European Network Against Racism
Réseau européen contre le racisme

Monitoring EU law on racist crime: A guide for civil society

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Foreword by Sarah Isal, Chair of ENAR

Hate crime, and in particular racist crime are a European-wide emergency. In a general context characterised by economic and social tensions and the growth of political forces promoting racist and xenophobic ideas, policies, laws and practices, anti-racism civil society organisations record an increase in the number of reported attacks. The same is true when it comes to hate crimes targeting other communities, such as LGBTI persons. ENAR and other anti-discrimination NGOs have long been calling for consistent and comprehensive policies to be put in place.

In 2008, the EU adopted a Framework Decision to combat racism and xenophobia by means of criminal law (hereafter: the Framework Decision). Although it represents a first step, this instrument remains too limited in its scope, and only provides for a low level of harmonisation. Not all hate crimes are covered by the Decision, which also fails to provide clear and detailed rules as regards investigation, prosecution and sentencing of such offences. In addition, the European Commission itself, in its evaluation reports, has acknowledged that the implementation of the existing provisions remains far from satisfactory. In 2012, the EU adopted another piece of legislation, a Directive on the rights of victims of crime, which gives Member States certain obligations in cases of hate crimes, in particular as regards victims' protection needs. This Directive is a new step forward, but does not – and was not intended to – improve the gaps of the Framework Decision's criminal law provisions.

Since the end of 2014, the European Commission has gained the power to act for Member State to fully comply with their obligations under the 2008 Framework Decision. The Victims' Rights Directive will have to be fully transposed and implemented in all countries by November 2015. For the European anti-racism movement, the priority is to gather and produce information on actual implementation of EU standards. This exercise is necessary to precisely identify gaps and to advocate for the full implementation and reinforcement of existing instruments.

This guide aims to organise and facilitate reporting by ENAR members and other civil society organisations on EU law transposition, and on the effectiveness of the policies adopted by Member States as a result. We need this information to be systematically collected in order to provide evidence that the current legislation is not enough. We need this information to be able to define the improvements that need to take place. Last but not least, we need this information to build political will.

Until now, despite calls by the European Parliament, the EU Council and the European Commission have consistently insisted that existing legislation needed to be fully implemented first before standards can be improved. Fair enough. It is now up to us to accumulate evidence showing that enforcement should be taken seriously and not be an excuse to stall progress.

Monitoring EU law on racist crime - A guide for civil society is a simple check list of existing obligations. It is yours. Use it, compare it to your country's laws and policies. Tell us what the gaps are. Tell us what is missing, so that we can make the case for improved standards.

1. What is the nature of Member States' obligations?

Implementing European Union legislation is not an option. Member States have to comply with EU provisions. However, the type of legislative instruments used by the EU in the area of hate crime lead to some complexity. In fact, Framework Decisions and Directives are not directly applicable. They are enforced after **transposition into national law**, by means of national legislation adopted by national Parliaments. The two EU pieces of legislation in the area of hate crime have different characteristics in this respect.

1.1 Nature of Member States' obligations under the Framework Decision on Racism and Xenophobia (2008/913/JHA)

The ***Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*** was adopted on 28 November 2008 by the Council of the EU, after seven years of negotiations. Member States had to comply with all its provisions by 2 November 2010 at the latest. The Decision also included a time frame for Member States to report to the European Commission on the state of implementation, and for the Commission and the Council to subsequently review the Decision.

Until the end of 2014, the European Commission did not have any power to force Member States to improve their legislation resulting from framework decisions, even where the implementation would not have been deemed satisfactory. The adoption of the Lisbon Treaty has changed this situation:

- From now on, Framework Decisions no longer exist.
- The existing obligations resulting from Framework Decisions adopted in the past have been aligned with obligations resulting from Directives, following a transition period of 5 years, which expired on 1 December 2014.

In practice, this means that the European Commission has now gained the power to launch infringements proceedings against Member States. If the assessment of the Decision's implementation at national level concludes that the provisions have not been consistently enforced, it is now possible to legally force national governments and parliaments to comply with their obligations. This can include legal proceedings before the Court of Justice of the European Union (CJEU), if dialogue does not result in the situation being adequately addressed.

This change entered into effect in December 2014. This is why engaging in a thorough NGO monitoring of the Framework Decision's implementation is important for ENAR. Civil society organisations providing evidence to the European Commission is indeed one way of establishing a State's systematic failure to comply with its obligations, which is the condition for infringement procedures to be launched.

