

A Comparative Perspective on the Protection of Hate Crime Victims in the European Union

New Developments in Criminal Procedures in the EU Member States

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Abstract

Hate crime victims involved in a criminal procedure experience difficulties that are different from problems encountered by other victims. In trying to meet the specific procedural needs of hate crime victims many EU Member States have introduced protective measures and services in criminal proceedings, but the adopted approaches are widely disparate. By reporting the results of an EU-wide comparative survey into hate crime victims within national criminal procedures the authors aim to: (1) make an inventory of the national (legal) definitions of hate crime and the protection measures available (on paper) for hate crime victims; and (2) critically discuss certain national choices, inter alia by juxtaposing the procedural measures to the procedural needs of hate crime victims to see if there are any lacunae from a victimological perspective. The authors conclude that the Member States should consider expanding their current corpus of protection measures in order to address some of the victims' most urgent needs.

Keywords: hate crime, victims, victim rights, procedural justice, EU Member States, criminal procedure.

1 Introduction

Nowadays, more and more attention is being paid to the heterogeneity of victims of crime. Different groups of victims face different problems during criminal proceedings, and, in that respect, display different vulnerabilities.¹ This is also true for victims of hate crime. A systematic literature review of quantitative hate crime victimisation studies revealed that hate crime victims involved in a criminal procedure experience difficulties that are different from problems encountered by other victims.² Hate crime victims are, for instance, (thought

to be) less willing to report the crime in comparison to victims of crimes without hate aspect,³ or they cannot access special services available to them.⁴ In addition, criminal justice authorities sometimes fail to recognise a reported incident as a hate crime or they do not acknowledge its seriousness. As a consequence, at least in the UK, victims of hate crime are less satisfied than 'regular' victims with the criminal justice system,⁵ and the risk of secondary victimisation is higher for this group of victims as well.⁶

But when it comes to their experiences with criminal proceedings, hate crime victims do not form a homogeneous group either. Depending on the distinctive discriminatory ground or strand for which they were targeted – such as their sexual orientation, race, disability, religion or gender identity – various groups of hate crime victims face distinctive problems.⁷ Mentally disa-

2922 *Wetenschappelijk Onderzoek- en Documentatiecentrum* (2020).

- 3 A.R. Feddes and K.J. Jonas, 'LGBT Hate Crime, Psychological Well-being, and Reporting Behaviour: LGBT Community and Police Perspectives', *Amsterdam University* (2016); K. Christmann and K. Wong, 'Hate Crime Victims and Hate Crime Reporting: Some Impertinent Questions', in N. Chakraborti (ed.), *Hate Crime: Concepts, Policy, Future Directions* (2010) 194; N. Chakraborti, J. Garland & S. Hardy, 'The Leicester Hate Crime Project: Findings and Conclusions', *University of Leicester* (2014); N. Chakraborti and S. Hardy, 'LGB&T Hate Crime Reporting: Identifying Barriers and Solutions', *Equality and Human Rights Commission* (2015).
- 4 S. Hardy and N. Chakraborti, 'Healing the harms: identifying how best to support hate crime victims', *University of Leicester* (2015); S. Wortley, 'Hidden Intersections: Research on Race, Crime and Criminal Justice in Canada', 35(3) *Canadian Ethnic Studies* 99, at 114 (2003); S. McDonald and A. Hogue, 'An Exploration of the Needs of Victims of Hate Crime', *Canada: Department of Justice* (2007).
- 5 The Crime Survey for England and Wales, for instance, demonstrated that victims of hate crime are less satisfied with the manner in which the authorities had dealt with their case: only 52% of hate crime victims was satisfied, compared to 73% of the 'regular' victims (H. Corcoran and K. Smith, 'Hate Crimes, England and Wales', 16 *Home Office* (2015)).
- 6 Secondary victimisation can be defined as the 'negative social or societal reaction in consequence of the primary victimisation and is experienced as further violation of legitimate rights or entitlements by the victim' (U. Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings', 15(4) *Social Justice Research* 313 (2002))
E.g. J. Parsons and T. Bergin, 'The Impact of Criminal Justice Involvement on Victims' Mental Health', 23(2) *Journal of Traumatic Stress* 182 (2010); K.T. Berrill and G.M. Herek, 'Primary and Secondary Victimization in Anti-gay Hate Crimes', 5(3) *Journal of Interpersonal Violence* 401 (1990)
- 7 Hate crime victims also demonstrate 'within strand' differences regarding the consequences of the crime. P. Iganski and S. Lagou, 'Hate Crimes Hurt Some More Than Others: Implications for the Just Sentencing of Offenders' 30(10) *Journal of Interpersonal Violence* 1696 (2015), for instance,

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1 S. van der Aa, 'Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU Law', 7(1) *New Journal of European Criminal Law* 39 (2016).

2 S. van der Aa, J. Claessen & R. Hofmann, 'Speciale behoeften van slachtoffers van hate crime ten aanzien van het strafproces en de slachtofferhulp',

bled victims, for instance, can meet with insensitivity or ignorance on the part of criminal justice authorities, while some LGBTI+ victims of hate crime shy away from reporting the crime out of fear of being prematurely 'outed' as a result of their involvement in the criminal procedure. Compounded or intersecting problems can be experienced by victims of hate crime belonging to multiple vulnerable groups.

