criminal justice authorities to be able to fully understand the profile, position and attitudes of victims.

A heavy reliance on the assessment of the offender's profile and motives, which is not counterbalanced by a victim's oriented approach, can negatively impact on the impartiality and effectiveness of responses: victims are, in most cases, the most important witness and their contribution can be crucial for the gathering and assessment of evidence, as well as for gaining a better understanding of the impact of the

²⁶ An overview of different legal frameworks existing at national level is offered by the report by the EU Agency for Fundamental Rights, "*Hate crime recording and data collection practice across the EU*" (see in particular the country fiches and Annex I).

²⁷ See also ECRI General Policy Recommendation N°7 (revised) on National legislation to combat racism and racial discrimination, paragraph 21, and related explanatory memorandum.

²⁸ See in this respect ODIHR, "*Prosecuting Hate Crime – A practical guide*", p. 22.

crime on the victim and on the concerned group or community, and of the context in which the crime was committed (see also below, section 3.4). This also holds true for the purpose of establishing whether the crime was committed because of the offender's mistaken perception about the victim's membership in a protected group, or because of the victim's association, connection or affiliation with a protected group, rather than actual or perceived membership in that group (see ECtHR, *Skorjanec v Croatia*).

Being able to deal and cooperate with victims by acknowledging and addressing their needs and vulnerabilities is therefore crucial. Relevant standards relating to the protection of victims during criminal investigations and interviews, the protection of the victim's privacy during criminal proceedings and special measures which a victim may benefit from as a result of an individual assessment of specific protection needs during criminal proceedings, as set in particular in the EU Directive on the rights of victims of crime²⁹, are particularly relevant to guide the behaviour of criminal justice authorities in such cases, and help them identifying the appropriate support services the victim should be referred to. These may include psychosocial and psychological support services, which can prove particularly beneficial for victims of hate crime and hate speech, including online hate speech, within and beyond criminal proceedings.

Various mechanisms and procedures implemented at local, regional or national level can support a better interaction between victims and criminal justice authorities, such as the setting up of liaison structures, or the drawing up and application of specialised protocols. A compilation of key guiding principles on ensuring justice, protection and support for hate crime victims was drawn up by the EU High Level Group on combating racism, xenophobia and other forms of intolerance, also having regard to the minimum standards on the rights, support and protection of victims of crime set in EU legislation.³⁰ Practical guidance on working with hate crime victims has also been offered by ODIHR, covering issues such as addressing reluctance to report and cooperate with the authorities and building trust, assessing victims' credibility without bias or prejudice, addressing conflicts with victims and cooperating with victim counsel, advocates and support groups.³¹

A thorough understanding and assessment of both offender and victim's profiles can further help identify other types of intervention deemed appropriate, having regard, for example, to the offender's profile (for example, whether he or she is a young offender, or a recidivistic offender) and possible rehabilitation opportunities, to the victim's vulnerability to repeat victimisation, intimidation or retaliation (see in this respect, *mutatis mutandis*, ECtHR, *Dordevic v Croatia*), or to the risk of escalation, backlash or further harm to the general public or to specific individuals, groups or communities, also considering the level of hostility towards the target victim or group in the community concerned, existing community and inter-community relations and more general societal tensions.

3. ENSURING EFFECTIVE INVESTIGATION AND PROSECUTION

3.1. Jurisdiction and mutual cooperation

Article 9 of the Framework Decision establishes a series of criteria conferring jurisdiction to prosecute and investigate cases involving the offences referred to in the Framework Decision. These include the territoriality principle (i.e. cases where the offence is committed in whole or in part on a Member State's territory), the active personality principle (i.e. cases where the offence is committed by a national of a Member State) and the cases where the offence is committed for the benefit of a legal person having its head office in the territory of a Member State. Given that not all Member States' legal traditions recognise extraterritorial jurisdiction for all types of criminal offences, the Framework Decision also allows them not to establish, or to establish only in specific cases or circumstances, jurisdiction in cases where the offence

²⁹ 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, OJ L 315, 14.11.2012, p. 57-73.