1.2 Nature of Member States' obligations under the Victims' Rights Directive (2012/29/EU)

The ***Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime*** was adopted by the European Parliament and the Council on 25 October 2012. In EU law, it is very clear that Member States need to comply with all the obligations brought about by a Directive, at the latest by the end of its transposition period.

In the event that a Member State fails to transpose, or incorrectly transposes a Directive, the European Commission has the power to launch infringement procedures, based on its evaluation of the situation. Information provided by civil society organisations can play a key role in establishing a State's failure to comply with its obligations. In addition, the CJEU has clarified that the Directive can be given direct effect after the end of the transition period, in case it has not been correctly transposed. However, this applies only where an individual brings a case to court, based on clear and precise provisions.

The transposition period will expire on 16 November 2015. The Commission will then have another two years to assess the extent to which the Member States have taken the necessary measures.

The Directive is a complex piece of legislation, and its implementation may require the adoption and/or modification of different types of national laws and policies. It is thus important for ENAR member organisations to start building their capacity to assess its transposition.

2. The Framework Decision on Racism and Xenophobia: list of obligations

The Framework Decision is a criminal law instrument, and its transposition had to result in the adoption of national criminal law provisions conforming to the minimum standards it defines.

2.1 Criminal law measures tackling racist and xenophobic crimes

Unlike for racist speech (see next section), the Framework Decision requires little from Member States when it comes to racist crime. Article 4 ('Racist and xenophobic motivation') **obliges Member States to consider a racist or xenophobic motivation as an aggravating circumstance, or to have it taken into consideration by the courts in the determination of penalties.**

> "**[Article 4]** For offences other than those referred to in Articles 1 and 2, Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties."

The Decision does not set any guidelines on the level of aggravation or penalty enhancement that should be associated with a proven racist motivation.

Significantly, **aggravation or consideration in the determination of penalties shall apply to all criminal law offences - from the most benign ones to murder - provided that a racist or xenophobic motivation is found.** Many national laws only provide for aggravating circumstances for certain types of offences.

2.2 Criminal law measures tackling racist and xenophobic speech

As the present publication focuses on EU law obligations related to hate crime, we will only describe the type of hate speech offences which are subject to criminal law harmonisation measures. It has to be emphasised that this constitutes the biggest part of the Decision.

The Decision defines a common criminal law approach to certain forms of racist and xenophobic expression. As a consequence, Member States must ensure that the following intentional conduct is punishable when directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin:

- Public incitement to violence or hatred (Article 1 (1) (a));
- Similar incitement committed by public dissemination or distribution of tracts, pictures or other material (Article 1 (1) (b));
- Public condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes, defined by a reference to the Statute of the International Criminal Court (Article 1 (1) (c));
- Public condoning, denying or grossly trivialising the crimes defined by a reference to the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945 (Article 1 (1) (d));
- Article 2 of the Decision also obliges Member States to make instigation, aiding and abetting of such conducts punishable.

Importantly, the Decision also provides that such conduct shall be punished by "effective, proportionate and dissuasive criminal penalties", and that all the forms of conduct described in Article 1 shall be punished by maximum penalties of at least between 1 and 3 years of imprisonment (Article 3). In addition, Articles 5 and 6 of the Decision provide that legal persons can hold a liability for committing the same offences. They describe how such a liability should translate in concrete terms, without excluding criminal proceedings against the natural persons who perpetrate the offence. Member States are also invited (but not obliged) to consider specific sanctions, such as the exclusion from entitlement to public benefits.

Member States are authorised to limit the scope of the hate speech provisions to be enacted as a result of the Decision. For example, they can choose to punish only conducts carried out in a manner likely to disturb public order, or which is threatening, abusive or insulting (Article 1 (2)). They can limit the application of criminal law provisions, in the case

of “groups defined by reference to religion”, to the cases where religion is intended to cover conduct which is “a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic religion” (Article 1 (3)).

2.3 Sticky points for the European Commission and possibility of infringement procedures

On 27 January 2014, the European Commission published a report on the implementation of the Framework Decision, a first evaluation step before possibly considering infringement procedures to force Member States to modify their legislation, policies and/or practice. As the Commission clarifies in the report’s introduction, **this assessment is based on a legalistic approach**, in the sense that it is based on the transposition measures notified by the Member States. However, the Commission also made use of technical information such as national case-law and policy guidelines, in order to understand the actual functioning of existing transposition measures.

