

**FRA Opinion – 02/2013**  
**Framework Decision on Racism and Xenophobia**

Vienna, 15 October 2013

**Opinion of the  
European Union Agency for Fundamental Rights  
on the  
Framework Decision on Racism and Xenophobia –  
with special attention to the rights of victims of  
crime**

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),

Bearing in mind the Treaty on the European Union (TEU), in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (the Charter),

In accordance with Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, in particular Article 2 with the objective of FRA “to provide the relevant institutions, bodies, offices and agencies of the Community and its EU Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights”,<sup>1</sup>

Having regard to Article 4 (1) (d) of Council Regulation 168/2007, with the task of FRA to “formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the EU Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission”,

Having regard to the Council Framework Decision 2008/913/JHA of November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (Framework Decision on Racism and Xenophobia),<sup>2</sup>

Taking note of Recital (1) of this Council Framework Decision, stating that “racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States”,

Having regard to the international – United Nations and Council of Europe – standards relating to rights of victims of crime, in particular related to racism and xenophobia, including the International Covenant on Civil and Political Rights (ICCPR, 1966, Articles 20 and 26); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965 Articles 4 and 5); and General Comment No. 35 by the Committee on the Elimination of Racial Discrimination, on combating racist hate speech (CERD/C/GC/35, 26 September 2013); the European Convention on Human Rights (ECHR, 1950, Article 14 as well as Protocol No. 12 to the Convention); and the Council of Europe Convention on Cybercrime (2001) and its Additional Protocol (2003), concerning “criminalisation of acts of a racist and xenophobic nature committed through computer systems”.

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<sup>1</sup> Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L 53.

<sup>2</sup> 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, OJ 2008 L 328, p. 55.

Having regard to the request of the Council of the European Union Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP) of 18 June 2013 for an opinion of the FRA on fundamental rights issues associated with victims of crime "in the context of the review of the Framework Decision on Racism and Xenophobia",<sup>3</sup>

Having regard to the FRA opinion 1/2013 of 1 October 2013 on the situation of equality in the European Union 10 years on from initial implementation of the equality directives,<sup>4</sup>

Building on the evidence collected and analysed by FRA, including its large scale surveys, as well as its thematic and annual reports.

SUBMITS THE FOLLOWING OPINION:

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<sup>3</sup> Council of the European Union, 11684/13, FREMP 98, Outcome of proceedings, 27 June 2013.

<sup>4</sup> FRA (European Union Agency for Fundamental Rights) (2013), Opinion of the European Union Agency for Fundamental Rights on the situation of equality in the European Union 10 years on from initial implementation of the equality directives, FRA opinion 1/2013 EU equality directives, Vienna, 1 October 2013, available at: [http://fra.europa.eu/sites/default/files/fra-2013\\_opinion-eu-equality-directives.pdf](http://fra.europa.eu/sites/default/files/fra-2013_opinion-eu-equality-directives.pdf).

# Introduction

FRA welcomes the request of the Council of the European Union (Council), as done through the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP), of 18 June 2013 to provide advice on the Framework Decision on Racism and Xenophobia. In particular, the Council request concerns two specific aspects:

“Assessment of the impact of [the Framework Decision on Racism and Xenophobia] on combating certain forms and expressions of racism and xenophobia by means of criminal law on the rights of the victims of crimes motivated by hatred and prejudice, including racism and xenophobia;

Is there anything further that needs to be done at [European Union] level to better protect and acknowledge the rights of victims of crimes motivated by hatred and prejudice, including racism and xenophobia?”

This FRA opinion contributes to the Council’s review of the Framework Decision on Racism and Xenophobia, due by 28 November 2013 under Article 10 (3) of the same Framework Decision.

The Framework Decision on Racism and Xenophobia represents a milestone in combating crimes committed with a racist motive. It establishes, for the first time, legally binding minimum standards in the EU for counter-acting severe forms of racism and xenophobia by criminal law definitions and sufficiently deterrent criminal sanctions.

The framework decision contains two parts. The first and main component aims at harmonising EU Member States’ penal laws concerning the definition of criminal offences and sanctions, in particular certain forms of public expressions of racism and xenophobia, forms that are commonly referred to as ‘hate speech’<sup>5</sup> and ‘negationism’.<sup>6</sup> Negationism refers to “publicly condoning, denying or grossly trivialising” genocide and other severe crimes as defined in particular documents.<sup>7</sup>

A second component is to be found in Article 4 of the framework decision. It obliges EU Member States’ authorities – including the police, public prosecutors and criminal courts – to take into consideration any racist or xenophobic motivation behind a criminal offence. This provision relates to the right of victims of crime to have courts render visible – that is, ‘unmask’ – any discriminatory motives of offenders.<sup>8</sup> The crucial

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<sup>5</sup> Article 1 (1) (a) and (b).

<sup>6</sup> Article 1 (1) (c) and (d).

<sup>7</sup> See Article 1 (1) (c) and (d) of the Framework Decision with reference to genocide, crimes against humanity and war crimes, as defined in the Statute of the International Criminal Court; see also crimes as defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945.

<sup>8</sup> European Court of Human Rights (ECtHR), *Nachova and Others v. Bulgaria*, Nos. 43577/98 and 43579/98, 6 July 2005.

difference in comparison to the first component is that Article 4 of the framework decision does not oblige EU Member States to incriminate or punish any particular behaviour. Only if Member States decide to criminalise certain conduct, does this decision come with the requirement, and corresponding right of victims, that state authorities be ready to distinguish between offences *per se* and offences committed with a discriminatory motive.

A crime is committed with a discriminatory motive if it is based on the contempt, disdain or rejection of individuals to whom a certain label, like those listed in Article 21 of the Charter of Fundamental Rights of the European Union (Charter) on non-discrimination, is thought to apply.<sup>9</sup>

As the Council has asked FRA to submit an opinion concerning the rights of victims of “crimes motivated by hatred and prejudice” (bias-motivated crimes or bias crimes),<sup>10</sup> this opinion does not address the question of which forms of discriminatory conduct – and in particular which forms of hate speech or negationism – should be criminalised. But acts of so-called hate speech, if criminalised, will regularly qualify as crimes committed with a discriminatory motive and hence activate victims’ rights.

The impact of bias-motivated crime can easily be underestimated, in particular if the focus is exclusively on what was said by the offenders and ignores the experience of the victim. Evidence shows that hate crime strongly impacts on victims, in part because they are abused for what they are perceived to be. They are forced to accept that their identity was targeted and that they, for that reason, remain at risk of repeat victimisation. Victims of hate crime may, therefore, experience symptoms of trauma. It is in the intensity of feelings of fear, anxiety and loss of confidence in others where their experiences can differ most significantly from those of victims of crime such as burglary or theft where these crimes were not motivated by bias. Even in cases of violent crimes, the physical harm is often less significant than the accompanying sense of violation and humiliation.<sup>11</sup> In addition, hate crime affects not only victims but also their families and their wider communities as these groups may share the perceived characteristics on the basis of which the perpetrator targeted the victim.<sup>12</sup>

Concretely, hate crime ranges from everyday acts committed by individuals on the street or over the internet, to various large-scale crimes. Whenever individuals are targeted and victimised by acts of hate speech committed with a discriminatory motive, they have all the rights of victims of bias-motivated crime. In the sense of the Framework Decision on Racism and Xenophobia, the same holds true with regard to acts of negationism. If negating genocide or crimes against humanity is motivated by

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<sup>9</sup> For further analysis, see FRA (2012), *Making hate crime visible in the European Union: acknowledging victims’ rights*, Luxembourg, Publications Office of the European Union (Publications Office), pp. 18–24, available at: [http://fra.europa.eu/sites/default/files/fra-2012\\_hate-crime.pdf](http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf).