³⁰ "Ensuring justice, protection and support for victims of hate crime and hate speech: 10 key guiding principles", available at http://ec.europa.eu/newsroom/just/document.cfm?doc_id=48874

³¹ See in particular ODIHR, "Prosecuting Hate Crime - A practical guide", p. 51.

is committed by one of its nationals or for the benefit of a legal person having its head office in its territory.

Article 9(2) of the Framework Decision sets specific rules on jurisdiction for cases where the conduct is committed through an information system, providing that Member State shall take the necessary measures to ensure that their jurisdiction extends to cases where: (a) the offender commits the conduct when physically present in its territory, whether or not the conduct involves material hosted on an information system in its territory; (b) the conduct involves material hosted on an information system in its territory, whether or not the offender commits the conduct when physically present in its territory. Challenges may arise for Member States to establish jurisdiction in these cases, which may need to be addressed through specific provisions where general provisions on jurisdiction are insufficient.

Where Member States' legislation does foresee extraterritorial jurisdiction, establishing channels for efficient cross-border cooperation among States' authorities, and in particular police, including for the purpose of information exchange, can prove very useful. In fact, as mentioned in the explanatory memorandum which accompanied the Commission's proposal, and as reflected in the preamble to the Framework Decision (see in particular recital (3)), one of the objectives of this instrument was to stimulate and improve, through further approximation of Member States' laws, cooperation among Member States to combat these offences.

3.2. Opening the case file: identifying and recording the offence

Victims of bias motivated offences are very often particularly vulnerable, and therefore reluctant to initiate legal proceedings.³² As stressed in the key guiding principles on ensuring justice, protection and support for hate crime victims drawn up by the EU High Level Group on combating racism, xenophobia and other forms of intolerance, preventing and addressing underreporting by setting in place tools and mechanisms which can support victims of hate speech and hate crime accessing justice remains therefore crucial: this may include initiatives aimed at increasing trust in the authorities, awareness raising campaigns, user friendly reporting tools and structures, and providing the possibility for third parties, like civil society organisations, to initiate proceedings on behalf of victims.³³

Acknowledging the issue of underreporting, Article 8 of the Framework Decision provides that each Member State shall take the necessary measures to ensure that investigations into or prosecution of the conducts defined in particular in Articles 1 and 2 of the Framework Decision shall not be dependent on a report or an accusation made by a victim of the conduct, at least in the most serious cases where the conduct has been committed on their territory. This is particularly important in relation to hate speech that is often not directed to one particular identifiable victim but rather to a protected group as a whole. From the information gathered by the Commission, all Member States have specific, often horizontal criminal law provisions which ensure *ex officio* investigation and/or prosecution of the majority of crimes, including hate speech and hate crimes, or otherwise have shown that this is the case in practice.³⁴

At the same time, it is important to recall that the prompt and effective investigation and prosecution of these conducts depends on the ability, in particular of reporting or first responding police officers, to identify and record the conduct as a potential hate speech or hate crime offence in the case file.

This requires thorough knowledge by reporting or first responding police officers of the concepts of hate speech and hate crime – based on a shared understanding of these concepts among national criminal justice authorities – and of the applicable national provisions which may be relevant for a preliminary legal qualification of the conduct (see above, section 2).

As regards in particular hate crimes, effective identification and recording require early recognition of a

³² See to that effect the explanatory memorandum accompanying the Commission's proposal, p. 10.

³³ "Ensuring justice, protection and support for victims of hate crime and hate speech: 10 key guiding principles", p. 8-9. See also the report from the EU Agency for Fundamental Rights, "Ensuring justice for hate crime victims: professional perspectives", p. 27.