The report remains a very short document, which provides a global overview for each key provision of the Decision. This is why ENAR has undertaken research including in the frame of its **Racist Crime in Europe: ENAR Shadow Report 2013-2014** on hate crime, to have a better and clearer picture of the state of play of anti-racist criminal law in Europe, and of its actual implementation. **ENAR’s aim is also to go beyond a merely legalistic approach**, as a proven and systematic incapacity to implement adopted measures can also be a reason for the European Commission to launch infringement procedures.

Civil society reporting on implementation gaps, including gaps due to policy practices, will matter to ensure that the Commission fully identifies implementation failures and consequently undertakes corrective action. This is by no means a theoretical notion: at the time of writing the present publication (December 2014), the Commission has confirmed that initiatives have already been taken to ask some Member States to better clarify their policies.

The points below offer examples of some of the problematic areas identified by the Commission in 2014:

- As regards the transposition of the hate crime provision, a significant number of Member States provide that a racist or xenophobic motivation shall be considered as an aggravating circumstance with regard to ***only*** certain crimes. Among them, Bulgaria, Estonia, France, Hungary, Ireland, Luxembourg, Poland, Portugal and Slovenia (at least) seem not to have been able to prove that their national criminal legislation and policies matched EU law requirements.
- On the possibility offered to Member States to limit the scope of criminal law provisions, the Commission provides no information about the limitation of the concept of religious groups. In contrast, it is established that some Member States have made use of the possibility to punish only hate speech that is likely to disturb public order or that is threatening, abusive or insulting (Austria, Cyprus, Germany, Hungary, Ireland, Lithuania, Malta, Slovenia, United Kingdom).

- On the different forms of hate speech that shall be punished in application of the Decision, the Commission provides a separate assessment. For all of these forms of hate speech, implementation measures vary from Member State to Member State, and in all cases, some of them are found not to fully comply with the Decision's minimum requirements.

3. The Victims' Right Directive: list of obligations

This section lists the most important obligations of Member States as regards racist crimes and other forms of hate crime. However, it is important to note that the rights defined in the Directive are rights guaranteed to victims of all crimes, and are not specific to victims of hate crime.

3.1 All migrants benefit from the rights guaranteed by the Directive – Article 1 (1)

According to Article 1 (1) of the Directive, **all migrants shall benefit from the rights it legally establishes**. The Directive is very clear that this shall be the case, irrespective of their residence status.

> "**[Article 1 (1)]** […] Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings. The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status."

Any legislative provision or policy that would contradict this principle, or *de facto* prevent it from being enforced, would be in contradiction with Member States' legal obligations.

3.2 Obligations of public authorities to acknowledge crime reports – Article 5 and preamble

The provisions of the Directive as regards reporting crimes to the authorities are relatively complex, and require interpretation in light of the preamble.

Obligation to acknowledge in writing the complaint and the type of crime

The first clear obligation mentioned in the Directive is the **obligation for Member States' authorities to deliver a written acknowledgement of a formal complaint to victims** (most often, this will mean the police). This obligation is defined in Article 5 (1) of the Directive:

> "**[Article 5 (1)]** Member States shall ensure that victims receive written acknowledgement of their formal complaint made by them to the competent authority of a Member State, stating the basic elements of the criminal offence concerned."

In light of the preamble, **the concept of "basic elements of the criminal offence", mentioned in Article 5 (1), shall include the type of crime at stake**. As the Directive, in other articles, mentions crimes committed with bias or discriminatory motives related to the victims' characteristics, it is arguable that the written acknowledgement should include whether the crime reported is a hate crime, a particular type of crime.

> "**[Recital 24]** When reporting a crime, victims should receive a written acknowledgement of their complaint from the police, stating the basic elements of the crime, such as the type of crime […]."

Obligation to use of a language understood by the victim

Another obligation (Article 5 (2)) is the **obligation for public authorities to ensure that the victim receives linguistic assistance or is enabled to make the complaint in a language they understand**. This obligation has to be read in conjunction with the fact that the Directive's provisions and rights are guaranteed not only to EU citizens, but to all victims of crime irrespective of their residence status.