<sup>10</sup> The term hate crime is used to encapsulate bias or bias-motivated crime and hate speech. Bias or bias-motivated crime can more exactly be termed ‘crimes committed with a discriminatory motive’.

<sup>11</sup> See FRA (2012), *Making hate crime visible in the European Union: acknowledging victims’ rights*, Luxembourg, Publications Office, p. 20.

<sup>12</sup> *Ibid.*

discriminatory attitudes directed against one or more groups of victims of these crimes then the acts of negationism qualify as bias-motivated crimes.

This FRA opinion is divided into two sections; one corresponding to each of the Council's requests. The first section briefly assesses the impact of the Framework Decision on Racism and Xenophobia on the rights of victims and contrasts this with an assessment of certain aspects of victims' rights recognised in other instruments of secondary EU legislation. The second section explores options and requirements to improve the situation of victims' rights in the area of hate crime based on FRA research.

# 1. The impact of the Framework Decision on the rights of victims

The approximation of EU Member States' criminal codes with regard to certain offences in the Framework Decision on Racism and Xenophobia obliges Member States to adopt criminal law definitions covering all conduct coming under Articles 1 and 2 of the Framework Decision, unless such definitions already exist.

The Framework Decision obliges EU Member States to ensure that the racist motives behind offences are not overlooked but that criminal justice systems give them appropriate attention (Article 4). This provision of the Framework Decision reflects the crucial right of victims of racist crime as required by well-established case law of the European Court of Human Rights (ECtHR).<sup>13</sup>

Article 8 of the Framework Decision obliges EU Member States to ensure that investigations do not depend on a report or an accusation made by a victim. While this provision clearly and importantly aims to unburden victims, it is also expressly limited to victimisation under Articles 1 and 2 of the Framework Decision. Hence, it does not extend to victims of bias-motivated crime in the sense of Article 4 of the Framework Decision.

Compared with other recent instruments relating to the rights of victims, such as the Trafficking Directive,<sup>14</sup> the Directive on Child Sexual Abuse and Exploitation,<sup>15</sup> and the Victims' Directive,<sup>16</sup> the Framework Decision on Racism and Xenophobia pays less attention to the rights of victims. In particular, the Victims' Directive, which was adopted in October 2012 and is due to be transposed at Member State level by November 2015, comprehensively covers the rights of victims of crime to: recognition; effective access to justice; participation in proceedings; and to protection against repeat victimisation. But all three of the directives just mentioned deal with certain rights of crime victims; for example, they include provisions ensuring the effectiveness of investigations and prosecution, the rights of victims to the provision of assistance and victim support, the rights of victims to legal advice, representation and legal aid or the protection of victims against secondary victimisation. None of these rights are mentioned in the Framework Decision on Racism and Xenophobia.

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<sup>13</sup> For a brief outline of this case law, see FRA (2012), *Making hate crime visible in the European Union: acknowledging victims' rights*, Luxembourg, Publications Office, pp. 15–24.

<sup>14</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ 2011 L 101, p. 1.

<sup>15</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ 2011 L 335, p. 1.

<sup>16</sup> 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, OJ 2012 L 315, p. 57.

Another restriction derives from the fact that the Framework Decision relates to crimes committed with a racist or xenophobic motivation and, to a certain extent, also to crimes motivated by bias against certain religious groups, but it does not relate to other characteristics protected by Article 21 of the Charter. The Victims' Directive, in contrast, deals with all forms of discriminatory motivations on an equal footing. The Directive on Audiovisual Media Services, which seeks to regulate the single European market, including combating discrimination, also goes beyond racism to cover discrimination based on sex, religion or belief, disability, age or sexual orientation.<sup>17</sup>

In this regard, it is worthwhile to recall that the Treaty of Lisbon introduced a new horizontal obligation for the EU legislator in Article 10 of the Treaty of the Functioning of the European Union (TFEU): "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." The EU has, therefore, to engage in fighting discrimination based on all of the grounds as listed in Article 19 of the TFEU, including in the context of criminal law.

Article 83 (1) of the TFEU refers to "the definition of criminal offences" in "areas of particularly serious crime". Since any offence, in theory, can be committed with a discriminatory motive, 'hate crime' could comprise all possible offences committed. Nevertheless, hate crime neither refers to a type of offence, nor to an area of crime in the sense of Article 83 (1) of the TFEU. Many areas of crime listed in Article 83 (1) of the TFEU may occur as hate crimes. It should be noted that many other relevant offences and areas of crimes are not listed in this TFEU article. This cannot imply, however, that the EU is excluded from fighting discriminatory motivation in the context of such non-listed criminal offences or areas of crime: since the right to see that a discriminatory motivation is unmasked and properly addressed is the right of a victim, all policies and measures aimed at meeting this right can be based on Article 82 (2) (c) of the TFEU. In doing so, the EU legislator has to ensure that not only one ground of discrimination is covered but also all of the other grounds as listed in the horizontal clause in Article 10 of the TFEU.

Whereas the relevance of the Framework Decision on Racism and Xenophobia for victims' rights remains limited, Article 82 (2) (b) and (c) of the TFEU can form the legal base for a great number of EU actions that could help "to better protect and acknowledge the rights of victims of crimes motivated by hatred and prejudice, including racism and xenophobia". In addition, there is much room for EU Member States to further improve the situation of such victims in areas falling within the scope of EU law.

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<sup>17</sup> 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), OJ 2010 L 95, p. 1, Art. 9 (1) (c) (ii). It does, however, include a broad reference to "human dignity" in Art. 9 (1) (c) (i).



## 2. Evidence-based advice: proposed action within the EU

This section identifies areas of concern where FRA is of the opinion that EU action could and should improve the situation of the rights of victims of hate crime. This section responds to the Council's second request, on what actions, in addition to the Framework Decision on Racism and Xenophobia, are needed at EU level. Several proposals would simply bring the Framework Decision inline with the Victims' Directive.

Noting that FRA currently has the most extensive set of EU-wide data on different groups' experiences of what they perceive to be hate-motivated victimisation – based on surveys with these groups – the Agency is able to draw on this data, together with other reports produced by it, when making suggestions to EU institutions concerning hate crime. In this regard, FRA suggests that EU institutions act to assist, encourage, provide incentives for and require Member States to take action in a number of areas. To address the problems identified by FRA research findings, the actions include the full range of considerations, from data collection, awareness-raising and trust in police to enhanced penalties and judicial review.

Recent FRA research into various forms and aspects of hate crime offers policy makers at EU and Member State level a robust foundation on which to take evidence-based decisions.

- *EU-MIDIS Data in Focus 6: Minorities as victims of crime*, published by FRA in 2012,<sup>18</sup> looked into rates of criminal victimisation with respect to those respondents who perceived that this was due to bias motivation; people's experiences when reporting crime; and on their awareness of the rights they hold when attempting to access or engage with police. This study is based on a large-scale survey, the first EU-wide survey to ask immigrant and ethnic minority groups about their experiences of discrimination and criminal victimisation in everyday life. Similar to the FRA survey on gender-based violence mentioned later, it is based on 23,500 face-to-face questionnaire interviews lasting on average almost one hour.
- *Making hate crime visible in the European Union: acknowledging victims' rights (Making hate crime visible)*,<sup>19</sup> enquired into current models and mechanisms of data collection, their merits and flaws. The report also aims

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<sup>18</sup> FRA (2012), *EU-MIDIS Data in Focus 6: Minorities as victims of crime*, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2012/eu-midis-data-focus-report-6-minorities-victims-crime>. For more information, see: FRA (2010), *EU-MIDIS: Main results report*, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/survey/2012/eu-midis-european-union-minorities-and-discrimination-survey>.