³⁴ See already 2014 Commission Report, p. 9.

potential bias motivation of the conduct, which might not be immediate in cases where the bias motivation is not obvious and when, as it is often the case, the defendant does not acknowledge that the crime was bias motivated (see in this respect ECtHR, *Balász v Hungary*). The early recognition and filtering out of the bias motivation, including the identification of the discrimination ground(s) (including multiple or intersectional grounds) behind such bias motivation, bears particular relevance in terms of evidence gathering, which in turn is key to enable successful prosecution under relevant applicable national provisions.³⁵ This is the case especially where the consideration of the bias motivation of a criminal offence is based on the “penalty enhancement model”, in particular when this is achieved through general penalty enhancement provisions: in such cases, the assessment on the possible application of the penalty enhancement provisions normally comes at a later stage as part of the court’s sentencing discretion, so that the failure to identify the existence of possible bias motives of the crime in the recording phase may prevent such bias element from being communicated forward in the investigation and in the later stages of the criminal justice process, and thus not come to the court’s attention (see also section 3.3 below). Effective methodologies and practices for the identification and recording of the bias motivation can also contribute to the collection of reliable and comparable hate crime and hate speech data for statistical purposes, which can prove useful, among others, for the identification of other types of interventions, including preventative measures.

To that effect, a compilation of key guiding principles on improving the recording of hate crime by law enforcement authorities was drawn up by the EU High Level Group on combating racism, xenophobia and other forms of intolerance, with a view to assist law enforcement agencies in their efforts to ensure that law enforcement officials have the skills necessary to be able to identify the potential bias motivation of an offence, and that appropriate systems and tools are in place to enable them capturing and recording that information on file, which will help ensure adequate investigation and prosecution.³⁶ These include, at the operational level, the definition and consistent application of indicators to identify bias motivation – a practice which exists in a number of Member States.³⁷ Detailed guidance on the most important bias indicators and their use has also been offered by ODIHR.³⁸

In relation to the identification of online hate speech, ensuring digital expertise and capabilities of investigating crime in the online world at the level of law enforcement is crucial. Several Member States are using the expertise of specialised cyber police units for this purpose. Cooperation between Member States and online platforms is also central. This is recognised in the recent recommendation by the Commission on measures to effectively tackle illegal content online³⁹ which encourages Member States to establish legal obligations for hosting service providers to promptly inform law enforcement authorities, for the purposes of the prevention, investigation, detection or prosecution of criminal offences, of any evidence of alleged serious criminal offences involving a threat to the life or safety of persons obtained in the context of their activities for the removal or disabling of access to illegal content, in compliance with the applicable legal requirements, in particular regarding the protection of personal data protection.⁴⁰

3.3. Evidence gathering

The Framework Decision does not contain any provisions on the gathering of evidence in relation to the

³⁵ See also ODIHR, *Prosecuting Hate Crime – A practical guide*, p. 45.

³⁶ *Improving the recording of hate crime by law enforcement authorities – key guiding principles*, available at <http://fra.europa.eu/en/news/2017/improving-recording-hate-crime-law-enforcement-authorities>. The implementation of the guiding principles has been supported by country workshops and activities facilitated by the EU Agency for Fundamental Rights: <http://fra.europa.eu/en/project/2017/subgroup-methodologies-recording-and-collecting-data-hate-crime>

³⁷ A comprehensive overview of hate crime recording and data collection systems across the EU can be found in the report from the EU Agency for Fundamental Rights, *Hate crime recording and data collection practice across the EU*.

³⁸ See in particular ODIHR, *Prosecuting Hate Crime – A practical guide*, p. 46.

³⁹ Commission Recommendation of 1 March 2018 on measures to effectively tackle illegal content online, C(2018) 1177 final.

⁴⁰ In particular Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1-88.

conducts covered therein. The gathering of evidence is a responsibility of competent national authorities and is exclusively subject to the applicable national rules, procedures and practices.