> "**[Article 5 (2)]** Member States shall ensure that victims who wish to make a complaint with regard to a criminal offence and who do not understand or speak the language of the competent authority be enabled to make the complaint in a language that they understand or by receiving the necessary linguistic assistance."

Reporting obligations and data collection

As is normally the case with EU Directives, Member States have an obligation to provide to the Commission, by November 2017, data showing how victims have accessed their rights. The preamble makes this obligation more specific. By mentioning an obligation to report statistical data on the "type of the reported crimes**", it arguably provides a legal basis for Member States to report information on hate crime, including racist crimes**.

> "**[Recital 64]** Member States should communicate to the Commission relevant statistical data related to the application of national procedures on victims of crime, including at least the number and type of the reported crimes and, as far as such data are known and are available, the number and age and gender of the victims. Relevant statistical data can include data recorded by the judicial authorities and by law enforcement agencies and, as far as possible, administrative data compiled by healthcare and social welfare services and by public and non-governmental victim support or restorative justice services and other organisations working with victims of crime."

3.3 Obligation of public authorities to guarantee access to victim support services – Articles 8 and 9

Firstly, Article 8 (1) and (2) make clear that **support services should be made available free of charge and according to the victims' needs**, before, during and for an appropriate time after criminal proceedings. Article 8 (2) also provides that Member States shall "facilitate the

referral of victims by the competent authority that received the complaint and by other relevant entities to victim support services".

Secondly, it is very important to note that according to Article 8 (5), **access to victim support services should not be limited to victims who have made a formal complaint** to a competent authority. This should be kept in mind, particularly in the case of undocumented migrant victims who could be reluctant to contact police services:

> "**[Article 8 (5)]** Member States shall ensure that access to any victim support services is not dependent on a victim making a formal complaint with regard to a criminal offence to a competent authority."

Lastly, Article 8 makes clear that **the existence of victim support services, both generalist and specialist, is a positive obligation for Member States**. Article 8 (4) adds that such services can be professional or voluntary, public or provided by NGOs, but in all cases Member States have to ensure that they exist, which entails public funding obligations, as all those services shall be provided free of charge.

3.4 Obligation of public authorities to recognise specific protection needs and to make available protection measures for victims of racist crimes – Articles 22 and 23

The Directive puts a strong emphasis on the protection of victims and the recognition of victims with specific protection needs. Such specific protection needs can result in specific protection measures during investigation phases and court proceedings (Article 23):

- During criminal investigation, they include accommodation measures as regards interviews with victims (training level of the professional conducting the interviews, characteristics of the premises, gender of the interviewer, etc.);
- During court proceedings, they include avoiding eye contact between victims and offenders, the avoidance of unnecessary questioning on the victims' private life, or the possibility of hearings without the presence of the public.

Member States should provide for individual assessment of victims to identify specific protection needs (Article 22) including victims of hate crime. All victims of crime shall receive such an assessment, but Article 22(3) explicitly provides that **victims of all forms of hate crimes, including racist crimes and multiple bias crimes, should be paid particular attention**, as they are likely to have specific protection needs. While Article 22(3) itself does not mention specific forms of hate crimes, the Directive's preamble, in its Recital 56, provides an inclusive and open list of personal characteristics that may be related to a hate crime. Member States should adopt clear and effective measures to implement this provision, regardless of the level of precision and of the quality of their criminal law provisions on hate crime.

> "**[Article 22 (3))]** In the context of the individual assessment, particular attention shall be paid to […] victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal

characteristics […]. In this regard, victims of […] gender-based violence […] or hate crime […] shall be duly considered."

"**[Recital 56]** Individual assessments should take into account the personal characteristics of the victim such as his or her age, gender and gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, residence status, communication difficulties, relationship to or dependence on the offender and previous experience of crime. They should also take into account the type or nature and the circumstances of the crime such as whether it is a hate crime, a bias crime or a crime committed with a discriminatory motive […]."