National and international legislators are increasingly aware of the different needs and vulnerabilities of crime victims. This can, for instance, be witnessed by the fact that the EU Victim Directive has earmarked various groups of victims as 'vulnerable' in Article 22(3).⁸ It is assumed that these victims run a higher risk of 'secondary and repeat victimisation, intimidation and retaliation', and that they have specific protection needs, although this assumption has to be substantiated with the help of an individual assessment (Art. 22(1)). Hate crime victims are explicitly mentioned in the 2012 EU Victim Directive as potentially vulnerable victims, with a right to additional protective measures during criminal proceedings (Art. 22(3)). If the individual assessment indeed points towards special protection needs, hate crime victims should, in principle, be able to benefit from the additional measures mentioned in Article 23.⁹ During the pre-trial investigation phase victims are, inter alia, entitled to be interviewed by professionals specifically trained for that purpose and, in the case of multiple interviews, by the same persons 'unless this is contrary to the good administration of justice' (Art. 23(2)). During trial, Member States should provide measures to avoid eye contact between victims and suspects, facilitate victim testimony via telecommunication technology, avoid irrelevant questions related to the victims' private life and allow for *in camera* hearings (Art. 23(3)).

In trying to meet the procedural needs of hate crime victims – such as the need to reduce reporting barriers, the need to be taken seriously by criminal justice officials, and the need for the discriminatory aspect of the crime to be recognised and acknowledged throughout the criminal procedure¹⁰ – many EU Member States are going above and beyond these minimum standards required by the EU Victim Directive by providing additional protective measures and services to them. However, the adopted approaches are quite diverse, ranging from holistic national policies to an absence of dedicated attention to hate crime victimisation.¹¹ Although some comparative studies in the field of hate crime have been

carried out in the past, most of these focused on substantive legal issues – such as the question of distinct criminalisation or the impact of a bias element on the criminal penalty – rather than procedural aspects.¹² And while the comprehensive UK approach has received ample attention in literature¹³ there is a dearth of information regarding this issue in other EU Member States.¹⁴ This is something this article intends to address. By reporting the results of an EU-wide comparative survey into protection measures for hate crime victims within national criminal procedures it aims to: (1) make an inventory of the national (legal) definitions of hate crime and the protection measures (exclusively) available for hate crime victims in criminal proceedings; and (2) critically discuss certain national choices, inter alia by juxtaposing the procedural *measures* available to the procedural *needs* of hate crime victims to see if there are any lacunae from the perspective of victimological literature.

After a discussion of definitional (Section 2) and methodological (Section 3) issues, a descriptive summary of the results of the survey is provided for (Section 4), followed by a critical analysis of these results (Section 5). The article concludes with some final remarks and suggestions for policy implications (Section 6).

2 Definition of Hate Crime

Gathering reliable information on substantive criminal or criminal procedural law for the purpose of legal comparisons between countries is a daunting task. This endeavour becomes even more complex in cases of hate crime. Being a relatively new (legal) concept, many jurisdictions are still in the process of developing its meaning, without straightforward international guidance to help pave the way. Countries furthermore differ in the extent to which they perceive hate crime worthy

found diversity amongst victims of (perceived) racist crimes in the extent to which their mental health was influenced by the incident.

8 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 25 October 2012 L315).

9 Minor victims can benefit from even more additional protective measures (art. 24 EU Victim Directive), but these will not be discussed here.

10 See §5 for more information on the needs of hate crime victims.

11 The comparative IVOR study demonstrated that five years ago many EU Member States did not (explicitly) acknowledge hate crime victims as a (potentially) vulnerable victim group in the sense of Article 22 of the EU Directive (E. Biffi and E. Mulder (eds.), 'IVOR Report: Implementing Vic-

tim-Oriented Reform of the Criminal Justice System in the European Union', APAV (2016)).

12 The same holds true for national anti-hate crime statutes. In many legal systems, anti-hate crime statutes have a lopsided focus on (aggravating) sentencing, without paying much heed to procedural issues (for an overview, see Fundamental Rights Agency, 'Equal Protection for All Victims of Hate Crime: The Case of People with Disabilities', 3 *FRA Focus* (2015).

E.g. The Law Commission, 'Hate Crime: Should the Current Offences Be Extended?' William Lea Group (2014) www.gov.uk/government/publications/hate-crime-should-the-current-offences-be-extended (last visited 23 March 2020)

13 E.g. N. Antjoule and M. Stray, 'Pride and Prejudice: Anti-LGBT Hate Crime in the United Kingdom', in P. Godzisz and G. Viggiani (eds.), *Running through Hurdles: Obstacles in the Access to Justice for Victims of Anti-LGBTI Hate Crimes* (2018) 269; Home Office, 'Action Against Hate: The UK Government's plan for tackling hate crime', www.gov.uk/government/publications/hate-crime-action-plan-2016 (last visited 23 March 2021); HM Government, 'Action Against Hate: The UK Government's plan for tackling hate crime – two years on', www.gov.uk/government/publications/hate-crime-action-plan-2016 (last visited 23 March 2021).

14 A positive exception to this rule is the report by J. Schweppe, A. Haynes & M.A. Walters, 'Lifecycle of a Hate Crime: Comparative Report', *Irish Council for Civil Liberties* (2018)), which included comparisons of five jurisdictions: the Czech Republic, Ireland, England & Wales, Latvia, and Sweden.

of separate criminalisation, whether they have prioritised the fight against hate crime and whether they have implemented solely retributive or also preventive and restorative aspects in their national anti-hate crime approaches. In fact, many countries do not use the term 'hate crime' as a distinct legal concept at all, and those that do vary in their selection of discriminatory strands that can transform an 'ordinary' crime into a hate crime. In academic literature, some authors have therefore adopted non-legal definitions, such as the definition developed by the Office for Democratic Institutions and Human Rights:¹⁵

A hate crime can be defined as: (A) any criminal offence, including offences against persons or property, where the victim, premises, or the target of the offence are selected because of their real or perceived connection, attachment, affiliation, support or membership of a group as defined in Part B; (B) a group may be based upon a characteristic common to its members, such as real or perceived race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or other similar factor.¹⁶

This relatively wide-ranging definition will form a point of departure for the current article as well, albeit that the offences under consideration do not necessarily have to be inspired by a biased *motive* in order to qualify as a hate crime. For the comparative purposes of this article, the net will be cast even wider. Crimes committed out of a different (primary) motive are also included if expressions of hate or bias are used to increase the impact of the underlying crime. This means, for instance, that criminal assault committed in the context of an altercation that began for alternative reasons – jealousy, drunkenness, drugs – can transform into a hate crime if the assailant also makes derogatory remarks on his opponent's skin colour or his sexual orientation in order to increase the victim's suffering.