In this respect, it is nonetheless important to bear in mind that, in hate speech and hate crime cases, the decision by police and prosecutors on the type of evidence to be gathered and the manner in which such evidence is to be looked for and gathered at the different stages of the procedure should take due account of the particular nature of these crimes.

In particular, given that hate speech and hate crimes are message crimes whose drivers are the bias and prejudice of the offender towards the protected group to which the victim belongs or is perceived to belong (or, where relevant, is or is perceived to be affiliated to), evidence gathering shall respond to the need of proving the offender's alleged bias motives. As expressions of prejudice, hatred and hostility are internal emotional states, while each case may require different thresholds of "sufficiency" and different gathering techniques, generally speaking bias motives will have to be inferred on the basis of their manifestations – i.e. the words, actions or circumstances surrounding the conduct, which may serve to prove the bias and prejudice of the offender (if needed, also on the basis of a specific assessment of the offender's mental and emotional state) and/or show that the selection of the victim by the offender was due to his or her actual or perceived membership in (or, where relevant, association, connection or affiliation to) a protected group. In this context, particular attention should be paid to the importance, where relevant, of making bias motives standing out among other motives or situational factors which may have determined the offender's conduct, and to cases where the offender's conduct may relate to multiple or intersectional bias motives.

Good evidence gathering capabilities are particularly important in hate crime cases, where the bias motivation may be less immediately apparent and proving it can be extremely difficult in practice. Yet it derives from ECtHR case-law that, in order to discharge their obligation to use the best endeavours to unmask the bias motive, authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence (ECtHR, *Nachova v Bulgaria*). In the absence of admissions or clear statements when committing the crime, the indications of the offender's motives may need to be looked for in statements or admissions made before or in the aftermath of committing the crime, and/or drawn from circumstantial evidence (see for example, in that respect, ECtHR, *Nachova v Bulgaria*, *Balász v Hungary* and *R.B. v Hungary*). In this context, a focus on the victim's perception on the motivation and circumstances of the crime can be crucial in order to fill the gaps left by the absence of clear and reliable direct evidence. The consistent reference to other bias indicators in the evidence gathering phase can also prove particularly useful as a means to identify and collect circumstantial evidence. Practical guidance on preparing and gathering evidence in hate crime cases, be it direct or circumstantial evidence, has been offered by ODIHR.⁴¹

The particular nature of hate speech and hate crimes is also to be taken into account when gathering proof of the impact of the crime on the victim, and assessing its evidential relevance. Reference goes in particular to gathering evidence of the psychological impact of the crime on the victim, be it either through medical documentation or by offering the victim, ideally with the help of specialized victim support services and/or psychosocial and psychological support services, the opportunity to fully present their experience and the impact suffered in the manner most appropriate.⁴²

Evidence gathering in cases of hate speech online has proved particularly challenging for national authorities and prosecutors. The anonymity behind which a perpetrator may hide in an online platform, together with the establishment of jurisdiction, is the main obstacle to evidence gathering for cases of hate speech online. To overcome the difficulty with anonymous postings, many specialised law enforcement units have developed practices whereby they use all the available information that they have

⁴¹ ODIHR, "Prosecuting Hate Crime - A practical guide", p. 56.

⁴² See also ODIHR, "Prosecuting Hate Crime - A practical guide", p. 63.

that could give leads as to the poster and cross-check this information against other sources online and off-line which when added together may help to identify the person who made the anonymous post. Exchanges on such strategies between law enforcements units, could help improving knowledge sharing and expertise in finding ways to identify perpetrators even when they have committed hate speech offences anonymously or using an alias.

Currently, law enforcement and judicial authorities cooperate to obtain electronic evidence by using mutual legal assistance procedures outside the European Union or the European Investigation Order⁴³ inside the European Union. However, these judicial cooperation tools are often too slow and cumbersome for obtaining electronic evidence, which can be transferred or deleted at the click of a mouse.

