

Thematic analyses of the implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to Council of Europe member states on measures to combat discrimination based on sexual orientation or gender identity

HATE CRIMES AND OTHER HATE MOTIVATED INCIDENTS AGAINST LGBTI PEOPLE IN ROMANIA

NATIONAL REPORT

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This English version is a translation of the original in Romanian. In case of a discrepancy, the Romanian original will prevail.

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I. Executive Summary

Section I Legal, policy and institutional context

Sexual orientation and gender are explicitly listed as hate crime grounds in the Criminal Code, but gender identity and sex characteristics are not. Since its introduction in 2006, the provision on aggravating circumstances has never been applied in cases of SOGIESC-based hate crimes. The National Strategy on the prevention and combating of anti-Semitism, xenophobia, radicalization, and hate speech does not include anti-LGBTI hate crimes. While there is some cooperation on anti-LGBTI hate crime between authorities, civil society, and specialized Council of Europe bodies, there are no specific measures to enhance cooperation between the police and vulnerable groups like LGBTI and Roma. There have been no developments regarding exposing and challenging institutional LGBTI-phobia as barriers to reporting.

Section II Data collection

Romania does not have national studies on the situation of LGBTI people but data from international surveys reveal a high level of victimization and a low level of reporting, often due to fear of homophobic or transphobic reactions from law enforcement. The system for collecting hate crime data has been criticized for its deficiencies. There is no shared definition of hate crime and no institutional collaboration in this area. The police introduced a new methodology for data collection in May 2022, but it is unclear which bias indicators or protected grounds are included as the methodology and statistical matrix were not made public. Hate crime data are not published, but may be available upon request. Official records show that between 2017 and 2021, there were no cases where the anti-LGBTI bias motivation of a crime was recognized as an aggravating circumstance. The new data protection regulations allow institutions to process data on anti-LGBTI victimization.

Section III Reporting, investigating and sentencing

Romania lacks adequate procedures for reporting hate crimes, and there are no third-party reporting services to help victims who are afraid to talk to the police. Online reporting is possible through the website of the Romanian Police, but anonymous reporting is not available. Victims have the right to be accompanied by a person of their choice when reporting a crime, but police officers are not always aware of this right. Legal provisions related to hate crimes have rarely been applied, and the response of the criminal justice system to such offenses remains inadequate. There has been no conviction of a person for committing a hate crime motivated by bias based on SOGIESC until 2021.

Section IV Victims' rights

Victim support services in Romania do not specifically address the situation of victims of hate crimes or LGBTI victims. There is no dedicated emergency accommodation for LGBTI people at risk of homelessness due to experiencing crime. Social workers, police officers, and court staff are not required to receive LGBTI-sensitization training. NGOs working for the LGBTI community provide legal and psychological support to victims, but these services depend on pro bono work or grants from private donors. Public funding is not available for victim support services for LGBTI persons. The Public Prosecutor's Office and the Ministry of Justice are implementing a project to improve the response of the criminal justice system to hate crimes and the protection and assistance mechanisms for victims of hate crimes.

Section V Protection against anti-LGBTI hate crimes in detention

Persons deprived of liberty in Romania may be deemed vulnerable based on potential discrimination, including based on SOGI. There is no data on how many times various protected measures were used for LGBTI individuals. Routine placement of LGBTI detainees in solitary confinement is not specifically prohibited, but according to the authorities, measures taken by prison administrators aim to protect rights and avoid discrimination. Transgender prisoners who have not changed their sex in civil status documents are not given the option to be allocated to male or female facilities based on their gender self-identification. There is no specific training on the safety and dignity of LGBTI detainees for prison officers.

Section VI Awareness raising and training

There are no awareness and education campaigns targeting the general public on anti-LGBTI hate crimes. Conversely, a campaign was organised to ban same-sex marriage in the constitution, and a bill to ban "gay propaganda" among children was submitted in the legislature. There is no research on the level of knowledge about the legal definition of hate crimes among police, prosecutors, judiciary, and prison staff. Lack of prosecutions suggests that the state's ability to detect, prosecute, and sentence anti-LGBTI hate crimes is low. There is no requirement for relevant authorities to be trained on hate crimes. Ad-hoc training is delivered by experts from international organizations, the national equality body, and NGOs.

II. Introduction

A. Background to the thematic review of Recommendation CM/Rec(2010)5

The present report is part of a project to provide thematic analyses of the implementation of the Recommendation CM/Rec (2010)5 of Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity¹ by Council of Europe member states.²

This project was initiated by the Council of Europe at the beginning of 2021. It aims at providing support to on-going efforts to advance dialogue at national level on some issues deemed important for the advancement of the human rights of LGBTI persons. To date, in addition to Romania, Albania and France have also volunteered to participate in this thematic review and use this opportunity to advance their national reform process.

B. Scope of the Report

Recommendation CM/Rec(2010)5

The present thematic review³ focuses on Section A entitled “Hate crimes” and other hate-motivated incidents of Recommendation CM/Rec(2010)5. This section falls under the general heading entitled “Right to life, security and protection from violence”. As per paragraphs 1 to 5 of Section A, “member states should ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator; (...) [they] should ensure that (...) a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance; [they] should take appropriate measures to ensure that victims and witnesses of sexual orientation or gender identity related “hate crimes” and other hate-motivated incidents are encouraged to report these crimes and incidents; [they] should take appropriate measures to ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons (...); [and finally, they] should ensure that relevant data are gathered and analysed on (...) “hate crimes” and hate-motivated incidents related to sexual orientation or gender identity”.

The content of the present report is therefore anchored in these recommendations. It is also guided by reference texts on the subject of hate crime such as the definition of the Organisation for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe (OSCE ODIHR) and takes into account the evolving interpretation of relevant human rights standards (see below).

What is hate crime? What are “other hate-motivated incidents”?

There is no unified definition of hate crime at the international level. However, a reference definition is provided by the OSCE ODIHR: its non-legally binding definition refers to hate crimes as ‘criminal acts motivated by bias or prejudice towards particular groups of people’⁴. Hate crimes are deemed to comprise two elements: a conduct qualifying as a criminal offence and a bias motivation. Accordingly, hate crime is understood to take place when a perpetrator has intentionally targeted an individual or

¹ Hereafter SOGI.

² See the text of the Recommendation available in different languages: <https://www.coe.int/en/web/sogi/rec-2010-5>

³ The present review is part of the second cycle thematic reviews of the Recommendation CM/Rec(2010)5. The first review was completed in 2021 and dealt with legal gender recognition.

⁴ See “What is hate crime?” at <https://hatecrime.osce.org/>.

property associated with – or even perceived to be a member of – a group that shares a protected characteristic among which sexual orientation, gender identity and expression.

In addition to hate crime, the Recommendation CM/Rec(2010)5 refers to “other hate-motivated incidents” : it follows from the Explanatory Report to the Recommendation that these “encompass any incident or act – whether defined by national legislation as criminal or not – against people or property that involves a target selected because of its real or perceived connection or membership of a group. The term is broad enough to cover a range of manifestations of intolerance from low-level incidents motivated by bias to criminal acts”.

While the main focus of this report is on hate crime, “other hate-motivated incidents” will also be examined in its relevant sections. The report will also consider the domestic authorities’ understanding and practice with regard to these subjects.

C. What are the applicable international standards?

Hate crime has been addressed by a range of international bodies in and outside the Council of Europe (CoE) system⁵. The below paragraphs will focus on state obligations to tackle hate crime which can be derived from the relevant case-law of the European Court of Human Rights (hereafter the Court). Other relevant international instruments (CoE recommendations, relevant EU legal acts and OSCE ODIHR tools) have also further detailed measures to combat hate crime. They are also referred to in this section.

1. Case-law of the European Court of Human Rights

The case-law of the Court has developed the doctrine of “positive obligations” to conduct an effective investigation of hate crimes. It derives from these positive obligations that additional duties, both procedurally and substantively, are placed on CoE member states when addressing such crimes. The paragraphs below explain how the Court developed the positive duty of state authorities to investigate bias motivations of an offence when there are indications for its existence, how this duty was then applied to cases involving LGBT persons, ⁶including cases of crimes committed by private parties. It discusses cases where the discriminatory motive is by association and when mixed motives and intersecting prejudice are involved. This section also covers state’s obligation to protect against anti-LGBTI hate crimes in detention facilities.

a) Positive duty of the state to unmask the bias motivation of a crime, including crimes committed by private parties and police and need for an adequate legal response

The Court clearly established that under Article 2 of the ECHR (right to life), state authorities have a procedural obligation to carry out an effective criminal investigation “capable of establishing the cause (...) and the identification of those responsible with a view to their punishment”.⁷ In *Nachova and*

⁵ While the catalogue of protected grounds under international human rights law may not mention expressly sexual orientation and gender identity, it is generally accepted that international human rights law applies to individuals discriminated against on the basis of SOGI grounds. This application has been based on the treaty bodies’ interpretation of the ground of sex, and their inclusion of some of the SOGI grounds under “other status” provisions contained in the UDHR, the ICCPR and the ICESCR.

⁶ References to “LGB”, “LGBT”, or “LGBTI” follow the Court’s judgements wording.

⁷ *Menson and Others v. UK* (Application No. 47916/99), decision on the admissibility, 6 May 2003. In that case, the Court found that there were serious defects in the handling of the racist attack on Michael Menson. However, noting that the culprits had been convicted and punished, the Court held that “the legal system of the respondent State ably demonstrated (...) , its capacity to enforce the criminal law

others v. Bulgaria (2005), the Court went further: for the first time, it derived from Article 14 of the ECHR (non-discrimination) a separate duty of the state to investigate and unmask the bias motivation of a crime should there be such indications (racial motivation in that particular case).⁸

This “positive duty principle” initially focusing on the racist motivation of the crime has been expanded to other bias motivations, including sexual orientation. This principle has not only been applied in connection with Article 2 of the ECHR but it also extends to Article 3 (prohibition of torture and inhuman and degrading treatment) and in some cases to Article 8 (right to respect for private and family life⁹), hence helping to identify further the scope of states’ duties regarding hate crimes under the ECHR.

In several key judgments, the Court dealt with the **failure of law enforcement to “unmask” the bias of hate crimes** when there are indications of violence motivated or influenced by the sexual orientation of the victim.¹⁰ In these cases, the duty of the authorities to offer protection from hate-motivated violence and address it fell not only under the procedural aspects of Article 3 but were also part of the authorities’ duties to secure the right contained in Article 3 without discrimination under Article 14.

In *Identoba v. Georgia* (2015), thirteen individual applicants contended that the authorities had failed to protect them from the violent attacks in the context of a peaceful demonstration in Tbilisi in May 2012 to mark the International Day Against Homophobia (IDAHO). The authorities were also reported as having failed to effectively investigate the incident and its possible discriminatory motive. Concluding that there was a violation of the Article 3 read in conjunction with Article 14, the Court referred to widespread negative attitudes against members of the LGBTI community in some parts of Georgian society as detailed in various reports, in particular from the CoE Commissioner for Human Rights. It also referred to the warnings addressed by the organisers of the march to the police about the possibility of conflicts. Additionally, the Court noted that Georgian authorities failed to investigate the homophobic motive of the attack despite its national legislation providing that discrimination on the grounds of sexual orientation and gender identity should be treated as an aggravating circumstance.¹¹ The failure of the authorities to carry out a timely and objective investigation into the attacks on the LGBT community in the case of *Identoba* were again referred to in a case where LGBTI demonstrators participating in the IDAHO demonstration the following year were attacked by a mob (see *Women’s Initiatives Supporting Group and Others v. Georgia* (2021)).¹² The Court concluded to a violation of Article 3 in conjunction with Article 14 as well as a violation of Article 11 for failing to take measures to protect the LGBT demonstrators from the mob chanting homophobic insults and physical threats, despite being aware of the risks associated with the event. Further, the Court explained that it could not exclude the possibility that the unprecedented scale of the violence had been influenced

against those who unlawfully took the life of another, irrespective of the victim’s racial origin”. In light of this and other reasons, the Court declared the case inadmissible.

⁸ *Nachova and others v. Bulgaria* (Applications No. 43577/98 and [43579/98, ECtHR](#)), 6 July 2005. In this case, the Court concluded that the authorities had failed in their duty under Article 14, taken together with Article 2, to take all possible steps to investigate whether or not discrimination may have played a role in the shooting of two Roma fugitives by military police during the attempted arrest. In other words, this conclusion is based on the violation by the Bulgarian authorities of their procedural duty to investigate rather than finding a racist motive which would have entailed a violation on substantive grounds.

⁹ See for example, *R.B v Hungary* (Application No. 64602, April 2016) regarding the failure to investigate harassment and violence of a Roma person by demonstrators during an anti-Roma rally. The Court concluded that the facts of the case did not have the minimum level of severity required to qualify as a degrading treatment (Article 3) but there had been a violation of the right to respect for private and family life under Article 8: since the abuse suffered was directed against the applicant for her belonging to an ethnic minority, this conduct necessarily affected the applicant’s private life, in the sense of ethnic identity, within the meaning of Article 8 of the ECHR.

¹⁰ As explained by the Court in *Nachova and others v. Bulgaria* (see above) and *Bekos and Koutropoulos v. Greece*, Application No. 15250/02), 13 December 2005 in the context of racist-motivated violence: ‘The respondent State’s obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute. The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence.

¹¹ *Identoba and others v. Georgia* (Application No. [73235/12, ECtHR](#)), 12 August 2015.

¹² *Women’s Initiatives Supporting Group and Others v. Georgia* (Application No. 73204/13 and 74959/13), 16 December 2021.

by the authorities' failure to carry out a timely and objective investigation into the attacks on the LGBTI community during the previous year's event which was the subject of its judgement in *Identoba v. Georgia*.

In another similar case concerning homophobic violence following an annual Pride March (*M.C. and A.C. v. Romania* (2016)), the Court found that the authorities had not only protracted the investigation but also failed to take "reasonable steps"¹³ to examine the role played by possible homophobic motives behind the attack. This led the Court to conclude to a violation of Article 3 in conjunction with Article 14.¹⁴

The Court also examined the lack of investigation and steps taken **to unmask the homophobic motives of police forces** behaviour in *Aghdgomelashvili and Japaridze v. Georgia* (2020).¹⁵ The case concerned a police raid on the office of a lesbian, gay, bisexual, and transgender organisation in Tbilisi during which the police had insulted and threatened the applicants, subjected to physical and mental abuse with clear homophobic and/or transphobic overtones and put them through humiliating strip-searches. Noting that the investigation had been protracted, the Court established that the respondent state had failed to adequately investigate the case, highlighting the Georgian authorities' "inability, or unwillingness, to examine the role played by homophobic and/or transphobic motives in the alleged police abuse" and held that the police officers' conduct had not been compatible with respect for their human dignity. The Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention under its substantive aspect taken in conjunction with Article 14 (prohibition of discrimination) and a violation of Article 3 under its procedural aspect taken in conjunction with Article 14.

In its case-law, the Court also extended states' positive duty to carry out an effective investigation of possible bias motivation in **cases involving private persons** rather than state authorities (see *Šečić v. Croatia* (2007)¹⁶, *Angelova and Iliev v. Bulgaria* (2007)¹⁷ for cases regarding the failure to adequately investigate a racist attack by private individuals; this positive duty in cases involving private persons was also reiterated regarding cases of homophobic violence (see the abovementioned case, *M.C. and A.C. v. Romania* (2016) para. 109).

In addition to examining whether the bias motive of a hate crime was unmasked, the Court also addressed the **legal response given by the domestic courts**.

In *Sabalić v. Croatia* (2021),¹⁸ the Court held that the state had failed to discharge its procedural obligations under Article 3 of the Convention in conjunction with Article 14 in respect of the violent attack against the applicant motivated by her sexual orientation. The Court held that the minor-

¹³ On what "reasonable steps" entails, see in *M.C. and A.C. v. Romania* para 103: "When investigating violent incidents, such as ill-treatment, State authorities have a duty to take all reasonable steps to uncover any possible discriminatory motives, which the Court concedes is a difficult task. The respondent State's obligation to investigate possible discriminatory motives for a violent act is an obligation to use its best endeavours to do so, and is not absolute. The authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, to explore all practical means of discovering the truth, and to deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination (see *Nachova and Others v. Bulgaria* [GC], Nos. [43577/98](#) and [43579/98](#), § 160, ECHR 2005-VII; *Members of the Gldani Congregation of Jehovah's Witnesses and Others*, §§ 138-42, cited above; and *Mudric v. the Republic of Moldova*, No. [74839/10](#), §§ 60-64, 16 July 2013, recently reiterated in *Identoba and Others*, cited above, § 67)."

¹⁴ *M.C. and A.C. v. Romania* (Application No. [12060/12](#), ECHR) 12 April 2016.

¹⁵ *Aghdgomelashvili and Japaridze v. Georgia* (Application No. 7224/11, ECHR), 8 October 2020.

¹⁶ *Šečić v. Croatia*, (Application No. 40116/02, 31 May 2007, para. 67). The *Šečić* case concerns an attack by a skinhead group on the applicant resulting in severe bodily harm and hospitalisation. The applicant alleged that the Croatian authorities had failed to undertake a thorough investigation of this attack and that this failure related to his Roma origin. The Court recalling its *Nachova* judgment, emphasized that when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and stated that this was "true also in cases where the treatment contrary to Article 3 of the Convention is inflicted by private individuals".

¹⁷ *Angelova and Iliev v. Bulgaria* (Application No. 55523/00, 26 July 2007).

¹⁸ *Sabalić v. Croatia* (Application No. 50231/13), 14 January 2021.

offence proceedings against the applicant's aggressor had not addressed the hate-crime element of the offence and had resulted in a derisory fine. According to the Court, the domestic authorities had acted contrary to their duty to combat impunity for hate crimes, which are particularly destructive of fundamental human rights.

In a case concerning a homophobic murder of the 26-year-old son of the applicant by secondary-school students (*Stoyanova v. Bulgaria (2022)*¹⁹, the Court acknowledged that the authorities had clearly established the homophobic motivation behind the attack. However, it held that there had been a violation of Article 14 taken together with Article 2 due to the inadequate legal consequences in the Bulgarian courts. This, according to the Court is due to the fact that Bulgarian criminal law had not properly equipped the courts to respond. The Court pointed out to the fact that according to the said law, murder motivated by hostility towards the victim on account of his or her actual or presumed sexual orientation was not aggravated or otherwise treated as a more serious offence. In this regard, the Court indicated under Article 46 of the Convention (binding force and execution of judgments) that Bulgaria should ensure that violent attacks motivated by hostility towards the victim's actual or presumed sexual orientation were treated as aggravated circumstances in criminal-law terms (see also below, [Hate crime legislation: aggravating circumstances and dissuasive sanctions](#), page 9).

b) Discrimination by association

The Court has further developed the positive duty of State authorities to investigate and unmask the bias motivation of an offence to cases of discrimination by association. In *Škorjanec v. Croatia (2017)*²⁰, the Court further explained that the duty to effectively investigate and prosecute possible bias motivations does also apply in cases where the victim of an offence is targeted not because of the person's actual or perceived personal status or characteristics but because of the presumed association or affiliation with another person with this actual or perceived personal status.

c) Mixed motive and intersecting prejudices

Unmasking the bias motivation of a hate crime may be complicated by the fact that many perpetrators will have mixed motivations and hold intersecting prejudices. The Court established that for an act to be classified as "hate crime", it is not necessary that it has been based solely on a victim's characteristics. In *Balázs v. Hungary (2015)*²¹, the Court found that "perpetrators may have mixed motives, being influenced by situational factors equally or stronger than by their biased attitude towards the group the victim belongs to" (para. 70).

d) State obligation to provide protection against anti-LGBTI hate crimes in detention facilities

In its case-law, the Court established the responsibility of the state to prevent and address possible risks of hate crimes in places of detention including in the context of violence among inmates (Article 3 of the ECHR). In particular, the Court reviewed whether the administration of detention facilities took reasonable steps to eliminate those risks and to protect the applicant from that abuse as part of states' obligation to protect an individual from ill-treatment. This includes launching a prompt and

¹⁹ *Stoyanova v. Bulgaria* (Application No. 56070/18), 14 June 2022.

²⁰ *Škorjanec v. Croatia* (Application No. 25536/14) 28 March 2017: The case concerned two perpetrators of a racist attack who were prosecuted and convicted for a hate crime against the applicant's partner, who was of Roma origin. However, although the applicant had also been beaten and suffered bodily injury, the perpetrators were not charged for a racially motivated crime against her, since the prosecuting authorities argued that, not being a Roma herself, there was no indication that they had attacked her because of racial hatred.

²¹ *Balázs v. Hungary* (Application No. 15529/12), 20 October 2015.

effective investigation into allegations of ill-treatment by other inmates and warders.²² The below paragraphs focus on alleged lack or inappropriate protective measures taken against risks of anti-LGBTI hate crimes in detention facilities.

In *Stasi v. France* (2011)²³, the applicant, a gay male detainee complained that he was victim of ill-treatment by other inmates, in particular because of his homosexuality and argued that the authorities had not taken the necessary measures to ensure his protection. However, in this case, the Court did not conclude there was a violation of Article 3: the Court found that the criminal provisions in place provided the applicant with effective and sufficient protection against physical harm. In addition, the Court held that in the circumstances of the case, the authorities had taken all reasonable steps to protect the applicant such as being transferred to another cell, being allowed to take a shower alone and being systematically accompanied by a warder (para. 96).

The Court also examined to extent to which the measures taken to protect the safety and dignity of an applicant at risk in prison are appropriate. For example, in the case of *X v. Turkey* (2012)²⁴, the Court considered that placing a gay male prisoner in total isolation and in inadequate conditions for more than eight months to protect him from fellow prisoners was not justified and constituted a violation of Article 3 alone. In that case, the Court was also not convinced that the justification for excluding the detainee from prison life was grounded by the protection of the applicant's physical well-being but grounded by his sexual orientation and concluded that the applicant had sustained discrimination on grounds of sexual orientation on the part of the prison authorities (para. 57).

2. Other relevant international instruments

a) Hate crime legislation: aggravating circumstances and dissuasive sanctions

Several CoE documents have recommended that the bias motive of a criminal offence be considered as an aggravating circumstance when determining the sanction. When it comes to bias motive related to sexual orientation and gender identity, Recommendation CM/Rec (2010)5 explicitly states that "Member States should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance" (see para. 2).

In the wake of the adoption of CM/Rec (2010)5, the European Commission against Racism and Intolerance (ECRI) started examining discrimination and intolerance towards LGBT persons in its fifth cycle of country monitoring (2012-2018²⁵) and towards Intersex persons in its sixth monitoring cycle (2019). In this context, ECRI has been reviewing CoE member states' criminal legislation and its implementation, including on LGBT-phobic crime, notably in light of its General Policy Recommendation (GPR) No. 7 on National Legislation to Combat Racism and Discrimination (revised in 2017)²⁶: That recommendation highlights that member States might prohibit, alongside racial

²² See for example, *Preminin v. Russia* (Application No. 44973/04, 10 February 2011). The case concerns the alleged ill-treatment of a detainee, suspected of having broken into the online security system of a bank, by his cellmates and by prison warders. The Court held that authorities knew or ought to have known that an applicant was suffering or at risk of being subjected to ill-treatment at the hands of his cellmates but did not take reasonable steps to eliminate those risks and to protect the applicant from that abuse. It concluded to a violation of Article 3 in respect of the authorities' failure to fulfil their positive obligation to adequately secure Mr Preminin's physical and psychological integrity and in relation to the ineffective investigation into Mr Preminin's allegations of systematic ill-treatment by other inmates and by warders. It also concluded to a violation of Article 5 § 4 (right to liberty and security).

²³ *Stasi v. France* (Application No. 25001/07, 20 October 2011).

²⁴ *X v. Turkey* (Application No. 24626/09, 9 October 2012).

²⁵ See the Compilation of ECRI's Country Reports Recommendations pertaining to LGBT persons, Fifth monitoring cycle available at: <https://rm.coe.int/5th-cycle-ecri-recommendations-on-lgbt-issues/16809e7b66>

²⁶ See ECRI's GPR No. 7: <https://rm.coe.int/ecri-general-policy-recommendation-no-7-revised-on-national-legislatio/16808b5aae>.

discrimination, other forms of discrimination such as those based on gender, sexual orientation and other grounds (see explanatory memorandum page 12).

As ECRI itself highlighted, recommendations “should not be taken in isolation from relevant Council of Europe and other international standards”²⁷. The Yogyakarta Principles+10 (2017) although not binding have for example highlighted the need to “take account of developments in (...) law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions”. They also recognize “the distinct and intersectional grounds of gender expression and sex characteristics.”²⁸

Some other Council of Europe bodies have recently taken up issues of hate crime against LGBTI people more explicitly, notably regarding the need for hate crime legislation to include grounds of sex characteristics and gender expression. This is the case of the Parliamentary Assembly which Resolution 2417 (2022) Combating rising hate against LGBTI people in Europe calls on member States in particular to: “14.1 amend criminal legislation as necessary to ensure that its provisions with respect to hate crimes clearly cover all offences committed against a person or group of persons based on their sex, sexual orientation, gender identity, gender expression and sex characteristics, include proportionate and dissuasive sanctions, protect victims’ rights and make provision for them to receive compensation; and 14.2 make motivations based on sex, sexual orientation, gender identity, gender expression and sex characteristics an aggravating circumstance for all ordinary offences”.

Currently, EU law criminalises hate crime and hate speech only if related to a limited set of protected characteristics such as ethnicity (see the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal sanction). The Victims’ Rights Directive requires EU states to treat those who are victims of anti-LGBTI hate crime as deserving of special protection (see also below). However, a further step to enhance protection against LGBTI hate crimes is now expected with an initiative²⁹ to extend the list of “EU crimes” to hate speech and hate crime on other grounds than racism and xenophobia, in particular the grounds of sex, sexual orientation, age and disability and combat these “on a common basis”.³⁰

b) Hate crime reporting and data collection

Relevant international standards point out to the need to collect robust data on hate crimes. This includes the Recommendation CM/Rec (2010) 5 which states that “relevant data should be gathered and analysed on the prevalence and nature of discrimination and intolerance on grounds of sexual orientation or gender identity”. ECRI’s GPR No. 11 (2007) refers to the necessity “to develop a reliable system for the recording and monitoring of racist incidents” (para. 68).

In the EU context, the 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 (hereafter Victims Rights Directive) emphasized that ‘Systematic and adequate statistical data collection is recognised as an essential component of effective policymaking in the field of rights set

²⁷ See ECRI factsheet on LGBTI issues available here: <https://rm.coe.int/ecri-factsheet-lgbti-issues/1680a1960a> (page 4).

²⁸ See Yogyakarta Principles+10 (2017) page 4, available here: https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

²⁹ See the Communication from the Commission to the European Parliament and the Council on a ‘A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime’ available here: https://ec.europa.eu/info/sites/default/files/1_1_178542_comm_eu_crimes_en.pdf

³⁰ In its communication, the Commission pointed out among other things to the need to tackle the current fragmentation of the existing criminal framework on hate speech and hate crime among EU member states. According to the Commission, such a fragmentation leads to “a lack of a level playing field for individuals who can fall victim to hate speech and hate crime.”

out in the Directive’ and asks member states ‘to communicate to the Commission relevant statistical data related to the application of national procedures on victims of crime.’ (para. 64).

OSCE participating states of the OSCE have made a specific commitment to collect hate crime data and to take appropriate measures to encourage victims to report hate crimes.³¹ As a result, the OSCE ODIHR maintains information from OSCE participating states, civil society, and inter-governmental organizations about hate crimes, including in its dedicated section on anti-LGBTI hate crime³². In 2020, 21 participating states³³ were providing such information. The 2019 Hate Crime Report released by the OSCE ODIHR revealed that “sexual orientation or gender identity” was the third most common ground among the reported hate crimes (18.35%), an increase compared with 2018 (14.61%).

At the same time, under-reporting of hate crimes has been identified over the years as a persistent obstacle to effectively tackling hate crime.³⁴ Only a small number of victims report hate-motivated incidents to the police³⁵. In addition, law enforcement officers may not recognise certain incidents as stemming from prejudice or lacking the tool to flag them as hate crimes. The Recommendation CM/Rec (2010)5 addresses the issue and recommends states to ensure that “law enforcement structures, including the judiciary, have the necessary knowledge and skills to identify such crimes and incidents and provide adequate assistance and support to victims and witnesses” (para.3).³⁶ In its monitoring work, ECRI highlighted the importance of co-operating with equality bodies and the LGBTI community in these trainings and the need to evaluate their impact.³⁷

c) *Victims’ Rights*

Several instruments have addressed the importance for victims of crime (including hate crime) of having a genuine opportunity to seek redress. Minimum standards have been set in this respect:

At the level of the Council of Europe, the **Committee of Ministers Recommendation (2006)8 on Victim Support Services**³⁸ includes some principles to ensure the effective recognition of, and respect for, the rights of victims without discrimination. It outlines measures to this end such as the establishment and co-ordination of dedicated victim support services and the training of their staff, the victims’ access to information of relevance to their case and access to legal aid.

³¹ OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes, <https://www.osce.org/cio/40695?download=true>

³² See the section devoted to anti-LGBTI hate crime here: <https://hatecrime.osce.org/anti-lgbti-hate-crime>.

³³ These are: Andorra, Belgium, Canada, Croatia, Cyprus, Denmark, Finland, France, Georgia, Germany, Greece, Iceland, Italy, Lithuania, Netherlands, Poland, Spain, Sweden, Ukraine, United Kingdom, United States of America.

³⁴ See for example, Hate crime recording and data collection practice across the EU, EU Fundamental Rights Agency, 2018 https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-hate-crime-recording_en.pdf, see also Encouraging hate crime reporting - The role of law enforcement and other authorities, EU Fundamental Rights Agency, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-hate-crime-reporting_en.pdf.

³⁵ According to findings from FRA’s 2019 survey on LGBTI people in the EU and North Macedonia and Serbia. fear of or lack of trust in the police features as a prominent reason for nonreporting, particularly among LGBTI and Jewish respondents, and especially with regard to violent hate crimes (24 % and 25 %, respectively). LGBTI victims of bias-motivated attacks also indicated that their fear of a homophobic or transphobic reaction from the police was a reason for non-reporting, with substantial differences between the countries surveyed (EU average, 25 %). See A Long Way to Go for LGBTI Equality, EU Fundamental Rights Agency, 2020, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf.

³⁶ Building on CoE standards on hate crime investigation, see the Council of Europe’s manual “Policing Hate Crime against LGBTI persons: Training for a Professional Police Response is designed for police trainers, investigators, managers, hate crime officers and frontline police officers”, <https://rm.coe.int/prems-030717-gbr-2575-hate-crimes-against-lgbti-web-a4/1680723b1d>.

³⁷ See in addition to ECRI’s GPR No. 10 para 6 and GPR No. 15 para § 10(h) on training of public officials, see Compilation of ECRI’s Country Reports Recommendations pertaining to LGBT persons, Fifth monitoring cycle, §§ 94-100.

³⁸ Recommendation [Rec\(2006\)8](#) of the Committee of Ministers to member states on assistance to crime victims adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers’ Deputies, available at: <https://rm.coe.int/16805afa5c>.

At the level of the EU, **the Victims' Rights Directive**³⁹ aims “to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings” (Article 1). The Victims' Right Directive refers to all victims of hate crime on an equal footing and recognises victims of hate crime as being particularly vulnerable victims who require individual assessments to identify their specific protection and support needs (Article 22). It also encourages states to raise awareness on the rights of victims as set out in this Directive, notably by co-operating with civil society and other stakeholders on awareness raising campaigns, research, and education programmes (Article 26). Under Article 27, EU member states had to transpose the requirements of the Directive into their respective national legal order by 16 November 2015. In 2020, the Commission published a report on the level of transposition of the directive in EU member states⁴⁰ and in March 2022, it launched a consultation to identify possible ways to strengthen the existing rights of victims as part the EU Strategy on Victims' Rights (2020 – 2025).⁴¹

D. Methodology and structure of the report

The present report was drafted by a national expert, in liaison with international experts. The drafting process benefited from the contribution, support, and guidance from the Network of European Governmental LGBTI Focal Points, the Working Group on SOGI (GT-ADI-SOGI) of the Steering Committee on Anti-Discrimination, Diversity, and Inclusion (CDADI) and its observer NGOs.

The report draws from a wide range of information, making use of both international and national sources. Civil society reports, international agencies surveys or publications, academic articles and research have all fed into the report. The data and information considered at the time of drafting the analysis (August 2022) were related to the period until the end of 2021, considering that the statistics and publications related to the current year were either not available or were incomplete.

As part of the report process, a national roundtable was organised on 4 October 2022, which brought together a large spectrum of interlocutors including government officials, members of Parliament, law enforcement officials, members of the judiciary, ombudsperson or equality bodies and civil society representatives. The information collected and views expressed during this roundtable, notably by LGBTI persons, as well as the comments received in writing after the event, were reflected in the final version of the present report.

In addition to providing a short summary of the principles set out in the Recommendation CM/Rec(2010)5 and highlighting applicable international human rights law standards, the report is divided into six sections. It provides an overview of the legal, policy and institutional context pertaining to hate crime based on SOGI (Section I), it discusses issues of data collection (Section II), reporting, investigating, and sentencing (Section III), it victims 'rights (Section IV). It also covers the protection against anti-LGBTI hate crimes in detention facilities (Section V) and devotes a specific section to measures taken to raise-awareness and offer trainings on addressing anti-LGBTI hate crimes (Section VI). Examples of positive reforms (so-called “best practice examples”) are highlighted in a separate document (reference) and may be read in conjunction with the present report with a view to stimulate discussions and provide further guidance.

³⁹ 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=EN>.

⁴⁰ See Report from the Commission to the European Parliament and the Council on the implementation of the Victims Right Directive. As of the date of publication of this Report, 16 member states have not completely transposed the Victims' Rights Directive and infringement proceedings for these countries are on-going (Austria, Belgium, Bulgaria, Croatia, Cyprus, Finland, France, Greece, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Romania, Slovenia, and Slovakia). See the full report here: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:188:FIN>.

⁴¹ See for further information: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0258>.

III. Section I – Legal, Policy and Institutional Context

A. Legal and policy context

1. Scope

a) *Approach to criminalizing hate crime and protected grounds covered by the law*

“Hate crime” is not defined in the national criminal or other legislation; the expression is not used in the legislation. The legal protection against hate crime is ensured through an aggravating circumstance of all criminal offences when the motive was to discriminate on a protected ground (Article 77.(h) of the Criminal Code⁴²) and through criminal offences that contain in their definition the element of hate or discrimination as an element of the subjective side of the criminal offence.

First, the aggravating circumstance under Article 77.h of the Criminal Code covers “gender” and “sexual orientation”, among other protected grounds, and there is an open list of protected grounds, ending with “*other reasons of the same type, considered by the offender to cause the inferiority of an individual from other individuals*”.⁴³ Since gender identity is not explicitly included in the list of protective grounds, it is questionable whether such ground is protected, even implicitly, as part of “gender” or “other reasons of the same type”. There is no case law where this issue was addressed. Therefore, it is uncertain whether the police and the prosecutors would actually be pro-active and take into account as an aggravating circumstance the bias against transgender persons in committing a violent crime. It is also uncertain if such aggravating circumstance would hold in court, in case the defendant opposed the argument that the law is not clear and predictable, as a criminal law provision has to be. In a case concerning the criminal offence of *Incitement to violence, hate or discrimination* (Art.369 of the Criminal Code), the Constitutional Court found unconstitutional an open-ended list of protected grounds because it was not drafted in a clear and precise way, that is required of a criminal law provision (see below in this section in the discussion about hate speech).⁴⁴

The difference in the case of Article 77.h is that we are talking about a circumstance of committing a criminal offence, and not the content of a criminal offence. Nevertheless, the application of the aggravating circumstance is important, because it has the potential of increasing the penalty, as described below, in Section III.C. In any case, until the time of writing the report, there have been no instances where the aggravating circumstance was applied by the police and prosecutors on the grounds of sexual orientation and gender identity⁴⁵.

During the consultation round table on the first version of this report, OII Europe (Organisation Intersex International Europe) raised the same question in the case of the “sexual characteristics”

⁴² Romania, Criminal Code of 2009 (Law 286/2009) (*Codul Penal din 2009 (Legea nr. 286/2009)*), of 17 July 2009, Article 77.h, published in the Official Journal no.510 of 24.07.2009.

⁴³ Ibid.

⁴⁴ Constitutional Court of Romania, Decision no.561/2021 of 15 September 2021, para.34, published in the Official Journal no.1076 of 10 November 2021.

⁴⁵ Information provided in February 2023 directly to the authors of the report indicates that at the IGPR level during 2022, two crimes were registered for which the aggravating circumstance provided for by art. 77. h of the Criminal Code, on grounds of sexual orientation.

criterion, which aims to protect intersex people against hate crimes. As in the case of gender identity, this criterion is not explicitly provided for in art. 77 letter h of the Criminal Code.⁴⁶

At the same time, the fact that there is a list of multiple criteria protected by the law allows, in principle, for the situation that multiple and intersecting bias or motivation to hate crime to be taken into account. However, there is no legislation and policy document allowing for an intersectional approach to hate crime and there are no legal consequences of such a finding because of the rules related to multiple aggravating circumstances, as described below, in Section III.C.

During the consultation round table on the first version of this report, the non-governmental organizations drew attention to the wording of the final sentence of art. 77 letter h, after the comma: "for other circumstances of the same kind, considered by the perpetrator as causes of a person's inferiority in relation to the others". In their opinion, if the text will be applied more widely, not only to qualify other circumstances of the same kind to consider them among the protected criteria, but for each criterion already specified in the list, it is necessary to provide evidence that certifies that the perpetrator has related to that criterion as a cause of the alleged victim's inferiority in relation to the other persons, then the task of the criminal investigation bodies would be excessively difficult and some cases would escape unsanctioned, because in many cases it is not about perceiving the victim as inferior, but that she does not fit into a certain pattern or, on the contrary, is considered superior and precisely for this reason she must take revenge or set it right.⁴⁷ Given that in the last 16 years since this aggravating circumstance was introduced, there is no case of its application by the judge, we are not certain that it will not be applied in the above limiting manner, especially in the conditions where the Court Constitutional in one of the two cases regarding art. 369 of the Criminal Code (Incitement to violence, hatred or discrimination), qualified the criteria protected in art. 369 as "the criteria considered by the perpetrator as causes of the inferiority of a person in relation to the others", borrowing this qualification from art.77 letter h, because the text is not found in art.369.⁴⁸

b) *Self-standing criminal offences punishing hate crime*

Second, some behaviours that fall under the concept of hate crime are criminalized in Romanian law as self-standing criminal offences. Among these specific criminal law offences, relevant for the protection against the LGBTI hate crimes are: *Torture* that has a motive of discrimination (Article 282.(1).(d) of the Criminal Code), *Abuse of office by limiting certain rights based on discrimination* (Article 297.(2) of the Criminal Code).

Article 282.(1).(d) of the Criminal Code punishes the deed of *Torture*, consisting of "the act of causing physical or mental suffering to a person committed by a civil servant who performs a function involving the exercise of State authority or by another person who acts at the instigation or with the express or tacit consent of the civil servant", when the motive for committing this act is based on any form of discrimination. Such criminal offence is punishable by imprisonment from 2 to 7 years and a ban on the exercise of certain rights.⁴⁹ The criminal law does not specify the definition of discrimination or the protected grounds, leaving the incrimination unclear and unpredictable, based on the standards established by the Constitutional Court case law in this field, detailed above. This criminal offence is

⁴⁶ Discussions during the Consultation Round Table on the Preliminary Thematic Analysis, October 4, 2022, National Library, Bucharest.

⁴⁷ Discussions during the Consultation Round Table on the Preliminary Thematic Analysis, October 4, 2022, National Library, Bucharest.

⁴⁸ Constitutional Court of Romania, [Decision no.228/2022](#), of 28 April 2022, published in the Official Journal no.532 of 31 May 2022, para.44.

⁴⁹ Romania, [Criminal Code of 2009](#) (Law 286/2009) (*Codul Penal din 2009 (Legea nr. 286/2009)*), of 17 July 2009, Article 282.(1).(d), published in the Official Journal no.510 of 24.07.2009.

meant to be addressing the behaviour of the civil servants who intentionally inflict physical or mental suffering, attaining a certain degree of severity, as described in the ECtHR jurisprudence, usually, but not limited to, places of confinement, during police custody or in other way exercising power over an individual.⁵⁰ There is no case in the country prosecuted for torture, nevertheless torture inflicted due to discrimination. In only one case where the issue of torture came up, the dispute in the judiciary was around the severity of the suffering inflicted. The case is about prison guards who suspected an inmate of carrying a knife and in response they inflicted violence; the inmate temporarily lost his bodily functions, entered a prolonged coma, his life was endangered, had a kidney rupture and a 2000ml hematoma. The prosecutor indicted the guards for Abusive behaviour (Art.296 of the Criminal Code), the first instance court decided that the acts fall under Torture (Art.282.(1).(b) of the Criminal Code) and referred the case to the tribunal,⁵¹ who did not agree with torture because the evidence collected by the prosecutor were allegedly not supporting this qualification of the facts, and inclined to consider Personal injury (Art.194 of the Criminal Code),⁵² and the case was finally decided on this last criminal offence.⁵³

Article 297.(2) of the Criminal Code punishes the criminal offence of *Abuse of office by limiting certain rights based on discrimination* understood as:

“the action of a civil servant who, while exercising their professional responsibilities, limits the exercise of a right of a person or creates for the latter a situation of inferiority on grounds of race, nationality, ethnic origin, language, religion, sex, sexual orientation, political membership, wealth, age, disability, chronic non-transmissible disease or HIV/AIDS infection. Such criminal offence is punishable by imprisonment from 2 to 7 years and the ban from exercising the right to hold public office.”⁵⁴

The wording of this criminal offence may imply that all act of discrimination inflicted by a civil servant in the exercise of office attracts criminal liability. Nevertheless, there are many cases when discrimination conducted by civil servants was punished as administrative offence, under the Anti-discrimination Law (Government Ordinance no.137/2000 on prevention and punishing all forms of discrimination), because the legal provisions overlap. Such a situation of overlapping criminal and administrative law provisions in the field of combating discrimination was clarified by the Constitutional Court in a second decision concerning *Incitement to violence, hate or discrimination* (Art.369 of the Criminal Code, developed below).⁵⁵ The Court found that criminal liability is engaged when the behaviour examined “poses a social danger, meaning that it has certain intensity and seriousness to justify criminal liability – per a contrario, civil or administrative liability can occur instead of criminal liability, for example based on [...] the Anti-discrimination Law...”.⁵⁶ Except for this distinction made in the case law, there is no definition of non-crime hate incidents in the legislation.

There are no particular offences regarding attacks on LGBTI properties or events. In principle, in such cases, the aggravating circumstance should apply to the criminal offence of *Destruction* (Article 253

⁵⁰ Constitutional Court of Romania, Decision no.561/2021 of 15 September 2021, published in the Official Journal no.1076 of 10 November 2021.

⁵¹ Romania, First Instance Court of the 5th District, Criminal Judgment 655/2017 of 9 March 2017.

⁵² Romania, Bucharest Tribunal, Criminal Decision 1237/2017 of 15 June 2017.

⁵³ Romania, First Instance Court of the 5th District, Criminal Judgment 3670/2018 of 19 December 2018.

⁵⁴ Romania, Criminal Code of 2009 (Law 286/2009) (*Codul Penal din 2009 (Legea nr. 286/2009)*), of 17 July 2009, Article 297.(2), published in the Official Journal no.510 of 24.07.2009.

⁵⁵ Constitutional Court of Romania, Decision no.228/2022, of 28 April 2022, published in the Official Journal no.532 of 31 May 2022.

⁵⁶ Constitutional Court of Romania, Decision no.228/2022, of 28 April 2022, paras.47-50, published in the Official Journal no.532 of 31 May 2022

of the Criminal Code) or to the criminal offence of *Hindering the free and peaceful assemblies*, stipulated by the special law on peaceful assemblies.⁵⁷ The Ministry of Justice reported 17 criminal cases on 'Destruction', with the retention of the aggravating circumstance from art. 77.h, that have been solved on the merits between 2019-2021, but the protected criterion is not obvious⁵⁸. Additionally, as of 2021, none of the complaints regarding attacks on LGBTI properties or events reported by the Association ACCEPT or other grassroots organizations, have been resolved with the initiation of criminal prosecution against an individual⁵⁹. Therefore, the effectiveness with which the legal provisions in force are applied when it comes to the criterion of sexual orientation cannot be demonstrated.

c) *Punishing hate speech*

Romanian criminal law punishes hate speech under a general provision of the Criminal Code Article 369 (*Incitement to violence, hatred or discrimination*) and two special criminal laws that do not apply to LGBTI hate speech, because they are focusing on antisemitic and racist hate speech⁶⁰. Article 369 of the Criminal Code punishes *Incitement to violence, hatred or discrimination* as the act of

“inciting the public, using any means, to violence, hatred or discrimination against a category of persons or against a person based on his/her belonging to a category of persons defined by grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, political opinion or allegiance, wealth, social origin, age, disability, chronic non-transmissible disease or HIV/AIDS infection, considered by the perpetrator as causes of a person’s inferiority in relation to other persons.”

Such criminal offence is punishable by imprisonment from six months and to 3 years or by a fine.⁶¹

⁵⁷ Romania, Law no.60/1991 on the public assemblies (*Legea 60/1991 privind organizarea și desfășurarea adunărilor publice*), of 23 September 1991, Article 29, republished in the Official Journal nr.186 of 14.03.2014.

⁵⁸ More detailed information was provided by the Ministry of Justice, following the Round Table on the preliminary thematic Analysis, which was held on October 4, 2022, National Library, Bucharest. See Annex 3 MJ.

⁵⁹ Committee of Ministers of the Council of Europe, 1419th meeting (December 2021) (DH) - Rule 9.2 - Communication from an NGO (Anti-Discrimination Coalition of Romania) (18/11/2021) in the case of M.C. and A.C. v. Romania (Application No. 12060/12): “- In the summer of 2019, ACCEPT Association filed two criminal complaints filed with the Police Station number 8 against a neighbour near the headquarters of our organization who threatened and harassed LGBTIQ+ people who came to community support groups. In one case, the perpetrator partially destroyed the car of a transgender woman. For one of the two complaints, we were called, together with the victims of hate crimes, for police hearings only this year, and for the second complaint we did not receive any answer. - In December 2020, ACCEPT Association filed two criminal complaints with Police Station number 8. One of the complaints was made as a result of the vandalization of the rainbow mural that the association’s volunteers drew on the ACCEPT headquarters building [...]. Neither of these two criminal complaints has moved the authorities in any way to investigate who is the perpetrator of these hate crimes.”

⁶⁰ Romania, Emergency Governmental Ordinance 31/2002 on the prohibition of Fascist, Legionnaire, Racist or Xenophobic organizations, symbols and deeds and the promotion of the cult of persons guilty of genocide against humanity and war crimes (*Ordonanță de urgență nr. 31/2002 privind interzicerea organizațiilor, simbolurilor și faptelor cu caracter fascist, legionar, rasist sau xenofob și a promovării cultului persoanelor vinovate de săvârșirea unor infracțiuni de genocid contra umanității și de crime de război*), of 13.02.2002, published in the Official Journal no.214/28.03.2002. Romania, Law 2/2021 on certain measures to prevent and combat anti-Gypsyism (*Legea nr. 2/2021 privind unele măsuri pentru prevenirea și combaterea antițigănistului*), of 4.01.2021, published in the Official Journal no.8/5.01.2021.

⁶¹ Romania, Criminal Code of 2009 (Law 286/2009) (*Codul Penal din 2009 (Legea nr. 286/2009)*), of 17 July 2009, Article 369, as amended by Law 170/2022 of 3.06.2022, published in the Official Journal no.548 of 6.06.2022.

The Constitutional Court clarified the content of the criminal offence, in a decision cited above.⁶² The act of incitement to violence, hate or discrimination is directed to the public, which means an undetermined number of persons.⁶³ As emphasized by the First Instance Court Miercurea Ciuc, in a case involving alleged acts of inciting to violence against Hungarians, the criminal offence punished in Article 369 of the Criminal Code is not spreading ideas for the purpose of information, presentation, raising awareness, in the form of propaganda that is ‘an insidious way of seeding hate, involving a systematic action’ (acts covered by Art.15 of the Anti-discrimination Law, detailed below in this section), but the act of incitement involves “urging, instigating the public to a result that is immediate, is not in the future”.⁶⁴ Therefore, in case of Incitement, the perpetrator pursues that the public adopts a certain behaviour immediately, which gives gravity by “creating a threat to the good understanding between the members of the society”.⁶⁵ In the same time, as emphasized by the Constitutional Court, Incitement to violence, hatred or discrimination is a conduct crime and not a result crime, meaning that “it is necessary and sufficient that the incitement is likely to create or amplify the public’s feelings of adversity and intolerance, the legislator is presuming the state of danger for the protected values,” there is no need to prove that such a result actually existed. The incitement to violence, hate or discrimination is one offence and not three different offences with different penalties and it is up to the judge to decide a proportionate penalty, depending on the virulence of the speech, among other possible circumstances. Moreover, the criminal offence can only be committed with intent,⁶⁶ given that the act of incitement to violence, hatred or discrimination is punishable under Article 369, only when it is based on one of the protected criteria explicitly enumerated in the limited list, and the particular criterion must have been `considered by the perpetrator as the cause of inferiority of a person in relation to other persons and susceptible of generating feelings of hatred or the wish to discriminate a social category`.⁶⁷ Sexual orientation is explicitly included in the list, therefore it is a protected ground, while gender identity is not protected, based on the assessment made by the Constitutional Court in the abovementioned decision, finding that the protected criteria from the definition of a criminal offence must be explicitly enumerated by the law, otherwise the criminal law is not clear and predictable:

“...drafted in a general way, which implies a high degree of unpredictability, raising concerns under Article 7 of the European Convention on Human Rights, as well as other fundamental requirements of the rule of law, because such drafting opens the way to arbitrary/aleatory interpretations and applications. [The Court]... finds necessary to regulate the grounds based on which the group protected (as a group or individually a group member) from the offence of public incitement to violence, hate or discrimination, in order to find whether a case falls under the provisions of the criminal law or not.”⁶⁸

⁶² Constitutional Court of Romania, Decision no.228/2022, of 28 April 2022, published in the Official Journal no.532 of 31 May 2022.

⁶³ Constitutional Court of Romania, Decision no.228/2022, of 28 April 2022, para.36, published in the Official Journal no.532 of 31 May 2022.

⁶⁴ First Instance Court Miercurea Ciuc, Criminal Judgment no. 723/2021, of 10.11.2021.

⁶⁵ Ibid.

⁶⁶ Constitutional Court of Romania, Decision no.228/2022, of 28 April 2022, para.44, published in the Official Journal no.532 of 31 May 2022.

⁶⁷ Constitutional Court of Romania, Decision no.228/2022, of 28 April 2022, para.39, published in the Official Journal no.532 of 31 May 2022.

⁶⁸ Constitutional Court of Romania, Decision no.561/2021 of 15 September 2021, para.34, published in the Official Journal no.1076 of 10 November 2021.

Until the end of 2021, there was no prosecution of incitement to violence, hate or discrimination on the grounds of sexual orientation or gender identity⁶⁹.

Hate speech can also be punished under civil law in a civil action in tort⁷⁰ or under administrative law, by the National Council for Combating Discrimination, according to the Anti-discrimination Law, cited above.⁷¹ The Anti-discrimination Law defines hate speech as a

“behaviour that takes place in public, having the nature of nationalistic-chauvinistic propaganda, incitement to racial or national hatred or the behaviour that is aimed at or focuses on affecting the personal dignity or the creation of an intimidating, hostile, degrading, humiliating or offensive environment, against a person or a group of persons or a community, in connection with their belonging to a particular race, nationality, ethnicity, religion, social category, or to a disadvantaged category, or by the beliefs, sex or sexual orientation of the person.”

Gender identity criterion is not present in the list, but because this is an administrative law provision, and not a criminal law provision, according to the Constitutional Court, the list of criteria is non-exhaustive, which means that gender identity should be implicitly protected.⁷²

The administrative punishments may consist of a written warning or a fine ranging between EUR 200 (RON 1,000) and EUR 6,000 (RON 30,000) if the discrimination was against an individual person and EUR 400 (RON 2,000) and EUR 20,000 (RON 100,000), if the discrimination was against a group of persons or a community.⁷³

Law 504/2002 on audio-visual⁷⁴ and the Code of regulation of the audio-visual content⁷⁵ forbid all programs that contain any form of incitement to hatred on the grounds of race, religion, nationality, sex or sexual orientation. Gender identity is not explicitly covered by these legal provisions. Moreover, Law 148/2000 on publicity forbids the publicity that includes discrimination based on race, sex, language, origin, social origin, ethnic identity or nationality. Sexual orientation and gender identity are not explicitly covered.⁷⁶

⁶⁹ Information provided in February 2023, directly to the authors of the report, indicates that at the IGPR level (police) during the year 2022, 7 cases were registered (the criminal investigation *in rem* had been initiated) under art. 369 of the Criminal Code, on grounds of sexual orientation.

⁷⁰ Romania, Government Ordinance no.137/2000 on prevention and punishing all forms of discrimination (*Ordonanta 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Art.27.(1), republished in the Official Journal no.166 of 07.03.2014.

⁷¹ Romania, Government Ordinance no.137/2000 on prevention and punishing all forms of discrimination (*Ordonanta 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Art.20.(1), republished in the Official Journal no.166 of 07.03.2014.

⁷² Constitutional Court of Romania, Decision no.561/2021 of 15 September 2021, paras.27-32, published in the Official Journal no.1076 of 10 November 2021.

⁷³ Romania, Government Ordinance no.137/2000 on prevention and punishing all forms of discrimination (*Ordonanta 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Art.26, republished in the Official Journal no.166 of 07.03.2014.

⁷⁴ Romania, Law 504/2002 on audiovisual (*Legea 504/2002 a audiovizualului*), of 11.07.2002, Article 40, published in the Official Journal no.534 of 22.07.2002.

⁷⁵ Romania, National Council of Audiovisual, Decision 220/2011 on the Code of regulation of the audiovisual content (*Decizia 220/2011 privind Codul de reglementare a conținutului audiovizual*), of 24.02.2011, Article 47, published in the Official Journal no.174 of 11.03.2011.

⁷⁶ Romania, Law 148/2000 on publicity (*Legea 148/2000 privind publicitatea*), of 26.07.2000, Article 6, published in the Official Journal no.359 of 02.08.2000.

2. Review of the existing legal framework and legislative/policy framework proposals

The only independent assessment of the legal and policy framework regarding anti-LGBTI hate crimes was carried out within the framework of the execution of the ECtHR judgments, *M.C. and A.C. v. Romania*⁷⁷ and *ACCEPT Association and Others v. Romania*.⁷⁸ The two judgements concern the lack of effective investigation into complaints of homophobic violence and verbal abuse around public events like the 2006 gay pride march organized in Bucharest, in the first case, and a public screening of a movie during the 2013 Gay History Month, in the second case. Nevertheless, the execution of the judgments is limited to the lack of effective investigation of hate crimes (that we will detail below) and does not assess how the legal and policy framework responds to the needs of victims from the LGBTI group. The latest recommendations made by the Committee of Ministers of the Council of Europe, in November 2021, urged the authorities to: provide information on the scope and content of the institutional, practical and capacity building measures put forward to improve criminal justice response to hate crime, and the timeframe foreseen for their implementation, address the deficiencies in the criminal law provisions punishing incitement to hatred or discrimination as noted recently by the Constitutional Court, complete rapidly their plans to upgrade the existing relevant data collection system, and continue to monitor closely the impact of their action to ensure an effective criminal law response to hate-motivated crime.⁷⁹ The Committee acknowledged the cooperation of the law enforcement authorities with the national equality body, the SOGI Unit and the civil society, especially in the field of capacity building.⁸⁰

The proposed revisions of the definition of Incitement for violence, hate or discrimination, per the Constitutional Court judgments, made by the Committee of Ministers, referred in the paragraph above, and supported by several civil society organisations on different occasions,⁸¹ were implemented by the Parliament upon the adoption of the amendment of Article 369 of the Criminal Code, that entered in force on 9 June 2022.⁸² There are no other proposed changes of legal provisions in the field of hate crime supported by the Government or debates by the civil society in this respect at the moment of writing this report.

B. Institutional response and co-operation

There are no co-ordination mechanisms on hate crimes/hate speech or on hate crimes/hate speech data collection. In February 2022, the Prime minister established a committee formed of representatives of various ministries,⁸³ under the coordination of a State Secretary within the

⁷⁷ European Court of Human Rights, *M.C. and A.C. v Romania*, application no.1260/12, judgment of 12 April 2016.

⁷⁸ European Court of Human Rights, *Asociația ACCEPT and Others v. Romania*, application no.19237/16, judgment of 1 June 2021.

⁷⁹ Committee of Ministers of the Council of Europe, 1419th meeting (30 November – 02 December 2021), CM/Notes/1419/H46-27.

⁸⁰ Ibid.

⁸¹ See Romanian Academic Society, Comparative analysis of the legislation and jurisprudence in the field of discriminatory or hate speech, September 2015. See also Anti-discrimination Coalition, Amicus curiae brief sent to the Constitutional Court in the File no. 2496Al/2021.

⁸² Romania, Law 170/2022 on the amendment of Article 369 of the Law 286/2009 on the Criminal Code, published in the Official Journal no.548 of 06.06.2022.

⁸³ Chancellery of the Prime Minister, Ministry of Foreign Affairs, Ministry of Internal Affairs, Ministry of Justice, Ministry of Education, Ministry of Culture, Ministry of National Defense, Ministry of Sport, General Secretariat of the Government, The National Institute for the Study of Holocaust in Romania “Elie Wiesel”, National Agency for Roma. See Prime Minister, Decision 173/2022 on establishing the Interministerial Committee for

Chancellery of the Prime Minister, that will monitor the implementation of the *National Strategy on the prevention and combating of anti-Semitism, xenophobia, radicalization and hate speech, for the period 2021-2023 and its Plan of action*.⁸⁴ This strategy focuses on combating anti-Semitism, xenophobia, radicalisation and hate speech, through improving data collection and existing legislation, evaluating and updating the training programs, including the ones for the law enforcement and the judges and prosecutors, evaluating and updating school curricula, developing pilot cultural programs, strengthening the efforts of Romania at the international level.⁸⁵ The issues related to hate speech or hate crime against the LGBTI community are not addressed by the strategy and its action plans and the LGBTI civil society organisations were not consulted in the process of drafting the strategy and in its implementation.