3.5 Obligations of Member States to implement training programmes for relevant professionals – Article 25

Article 25 of the Directive is probably one of the most crucial ones for its effective implementation. It defines a set of obligations as regards training of relevant professionals on the Directive's provisions and implementation measures. Article 25 refers in particular to the victims' needs, and to the notion of respect, impartiality and non-discrimination. In particular:

- Member States ***shall ensure*** that training is provided to officials "likely to come into contact with victims", including police officers and court staff (Article 25 (1)).
- Member States ***shall request*** that judges and prosecutors training bodies deliver such training (Article 25 (2)).
- Member States ***shall recommend*** that the same dimensions are taken into consideration in the training of lawyers (Article 25 (3)).
- Finally, Article 25 (4) gives to Member States an obligation ***to encourage*** initiatives on adequate training to "those providing victim support and restorative justice services".

In the long term, the success of **the Directive's implementation will be to a large extent determined by the way in which these trainings are actually and thoroughly delivered** to the relevant practitioners. From an ENAR perspective, it is crucial that civil society and institutional stakeholders seriously work on policy delivery in this respect, and create useful benchmarks to ensure that real efforts are made.

This shall not be regarded as an option for Member States' authorities. **The Directive's preamble reinforces Article 25's provisions.** Recital 61 clarifies that ongoing training should enable practitioners to identify victims' needs in a sensitive manner, in particular in the frame of the individual assessment of victims' special protection needs (see previous section). Recital 62 also encourages Member States to work closely with civil society organisations, including as regards policy making, awareness raising, research, education and training, as well as monitoring and evaluating the impact of measures.

3.6 Additional obligations related to the Directive's interpretation principles (preamble)

The preamble of EU Directives usually sets out general principles, as well as detailed definitions. These are very useful for the interpretation of the measures concerned, and they are very often taken into account by the CJEU. As a result, it is very important to monitor the application of such principles and definitions in national law, as a Member State's failure to correctly implement them arguably results in a transposition shortcoming. Similarly, these principles and definitions have to be mainstreamed in transposition advocacy strategies by NGOs.

Possibility to keep or adopt more favourable measures

EU Directives, as a matter of principle, define minimum harmonisation legal standards. In their national legislation, **Member States then have an obligation to *at least* comply with those standards**. However, they also have the possibility to offer higher guarantees. This principle is made explicit in the preamble of the Victims' Rights Directive, as is often the case in EU law.

> "**[Recital 11]** This Directive lays down minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection."

Obligation not to discriminate in the implementation of the Directive

The Directive's preamble reaffirms the principle of non-discrimination in a particularly explicit way. More precisely, it acknowledges that different situations have to be addressed by tailored and sensitive reactions.

> "**[Recital 9]** As such, victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health. In all contacts with a competent authority operating within the context of criminal proceedings, and any service coming into contact with victims, such as victim support or restorative justice services, the personal situation and immediate needs, age, gender, possible disability and maturity of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity"

Obligation to address gender-based violence and to respond to the needs of victims of gender-based violence

One important dimension of the Directive is the way it addresses gender-based violence. In fact, the EU institutions have tried to mainstream this aspect of victims' rights in this instrument, as they had promised to combat violence against women – but have failed to deliver a dedicated policy frame until now. As a result, the Directive's preamble includes a definition of gender-based violence and recognises that victims of such forms of violence

often face particularly tough situations in relation to secondary victimisation and the need for protection measures.

These principles should be kept in mind when monitoring the transposition of the Directive and its implementation in the case of women victims of racist violence. It has to be stressed that Recital 57 in particular mentions the risks of secondary or repeat victimisation, intimidation and retaliation in relation to victims of gender-based violence and of victims of hate crime. Member States that would fail to adopt sensitive policies would clearly be in breach of their EU obligations in that respect.

> "**[Recital 17]** Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called 'honour crimes'. Women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence."

> "**[Recital 57]** Victims of […] sexual violence or exploitation, gender-based violence, hate crime, and victims with disabilities and child victims tend to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation. Particular care should be taken when assessing whether such victims are at risk of such victimisation, intimidation and of retaliation and there should be a strong presumption that those victims will benefit from special protection measures."

4. Next steps to address current gaps in EU law

While ENAR fully subscribes to the European Commission's conclusion "that the full and correct legal transposition of the existing" legislation "constitutes a first step towards effectively combating racism and xenophobia", we develop our position beyond the application of existing EU law, and remain very critical of the quality of such legislation.

Why should anti-racism organisations engage in thorough monitoring?

Our ***Racist Crime in Europe: ENAR Shadow Report 2013-2014*** provides a more detailed assessment of legislative and policy gaps in all EU Member States. EU law obligations are part of the benchmark, but we go further: we also identify areas that require measures currently not covered by European law.