3 Methodology¹⁷

The data forming the basis of this article was acquired with the help of a survey that was distributed among foreign experts on discrimination and hate crime.¹⁸ The survey consisted of a total of 12 questions – 9 of which were multiple choice – which inquired inter alia after the national definition of hate crime, the different groups of victims covered by this national definition and several distributive and procedural measures available for these victims within the national criminal justice systems.

The questionnaire was distributed via e-mail in the period January to March 2019 among experts with different backgrounds (academia, police, public prosecution service, government, NGO).¹⁹ Per EU country approximately 2 to 3 experts were contacted with the request to fill out the survey, resulting in a total of 24 returned surveys from 21 different Member States. The final survey was returned on 8 May 2019. With information on the Dutch situation stemming from the authors themselves, the following 22 Member States were included:

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15 The Office for Democratic Institutions and Human Rights is an organ of the Organization for Security and Co-operation in Europe and is charged with providing 'support, assistance and expertise to participating States and civil society to promote democracy, rule of law, human rights and tolerance and non-discrimination' (see www.osce.org/odihr).

16 This definition is, for example, used by J. Goodey, 'Introduction', in: J. Goodey and A. Kauko (eds.), *Hate Crime. Papers from the 2006 and 2007 Stockholm Criminology Symposium* (2008) 5 and the European Network Against Racism.

17 For an overview of the complete questionnaire, a more detailed description of the research methodology, the names and affiliations of the respondents who participated in the survey, and an in-depth discussion on the limitations of the chosen research method, see van der Aa et al., above n. 2, at 110-112 and Annex 4 (2020).

18 This survey formed part of a study commissioned by the Dutch Ministry of Justice and Safety into procedural rights and services for hate crime victims (van der Aa et al., above n. 2).

19 Some experts preferred to remain anonymous, hence their names and work affiliation were not mentioned in the report. The experts that did not object to being mentioned worked for: the Center for the Study of Democracy (BG); the Danish Institute for Human Rights (DK); the National Police Board (FI); the Racist Violence Recording Network (EL); the University of Brescia (IT); the State Police College of the Ministry of Interior of Latvia; the European Foundation of Human Rights (LT); The People for Change Foundation (MT); University of Vienna; Antidiscrimination Office Styria (AT); APAV Portuguese Association for Victim Support (PT); Advocate of the Principle of Equality (national equality body) (SI); University of Girona (ES); In IUSTITIA (CZ); Umeå University (SE). Information from the Netherlands was gathered with the help of various national experts from different relevant organisations (e.g. Victim Support; police, public prosecution service; various minority rights organisations).

Table 1 EU Member States Included in the Survey

Austria (AT)	Finland (FI)	Italy (IT)	Portugal (PT)
Belgium (BE)	France (FR)	Latvia (LV)	Slovenia (SI)
Bulgaria (BG)	Germany (DE)	Lithuania (LT)	Spain (ES)
Czech Republic (CZ)	Greece (EL)	Malta (MT)	Sweden (SE)
Cyprus (CY)	Hungary (HU)	Netherlands (NL)	
Denmark (DK)	Ireland (IE)	Poland (PL)	

A major challenge in comparative legal research is to ensure comparability of collected data, legal processes and procedures.²⁰ Comparative research inhibits the risk of misunderstandings,²¹ and the confusion of law in the books and the law in practice.²² This is particularly true when not only two or three legal systems are within the scope of comparison but, as is the case in this study, most of the Member States of the EU. To minimise these methodological risks the survey was designed to ensure legal comparability while,²³ at the same time, accounting for the complexity of the issue. By carefully identifying and focusing on selected and rather generalised aspects of hate crime victimisation the complexity was reduced and comparative conclusions were made possible. But this comparative method brings along several limitations, such as the lack of room for nuance or further details in the relatively brief survey.

As a consequence, the data only paint a global picture of the manner in which EU countries have regulated the treatment of victims of hate crime. Also, the information provided by the experts was relied on at face value, because there was no possibility to access national legal sources or otherwise double-check the gathered data. Furthermore, from Austria, Belgium, Portugal and Malta, two surveys were returned, which sometimes resulted in contradicting answers. These differences can either indicate real differences in the implementation of certain rights and services in various parts of a country, for instance in countries with a federal structure, but di-

verging interpretations of the survey, unfamiliarity with a certain topic, or difficulties with the English legal terminology may also have played a role.²⁴ While these contradictions are indicative of the risk of possible errors in the countries in which two surveys were returned, errors could be present in all the singular surveys too. A final limitation involves the difference between *the law in the books* and *the law in practice*. Although the survey inquired after the law in the books – the rights and services provided for by law and policy documents – some respondents may have based their answers on their knowledge of the law in practice. Although some respondents carefully distinguished between the law in the books and the law in practice – for example by indicating that certain prescribed services are not implemented in practice due to lack of capacity or funding – other respondents only ‘ticked the boxes’ of the survey without further elaboration. In the latter case, we had to rely on them having reported on the law in the books for – again – there was no double-checking.

In order to reduce the risk of error and mistake, considerable time was invested in finding knowledgeable experts and each question had ‘I do not know’ as an alternative answer-option available. Contradicting information, unclear answers or missing answers, are all reported as ‘missing’ in the following results section. Questionnaires with too many ‘blanks’ were excluded from the study. Despite these precautions, the aforementioned limitations may have had an impact on the reliability of the findings and the results therefore need to be interpreted with care.

Despite these methodological caveats we still think the results are worthwhile. Perhaps not so much on the level of the individual countries: the methodological limitations are too significant to draw final conclusions regarding a particular measure in a particular country and readers interested in the exact national regulatory framework in a country are advised to look for additional information in other sources. But the overall picture painted by the results do give an explorative and more global idea of the manner in which EU countries cater for victims of hate crime. Although the correct classification of the countries in the following tables cannot be guaranteed with 100% accuracy, the tables do present an estimation of the different measures available for

20 N. Maguire and K. Beyens (eds.), ‘Using Vignette Methodology to Research the Breach Comparatively’, 7(3) *European Journal of Probation* 241 (2015).

21 D.P. Farrington, ‘Cross-National Comparative Research on Criminal Careers, Risk Factors, Crime and Punishment’, 12(4) *European Journal of Criminology* 386 (2015); G. Robinson and K. Svensson, ‘Fish Out of Water? Introduction to the Special Issue on Innovative Methods for Comparative Research on Offender Supervision Practice’, 7(3) *European Journal of Probation* 171 (2015).

22 M. Siems, ‘The Power of Comparative Law: What Types of Units Can Comparative Law Compare?’, 67(4) *American Journal of Comparative Law* 861 (2019).

23 The comparability of the findings was, for instance, increased by providing the experts with a survey in which certain legal terminology was explained in words or with the help of examples (e.g. ‘[h]ate crimes are aggravated offences, meaning that the law prescribes a higher penalty’ or ‘police officers who share the same characteristic as the victim (e.g. also LGBTQI+); by adopting – as much as possible – terminology from the EU Victim Directive; and by operationalising more generic rights from the EU Victim Directive into concrete examples of protection measures (the right to protection against repeat victimisation was, for instance operationalised through questions regarding choosing domicile at the police station, keeping contact details out of the police report, etc.).

24 According to Maguire and Beyens (eds.), above n. 20, language barriers are the primary problem of any comparative research.

Table 2 Protected Grounds in EU Member States

	Race	National or ethnic origin	Language	Colour	Sexual orientation	Religion	Sex	Age	Mental or physical disability	Gender identity	Other ground
Austria (AT)	X	X	X	X	X	X	X	X	X		
Belgium (BE)	X	X	X	X	X	X	X	X	X		X
Bulgaria (BG)	X	X				X					X
Czech Republic (CZ)	X	X		X		X					X
Cyprus (CY)	X	X		X	X	X				X	X
Denmark (DK)	X	X		X	X	X					
Finland (FI)	X	X		X	X	X			X	X	
France (FR)	X	X		X	X	X	X			X	
Germany (DE)	X	X		X	X	X	X	X	X	X	X
Greece (EL)	X	X			X	X	X		X	X	X
Hungary (HU)	X	X			X	X			X	X	X
Ireland (IE)*											
Italy (IT)	X	X		X		X					
Latvia (LV)	X	X		X		X	X	X	X		X
Lithuania (LT)	X	X	X		X	X	X	X	X		X
Malta (MT)	X	X	X	X	X	X	X	X	X	X	X
Netherlands (NL)	X	X		X	X	X			X	X	
Poland (PL)	X	X				X					
Portugal (PT)	X	X		X	X	X	X		X	X	X
Slovenia (SI)	X	X	X	X	X	X	X				X
Spain (ES)	X	X		X	X	X	X	X	X	X	X
Sweden (SE)	X	X		X	X	X				X	

* Due to the lack of a national definition, the Irish respondent did not fill out this question

victims of hate crime and whether certain measures or discriminatory grounds are widely supported (or not) throughout Europe.

4 Summary Results From the Survey²⁵

4.1 National Definitions and Protected Grounds

The first question of the survey inquired after the national definition of hate crime. Clearly, there is no universally accepted definition and many experts indicate that even a national definition of hate crime does not

25 Because of space limitations only a selection of the results is presented here. A full account of the survey results can be found (in Dutch but with tables in English) in van der Aa et al., above n. 2.

Table 3 Investigation and Prosecution of Hate Crimes in EU Member States

	True for All Hate Crimes	True for Some Hate Crimes	Not True	I Do Not Know	Missing or Invalid Answer
Hate crimes are investigated and prosecuted more actively than 'regular' crimes	ES, FR	DK, EL, NL	AT, BE, BG, HU, IE, IT, LV, MT, PT, SE, PL, LT, CZ, CY	DE, SI	FI
When there is sufficient evidence, hate crimes have to be prosecuted (no discretionary power to dismiss cases)	AT, BG, DK, DE, HU, IT, LV, MT, PT, SE, PL	FI, EL, LT, CY, NL	IE, SI, FR	BE, ES, CZ	
Hate crimes have to be registered carefully and earmarked in police registration	BE, DK, FI, DE, EL, HU, LV, MT, SE, PL, CZ, FR, NL	AT, IE, ES, CY	BG, IT, PT, LT, SI		
Hate crimes are dealt with by specialised police officers	BE, HU, ES	AT, FI, EL, PT, SE, NL	BG, DK, IE, IT, LV, PT, PL, LT, CZ, CY, SI, FR		DE
Hate crimes are prosecuted by specialised prosecutors	BE, ES, PL, CZ	AT, EL, SE, NL	BG, DK, FI, DE, HU, IE, IT, LV, MT, PT, LT, SI, FR	CY	

exist. Often this is caused by the fact that hate crime *as such* has not been introduced in the national jurisdictions as an independent legal concept or a distinctive crime, but that discriminatory motives or aspects usually serve as aggravating circumstances to other underlying crimes.²⁶ Most countries have opted for the introduction of a generic statutory provision or – to a lesser extent – prosecutorial guidelines prescribing an aggravating sentence to all crimes with a discriminatory motive or aspect,²⁷ albeit that certain Member States have limited this effect to certain underlying crimes only (e.g. BE, MT).