Voluntary cooperation between law enforcement and service providers based in the United States has developed as an alternative way of obtaining electronic evidence. This form of cooperation is generally faster than judicial cooperation, but service providers have different ways of handling requests for disclosing electronic evidence. In order for this channel to be effective, it is important that law enforcement has good knowledge of the procedures in place as well as the conditions upon which such evidence can be provided from third countries or service providers based in third countries. Ensuring, through training and provision of manuals outlining the relevant procedures for requests to the most relevant service providers, that all relevant law enforcement bodies have the necessary expertise, could help to facilitate and make maximal use of the possibility to request evidence through these channels.

To make it easier and faster for law enforcement and judicial authorities to obtain the electronic evidence they need to investigate and eventually prosecute criminals and terrorists, the Commission recently proposed new rules on cross-border access to electronic evidence.⁴⁴ In particular, the proposed Regulation on European Production and Preservation Orders introduces new rules to help authorities secure and obtain electronic evidence stored by service providers, irrespective of where the evidence is stored.⁴⁵

3.4. Initial qualification of the offence and charging

The initial qualification of the offence and the related choice of the most appropriate charges will be done by the competent national authorities in accordance with relevant applicable national legislation, which shall, in turn, be in line with the minimum standards set by the Framework Decision as regards the conducts covered therein.

When proceeding with the initial qualification of the offence and thus determining the most appropriate charges it is important that prosecutors take into account the importance to avoid the risk of conflation of hate speech and hate crime concepts (see above, section 2.4) as well as the possible existence, in the national legal framework, of overlapping, similar or complementary provisions which may be applicable to the same conduct.

As regards hate crimes, it is useful to recall that the choice by the national legislator of the manner by which the obligation under Article 4 of the Framework Decision is transposed into the national legal framework (see above, section 2.4) entails some practical consequences for the initial qualification and charging of the offence.

In particular, where the bias motivation makes the object of the so called "penalty enhancement" approach, it will be important that the initial qualification of the offence gives account not only of the base offence, but also of all the factual and evidential elements which may justify the application of the penalty enhancement provision. To that effect, where this is possible under applicable national procedural law, the

⁴³ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1-36.

⁴⁴ For more information, see https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/e-evidence-cross-border-access-electronic-evidence_en

⁴⁵ Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM/2018/225 final.

alleged bias motive should be clearly stated in the summons, so that it is brought to the attention of the adjudicating court. While in those cases where the conduct is criminalised by means of the so called "substantive offence" approach, alternative charging, if contemplated under national criminal procedural law, might be considered including in cases where the prosecutor in the initial charging feels that more evidence is needed to prove the bias motive – so as to enable the court, in those jurisdictions where this cannot be done on its own motion, to still sentence the offender on the basis of the hate crime substantive offence, should it consider that there is sufficient evidence proving the bias motive.

Prosecutors should also consider, where this is possible under applicable national procedural law, illustrating their assessment as to the qualification of the conduct as a hate speech or hate crime offence in the event of a decision not to prosecute, also as a means to allow the victim to exercise in the best possible way his or her right to require a review of a prosecutor's decision not to prosecute.⁴⁶

4. SENTENCING

4.1. Determination of the penalties

The determination of penalties to be applied in individual hate speech and hate crime cases is subject to the discretion of the adjudicating national court, which shall proceed in the light of the facts and circumstances of the specific case, in accordance with relevant applicable national legislation.

As regards racist and xenophobic hate speech, Article 3 of the Framework Decision sets some minimum standards as regards penalties, providing that each Member State shall take the necessary measures to ensure that the conducts referred to in Articles 1 and 2 is punishable by effective, proportionate and dissuasive criminal penalties. Paragraph 2 of the same provision specifies that Member States shall ensure that the conduct referred to in Article 1 is punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment. The Framework Decision leaves to the discretion of the Member States to establish the lower ceiling for the determination of penalties for hate speech, which may range from ancillary or alternative sanctions such as pecuniary sanctions to community service or, deprivation of certain civil or political rights.