<sup>19</sup> FRA (2012), *Making hate crime visible in the European Union: acknowledging victims' rights*, Luxembourg, Publications Office.

to clarify basic concepts and the terminology used for drafting hate crime legislation and policies.

- A survey on discrimination and hate crimes against Jews in the eight EU Member States<sup>20</sup> that are home to some 90 % of the estimated Jewish population in the EU collected information allowing for a comprehensive analysis of the lived experience of antisemitism and its effect on the lives of Jewish people.<sup>21</sup> The survey, due to be presented in the fourth quarter of 2013, collected data on issues including perceptions of the extent to which antisemitism is widespread in the public sphere; the perceived threat of becoming victims of antisemitic attacks; experiences of crimes motivated by antisemitism, such as vandalism, physical assault or threats; experiences of specific forms of harassment, for example through the use of emails, text messages or the internet and social media; and the reporting of antisemitic incidents to the police or any other organisation and, in cases of non-reporting, the reasons for this. This study is based on an internet survey with some 5,800 respondents.
- The FRA EU LGBT survey on discrimination and victimisation of lesbian, gay, bisexual and transgender (LGBT) persons in EU Member States<sup>22</sup> provides evidence on a range of issues, including homophobic and transphobic crime and speech. The survey, presented in the second quarter of 2013, presents data on, for example, reporting and non-reporting of incidents, and reasons for non-reporting; levels of confidence in the authorities; behaviour of public servants and types of perpetrators. This study is based on an internet survey with some 93,000 respondents.
- Another FRA survey, to be presented in the first quarter of 2014, concerns gender-based violence against women in the EU. On the basis of a representative sample of more than 42,000 women interviewed on their experiences of physical, sexual and psychological violence, it will allow an assessment of levels, forms and contexts of victimisation, as well as the extent to which women report incidents of violence to the police and, where relevant, the reasons for non-reporting. In the context of this opinion, the results are relevant because they show the extent of gender-based violence experienced by women – that is, crimes that disproportionately affect women, such as sexual assault, rape and intimate partner violence, and which are predominantly perpetrated by men according to the survey findings (as the survey asked about the gender of perpetrators). The results of this survey can further support those of other FRA surveys that have highlighted issues such as trust in the police and non-reporting of particular crimes.

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<sup>20</sup> Belgium, France, Germany, Hungary, Italy, Latvia, Sweden and the United Kingdom.

<sup>21</sup> FRA (forthcoming), *Discrimination and Hate Crime against Jews in EU Member States: Experiences and Perceptions of Antisemitism*. The survey results will be published in November 2013.

<sup>22</sup> FRA (2013), *EU LGBT survey. European Union lesbian, gay, bisexual and transgender survey. Results at a glance*, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2013/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-results>.

## 2.1 Bias-motivated crimes: cover all protected characteristics

Hate crime is not necessarily carried out by persons belonging to ‘extremist’ groups as it is often motivated by feelings of hostility or bias held by persons who are not associated with such groups.<sup>23</sup> Therefore, the pervasiveness and ‘normality’ of many hate crimes needs to be highlighted. Data gathered by the FRA underline the need to address the ordinariness of many offenders alongside the common focus on right-wing extremist groups as perpetrators of hate crime.<sup>24</sup>

Data collected by FRA consistently show that violence and crimes motivated by a person’s race, religious belief, disability, sexual orientation or gender identity – often referred to as ‘hate crime’ – are a daily reality throughout the EU. FRA survey findings show, for example, that:

- on average, 18 % of Roma and of Sub-Saharan Africans in the EU-MIDIS survey were victims of one or more incidents of assault, threat or serious harassment with a perceived racist motive in the 12 months leading up to the survey;<sup>25</sup>
- in the year preceding the EU LGBT survey, 6 % of all respondents were attacked or threatened with violence which they thought happened partly or completely because they were perceived to be LGBT. In total, a quarter (26 %) of the LGBT people surveyed in the EU experienced violence (for any reason) in the five years preceding the survey, with the figure rising to one in three (35 %) for transgender people;<sup>26</sup>
- In total, one in five respondents (21 %) to the survey on discrimination and hate crime against Jews had personally experienced at least one incident of antisemitic verbal insult or harassment, and/or a physical attack in the past 12 months.

**Action 1:** When implementing the Victims’ Directive and having regard to the rights of victims of crimes committed with a discriminatory motive, EU Member States should interpret ‘discrimination’ as relating to all characteristics protected under Article 21 of the Charter.

<sup>23</sup> FRA (2013), *Fundamental rights: Challenges and achievements in 2012*, Annual report 2012, Luxembourg, Publications Office, p. 189.

<sup>24</sup> FRA (2012), *Making hate crime visible in the European Union: acknowledging victims’ rights*, Luxembourg, Publications Office, p. 23.

<sup>25</sup> FRA (2010), *EU-MIDIS: Main results report*, Luxembourg, Publications Office, p. 67. EU-MIDIS interviewed Roma in seven and Sub-Saharan Africans in eight EU Member States.

<sup>26</sup> FRA (2013), *EU LGBT survey. Results at a glance*, Luxembourg, Publications Office, pp. 21–22.

In Article 1 (2), the Victims' Directive underlines that the rights of victims apply in "a non-discriminatory manner, including with respect to their residence status." As a basic principle, criminal justice systems should deal with all grounds of discrimination covered by Article 21 of the Charter on an equal footing.<sup>27</sup> As the ECtHR has consistently emphasised, any discriminatory motive underlying victimisation should be unmasked. This applies not only to a bias based on race but also on the other grounds listed in Article 21 of the Charter. Treating all victims of hate crime equally is in line with trends at national level. In recent years, more and more Member States have included protected characteristics far beyond racism and xenophobia in their hate crime legislation.<sup>28</sup>

## 2.2. Bias: unmask bias motivations and encourage reporting

FRA survey findings show that victims of crime often do not report crimes, either to law enforcement agencies, the criminal justice system, non-governmental organisations (NGOs) or victim support groups. Specifically, the survey findings show that:

- between 57 % and 74 % of incidents of assault or threat suffered by members of minority or migrant groups in the EU are not reported to the police by their victims (EU-MIDIS);<sup>29</sup>
- between 75 % and 90 % of incidents of serious harassment of immigrants and ethnic minorities are not reported to the police;<sup>30</sup>
- one in five (22 %) of the most serious incidents of violence that happened to EU LGBT survey respondents in the last five years because they are LGBT are brought to the attention of the police. Almost one third (29 %) of those who do not report this incident fear a homophobic or transphobic reaction from the police (EU LGBT survey);<sup>31</sup>

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<sup>27</sup> See also: FRA (2011), Opinion of the European Union Agency for Fundamental Rights on the Proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (COM(2011) 32 final), FRA opinion – 1/2011 Passenger Name Record, Vienna, 14 June 2011, p.7, available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/1786-FRA-PNR-Opinion-2011\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1786-FRA-PNR-Opinion-2011_EN.pdf); and FRA (2012), Opinion of the European Union Agency for Fundamental Rights on the proposed data protection reform package, FRA opinion – 2/2012, Data protection reform package, Vienna, pp. 22, available at: <http://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf>.

<sup>28</sup> See FRA (2012), *Making hate crime visible in the European Union: acknowledging victims' rights*, Luxembourg, Publications Office, p. 25; FRA (2013), *Fundamental rights: Challenges and achievements in 2012*, Annual report 2012, Luxembourg, Publications Office, pp. 268-269.

<sup>29</sup> FRA (2012), *EU-MIDIS Data in Focus 6: Minorities as victims of crime*, Luxembourg, Publications Office, p. 14.