Detailed information collected on EU law implementation helps civil society anti-discrimination networks to provide evidence that it is not fully applied. It also contributes to prove that this often happens because Member States' obligations are not clear enough.

Detailed information on the state of play in Member States, including policies they adopted on top of their EU obligations, helps to identify what works and which practices are worth disseminating. It reinforces the case for the adoption of new legislation, as the current frame remains incomplete and to some extent inconsistent.

4.1 Indicative list of issues that require an improvement of EU legislation

- **Definition of racist crime:** The Framework Decision's criminal law definition of racist and xenophobic crimes is extremely short and does not provide enough indications on the harmonisation measures required from Member States.
- **Investigation of racist motive:** The Framework Decision falls short of providing clear directions to law enforcement professionals when it comes to the investigation of a racist motivation. This is a surprising gap, as the European Court of Human Rights has clearly identified such an investigation as an obligation for all European States, too often badly implemented because of the absence of clear enforcement policies.
- **Data collection on hate crime:** Despite the existence of commitments made by all European States at OSCE level, only few member States collect comprehensive data on hate crime. This is due to poor investigation and lack of consideration of the bias elements in the pre-trial and trial phases.
- **Definition of criminalised hate speech:** The Framework Decision's provisions criminalising hate speech are criticised by part of the human rights civil society community, because their language does not match international human rights law language as regards the reconciliation of freedom of expression and combating hatred. For example, the Decision seeks to punish "incitement to hatred", which is sometimes regarded as a relatively vague term (the International Covenant on Civil and Political Rights uses the more specific concept of "incitement to discrimination, hostility or violence").
- **Definition of criminal law penalties:** When it comes to the definition of penalties applicable to natural persons, the Framework Decision only sets standards in relation to imprisonment. As the fight against racism and other forms of intolerance is also a

question of prevention, education and example, it would have been useful to introduce an EU criminal standard as regards the possibility to make use of alternative penalties, including for example community service.

- **Definition of Member States' obligations in relation to victims' rights:** The Directive is very often ambitious and vague at the same time. Reading the articles in conjunction with the preamble provides guidelines for implementation. But there is a high risk that this will not be sufficient for all Member States to adopt implementation measures that fulfil its full potential.

4.2 Indicative list of legislative gaps requiring new EU legislation

- **Scope of the hate crime provisions:** The Framework Decision's provisions on hate crimes are limited to racist and xenophobic crimes, which is not consistent with the fact that the Victims' Rights Directive includes norms that explicitly benefit all victims of all forms of hate crimes and "crimes committed with a bias or discriminatory motive" related to any personal characteristic of the victim. As a result, the Directive's provisions make use of criminal law concepts that are fully covered by harmonising or approximating definition measures at EU level.
- **Scope of the hate speech provisions:** The Framework Decision's provisions criminalising hate speech also only cover racism and xenophobia, which is not consistent with the fact that EU treaties, the EU Charter of Fundamental Rights, and increasingly, the jurisprudence of the European Court of Human Rights put more discrimination grounds on an equal footing.

Useful documents and publications:

- Guidelines for transposition, EU Crime Victims' Directive and homophobic/transphobic hate crimes, ILGA-Europe, December 2013.
  http://www.ilga-europe.org/home/publications/reports_and_other_materials

- Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, European Commission, COM(2014)27, January 2014.
  http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf

- Contribution to the Consultations on the European Union's Justice policy (fundamental rights and criminal law), ARTICLE 19, December 2013.
  http://www.article19.org/resources.php/resource/37412/en/article-19%E2%80%99s-submission-to-the-consultations-on-the-european-union%27s-justice-policy

- Prohibiting incitement to discrimination, hostility or violence, ARTICLE 19, December 2012.
  http://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf

- Handbook for implementation of legislation and best practice for victims of crime in Europe, Victim Support Europe, 2013.
  http://victimsupporteurope.eu/activeapp/wp-content/files_mf/1385974688NewVersionVSEHandbookforImplementation.pdf

- EU Victims' Directive Transposition Checklist, PICUM, November 2014.
  http://picum.org/picum.org/uploads/publication/chart_countries_Full_MGM_Nov2014.pdf

- DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, replacing Council Framework Decision 2001/220/JHA, European Commission, December 2013.
  http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf