



DISCRIMINATION AND HATE CRIMES - THE ROLE OF THE PROSECUTOR'S OFFICE
EU ANTI-DISCRIMINATION LAW IN PRACTICE
MADRID
25 September 2024



FISCALÍA GENERAL DEL ESTADO

FISCALÍA GENERAL DEL ESTADO. C/ FORTUNY 4 // 28071 MADRID. www.fiscal.es



Funded by
the European Union

1

Steps
and
considerations in a
common
investigation

- Obtain a complaint and cooperation from the affected party
 - Victims of crimes of this nature are reluctant to report.
- Basic reasons:
 - The matter was not serious enough to involve the police.
 - Embarrassment and fear of negative police reaction.
 - Vulnerable victims.
 - Inadequate evidence.
 - Reluctance to invest time and resources in pursuing the issue.
- Notification by the National Police, Guardia Civil, Associations, Ombudsman...

2

Hate speech prosecution guidelines

- **Exceptionality of** criminal law due to risk of collision with freedom of expression.
- Danger of criminal prosecution of these criminal acts of hate speech being used to repress criticism of official policies, political opposition or religious beliefs.
- Any sanction imposed in a given case must reflect the **principle of proportionality**.
- **Serious acts:** where they are intended, or may reasonably be expected, to have the effect of inciting acts of violence, intimidation, hostility or discrimination and where the use of such expressions **takes place in public**.

3

DUTY TO INVESTIGATE

• **COUNCIL FRAMEWORK DECISION 2008/913/JHA 28/11/2008** (combating certain forms and expressions of racism and xenophobia by means of criminal law):

"Each Member State shall take the necessary measures to ensure that investigations into or prosecution of the conduct referred to in Articles 1 and 2 shall not be dependent on a report or an accusation made by a victim of the conduct, at least in the most serious cases where the conduct has been committed in its territory."

[Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law](#)

4

NEED FOR
RESEARCH



•ECHR 28/03/20107 Skorjanec v. Croatia:
Condemnation of the Croatian state because the Croatian state prosecutor's office failed to investigate racist motives in an attack on a mixed (Roma and non-Roma) couple.

Other Rulings: 4/03/08, 31/03/2010, 4/03/2011, 24/07/2012, 11/03/2014, 12/05/2015, 20/10/2015

The ECtHR obliges states to conduct effective fact-finding. To unmask the discriminatory nature of the facts. And to establish special vigilance and strong reaction mechanisms.

5

ECtHR 11/4/2024
Case Karter v.
Ukraine



•EUROPEAN COURT OF HUMAN RIGHTS FIFTH SECTION KARTER v. UKRAINE CASE JUDGMENT 11/04/24 APPLICATION NO. 18179/17 Obligation for the investigation of violent incidents caused by alleged discriminatory attitudes to be effective by taking all reasonable measures to unmask possible discriminatory motives.

•It stands as an obligation of means and not of results.

•The Court finds violation of Article 3 of the Convention

6

DEFINITION OF HATE SPEECH

ECRI
RECOMMENDATION No.
15 of 21/03/2016



Use of one or more forms of expression for the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression - based on a non-exhaustive list of personal characteristics or status including race, colour, language, religion or belief, nationality or national or ethnic origin as well as ancestry, age, disability, sex, gender, gender identity and sexual orientation.

[16808b7904 \(coe.int\)](https://www.coe.int/t/t09/ecri/ECRI_Recommendation_15_of_21_03_2016.aspx)

7

Concept of hate crime (2003)



- A) any criminal offence, including offences against persons or property, where the victim, his property or the target is chosen because of his actual or perceived connection, affiliation, support or membership of a group defined in Part B)
- B) a group must be based on a common characteristic of its members, such as their actual or perceived race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or other similar factor".

8

DEFINITION OF HATE SPEECH

Recommendation CCM/Rec (2024) Council of Europe



- A criminal offence committed with a hate element based on one or more actual or perceived personal characteristics or status, including within the term "hatred" bias, prejudice or contempt. And understanding as "personal characteristics or status" among others "race", colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender, sexual orientation, gender identity and expression, and sexual characteristics.

• [1680bo8c6b \(coe.int\)](https://www.coe.int/t/t09/Defining_hate_speech/Defining_hate_speech_en.pdf)

9

HATE CRIMES AND SPORT

racist insults



10

Freedom of expression, ideology or conscience
conscience and persecution of hate speech



UN Rabat Plan of Action to set the threshold to properly establish what kind of expressions constitute a crime:

- The context in which hate speech is used (whether there are previous serious tensions in society).
- The author's ability to influence others (political, religious or community leader...).
- The nature and forcefulness of the language used (provocative and direct, whether it uses misleading information, disseminates negative stereotypes and stigmatisation, or is otherwise capable of inciting acts of violence, intimidation, hostility or discrimination...).
- The context of the specific comment (whether it is isolated or repeated).
- The medium used.
- The nature of the audience to whom the message is addressed.