With regard to the protected grounds, most countries have opted for a limited list of victim categories, while other countries – through the use of open terms such as ‘other similar grounds’ or ‘other social groups’ in their national definitions – seem to accept non-defined categories of victims as well (e.g. DK, FI, SE, SI). In the countries with a limited list, the numbers of grounds covered by anti-hate crime laws and policies vary significantly, ranging from only three to four grounds (PL, BG, IT) to exhaustive lists that include a wide range of protected grounds (e.g. BE, DE, MT, ES). Table 2 provides an overview of the protected grounds covered in each Member State.

Table 2 shows that the grounds of ‘race’, ‘national or ethnic origin’ and ‘religion’ enjoy protection against hate crime in all Member States. The Member States are

more divided where ‘sexual orientation’ and ‘mental or physical disability’ are concerned. Still, these grounds are protected in a vast majority of the countries investigated. ‘Gender identity’ is protected in approximately half of the Member States, but this ground is clearly becoming more important and could be considered an emerging European trend.²⁸ Less popular grounds for protection are ‘language’, ‘sex’, ‘age’, and ‘ideological or political opinion’. Unique grounds – that is grounds acknowledged by a maximum of three Member States – are ‘citizenship’ (MT) and ‘social status or descent’ (DE, LT, BE). Also, while some countries have accepted multiple protected grounds, in practice and policy some grounds are prioritised over others. The German and Austrian approach to hate crime, for instance seems particularly focused on tackling politically motivated (right-extremism, antisemitism, xenophobia and racism) hate crime.²⁹

4.2 Investigation, Prosecution and Training Related to Hate Crime

Hate crimes are not necessarily investigated and prosecuted more actively than ‘regular’ crimes, but in many Member States there is less leeway for public prosecutors to use their discretionary power to dismiss cases of hate crime (see Table 3). Sometimes this is the result of a country’s adherence to the legality principle, which does not allow for prosecutorial discretion in any case, but other times, it is related to the fact that national

26 Many countries have criminalised specific crimes such as incitement to hatred, discrimination, denial of the Holocaust, but a generic hate crime offence is absent.

27 Only in Ireland and Sweden there seem to be no statutory provisions nor prosecutorial guidelines prescribing a higher penalty in the case of hate crime. Still, the courts in those countries are allowed to use their discretionary powers to impose a higher sentence.

28 Some experts related to the fact that gender identity was a relatively new protected ground, which did not exist before (e.g. the Netherlands). Sometimes the ‘trend’ transpired from the fact that this ground was recently introduced in criminal laws (e.g. Cyprus).

29 This is evidenced, for instance, by the fact that in Austria only these specific forms of hate crime are properly registered and only victims of on-line racist or antisemitic hate crime have access to online reporting facilities. For Germany, see also S-J. Kees and P. Iqanski (eds.), ‘Hate Crime Victim Support in Europe: A Practical Guide’, RAA Sachsen (2016), at 10.

Table 4 Training on Hate Crimes for Police Officers and Prosecutors in EU Member States

	Receive Compulsory Training on Hate Crimes	Can Take Elective Courses on Hate Crimes	There Is No Special Training on Hate Crimes	I Do Not Know	Missing or Invalid Answer
All police officers...	BG	BE, BG, DK, FI, DE, HU, IT, LV, MT, CZ, FR, NL	AT, EL, IE, PT, LT, SI	ES	CY, SE, PL
New police officers...	BE, BG, DE, FI, IT, LV, ES, NL	BG, DE, HU, FR	AT, EL, IE, PT, LT, SI	CZ	CY, SE, MT, PL
Specialised police officers...	BE, BG, HU, ES, PL, NL	BG, DK, FI, DE, IT, LV, CZ	EL, IE, PT, LT, SI	AT	CY, SE, MT, FR
All public prosecutors...	BG, PL	BE, BG, DK, FI, DE, IT, LV, CZ, FR, NL	AT, EL, HU, IE, MT, PT, LT, SI	ES	CY, SE
New public prosecutors...	BE, BG, EL, MT, FR	BG, DE, IT, LV, CZ, NL	AT, HU, IE, PT, PL, LT, SI	DK, FI, ES	CY, SE
Specialised public prosecutors...	BE, BG, ES, PL, NL	BG, DE, IT, LV, CZ	EL, IE, MT, PT, LT, SI	AT, DK, FI	CY, SE, HU, FR

policy prescribes mandatory prosecution in hate crime cases because of their seriousness.

The careful registration and earmarking of hate crimes in police registration systems also enjoys substantial following. In almost all Member States the police are supposed to carefully and separately register (certain) hate crime incidents. Of the respondents who reported that this is ‘not true’ for their country, some indicated that although separate registration is prescribed in theory, in practice the police do not live up to this requirement.

When it comes to specialisation of police officers and public prosecutors, Table 3 shows that while some Member States employ specialised police officers or specialised prosecutors, in practice, many hate crime cases are being dealt with by generalists in those countries as well, often on account of the limited availability of specialists.

As far as training is concerned, the countries usually work with elective courses that police officials and public prosecutors can take on a voluntary basis (Table 4). In some countries, however, mandatory courses are prescribed, but mostly for new or specialised police officers and prosecutors.

4.3 Protection Measures During Pre-trial Investigation

Table 5 depicts which (special) procedural rights and services hate crime victims can benefit from during the pre-trial phase.³⁰ It demonstrates the different ways by which countries deal with hate crime victims at this stage of the proceedings. The right to be individually as-

30 The questions were based on a combination of protection measures for vulnerable victims enlised in the EU Victim Directive and some rights available in the Dutch criminal justice system. The respondents were given the opportunity to also mention additional rights specific to their respective national systems (‘other rights, namely...’), but none of them made use of this option.

essed for protection needs stems from the EU Victim Directive and was implemented in almost all Member States, whereas the option to be interviewed by a police officer with the same characteristic as the victim is practically non-existent.³¹ Also, while rights related to specialised anti-discrimination services and victim support organisations; the provision of additional general information; and special support during interviews are available in quite a few Member States, this is not true for the right to choose domicile at the police station; to be interviewed by the same person in the case of multiple interviews; or to privileged case-specific information. These latter rights are not widespread at all. Large national discrepancies were furthermore found with regard to the right to report the crime online; the right to third-party reporting; and the right to keep victim contact details removed from the police report.³²

31 The Finnish respondent indicates that although this right exists ‘on paper’, it lacks practical meaning, because in practice it depends on whether the victim knows a police officer with similar characteristics. Ireland and the Netherlands also have LGBT Liaisons Officers and Ethnic Liaisons Officers, but these are not (always) available in all police stations. In Athens, there exists a similar practice, but this practice is limited and not laid down in legal or policy documentation.

32 It should be noted that even if particular rights are offered in certain Member States, large differences can exist between the scope and implementation of these rights in practice. Bulgarian hate crime victims are, for example, allowed to use online reporting facilities, but at a later stage they are still obliged to contact the authorities in person in order to sign the report or answer additional questions.

Table 5 Protective Measures for Hate Crime Victims During the Pre-trial Phase in EU Member States

Do Hate Crime Victims Have the Right ...	Yes, All Hate Crime Victims Have This Right	Yes, Some Hate Crime Victims Have This Right	No, This Is Not a Right for Hate Crime Victims	I Do Not Know	Missing or Invalid Answer
... to report the crime online?	BG, FI, DE, EL, LV, PT, LT, SI	AT, MT	BE, HU, IE, IT, ES, PL, CZ, CY, NL	DK, SE	FR
... to have the crime reported by third parties (e.g. NGO or employer)?	AT, BG, FI, DE, HU, LV, ES, SE, LT, SI, NL	MT, PT, FR	BE, EL, IE, IT, PL, CZ	DK, CY	
... to have their contact details kept out of the report?	DE, HU, SE, PL, CZ, LT, FR, NL	AT, LV	BE, BG, FI, EL, IT, PT	DK, IE, MT, ES, CY	SI
... to choose domicile at the police station?	LV, PT, ES, FR, NL		AT, BE, BG, EL, HU, PL, CZ, LT	DK, DE, IE, MT, SE, CY, SI	FI, IT
... to be individually assessed to see if they have special protection needs?	AT, BE, BG, FI, DE, EL, HU, IT, LV, PT, ES, SE, MT, CZ, FR, SI, NL	LT	PL	DK, IE, CY	
... to be interviewed by the same police officers (in case of multiple interviews)?	FI, HU, PT, CZ	NL	AT, BE, BG, DK, EL, IT, LV, SE, PL, LT, FR	DE, IE, MT, ES, CY, SI	
... to contact police officers who share the same characteristic as the victim (e.g. also LGBTQI+)?	FI	NL	AT, BE, BG, DK, EL, HU, IE, IT, LV, PT, ES, SE, PL, CZ, CY, LT, FR, SI	DE, MT	
... to receive particular support during interviewing/reporting?	FI, DE, HU, IT, PT, ES, SE, CZ, FR, SI, NL	AT, BG, EL, LV, MT	DK, PL, LT	BE, IE, CY	
... to be kept informed of the developments in their case more frequently or more in-depth than 'regular' victims?	BE, DE, EL, PT, ES, SI		AT, BG, DK, FI, HU, IT, LV, MT, SE, PL, CZ, CY, LT, FR, NL	IE	
... to receive additional general information (e.g. on specialised support services)?	BE, BG, FI, DE, EL, HU, IE, MT, PT, ES, SE, CZ, FR, SI, NL	LV	AT, DK, PL, LT	IE, CY	
... to be referred to specialised anti-discrimination services or victim support organisations?	BE, BG, DK, FI, DE, EL, HU, IT, ES, SE, FR, SI, NL	LV	AT, PT, PL, CZ, LT	IE, CY, MT	

4.4 Protection Measures During the Trial Phase

Table 6 demonstrates that certain measures, such as the right not to be asked irrelevant questions involving one's private life; measures to avoid eye contact with the suspect; to testify via a video-link; to request for an *in camera* hearing; and special support during trial are available to (certain) hate crime victims in a large majority of the Member States. Typically these measures are available on a case-by-case assessment of the victim's needs for such measures – with an individual assessment serving as a gatekeeper – while taking into account fair trial rights of the defendant.

The possibility of making a Victim Impact Statement (VIS) is less prevalent, with only Finland, Ireland, the

Czech Republic, Lithuania, the Netherlands and Latvia supporting this measure for (some) hate crime victims.³³ The fact that many Member States do not offer victims a right to make a VIS could be related to the fact that this is not included as a requirement in the 2012 EU Victim Directive.

33 It is important to note that a relatively high number of respondents did not know whether the right to make a VIS also applied to victims of hate crime. Possibly, this right can only be exercised by hate crime victims of serious (underlying) crimes. For this reason it is possible that the number of countries that do provide certain hate crime victims with a right to make a VIS could be higher than the data suggest.

Table 6 Protective Measures for Hate Crime Victims During the Trial Phase in EU Member States

Do hate crime victims have the right	Yes, All Hate Crime Victims Have This Right	Yes, Some Hate Crime Victims Have This Right	No, This Is Not a Right of (Hate Crime) Victims	I Do Not Know	Missing or Invalid Answer
... to not be asked irrelevant questions involving their private life?	AT, BG, DE, HU, IT, LV, PT, ES, SE, LT, CZ, SI, NL	MT	BE, EL, PL, FR	DK, FI, IE, CY	
... to avoid eye contact with the suspect with the help of screens?	FI, DE, EL, HU, IT, PT, ES, PL, CZ, SI	AT, BG, MT, NL	SE, LT, FR	BE, DK, IE, LV, CY	
... to testify via video conferencing?	FI, DE, HU, IT, LV, PT, SE, SI	AT, BG, EL, MT, NL	ES, PL, LT, CZ, FR	BE, DK, IE, CY	
... to have the trial be held <i>in camera</i> ?	FI, DE, HU, IT, LV, SE, LT, SI	AT, BG, MT, NL	BE, EL, PL, CZ, FR	DK, IE, ES, CY	PT
... to make a Victim Impact Statement?	FI, IE, LV, LT, CZ	NL	AT, BG, EL, HU, IT, SE, PL, FR	BE, DK, DE, MT, ES, CY, SI	PT
... to receive particular support during trial?	FI, DE, HU, IT, MT, PT, ES, SE, CZ, SI, FR, NL	AT, BG	IE, PL, LT	BE, DK, LV, CY	EL

5 Discussion of the Results

In order to assess whether the protection measures offered by the Member States match the victims' needs, we first need to clarify what procedural needs hate crime victims harbour exactly. Unfortunately, dedicated empirical research into the procedural needs of hate crime victims is still in its infancy and much information is anecdotal. However, if we operationalise needs as the desire to reduce the problems experienced by hate crime victims in the criminal justice context, there is more to go on.³⁴ Assuming that the needs of victims represent a mirror image of the problems they face, three clusters of 'needs' seem to top their list: (1) the need to reduce barriers that prevent them from reporting a hate crime to the police, (2) the need to be taken seriously and to receive proper treatment by criminal justice officials, and (3) the need for the discriminatory aspect of the crime to be recognised and acknowledged throughout the criminal procedure. The three needs and the measures that might contribute to fulfilling these needs are discussed separately in the following text. In reality, of course, the three needs often overlap and are difficult to strictly distinguish from one another. As a result, the following protection measures do not necessarily contribute to one need only, but can help fulfil multiple needs.

34 In the interviews with representatives of victim support organisations, the needs ascribed to victims by the interviewees often mirrored the problems they had signalled in the criminal justice context (van der Aa et al., above n. 2). So although 'needs' are not exactly synonyms for the 'reduction of problems', this latter concept can be used as a proxy for victims' needs.

5.1 Reduction of Reporting Barriers

Reporting barriers feature prominently in hate crime literature.³⁵ There can be all sorts of reasons why victims shy away from reporting the crime to the police, such as the fear of not being taken seriously, normalisation and internalisation of hate crime or fear of retaliation. In this respect, specialised police officers, and intensified cooperation between the police, specialised support organisations and affected communities could be of help. The same is true for confidentiality measures to protect the victim's identity and contact details, such as the leaving out of contact details from the police report, the option to choose domicile at the police station, and the possibility to hold *in camera* court hearings. These confidentiality measures could help victims who fear retaliation by the offender or who fear certain characteristics being inadvertently exposed to their relatives and friends.

The barriers mentioned earlier are typically *individual* barriers, that is problems that the individual victim anticipates or feelings that the individual victim harbours, and that prevent *this particular victim* from entering the criminal justice system. These anticipated problems and these feelings can not only be based on reality or previous negative experiences, but also on preconceived notions of how the criminal justice system operates, and while some victims are restrained from contacting the police, others are not. However, when the national laws or policies do not acknowledge certain victims as hate crime victims, this forms a *collective* barrier that blocks *all affected victims* from reporting incidents *as a hate crime*. Whether this is the case has to do with the na-

35 E.g. van der Aa et al., above n. 2; Feddes and Jonas, above n. 3; Christmann and Wong, above n. 3; Chakraborti et al., above n. 3; Chakraborti and Hardy, above n. 3.

tional definitions of hate crime and the discriminatory grounds included in such definitions. When it comes to these discriminatory grounds, most countries opt for a limited list of protected grounds, rather than an open-ended definition. On the one hand, this has the advantage of providing clarity and legal certainty for victims, offenders, law enforcement agents and victim support workers alike. On the other hand, more open definitions, with room for non-predefined categories of victims, are able to capture the full range of hate-associated crimes. For it is possible that other groups of victims are confronted with hostility because of their affiliation with a certain community, without being able to enjoy the protection of national anti-hate crime laws and policies. Nevertheless, given the volatile concept of hate crime, and given the reported problems with the proper acknowledgement and recognition of the hate element in practice, the clarity provided by an *extensive, yet limited list* of protected grounds should prevail over greater inclusivity. At least for now. It would be wise, however, to keep a close eye on the experiences in countries with an open definition or a definition that includes novel discriminatory grounds such as social status. How often do these alternative grounds feature in hate crime cases and what are the (dis)advantages of having a more inclusive definition? Also, signals of hate-related victimisation from non-protected communities need to be monitored carefully. In that sense it is commendable that an increasing number of EU Member States are including gender identity as a new protected ground.

5.2 Proper Treatment

Narratives of not being taken seriously or of experiencing insensitive treatment by criminal justice officials are also frequently reported.³⁶ In order to safeguard their proper treatment, the experts indicated that victims would appreciate the possibility to relate their story to liaison officers (with similar characteristics as the victim) or to officials specialised in hate crime. At the same time, these measures are often hard to realise in all hate crime cases because of practical and financial restraints. The survey results show that EU Member States are widely different when it comes to the employment of police officers and public prosecutors who specialise in hate crime. Often what is mentioned by the experts as a best practice has the potential to solve many of the procedural problems that hate crime victims are dealing with. Given the legal complexity of these types of cases – for instance in terms of recognition and evidence collection regarding the discriminatory element – and the need for the sensitive treatment of hate crime victims, there is definitely something to be said for specialisation. Working with specialists may also have the advantage of early detection of relevant new developments through closer personal contacts with affected communities.

36 E.g. van der Aa et al., above n. 2; N. Chakraborti, 'Responding to Hate Crime: Escalating Problems, Continued Failings', 18(4) *Criminology & Criminal Justice* 387 (2018).

At the same time it appears that even in countries with specialised criminal justice officials, hate crime cases are often dealt with by 'regular', non-specialised colleagues due to practical limitations, most notably a lack of specialists and sufficient financial resources. So even in these countries a certain level of specialist knowledge and skills in otherwise generalist police officers remains important. It is pivotal that generalists are able to recognise the hate element as well – or they cannot refer to specialist services – and all policemen should be able to respond in an emphatic, respectful and professional fashion during those first contacts with victims. Raising awareness and compulsory training for all front-office officials dealing with hate crime victims therefore seems indispensable.³⁷

5.3 Recognition and Acknowledgement of the Hate Element

Problems with the recognition and acknowledgement of the hate element play a role throughout the criminal procedure. In the reporting stage, the employment of specially trained or otherwise sensitised professionals helps, and so also the careful registration and earmarking of these cases, as reported by the experts in many EU Member States.

Furthermore, the instruction to register hate crime reports based on the *perception* of the victim and to actually register *reports* might also contribute to the recognition and acknowledgement of the hate element. In some systems (e.g. NL) there is a difference between registering the incident as a notification versus an official report. In the case of a notification, the notifier only wants to inform the police of an incident, whereas in the case of an official report, the person concerned implicitly asks for prosecution. In our study of the Dutch regulatory framework, several interest groups complained about the fact that sometimes hate crime victims intended to report a hate crime, but the incident was *de facto* only registered as a notification.³⁸ Since prosecution is typically reserved for cases in which the hate crime incident is *reported*, this led to disappointment on the part of the victims. On the basis of this study we could not verify to what extent other EU jurisdictions also allow for different registration methods (notification versus report). However, if such differences exist, registering incidents in an official report should be the default manner of registration, because at that stage, it is undesirable to provide police officers discretionary leeway to make their own choice based on the perceived seriousness of the incident or evidentiary considerations. Only after the victim has been properly informed about the difference between notifying the police and reporting a crime, and then *consciously and explicitly*

37 The Portuguese Victim Support Organisation (APAV), together with partners from Austria, Italy, Malta, the UK and Sweden, has developed a special training module for police officers, public prosecutors and victims support workers on hate crime and the manner in which victims should be treated (see the project *Hate No More: Training and Awareness Raising to Combat Hate Crime and Hate Speech*).

38 van der Aa et al., above n. 2.

chooses not to report the incident, can an incident be registered as having been notified. A similar consideration goes for the question of whether or not to tag an incident as a hate crime or as a regular offence under general criminal law without a discriminatory aspect. At the reporting stage, the victim's perception should be leading in this respect as well.

The hate element may also disappear further along the legal trajectory due to evidentiary difficulties resulting in a conviction for the underlying crime without the aggravating hate factor. In order to prepare victims for this risk, there is also a need for timely case-specific information and expectation management. This information furthermore needs to be provided and explained in a manner that the victim can understand (e.g. avoidance of legal jargon; or use of intermediaries in the case of disabled victims).

6 Conclusion

Although it provided a rather crude measurement of the legal situation in the Member States, the survey has revealed the widely disparate practices of the EU Member States when it comes to the national definitions of hate crime and the treatment of hate crime victims within criminal proceedings. Large variations were, for instance, found with regard to the protected grounds. While the 'classical' grounds of race, religion, sexual orientation and disability are widely acknowledged, other grounds are not included in national definitions or they do not receive similar prioritisation. Whereas a clear delineation of the scope of anti-hate crime policies deserves support, national legislators and policymakers are advised to be alert to new developments in society – for example the emergence of new groups of victims that are not yet protected – and to adjust their definitions accordingly. The recent inclusion of 'gender identity' in many jurisdictions is a good example of this.

The survey furthermore indicated that the level of procedural protection provided to hate crime victims is equally disparate. In fact, some Member States are not even living up to the minimum requirements codified in the EU Victim Directive, for example countries who do not provide for an individual assessment.

This does not mean that countries that have transposed the EU minimum standards in their national laws and policies can rest on their laurels.

Empirical victimisation studies showed that hate crime victims are confronted with a multitude of problems in the criminal justice context.³⁹ In that respect, the wide availability – at least on paper – in the EU Member States of the individual assessment as a screening device to check for protection needs is promising. If this paper reality is also implemented in practice and if it is combined with a well-balanced set of protection rights it allows for a much-needed tailor-made approach.

Judging by the problems found in literature, some of the protection measures adopted by the EU Member States certainly have the potential to fulfil victims' needs. This is, for instance, true for the careful registration and earmarking of hate crime cases, the use of specialised (liaison) officials, the organisation of training facilities, the confidentiality measures, and so on. Countries that have not done so already are advised to carefully consider implementing those measures in their national criminal justice systems.

Even though more research is needed – particularly on the distinctive needs of the different and heterogeneous groups of hate crime victims and the effectiveness of protection measures – Member States should consider expanding their current corpus of protection measures already in order to address some of the victims' most urgent needs. Inspiration could, for instance, be drawn from countries with elaborate national policies in this respect, most notably the UK. From the perspective of victims, the handling of their case by specialised police officers and prosecutors would take away some of their most pressing concerns. Bearing in mind, nevertheless, that even countries with the most sophisticated anti-hate crime policies struggle to provide for such specialists in all or even most cases, the need for compulsory training of all front-office personnel remains crucial. A final remark concerns the difference between the *law in the books* and the *law in practice*, which was a common theme in many replies from the experts. They emphasised the importance of a good implementation of the existent rights in practice. Arguably, in some countries, the bottleneck within the criminal procedure is not so much a lack of procedural rights, but rather a lack of proper implementation of these rights, lack of capacity and lack of specialised knowledge on the level of the enforcement agencies. The fact that hate crime victims will only ever experience proper treatment by justice officials with sufficient awareness of the special sensitivities of this group and the particular difficulties in relation to the recognition and acknowledgement of the discriminatory aspect makes differential treatment of this vulnerable group not a privilege, but the only way to level the playing field.