

**ECRI CONCLUSIONS
ON THE IMPLEMENTATION OF THE RECOMMENDATIONS
IN RESPECT OF GERMANY
SUBJECT TO INTERIM FOLLOW-UP**

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¹ Except where specifically indicated, any developments which occurred after 14 March 2016, the date on which the response of the German authorities to ECRI's request for information on measures taken to implement the recommendations chosen for interim follow-up was received, have not been taken into account in this analysis.

ECRI Secretariat
Directorate General II - Democracy
Council of Europe
F-67075 STRASBOURG Cedex
Tel.: +33 (0) 390 21 46 62
E-mail: ecri@coe.int
www.coe.int/ecri

FOREWORD

As part of its fifth round of monitoring work, ECRI has renewed its process of interim follow-up with respect to two specific recommendations made in each of its country reports.

In line with the Information Document on ECRI's fifth monitoring cycle brought to the attention of the Ministers' Deputies on 14 November 2012¹, not later than two years following the publication of each report, ECRI addresses a communication to the Government concerned asking what has been done in respect of the specific recommendations for which priority follow-up was requested.

At the same time, ECRI gathers relevant information itself. On the basis of this information and the response from the Government, ECRI draws up its conclusions on the way in which its recommendations have been followed up.

It should be noted that these conclusions concern only the specific interim recommendations and do not aim at providing a comprehensive analysis of all developments in the fight against racism and intolerance in the State concerned.

¹ CM/Del/Dec(2012)1154/4.2.

1. *In its report on Germany (fifth monitoring cycle) published on 25 February 2014, ECRI reiterated its recommendation to the authorities to ratify Protocol No. 12 to the European Convention on Human Rights as soon as possible.*

The German authorities have informed ECRI that they maintain their position, summarised in § 1 of the ECRI report, of not wishing to ratify Protocol No. 12 to the European Convention on Human Rights. ECRI refers to §§ 2 and 3 of that report and notes that this recommendation has not been implemented.

2. *In its report on Germany (fifth monitoring cycle), ECRI recommended that the German authorities reform their system for recording and following up "racist, xenophobic, homophobic and transphobic" incidents in order to ensure that all cases involving such a motive are recorded (§ 12 of General Policy Recommendation No. 11).*

ECRI reiterates that the collection of detailed and accurate information on racist, homophobic and transphobic incidents is a precondition to effectively monitoring how the criminal justice system as a whole deals with such incidents. It constitutes the essential basis for the ongoing improvement of criminal prosecutions with regard to racist, homophobic and transphobic incidents (§§ 68 to 71 of ECRI General Policy Recommendation (GPR) No. 11 on combating racism and racial discrimination in policing¹).

ECRI welcomes the fact that the police authorities have taken several measures to record more fully and follow-up more effectively "racist, homophobic and transphobic" incidents. For example, within the "Police statistics on politically-motivated criminal offences" there is now a sub-category on "hate crime", which includes files on "racism", "xenophobia" and "sexual orientation (LGBT)". In addition, since 2014, attacks on refugee reception centres have been recorded separately. Since 2016, this has also been the case for offences against politicians, voluntary workers and journalists committed in this context. A working party recently suggested that Islamophobic, anti-Christian and anti-Roma offences should also be recorded separately.

In this context, ECRI notes with satisfaction that Germany has made major progress in another area: following a 2015 amendment, Article 46 of the German Criminal Code now provides that the courts, when determining the sentence, must consider any racist, xenophobic or other particularly reprehensible motive as an aggravating circumstance. Subsequently, provisions obliging the authorities to attach particular attention to such motives were included in the guidelines for criminal proceedings and for police investigations. These provisions are likely to help ensure more comprehensive recording of racist, homophobic and transphobic offences.

At the same time, ECRI finds it regrettable that significant shortcomings remain with regard to the recording of racist, homophobic and transphobic incidents. Since the publication of ECRI's last report, these shortcomings have also been highlighted by several other organisations, in particular the UN Committee on the Elimination of Racial Discrimination (CERD),² the Federal Anti-Discrimination Agency (ADS)³ and Amnesty International (AI).⁴

Like the CERD, ECRI finds it regrettable that the police continue to use incorrect terminology. As ECRI stated in § 26 of its last report, the title of statistics that contain hate crimes and offences, "Statistics on politically-motivated criminal offences" is inappropriate as many racist, homophobic and transphobic offences are not "politically

¹ http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N11/default_en.asp.

² UN CERD (2015), Concluding observations on the combined 19th to 22nd periodic reports of Germany, CERD/C/DEU/CO/19-22: § 7.

³ Antidiskriminierungsstelle des Bundes, Kugelman D. (2015), Möglichkeiten effektiver Strafverfolgung bei Hasskriminalität – Rechtsgutachten.

⁴ Amnesty International 2016, Living in Insecurity – How Germany is Failing Victims of Racist Violence.

motivated”. This is also true of hate crimes and offences which are religiously motivated and are also included in these statistics. Furthermore, the ground of gender identity is not covered.⁵ ECRI reiterates its position that this terminology could be misleading to police officers when recording and subsequently dealing with offences with a racist, homophobic or transphobic motive.

In addition, the German police authorities use an excessively restrictive definition of hate crimes for their statistics. Under the definition used, an act is deemed to have a political motive only “if it targets a person on account of his or her political views, nationality, ethnic origin, race, skin colour, religion, philosophical belief, origin [...] or sexual orientation”. In point of fact, the police should, in line with § 14 of GPR No. 11, adopt a much broader definition and consider a racist, homophobic or transphobic incident to be “any incident which is perceived to be racist, homophobic or transphobic by the victim or any other person.”

It is not therefore surprising that there continue to be significant differences between the statistics on racist violence compiled by civil society and the official statistics. Whereas, for example, in 2015 the victim support group in Saxony recorded 477 offences involving politically motivated violence in the right-wing political movement, the authorities in Saxony recorded only 213 acts in the same category.⁶

Moreover, the judicial authorities have not broken down their statistics in the same way as the police authorities. For example, the statistics on hate crime do not specify the number of indictments or judgments; nor is it possible to ascertain how many cases recorded by the police are transferred to the prosecution service and, ultimately, classified and tried as racist, homophobic or transphobic offences (§ 12 of GPR No. 11). Similarly, as yet there are no statistics on the application of the amended Article 46 of the German Criminal Code.

In conclusion, ECRI finds that this recommendation has been partly implemented.

⁵ With regard to the difference between sexual orientation (which relates to Lesbian, gay and bisexual persons) and gender identity (which relates mainly to transgender persons) see Council of Europe, Commissioner for Human Rights (2011), Discrimination on grounds of sexual orientation and gender identity in Europe.

⁶ Amnesty International 2016, *ibid*: 59.