11

International
Covenant on Civil
and Political Rights
1966

- Art. 19.2: Everyone has the right to freedom of expression.
- Art. 20. 2: Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

12

INTERNET and SOCIAL NETWORKS



- It enhances and amplifies the harm to victims.
- Easy to commit.
- Anonymity.
- Dissemination to collaborating third parties (viral content).
- Difficulty in removing the content disseminated (perpetuity of the damage).
- Viral content: "young people encouraging an old man to snort cocaine", "oreo with toothpaste on a homeless person"...

13

Council of Europe Recommendation on online hate speech: TURIN 20.5.2022

[1680a04164 \(coe.int\)](https://www.coe.int/t/0900401680a04164)

El Consejo de Europa ha presentado una serie de directrices dirigidas a sus 46 Estados miembros para prevenir y combatir el discurso del odio, dentro y fuera de internet.

En una [Recomendación](#) adoptada durante su sesión anual que se celebra en Turín, el Comité de Ministros del Consejo de Europa llama a los gobiernos a desarrollar estrategias globales para prevenir y combatir la incitación al odio, incluyendo la adopción de un marco jurídico eficaz y la aplicación de medidas correctamente graduadas y proporcionadas. Al hacerlo, las autoridades nacionales deben conciliar cuidadosamente el derecho a la vida privada, el derecho a la libertad de expresión y la prohibición de la discriminación.

Celebrando la adopción de las directrices, la secretaria general Marija Pejčinović Burić ha declarado: "el discurso del odio está aumentando en Europa, especialmente en Internet, donde a menudo adopta la forma de racismo, antisemitismo o incitación a la violencia. Los gobiernos europeos deben unir fuerzas para hacer frente a esta compleja amenaza para nuestras sociedades mediante medidas eficaces y proporcionadas".

Las directrices recomiendan a los Estados miembros que diferencien entre los casos más graves de discurso del odio que deben ser prohibidos por el derecho penal, el discurso de odio sujeto al derecho civil y administrativo y, por último, las expresiones ofensivas o perjudiciales que no son suficientemente graves como para ser restringidas legítimamente en virtud del Convenio Europeo de Derechos Humanos, pero que, sin embargo, requieren respuestas alternativas.

Se ofrece orientación en materia de concienciación, educación, utilización de un contra-discurso y de un discurso alternativo, creación de mecanismos de apoyo a las personas afectadas por el discurso de odio y formación a los miembros de la policía y la judicatura, así como a otros profesionales.

Aunque se dirige principalmente a los Estados miembros y sus autoridades, la Recomendación también contiene orientaciones para otros actores como funcionarios públicos, partidos políticos, intermediarios de Internet, medios de comunicación y organizaciones de la sociedad civil.

14

ONLINE HATE SPEECH. PROTOCOL FOR
COMBATING HATE SPEECH ONLINE.
THE COMPUTER CRIME UNIT OF THE STATE
ATTORNEY GENERAL'S OFFICE AS A POINT OF
CONTACT.



15

PROTOCOL PARAMETERS NATIONAL RESPONSE TO HATE SPEECH



- Subject:** hate speech content of a criminal nature.
 - Decisions of judicial bodies issued in the course of criminal proceedings:
 - Of a definitive nature Art. 510.6° PC
 - Of a precautionary nature Art. 13 LECrim
- Action by the Public Prosecutor's Office:**
 - encourage and promote the use of the preferred channel: fci.retiradaodio@fiscal.es
 - Acting as a Point of Contact at national level:
 - FGE's Computer Crime Unit
 - Channelling the transmission of notifications and communication with IT companies.

16

PRACTICAL APPLICATION



- A. Propose the use of the preferred channel when measures are taken to make content inaccessible.
- B. Referral to Contact Point via :
 - A. Directly by judicial body
 - B. Through the corresponding territorial Prosecutor's Office.
- C. Recipient of the notification: only the companies that have signed the agreement (so far Facebook, Instagram, YouTube, Twitter, Microsoft, Tik Tok).
- D. Content of the application:  Concrete delimitation
 - Submit a copy of the court decision.
 - Specification of the measure requested:
 - Removal of the content
 - Service interruption
 - Possibility of demanding the duty of confidentiality (Art. 588 ter.e) and 588 octies LECrim).
 - Possibility to request preservation of information (Art 588 octies LECrim).

17

THANK YOU VERY MUCH
FOR YOUR ATTENTION



CYBERCRIME, HATE AND
DISCRIMINATION SECTION

E-mail:

ciberodio.fiscalia.madrid@madrid.org

 Ministerio
Fiscal

Fiscalía Provincial
de Madrid

18