<sup>30</sup> *Ibid.*

<sup>31</sup> FRA (2013), *EU LGBT survey: Results at a glance*, Luxembourg, Publications Office, p. 24.

- three quarters (76 %) of the Jewish people who say they were victims of antisemitic harassment in the past five years do not report the most serious incident, namely the one that affected them the most, to the police or to any other organisation (Survey on discrimination and hate crime against Jews).<sup>32</sup>

The FRA survey on discrimination and hate crimes against Jews provides examples as to why victims do not report the incidents to police. The study asked respondents why they have not reported the most serious incident of antisemitic harassment to the police. Those who have not contacted the police were presented with a list of possible reasons why they might not contact the police – respondents could indicate all options applicable to their case. Almost half (47 %) of the respondents who have not reported the incident say that nothing would have changed had they done so. About one quarter (27 %) say that they did not report either because this type of incident happens all the time, or because they handled the situation themselves or with the help of family or friends (23 %). Almost one in five (18 %) consider that reporting to the police is too bureaucratic or time consuming. See Figure 1 in the Annex for details.

Similarly, in the survey on gender-based violence against women, the main reasons for non-reporting include that ‘nothing would change’ as a result of reporting incidents, that ‘such incidents happen all the time’ or that they ‘did not trust the police’.

## 2.2.1 Discriminatory motives: use clear language, unmask bias

**Action 2:** EU Member States are asked to review that in cases of crime committed with a discriminatory motive, the police, prosecution services and courts acknowledge and pay proper attention to the discriminatory nature of the offence. In this regard, it is important that the terminology used to refer to bias-motivated crime is appropriate to highlight the discriminatory motives for which such crimes are committed. The use of political categories, such as ‘right-wing extremism’ or ‘left-wing extremism’ can lead to hate crimes being overlooked and victims not being acknowledged as victims of discriminatory crimes, in particular where crimes are not perpetrated by members of extremist groups.

Labeling racist, xenophobic, homophobic or antisemitic crimes committed by organised groups or networks as ‘right-wing extremist’ can have the effect of obscuring the element of discrimination and of concealing the particular victimisation suffered by

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<sup>32</sup> FRA (forthcoming), *Discrimination and Hate Crime against Jews in EU Member States: Experiences and Perceptions of Antisemitism*. The survey results will be published in November 2013.

victims of hate crime. Research also shows that right-wing extremism is a relatively rare phenomenon.<sup>33</sup>

**Action 3:** EU Member States could assess the extent to which the enhancement of penalties can be applied as a means of ensuring that bias motives are taken into consideration in a timely fashion and throughout criminal proceedings.

EU Member States' law enforcement agencies and criminal justice systems should be attentive to any indication of discriminatory motives when investigating, prosecuting and judging crimes. The police, public prosecutors and judges need to have a shared understanding of what constitutes hate crime as well as of the necessity to recognise such crimes and to acknowledge victims.

Enhanced penalties (under Article 4 of the Framework Decision) go significantly beyond dealing with a discriminatory motive only as an aggravating circumstance. The latter approach is limited in its impact because police might overlook a discriminatory motive because they are often less concerned about circumstances that would impact on sentencing only. And, even when a court takes the discriminatory motivation of an offender into consideration in determining the sentence, this does not necessarily happen in a way that is transparent to the victim, the offender or the public. The discrimination experienced by the victim is therefore neither 'unmasked' nor highlighted. Hence, merely including bias motivation in a list of aggravating circumstances is neither the most effective way to acknowledge victims nor to ensure public visibility of hate crime.

Enhanced penalties should cover at least the most serious or frequent forms of hate crime, possibly including homicide, assault, rape and sexual assault, harassment or stalking, arson, insult, defamation (libel and slander), threats or intimidation, damage to property and the desecration of graves.

**Action 4:** EU Member States should respect the right of victims of crimes committed with a discriminatory motive to have "a review of a decision not to prosecute" or to discontinue proceedings "in accordance with their role in the relevant criminal justice system" (Article 11, Victims' Directive).

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<sup>33</sup> See, for example, FRA (2012), *EU-MIDIS Data in Focus 6: Minorities as victims of crime*, Luxembourg, Publications Office, pp. 12–13. The findings show that of the most recent (last 12 months) incidents of assaults or threat, 60 % of Sub-Saharan Africans, 54 % of Roma and 43 % of North Africans indicated that 'racist' or religiously offensive language was used, in comparison with 23 % of Central and East Europeans and 27 % of Russians. The results also show that the perpetrators in these cases are often from the majority population. Sub-Saharan Africans reported the highest number, saying that in 71 % of the cases they were victimised by members of the majority population. Taken together, these two data sets indicate 'racist' victimisation. For Sub-Saharan Africans, as well as in general, the number of victims of recent incidents who identified the perpetrator as right-wing extremist gangs was very low at 8 %. See also part 2.7.

**Action 5:** EU Member States are asked to assess to which extent victims are entitled to ask for the review of a court decision in cases where victims claim that the court has not paid due attention to the discriminatory motives behind the offence.

This crucial right of victims to have bias-motivated crimes unmasked is not likely to become practically effective unless victims are in a position to require a review of whether or not public prosecutors or criminal courts gave due consideration to discriminatory motives.

Article 11 of the Victims' Directive underlines a victim's right to require a review of a prosecutor's decision not to prosecute. Victims of bias-motivated crime must have effective remedies available to them to enable them to assert their right to be acknowledged as victims of discrimination. This applies in any case where victims believe that the public prosecutor, when discontinuing proceedings, or that the criminal court in deciding on the case, did not pay sufficient attention to the violation of the victim's right to non-discrimination.

## 2.2.2 Crime reporting: enhance awareness, prevention and support to encourage reporting

**Action 6:** EU Member States are encouraged to take appropriate measures to facilitate the reporting of hate crime and to encourage victims and witnesses to report such crime.

The right under Article 47 of the Charter to have access to criminal justice also applies to victims of crime. This right should exist not only in theory but must also be effective in practice. Research conducted by FRA has, however, repeatedly and consistently shown that victims of hate crime are reluctant to come forward and report.

Trust in police is a major issue and FRA research shows a clear connection between perceptions of discriminatory treatment at the hands of the police and overall levels of trust in policing.<sup>34</sup> Alongside data from surveys, FRA research has shown that some victims weigh the costs of what they expect to be lengthy and bureaucratic administrative procedures against the improvements these procedures would make to their situation in the end.<sup>35</sup> These problems are magnified for those who are not citizens, and in particular for irregular migrants.<sup>36</sup> These hurdles highlight the importance of lowering the bureaucratic threshold. Practices such as online-reporting or 'third-party reporting' where civil society organisations report, or facilitate reporting

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<sup>34</sup> FRA (2010), *EU-MIDIS Data in Focus 4: Police stops and minorities*, Luxembourg, Publications Office.

<sup>35</sup> FRA (2012), *Access to justice in cases of discrimination in the EU: Steps to further equality* Luxembourg, Publications Office.

<sup>36</sup> FRA (2011), *Access to effective remedies: The asylum-seeker perspective*, Luxembourg, Publications Office.

of, incidents to the police should be considered as a means of facilitating access to the police and of improving reporting rates across a number of vulnerable groups.

**Action 7:** EU Member States may wish to consider how to raise awareness among persons who are at particular risk of hate crime victimisation about the rights of victims and how to seek assistance and advice. In conducting information and awareness-raising campaigns, Member States should work closely with civil society organisations, national human rights institutions, equality bodies and ombudsperson institutions to ensure efficient outreach.

EU Member States, in particular local authorities which are close to people’s lives and neighbourhoods, should step up awareness-raising activities to help victims know their rights and access procedures to report hate crime. Such awareness raising could take place in cooperation with authorities and NGOs that represent, and are in contact with, individuals who are at risk of hate crime victimisation or through media campaigns, for example by making hotlines known to potential victims.

**Action 8:** All officials “likely to come into contact with victims [of hate crime], such as police officers and court staff, [should] receive both general and specialist training to a level appropriate to their contact with victims” enabling them to identify crimes committed with a discriminatory motive, to understand the rights of victims of bias-motivated crimes, to assess and respond to the particular needs of such victims and to ensure that such victims are offered the best possible assistance and support available (Article 25 (1)), Victims’ Directive).

**Action 9:** EU Member States should review the methods applied to assess the needs of victims of bias-motivated crime, including requirements for effective protection against secondary and repeat victimisation, intimidation and retaliation.

High numbers of unrecorded hate crime can be related, in part, to inadequate methods of identifying crimes as hate crime and to the failure of police officers to enquire into bias motives of offenders, even in situations where there are clear indications of possible discriminatory motives. The ability of the police to identify cases of hate crime victimisation and to respond in a victim-sensitive and professionally appropriate manner would need to be assessed.<sup>37</sup> Possible measures to enhance the capacity of the police include the provision of relevant training to police officers concerning definitions of various forms of hate crime, the rights and needs of victims and strategies that have proved successful in safeguarding those rights. Member States should, for example, provide training for law enforcement personnel that would

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<sup>37</sup> Cf. Article 25 of the Victims Directive.



enable them to recognise and offer suitable services without discrimination. This will help protect against secondary (poor treatment when going through the criminal justice system) and repeat (victimisation on several occasions in a given period) victimisation, intimidation and retaliation, which is called for in Article 22 of the Victims' Directive.

Police officers should be supported and trained in implementing a system of individual assessment allowing them to understand the requirements of Article 22 of the Victims Directive. This Article obliges Member States to “ensure that victims receive a timely and individual assessment” – not just ‘blanket’ treatment – in order “to identify specific protection needs” in each case. In Member States where such a case-by-case assessment has not been implemented to date, an appropriate methodology needs to be developed, taking into account available expertise from other Member States.

**Action 10:** EU Member States could consider the benefits of setting up specialised units in police services, or other approaches such as community policing, to coordinate work to address hate crime and to deal with hate crime committed against a range of different groups of victims.

Setting up specialised units to deal with reports of hate crime and to coordinate the work of the police in this area can be one means of ensuring that police deliver an informed and victim-sensitive response. Community or liaison officers who enhance dialogue with civil society actors have an important role to play in improving the knowledge base of police services and in strengthening community relations and trust in the police's ability to respond sensitively to the rights and needs of victims. Such action can address everyday manifestations of hate crime, not only those attributable to organised groups and networks.

**Action 11:** Member States should assess existing safeguards against institutional forms of discrimination, including clear mission statements, robust systems of performance review with regard to preventing institutional discrimination and inclusive and effective independent complaint mechanisms.

To encourage hate crime reporting, confidence should be instilled among victims and witnesses of hate crime in the criminal justice system and law enforcement. One dimension of encouraging trust in the police relates to various safeguards against institutional forms of discrimination built into police services, such as explicit mission statements, on-going internal performance reviews and effective and independent police complaint mechanisms.

**Action 12:** Particular attention should be devoted to assessing the existing system of victim support provision in relation to all existing categories of hate crime victims. In this assessment, governments should cooperate with civil society organisations. In line with due diligence standards, EU Member States should make appropriate efforts to set up or strengthen existing victim support services with a view to ensuring that all victims of hate crime, “in accordance with their needs, have access to confidential victim support services, free of charge, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings” (Article 8 (1), Victims’ Directive). The Victims’ Directive also highlights the need for Member States to “encourage victim support services to pay particular attention to the specific needs of victims who have suffered considerable harm due to the severity of the crime”, including by providing interim accommodation and targeted support such as counselling for victims with specific needs (Article 8 (2), Victims’ Directive).

Staff members of support services need to be aware of the specific situation of victims of hate crime across various vulnerable groups. In reviewing and implementing standards of professional performance, victim support services should be encouraged to ensure that training is provided to equip their personnel to offer suitable services for victims of hate crime without discrimination.

Civil Society Organisations should have a meaningful role in monitoring and reporting hate crime; in victim support; in advocacy; and in cooperating with the police, local authorities and governments. EU Member States are therefore responsible for ensuring that civil society organisations have access to appropriate funding. The administration of public funding is enhanced if defined performance standards for services delivered by such organisations exist.

**Action 13:** EU Member States should examine how education about the Holocaust and other crimes committed by totalitarian regimes is integrated within human rights education and history curricula. They should also assess the effectiveness of teaching on these subjects.

FRA publications have suggested means of better incorporating memorial sites and museums into human rights education in the EU, in particular with regard to the remembrance of the Holocaust and of other hate crimes committed under totalitarian regimes.<sup>38</sup> EU Member States could draw on these publications and other practices in their efforts to preserve the memory of crimes committed by totalitarian regimes in Europe in order to strengthen human rights awareness in today’s society.

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<sup>38</sup> FRA (2011), *Human rights education at Holocaust memorial sites across the European Union: An overview of practices* Luxembourg, Publications Office; FRA (2011), *Discover the past for the future: The role of historical sites and museums in Holocaust education and human rights education in the EU*, Luxembourg, Publications Office.

## 2.3 Victim protection: prevent secondary victimisation, repeat victimisation, intimidation and retaliation

**Action 14:** When implementing the Victims’ Directive Member States should pay particular attention to the protection needs of victims of crimes committed with a discriminatory motive.

Member States need to grant victims of hate crime certain rights that aim at protecting them from secondary victimisation and traumatising experiences, according to Articles 22 and 23 of the Victims’ Directive (Victims of hate crime “shall be duly considered” (Article 22 (3)). Under these rights, interviews, for example, should be conducted within an appropriate setting and carried out by sufficiently trained professionals. The same person should conduct all interviews with the victim “unless this is contrary to the good administration of justice” (Article 23 (2) (c), Victims’ Directive). The general rights of victims to protection during criminal investigations tie in with the specific rights under Article 23, such as the right of victims that the number and extent of interviews be kept to a minimum and the right of victims to be accompanied by a person of their own choosing (Article 20, Victims’ Directive).

Victims of sexual hate crime must (Article 23 of the Victims’ Directive) be interviewed by a person of the same sex as the victim, if they so wish, unless the interview is conducted by a prosecutor or a judge and provided that the course of the criminal proceedings will not be prejudiced.

The police need to assess the risks of repeat victimisation in “a timely and individual” manner (Article 22 (1), Victims’ Directive) and either discuss with the individual victim what can be done to address these risks or reassure victims and allow them to regain basic feelings of security.

## 2.4 Hate crime on the internet: address manifestations of hate crime

The FRA survey on gender-based violence against women asked respondents about their experiences of sexual harassment through information and communication technologies, such as emails, text messaging and social networking sites. One woman in 10 (10 %) in the EU says that she has been a victim of cyber harassment since the age of 15 years, with ‘cyber harassment’ being the most common form of harassment experienced by women in the 12-month period before the survey. The risk of young women becoming a target is much higher than that for older women. See details in Figure 2 in the Annex.

The FRA survey on discrimination and hate crimes against Jews similarly shows that online antisemitism is seen as a particular problem. Among seven specific

manifestations provided to the interviewees, online antisemitism is seen as a particular problem: three quarters of all respondents (75 %) consider this either ‘a very big’ or a ‘fairly big problem’, and almost as many (73 %) believe that it has increased over the past five years. See details in Figure 3 the Annex. Overall, 10 % of respondents have experienced offensive or threatening antisemitic comments made about them on the internet.

The internet is increasingly important as a communication tool; the anonymity afforded by it, however, may lead some users to publish offensive material online. Action is needed to prevent the misuse of the internet as a zone where hate crime can be committed with impunity. The EU and its Member States should identify effective ways and good practices to address the growing concern about online hate crime.

Hate crime on the internet is of particular concern with respect to the exposure to hate incidents that young people can experience during their formative years.

**Action 15:** EU Member States should ensure that young people have a safe and supportive environment, such as in schools, that is free from bias-based bullying, harassment or other forms of hate incidents.

Schools should provide a safe and supportive environment for students, which includes policies and practices to combat stigmatisation and marginalisation, and which promotes diversity. Such initiatives can be framed within the context of anti-bullying policies. Competent state agencies, such as equality bodies, national human rights bodies and children’s ombudspersons, should be mandated and encouraged to explore cases of bullying and discrimination at school. In proceeding as such, this can support combating the manifestation of hate crime with respect to both potential victims and offenders. In turn, the EU should contribute to combating bullying, harassment and other forms of hate crimes against vulnerable pupils and students in educational settings.<sup>39</sup>

**Action 16:** Those EU Member States that have not yet done so should become party to the Additional Protocol to the Council of Europe Convention on Cybercrime.

The ratification of the Additional Protocol to the Convention on Cybercrime of the Council of Europe would be a means of enhancing cross-border police and judicial cooperation. EU Member States should provide criminal justice authorities with the necessary procedural law powers to investigate and prosecute such crime and engage in international cooperation as foreseen in the Convention.

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<sup>39</sup> See: FRA (2013), *EU LGBT survey. Results at a glance*, p. 12. The survey results show that more than eight in 10 of the respondents in each EU Member State witnessed negative comments or conduct during their time at school relating to sexual orientation or gender identity.

**Action 17:** EU Member States should assess whether the police and public prosecutors' offices are sufficiently staffed and equipped, including to investigate and prosecute hate crime committed on the internet, to address cyber hate to the extent necessary to meet Member States' responsibilities and standards of due diligence.

The police and public prosecutors' offices should be granted the resources needed to address hate crime on the internet. Member States should explore the option of establishing specialised police units that monitor and investigate hate crime on the internet, as well as measures to encourage users to report to the police whenever they detect content amounting to hate crime.

EU Member States should consider taking steps to enhance the legal basis for the investigation and prosecution of hate crime in line with Article 9 of the Framework Decision, which obliges EU Member States to establish jurisdiction in certain cases of cybercrime.

## 2.5 Media services: encourage information and programmes that support non-discrimination

**Action 19:** EU Member States should encourage the media – while respecting media freedom – to take self-regulatory measures and ensure that the information and programmes they publish or broadcast do not contribute to the vulnerability of victims and to breeding a climate of hostility towards individuals sharing protected characteristics.

EU Member States should encourage the media to ensure that the information and programmes they publish or broadcast do not contribute to the vulnerability of victims of hate crime or encourage hostility towards individuals sharing protected characteristics. To help, FRA developed a toolkit on diversity for factual programmes in public service television.<sup>40</sup> Any measures suggested by Member States should respect the freedom of expression of the media and should be available in practice.

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<sup>40</sup> FRA (2008), *A Diversity Toolkit for factual programmes in public service television*, Luxembourg, available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/111-media-toolkit-documentation\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/111-media-toolkit-documentation_en.pdf).

**Action 20:** EU institutions should consider introducing amendments to Article 6 of the Audiovisual Media Services Directive, which obliges Member States to ensure that audiovisual media services do not contain any incitement to hatred based on race, sex, religion or nationality. The directive does not refer to hatred based on disability, age or sexual orientation.

Extending the protection under the Audiovisual Media Services Directive to other grounds would help realise the EU's horizontal obligation to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation whenever "defining and implementing its policies and activities" (Article 10 of the TFEU). The EU Audiovisual Media Services Directive is not comprehensive in that it explicitly protects the rights only of certain victims of hate crimes or of individuals whose rights are undermined by incitement to hatred.

## 2.6 Victim support and protection: extend services

**Action 21:** EU Member States may wish to review whether services providing support, protection or therapy to victims of hate crime are available to refugees, asylum seekers or irregular migrants, who have been persecuted in their country of origin for reasons of race, religion, nationality, membership of a particular social group or political opinion.

The right to be acknowledged as a victim of hate crime is pertinent also in cases where the victimisation happened outside the territories of EU Member States and where the victim arrives in an EU Member State as an asylum seeker, although recognition will usually be the result of an asylum procedure rather than of criminal proceedings. Much of what has been said earlier about the necessity of enabling all public and private actors who communicate with victims of hate crime to effectively respond to the rights and needs of victims also applies to refugees who were the victim of such crime in their country of origin. In this context, FRA research on the practical effectiveness of asylum seekers' access to justice has highlighted some crucial issues.<sup>41</sup>

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<sup>41</sup> FRA (2011), *Access to effective remedies: The asylum-seeker perspective*, Luxembourg, Publications Office; FRA (2010), *Separated, asylum-seeking children in European Union Member States*, Luxembourg, Publications Office.

## 2.7 Uphold democracy: protect democratic institutions against ‘extremist’ groups and parties

**Action 22:** EU Member States should review their legislation and relevant procedures in order to ensure that the formation of associations or of political parties does not serve as a basis for promoting hatred or prejudice or for committing hate crime.

A recent FRA report highlighted the rise of so-called ‘extremist’ groups and political parties in the EU, with regard to their prominent role in promoting anti-Roma, antisemitic, anti-Muslim or anti-migrant resentment.<sup>42</sup> This raises questions as to the ability of EU Member States to prevent discriminatory propaganda from encroaching on democratic institutions while respecting the freedom of expression of members of parliaments.<sup>43</sup> In comparison, the European Parliament has robust regulations in place to prevent a political group from using it as a platform for the promotion of an ideology that violates the principles on which the EU is founded.<sup>44</sup>

There needs to be a higher level of consciousness among politicians and other leading public figures of the appropriate balance between freedom of expression and hate speech to ensure an appropriate political culture is well established.

In addition, Member States should promote a more balanced public opinion on discrimination issues by facilitating dialogue involving the media, political parties and religious institutions. Strong and positive political leadership is needed to promote the fundamental rights of individuals targeted by hate crimes. In particular, politicians and opinion makers should refrain from discriminatory statements and they should be encouraged to clearly renounce and condemn them when others make such statements in public debates.

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<sup>42</sup> FRA (2013), *Fundamental rights: Challenges and achievements in 2012*, Annual report 2012, Luxembourg, Publications Office, pp. 189–190. See also part 2.2.1, in relation to right-wing extremism.

<sup>43</sup> FRA (2013), *Fundamental rights: Challenges and achievements in 2012*, Annual report 2012, Luxembourg, Publications Office, pp. 20–25.

<sup>44</sup> See, in particular, Articles 3 and 5 of the Regulation (EC) No. 2004/2003 of the European Parliament and the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding, OJ 2003 L 297, p. 1.

## 2.8 Evidence base: collect and publish data on hate crime

**Action 23:** On the basis of clear and comprehensive guidelines, EU Member States together with Eurostat should, on an annual basis, collect and publish data pertaining to crimes committed with a discriminatory motive.

EU Member States record and publish different types of data on bias motivations. The lack of a consistent approach between Member States result in gaps in data collection across the EU. Differing legal approaches and interpretations of what constitutes hate crime influence the depth and breadth of official data collection mechanisms when recording and detailing its prevalence and nature. These disparities mean that the various Member States measure different realities, complicating any comparative analysis of the prevalence of hate crime across the EU. Data collected by the FRA consistently show that persistent gaps exist in data collection as to the prevalence of crimes motivated by racism, xenophobia and antisemitism in EU Member States. The same is true of crimes motivated by another person's sexual orientation, gender orientation or disability, or because of their presumed identification with these grounds.<sup>45</sup>

The FRA report, *Making hate crime visible*, tabulates the official data pertaining to hate crime published in 2010, by motivation and by EU Member State. Of the 10 motivations covered (nine specific and one general for 'other'), the report shows a wide variation between Member States. Only one Member State covers all 10 motivations and 17 Member States cover just three or less.<sup>46</sup> The report also classifies official data collection mechanisms pertaining to hate crime by Member State into three categories: limited, good and comprehensive data. Only four Member States are classified as having comprehensive data while 14 are logged with limited data.

EU Member States could, on a regular basis, collect and publish data pertaining to crimes committed with a discriminatory motive at an aggregate level and on an anonymous basis so that no individual case can be identified. This would serve to acknowledge victims of such crime, in line with the duty of Member States flowing from the ECtHR case law ECtHR to 'unmask' bias motives underlying criminal offences.

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<sup>45</sup> For more information on differences in Member States pertaining to data collection mechanisms, see FRA (2012), *Making hate crime visible in the European Union: Acknowledging victims' rights*, Luxembourg, Publications Office, pp. 31-41; and FRA (2013), *Fundamental rights: Challenges and achievements in 2012*, Annual report 2012, Luxembourg, Publications Office, pp. 183 and 269.

<sup>46</sup> FRA (2012), *Making hate crime visible in the European Union: acknowledging victims' rights*, Luxembourg, Publications Office, p. 35.



At a basic minimum, statistical data could be collected and published on:

- the number of incidents pertaining to crimes recorded by the authorities;
- the number of convictions of offenders;
- the grounds on which these offences were found to be discriminatory;
- the punishment handed down to offenders.

Data collected on crimes committed with a discriminatory motive should be disaggregated by gender, age and other variables, thereby enabling a better understanding of patterns of victimisation and offending as they relate to aggregate anonymous statistics concerning victims and offenders. Data will only be comparable, however, to the extent that definitions and data collection mechanisms are.

When looking at the number of official criminal justice reports of hate crime in individual Member States, consideration should be given to the overall size of the population and of specific groups within the population that are vulnerable to hate crime, such as ethnic minority and immigrant groups or persons with disabilities. Comparisons of official criminal justice data can be made between Member States that are similar with respect to population size and the proportion of minorities in that population when looking at the number and type of offences that are recorded by the authorities, for example, comparing France and the United Kingdom. Likewise, comparisons can be made between countries that share similar histories and similar approaches to tackling hate crime, while adjusting the analysis of data to take into account differences in population size, for example, Austria and Germany.

With the assumption that higher recorded figures indicate a well-functioning system in that more people are reporting victimisation to the police, and more cases are being processed through the criminal justice system, then Member States can be encouraged to compare their existing practices with each other. Member States, which currently have the most advanced data collection mechanisms in place for recording and reporting hate crime, have, historically, not always had such mechanisms. The processes that allow for improved data collection therefore need to be explored by Member States.

EU Member States should agree on a harmonised approach to data collection to show to which extent and how victims have accessed the rights set out in the Charter, the Victims' Directive (Article 28 requires detailed reporting on implementation) and the Framework Decision on Racism and Xenophobia. This would facilitate a comparative analysis of the effectiveness of measures taken in various EU Member States to fulfil the requirements of EU law. The FRA surveys collect data in a harmonised way across all EU Member States and are therefore illustrative of how data on victims' access to justice, for example, with respect to non-reporting to the police, can be collected in a harmonised way across the EU.

**Action 24:** EU Member States should encourage and, where appropriate, fund victimisation surveys that include questions on respondents' experiences of hate crime. Such surveys can, for example, look into the different forms and impact of hate crime victimisation, as well as the effectiveness of measures taken to address hate crime and to provide victims with assistance and support. Where Member States already conduct victimisation survey research on the general population, efforts should be made to include a booster sample of specific groups in the population so that sufficient numbers of respondents are captured who can respond to questions about hate crime, such as members of ethnic minority and immigrant groups.

Crime surveys collect data that is in line with or in addition to areas that are currently covered by EU and Member State legislation, making it possible to reveal the extent to which minorities experience forms of hate crime that the Framework Decision on Racism and Xenophobia and national legislation either cover or do not. These surveys therefore provide valuable data on victimisation under existing legislation and show gaps in current law. Survey data about areas of hate crime for which no legislation exists can be used to consider amendments to, and development of, legislation.

In previous opinions, FRA has underlined the importance of the use of statistics for anti-discrimination purposes, based on case law from both the ECtHR and the Court of Justice of the European Union.<sup>47</sup> "The analysis of data for statistical purposes – including personal data such as self-identified ethnicity or religion/faith – can be undertaken without reference to respondents' personal details such as their name and address. The identification of patterns of possible discrimination (alongside other patterns) is based on an analysis of large datasets that have no need to identify the individual. Rather, scientific confirmation of whether patterns of discrimination might exist is done by analysing the relationship between sets of different variables – such as gender, age and ethnicity – in relation to employment or profiling outcomes, for example; whereupon tests for statistical significance can show whether patterns are likely to be occurring by chance or not, which could indicate possible discrimination.

Where the number of cases (such as the number of individuals included in a study) falls below a certain value, then the convention in statistics is not to use or publish data where any individual could be identified unless they have explicitly given their consent. This ensures anonymity of data subjects while allowing for an analysis of possible patterns of discrimination. This is different from individual cases of discrimination that are examined in a court of law, where the circumstances of an individual case or cases are addressed, and where reference to a comparator can be made; however, evidence of discriminatory patterns – based on large data sets – can be used in a court of law as supporting evidence with respect to possible discrimination."<sup>48</sup>

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<sup>47</sup> See: FRA opinion – 1/2011 Passenger Name Record, Vienna, 14 June 2011, pp. 9-10; and FRA opinion – 2/2012, Data protection reform package, Vienna, 1 October 2012, pp. 22-24.

<sup>48</sup> FRA opinion – 2/2012, Data protection reform package, Vienna, 1 October 2012, p. 24.

## 2.9 Strategies and action plans: tackle hate crime systematically

**Action 25:** The EU and its Member States are encouraged to consider setting up multi-annual national strategies or action plans aimed at addressing hate crime or incorporate such action into other existing frameworks, all in cooperation with civil society organisations.

To ensure that hate crime in all its forms is addressed in a targeted, comprehensive, systematic and coordinated way, EU Member States may wish to consider setting up a national strategy comprising all measures addressing hate crime.

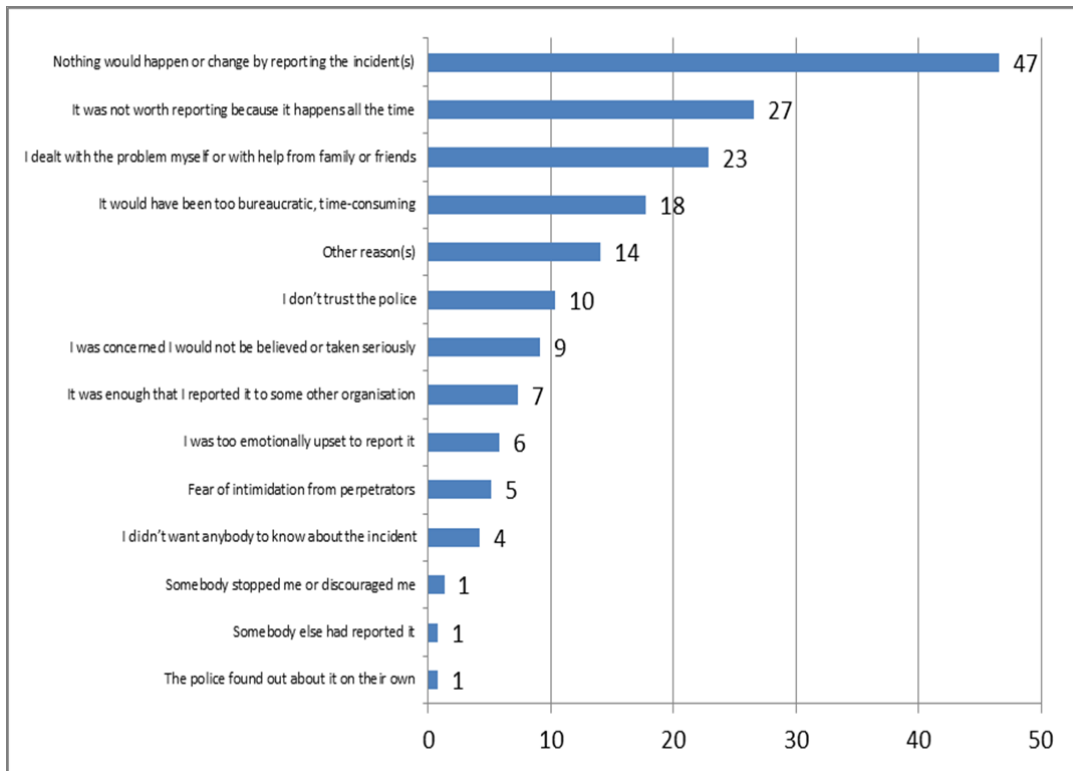
Alternatively, Member States may wish to integrate measures to combat hate crime in relevant national strategies and action plans across a number of relevant areas, including, for example, strategies and action plans on human rights, equality, crime prevention and violence prevention, as well as crime prevention strategies at the local level.

Persons who are in a position to represent groups of individuals who are at risk of hate crime victimisation should be involved in the decision making.

To foster the exchange of information among Member States, as well as to encourage initiatives and to share promising practices, a forum could be set up or appointed, such as a group of experts at EU level to which EU Member States would report on a regular basis on the prevalence and forms of hate crime as well as action taken to address such crime.

# Annex

**Figure 1: Survey on discrimination and hate crimes against Jews: reasons for not reporting the most serious incident of antisemitic harassment to the police in the past five years (%)**

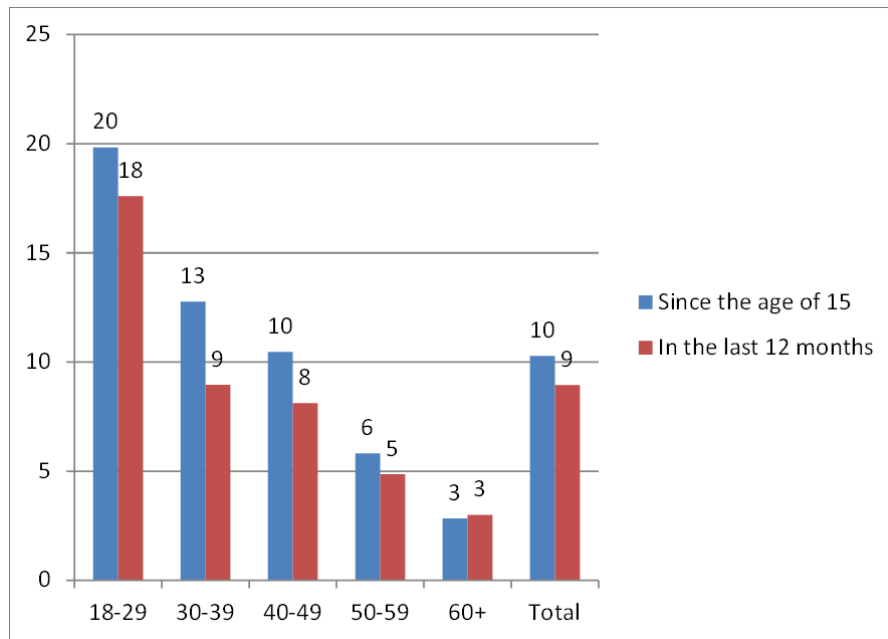


Question: C10. Why did you not report the incident to the police: (Items as listed in the figure)? Multiple responses possible.

Note: N=1,653.

Source: FRA (forthcoming 2013), *Discrimination and hate crime against Jews in EU Member States: experiences and perceptions of antisemitism*

**Figure 2: Survey on gender-based violence: cyber harassment since the age of 15 years in the last 12 months, by age group (%<sup>\*,\*\*</sup>)**

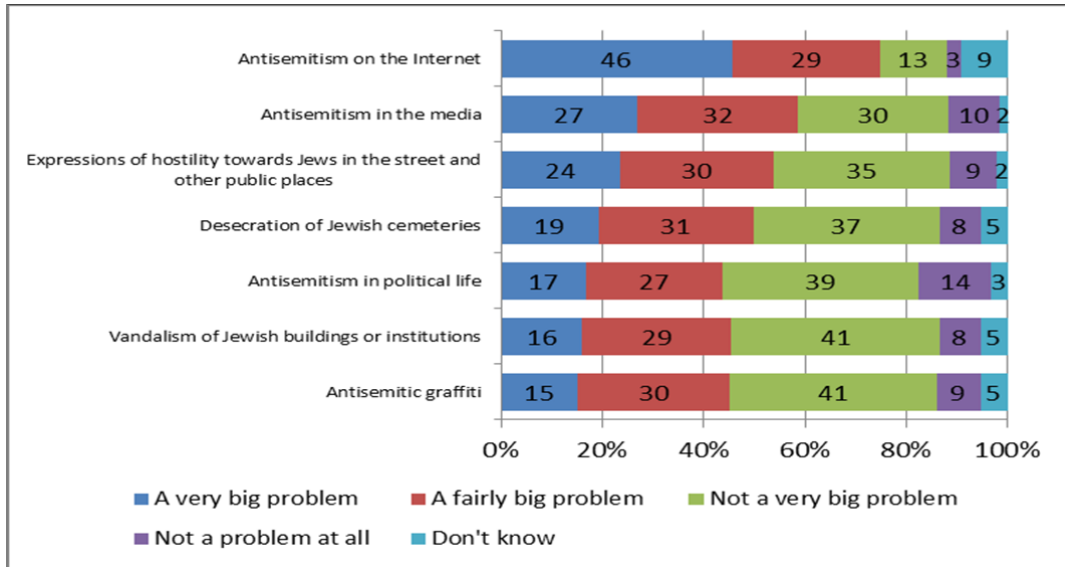


Notes: \* Since the age of 15: out of all women (N=42,002).

\*\* In the last 12 months: out of all women who have been sexually harassed at least once in their lifetime (N=23,205).

Source: FRA (forthcoming 2014), Violence against women survey

**Figure 3: Survey on discrimination and hate crimes against Jews: assessment of manifestations of antisemitism against the Jewish community today (% , average of the eight EU Member States surveyed)**



Question: B04a. In your opinion, how big a problem, if at all, are each of the following in [COUNTRY] today: (Items as listed in the figure)?

Note: N=5,847

Source: FRA (forthcoming 2013), *Discrimination and hate crime against Jews in EU Member States: experiences and perceptions of antisemitism*