Article 6 of the Framework Decision also provides that effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and other penalties, shall be applicable to legal persons held liable pursuant to Article 5 of the Framework Decision.

National judges will have full discretion to determine the penalties on a case-by case basis: in doing so, they shall take into account the general principle of proportionality in line with Article 3 of the Framework Decision. Guidance on the interpretation of the principle of proportionality in relation to penalties imposed in hate speech cases can be found in the case-law of the ECtHR, having regard to considerations concerning the nature and severity of the penalties imposed and their possible deterrent effect on the exercise of freedom of expression (see for example, ECtHR, *Incal v Turkey* and *Erbakan v Turkey*).

The Framework Decision does not contain any specific requirements as regards penalties for racist and xenophobic hate crimes. Nonetheless, the formulation of Article 4 implies that the racist and xenophobic motivation of crimes shall be taken into account when sentencing, by means of establishing the aggravated nature of the crime or in any case by considering such motivation when determining the penalty to be applied (see above, section 2.4).

While in those cases where the conduct is criminalised by means of the so called "substantive offence" approach the penalties for hate crime offences will normally be established in the relevant criminal law provisions, where the bias motivation makes the object of the so called "general penalty enhancement"

⁴⁶ See Article 11 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.

approach the uplift of the penalty will be subject to the criteria established by the general provisions applicable. Where applicable provisions do not specify the degree or specific method of calculation of the increased sentence for hate crime cases, sentencing guidelines may assist judges in the exercise of their discretion.

Where possible under the national procedural framework, courts should consider stating explicitly on the record the reasons and *rationale* behind the application of a penalty enhancement, both to maximise, where relevant, the declaratory value of the sentence on the offender, the victim but also society at large, and to allow for a review, where available, of the consideration given by the sentencing court to the bias motive, as well as to ensure that any history of bias-motivated offending can be known to criminal justice authorities.⁴⁷

It should be noted that all the above considerations are of course without prejudice to the assessment by the competent national authorities of the opportunity of other – complementary or alternative – types of intervention, having regard to the nature and seriousness of the offence in question.

4.2. Restitution and compensation

The Framework Decision does not contain any provisions on restitution and compensation from the offender for victims in relation to the conducts covered therein.

Restitution or compensation in hate speech and hate crime cases should therefore be considered and decided upon by the sentencing court or any other authority competent under national law, having regard to the particular nature of these offences and the impact they have on victims, in accordance with applicable national and EU law.⁴⁸ Any such decision should duly take into account the needs and wishes of the victim.

5. IMPLEMENTATION OF THE GUIDANCE NOTE AND ACCOMPANYING MEASURES

This guidance document is ultimately meant to assist the Member States in setting in place appropriate non-legislative and policy measures which shall guide and inform the day-to-day work of the competent national criminal justice authorities responsible for the effective application and enforcement on the ground of national hate crime and hate speech legislation – ranging from frontline police officers, to investigating officers and investigation coordinators, to prosecutors and prosecution services and judges. In view of the differences in the national criminal and procedural law frameworks and in the organisation, structure and competences of relevant authorities in the Member States, it is recommended that each Member State translates or incorporates this guidance into targeted operational guidelines, instructions or protocols adapted to the relevant national legal and institutional framework.

A wide range of measures to be implemented at local, regional or national level can further be considered in order to offer criminal justice authorities guidance, expertise and dedicated tools and structures which can support effective investigation, prosecution and sentencing of hate speech and hate crime cases. These may include specialised training (see, in this respect, the key guiding principles on hate crime training compiled by the EU High Level Group on combating racism, xenophobia and other forms of intolerance)⁴⁹; the setting up of specialised investigating and/or prosecuting units or departments; the setting up of coordinating bodies, units or departments; operational measures and mechanisms enabling the criminal justice authorities to better liaise with victims; frameworks or protocols of cooperation

⁴⁷ See also ODIHR, "*Hate Crime Laws - A practical guide*", p. 35-37.

⁴⁸ See in particular, Article 16 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 as well as the standards set in Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261, 6.8.2004, p. 15-18.

⁴⁹ "*Hate crime training for law enforcement and criminal justice authorities: 10 key guiding principles*", available at http://ec.europa.eu/newsroom/document.cfm?doc_id=43050

between criminal justice authorities and civil society or community based organisations.⁵⁰

Comprehensive policies, procedures or protocols addressing all aspects of the criminal justice process can also help overcome fragmentation and achieve the cooperation and coordination between police, prosecution and judicial authorities necessary to ensure that hate speech and hate crime cases are dealt with effectively and consistently at all stages of the criminal justice process and eventually met with appropriate responses. Such policies, procedures or protocols can also benefit from being integrated in broader national policy frameworks, strategies or plans of action tackling racism and intolerance, also as a means to ensure better coordination and cooperation with and among other relevant State departments and bodies involved in the definition and implementation of laws, measures and policies related to other relevant areas such as non-discrimination, victims' support, policing.

In addition, as already underlined in the 2014 Commission Report, reliable and comparable data on incidents of hate speech and hate crime and on their case history, including the level of prosecution and sentences, should be systematically recorded and collected, in order to assess criminal justice and other type of responses, and to assess under-recording and under-reporting in the light of the prevalence and nature of the offences.⁵¹ Member States should, in this context, build on the useful research and guidance offered by FRA⁵², ODIHR⁵³ and ECRI⁵⁴, and make use of the expertise and assistance offered by these bodies.

When it comes to hate speech and given the fact that this phenomena is increasingly moving "online" and features frequently on social media where it can spread virally, the work of enforcing the Framework Decision at national level against the individual offenders must also be complemented with other types of action, including actions ensuring that illegal hate speech is also expeditiously assessed and, where necessary, removed by online intermediaries and social media platforms.⁵⁵

Since 2016 IT companies, civil society and Member State authorities work together under the Code of conduct on countering illegal hate speech online to ensure the removal of illegal hate speech on social media platform.⁵⁶ The monitoring of the Code of conduct has showed good progress both in terms of rates of removal and time to assessment of notices from civil society organisations and national authorities. Improving the notification of illegal content to IT companies can also strengthen the investigation and prosecution of online hate speech, insofar as it contributes to the identification of cases: the monitoring of the Code of conduct revealed that in addition to notifying the content to the IT companies, the civil society organisations that took part in the monitoring, in parallel also reported around 17% of the identified cases of deemed illegal hate speech to the police, public prosecutor's bodies or other national authorities.

⁵⁰ See to that effect the 2014 Commission Report, p. 9. An overview of existing national practices in this area is offered by the "*Compendium of Practices*" developed by the EU Agency of Fundamental Rights, accessible at <http://fra.europa.eu/en/theme/hate-crime/compendium-practices>. As regards hate crimes, see also ODIHR, "*Prosecuting Hate Crime - A practical guide*", p. 75.

⁵¹ 2014 Commission Report, p. 9.

⁵² See in particular the report by the EU Agency for Fundamental Rights, "*Hate crime recording and data collection practice across the EU*", which provides a source of information to assist law enforcement agencies in the EU in their efforts to improve how they record hate crime, but also collect and publish hate crime data.

⁵³ See in particular ODIHR, "*Hate crime Data Collection and Monitoring Mechanisms – A practical guide*".

⁵⁴ See in particular General Policy Recommendation No. 4 on national surveys on the experience and perception of discrimination and racism from the point of view of potential victims.

⁵⁵ See also, in this respect, ECRI General Policy Recommendation No. 6 on Combating the dissemination of racist, xenophobia and antisemitic material via the Internet and General Policy Recommendation No. 15 on Combating hate speech.

⁵⁶ For more information, see http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300