In 2021, the Committee of Ministers of the Council of Europe commended on the “promising synergies with civil society, the national equality body and with specialised Council of Europe units, notably in the field of capacity building” of the law enforcement and the judiciary in the field of hate crime.⁸⁶ Nevertheless, due to lack of concrete progress registered for the victims of hate crimes, ECRI stated in the same year that the authorities made no progress on the level of cooperation between impacted communities and law enforcement officials. In particular, ECRI pointed towards the lack of specific measures on enhancing cooperation between the police and vulnerable groups, in particular Roma and LGBT communities, and reports communicated by civil society actors to ECRI suggesting that victims remain particularly reluctant to report hate incidents.⁸⁷

There have been no developments regarding exposing and challenging institutional homophobia/biphobia/transphobia/intersexphobia which act as barriers to reporting, despite the finding of the European Court of Human Rights in *ACCEPT Association and Others*, that we refer to below, in Section III.B.⁸⁸

the monitoring of the implementation of the National (*Decizia nr. 173/2022 privind înființarea Comitetului interministerial pentru monitorizarea implementării Strategiei naționale pentru prevenirea și combaterea antisemitismului, xenofobiei, radicalizării și discursului instigator la ură, aferentă perioadei 2021-2023*), of 28 February 2022, Annex, published in the Official Journal No.198 of 28.02.2022.

⁸⁴ The National Strategy on the prevention and combating of anti-Semitism, xenophobia, radicalization and hate speech, for the period 2021-2023 and its Plan of action, adopted by Government Decision No.539/2021(*Hotararea Guvernului nr. 539/2021 privind aprobarea Strategiei naționale pentru prevenirea și combaterea antisemitismului, xenofobiei, radicalizării și discursului instigator la ură, aferentă perioadei 2021-2023 și a Planului de acțiune al Strategiei naționale pentru prevenirea și combaterea antisemitismului, xenofobiei, radicalizării și discursului instigator la ură, aferentă perioadei 2021-2023*), of 13 May 2021, published in the Official Journal No. 517 of 19.05.2021

⁸⁵ Ibid.

⁸⁶ Committee of Ministers of the Council of Europe, 1419th meeting (30 November – 02 December 2021), CM/Notes/1419/H46-27.

⁸⁷ ECRI, Conclusions on the implementation of the recommendations in respect of Romania Subject to interim follow-up, 3.03.2022, CRI(2022)04.

⁸⁸ European Court of Human Rights, *Asociația ACCEPT and Others v. Romania*, application no.19237/16, judgment of 1 June 2021.

IV. Section II: Data collection

CM/Rec (2010)5, Section I.A.5

5. “Member states should ensure that relevant data are gathered and analysed on the prevalence and nature of discrimination and intolerance on grounds of sexual orientation or gender identity, and in particular on “hate crimes” and hate-motivated incidents related to sexual orientation or gender identity.”

A. Recorded hate crime cases

According to the most recent FRA survey, in Romania, the LGBTI community interviewed is reporting high rates of physical or sexual attacks motivated by the victim being LGBTI (15%),⁸⁹ while only 4 % of respondents reported physical or sexual attacks to the police.⁹⁰ It is important to mention that Romania is among the five countries in the EU with the highest score in terms of respondents who fear of a homophobic and/or transphobic reaction from police as the reason for not reporting a physical or sexual attack (38%), compared to a EU average of 25 %.⁹¹ Romanian respondents are also less likely to be out and they fear of expressing themselves in public given that 53% are almost never open about being LGBTI, while 40% indicate that they often or always avoid certain places or locations for fear of being assaulted, threatened or harassed.⁹² Except for these information collected at the EU level, there are no other victimization surveys measuring the level of victimization, underreporting and under recording of hate crimes, which is problematic especially in the context of high rates of physical and sexual attacks against LGBTI persons and very few cases decided on hate crimes, as shown below.

Until 2022, the police were not recording the number of cases reported under the aggravating circumstance, only the number of cases reported under the criminal offence of *Incitement to hate, violence or discrimination* (37 cases reported in 2017, 60 cases reported in 2018, 31 cases reported in 2019, 96 cases reported in 2020 and 66 cases reported in 2021). Out of a total of 290 cases reported in 5 years, the police have identified a person against which they carried out preliminary criminal investigations in less than 10% of cases (24 cases), in the rest of the cases they carried out *in rem* investigations, while a number of 21 cases (with 17 persons) were declined to the prosecutor's office, based on the material competence or according to the quality of the person. In consequence, the prosecutors did not receive minimum evidence essential for starting criminal investigations in more than 90% of cases reported.⁹³

With regard to the crimes of Torture based on discrimination and Abuse in service by limiting certain rights based on discrimination, the data are collected in the judicial statistics data collection system, being entered into the ECRIS system by the specialized staff from the courts and updated quarterly based on the activity of the courts. However, they are not usually reported and taken into account by the authorities when referring to the data on hate crimes, being made available to us on request, for the drafting of this analysis.⁹⁴ In addition, there are certain limitations of the statistical system in terms

⁸⁹ European Union Agency for Fundamental Rights, [A long way to go for LGBTI equality](#), 2020, p.39.

⁹⁰ European Union Agency for Fundamental Rights, [A long way to go for LGBTI equality](#), 2020, p.46.

⁹¹ European Union Agency for Fundamental Rights, [A long way to go for LGBTI equality](#), 2020, p.48.

⁹² European Union Agency for Fundamental Rights, [A long way to go for LGBTI equality](#), 2020, p.49

⁹³ General Inspectorate of the Romanian Police, Response no.511.468/07.07.2022.

⁹⁴ This more detailed information was provided by the Ministry of Justice, following the Consultation Round Table on the Preliminary Thematic Analysis, October 4, 2022, National Library, Bucharest.

of providing data on these crimes, which shows that so far they have not been specifically taken into account. For example, regarding the situation of definitively convicted persons, the available data can only be reported according to the main object of the case and cannot be disaggregated according to criteria related to the attributes of these objects. Also, the data on the volume of activity can be reported according to the main object of the case, but without being able to be disaggregated, within this report according to the specific circumstances (attributes) applicable in the respective cases. Thus, the general situation regarding the substantive activity of the courts in Romania is reported according to the main object of the cases (Art. 282, respectively Art. 297 Criminal Code), while the specific details, regarding the commission of the acts provided by Art. 282 Criminal Code in the context of paragraph (1) letter d), respectively of Art. 297 of the Criminal Code in the context of paragraph (2) can be reported in a statistical report separate from the one referring to the volume of cases, from the perspective of the situation of resolved cases. It is particularly problematic that such data does not receive the attention it deserves, given that the alleged perpetrators of these criminal offenses are representatives of the state that the state should be particularly interested in collecting and registering record data on hate crimes. The fact that such data do not receive adequate attention is problematic, given that the alleged perpetrators of these criminal offences are State representatives with respect to whom the State should be particularly interested to collect and report data on hate crimes. Upon request, the police informed the author of this report that in the last five years there have been 2 cases reported of Torture based on discrimination and between 20 and 50 cases reported per year of *Abuse of office by limiting certain rights based on discrimination* (45 cases reported in 2017, 20 cases reported in 2018, 25 cases reported in 2019, 50 cases reported in 2020 and 47 cases reported in 2021).⁹⁵ Of these, at the level of the prosecutor's office units, 0 cases of Torture based on discrimination were initiated with the initiation of criminal prosecution *in personam* and no cases were declined by the prosecutor's office, while for the crime of Abuse in service by limiting certain rights based on discrimination, 3 cases have was with the start of the criminal investigation *in personam*, with 3 suspects and 23 cases were declined to the prosecutor's office based on the material competence or according to the competence of the person, with 19 people. Out of all the cases resolved on the merits at the prosecutor's office, in the period 2017-2021, regarding the crime of Abuse in service by limiting certain rights based on discrimination, only one case was resolved, in 2017.⁹⁶

As to the data provided by the Ministry of Justice, in the period 2017-2021, there is no information whether a case was convicted by courts with the aggravating circumstance stipulated by Art.77.h of the Criminal Code on any protected ground (not only sexual orientation and gender identity⁹⁷), no case convicted on *Abuse of office by limiting certain rights based on discrimination* (Article 297.(2) of the Criminal Code), and only five cases decided on *Incitement to hate, violence and discrimination* (Article 369 of the Criminal Code), resulting in 2 persons convicted, but there is no data available as to which protected grounds these 2 convictions referred to.⁹⁸

⁹⁵ Consultation with the Romanian Police, based on the first draft of the 2022 Thematic review, 26.09.2022.

⁹⁶ This more detailed information was provided by the Ministry of Justice, following the Round Table on the Preliminary Thematic Analysis, October 4, 2022, National Library, Bucharest.

⁹⁷ The information and clarifications provided in February 2023 directly to the authors of the report indicate that the Ministry of Justice collects data (available for the years 2019 -2021) on the status of cases settled on the merits, on the part of Romanian courts, whose object was circumscribed by the "hate crime" attribute. However, the data made available does not indicate whether the reported convictions were ordered with the retention of the aggravating circumstance from art.77.h. They do not either indicate whether these cases were sent to court with the retention of that aggravating circumstance, by the prosecutor. Therefore, these type of statistics lack detail required to analyse the effectiveness of law enforcement in the field of hate crimes.

⁹⁸ Ministry of Justice, Response of 11 July 2022.

B. Methodological aspects of recording and official data collection

a) *No shared definition for hate crime*

There is not a shared monitoring definition for ‘hate crime’ across the police, prosecution service and the courts, but these institutions are usually collecting data about the application of the same set of legal provisions: the aggravating circumstance (Art.77.h), *Abuse in service by limiting certain rights based on discrimination* (Article 297.(2) of the Criminal Code), and *Incitement to violence, hatred or discrimination* (Article 369 of the Criminal Code), with some variations. For example, the police have been collecting data on the crime of Incitement to violence, hatred or discrimination since 2017, and from 2022 they are collecting data on the aggravating circumstance from art.77.h, including a breakdown by protected criteria.⁹⁹ The author of this report were not provided access to the actual template or detailed information about this statistical matrix and the methodology of implementing the matrix, adopted at the level of the Romanian Police. The reasoning given for this refusal was that “[t]he template for the collection of statistical data in the field of hate crime investigation is a document for internal use and the definitions used in this methodology have an indicative character and are intended to serve to identify and establish the discrimination criteria”.¹⁰⁰ The Prosecutor’s Office has started collecting the protected ground and data about Incitement to violence, hatred or discrimination from 2017¹⁰¹, but the Ministry of Justice is still not collecting this data about the aggravating circumstance and the protected grounds.¹⁰²

b) *No information about bias indicators for data collection*

If for the independent crimes presented in section II.A.1.b, the indicators are quantified from the moment the crime is reported, for the other crimes motivated by hate, which are the object of another shortcoming of the data collection system in the Statistical Situation regarding crimes motivated by hate, the indicators are quantified from the moment of apprehension of the aggravating circumstance provided for in Art.77.h, by the criminal investigation body of the judicial police or by the prosecutor.¹⁰³ The latter method of collection presents several shortcomings. First of all, the time of recording the data is far removed from the time of notification, because in order to retain the aggravating circumstance, evidence must be collected and evaluated, a report must be drawn up by the police or a resolution by the prosecutor. Secondly, the data collected in this way are the result of the investigation of the complaint, and not a simple and quick classification based on some indicators of prejudice resulting from the statement of the victim, the witnesses or from the initial observations of the criminal investigation body, which are to be supported or not by evidence.

In May 2022, the General Inspectorate of the Romanian Police adopted a statistical matrix and methodology for data collection in the field of hate crimes.¹⁰⁴ These documents are not public and we

⁹⁹ Ibid.

¹⁰⁰ Consultation with the Romanian Police, based on the first draft of the 2022 Thematic review, 26.09.2022.

¹⁰¹ Order no. 298 of December 20, 2017 regarding the amendment of Order no. 213 of 2014 regarding the organization and operation of the information system of the Public Ministry, with reference to the introduction of Annex no. 19: The half-yearly/annual situation regarding hate crimes / to which the aggravating circumstance provided for by Art. 77 letter h) of the Criminal Code or in which the element of hatred is part of the constitutive content of the offense provided for by Art. 369 Criminal Code, Art. 297 para. 2 Criminal Code, etc. and of Annex 20 regarding crimes under by GEO 31/2002, including data on the motive of hatred from those mentioned in Art. 77 lit. h) Criminal Code.

¹⁰² Ministry of Justice, Response of 11 July 2022.

¹⁰³ This more detailed information was provided by the IGPR, following the Consultation Round Table on the Preliminary Thematic Analysis, October 4, 2022, National Library, Bucharest.

¹⁰⁴ General Inspectorate of the Romanian Police, Response no.511.468/07.07.2022.

do not know if they contain a list of bias indicators that the police must evaluate and check and report data under the number of hate crime cases reported. From the limited information available, the perception of the victim is not taken into account in the process of data collection. The results of the application of these new data collection rules are not available, yet.¹⁰⁵

The police provided the authors of this report with a list of indicators of discrimination that they are using in investigating hate crimes, as stipulated in *The Criminal Investigation Policeman's Guide (2019)* (we are referring about this list below in Section III.B.a). While this is a very useful list that could be improved at least with respect to anti-LGBTI hate crime, it is unclear if and how the police that is collecting statistical data about hate crimes are using it and if the statistical matrix and its methodology rely on the same list or not.

Moreover, according to Government's Decision no. 539 of May 13, 2021 on the approval of the National Strategy for preventing and combating anti-Semitism, xenophobia, radicalization and hate speech, related to the period 2021-2023, and the Action Plan of the National Strategy for preventing and combating anti-Semitism, xenophobia, radicalization and hate speech to hate, related to the period 2021-2023, by the end of November 2022, the Ministry of Internal Affairs must develop a unitary methodology for identifying hate crimes, as well as for the systematic collection of statistical data on this type of crime.¹⁰⁶

c) Lack of comparability and traceability

After a criminal complaint is recorded at the police, a file number is provided and the police starts carrying out in rem criminal investigation, collecting evidence for the various indicators of the criminal offence. The result of this process takes the form of a report sent to the prosecutor containing a proposal to start (or not) the criminal investigation and the entire file put together at the level of the police. The police collect data on hate crime cases at this moment in the process. Similarly, the prosecutor's office collects data at the end of the procedures taking place at the level of the prosecutor, describing the type of order issued by the prosecutor, as well as the results of the case brought to court, in terms of conviction or acquittal. At the level of the judge, the data will be collected at the time of issuing a judgement in the case.

Other shortcomings of the data collection on hate crime in Romania is that there are no data-collection procedures or guidelines established across the police, prosecution service and the courts and other agencies, and the data collected is not comparable. Moreover, the data is not collected through a nationwide computerized system and there is no mechanism to review the quality of the data.

At the police level, the data review is done by the Judicial Statistics and Special Records Service, which constantly monitors the way statistical indicators are quantified to ensure their correctness and quality. The IGPR informed us that the statistical matrix is in the testing period and any inadvertence will be fixed in due time.¹⁰⁷

d) Intersectionality and other important indicators

As to the intersectionality, it is not taken into account at the moment; the police will identify the predominant criterion and record the hate crime as motivated only by that criterion, starting with

¹⁰⁵ Ibid.

¹⁰⁶ Consultation with the Romanian Police, based on the first draft of the 2022 Thematic review, 26.09.2022.

¹⁰⁷ This more detailed information was provided by the IGPR, following the Consultation Round Table on the Preliminary Thematic Analysis, October 4, 2022, National Library, Bucharest.

2022 (as described above).¹⁰⁸ Moreover, currently, the data is not segregated by the type or perpetrator, to identify data on hate crime by state actors and data on family violence against LGBTI persons, for example. However, the IGPR informed us that the statistical model mentioned above ensures a level of aggregation / disaggregation of indicators regarding hate-motivated criminality, which allows the integration of other elements, when new modes of operation / ways / circumstances of committing the act / etc. which could significantly influence the statistical indicators.¹⁰⁹

e) Data protection

The new Data Protection Law, regulates certain explicit exemptions from the exercise of certain rights of the person such as the right of access, the right to rectification, the right to restrict processing and the right to opposition, in the context of personal data collection, among other purposes, for scientific or historic research or for statistics, activity of data collection allowed according to Art.9 para.(1).(h) of the General Data Protection Regulation (EU) 2016/678.¹¹⁰ These explicit legal provisions should clarify an older concern of Romanian authorities who were refusing to collect data regarding protected characteristics,¹¹¹ in all areas, including hate crime, based on a restrictive interpretation of the old Data Protection Law.¹¹² The previous law was prohibiting "the use of personal data regarding the racial or ethnic origin, political, religious, philosophical or similar beliefs, trade union membership, as well as personal data regarding health status or sex life".¹¹³ That law used to make the exception for purposes of data collection but the wording was very circumstantiated:

*"where the law includes an express provision with the purpose of protecting important public interest, under the condition that data collection should be carried out in compliance with protection of the rights of the person concerned and with all guarantees provided by the law."*¹¹⁴

The new legal provision stipulates a general exception in the field of data collection, making the legal framework much clearer than in the past and allowing the institutions to process data on anti-LGBTI

¹⁰⁸ General Inspectorate of the Romanian Police, Response no.511.468/07.07.2022, point 22.

¹⁰⁹ This more detailed information was provided by the IGPR, following the Consultation Round Table on the Preliminary Thematic Analysis, October 4, 2022, National Library, Bucharest.

¹¹⁰ Law 190/2018 on measures to transpose the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (The General Data Protection Regulation)) (*Legea 190/2018 privind măsuri de punere în aplicare a Regulamentului (UE) 2016/679 al Parlamentului European și al Consiliului din 27 aprilie 2016 privind protecția persoanelor fizice în ceea ce privește prelucrarea datelor cu caracter personal și privind libera circulație a acestor date și de abrogare a Directivei 95/46/CE (Regulamentul general privind protecția datelor)*), of 18 July 2018, Article 8, published in the Official Journal no.651 of 26.07.2018.

¹¹¹ European network of legal experts in gender equality and non-discrimination, Romanița Iordache, Country report. Non-discrimination (2021), pp.25-26.

¹¹² Law 677/2001 on the protection of persons regarding the use of personal data and the free movement of personal data (*Legea 677/2001 pentru protecția persoanelor cu privire la prelucrarea datelor cu caracter personal și libera circulație a acestor date*), of 21.11.2001, Article 7.(1), published in the Official Journal no.790 of 12.12.2001 (no longer in force).

¹¹³ Ibid.

¹¹⁴ Law 677/2001 on the protection of persons regarding the use of personal data and the free movement of personal data (*Legea 677/2001 pentru protecția persoanelor cu privire la prelucrarea datelor cu caracter personal și libera circulație a acestor date*), of 21.11.2001, Article 7.(2), published in the Official Journal no.790 of 12.12.2001 (no longer in force).

victimization in accordance with the Data Protection Law, for example.¹¹⁵ This public policy can be considered an international good practice.

No anti-LGBTI hate crime research has been funded or commissioned. There are no CSOs that conduct hate crime monitoring. There are no victimization surveys available. Hate crime data is not published, but it is available upon request based on the Law on free access to public information.¹¹⁶ It is not discussed with the LGBTI community and the wider public. Besides the adoption of the statistical matrix in the field of hate crime, by the police, we are not aware of other current national efforts to improve the reporting of hate crime.

V. Section III. Reporting, Investigating and Sentencing

CM/Rec (2010)5, Section I.A.1

1. “Member states should ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator; they should further ensure that particular attention is paid to the investigation of such crimes and incidents when allegedly committed by law enforcement officials or by other persons acting in an official capacity, and that those responsible for such acts are effectively brought to justice and, where appropriate, punished in order to avoid impunity.”

2. “Member states should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance.”

A. Reporting

a) Conditions for filing a complaint

The standard procedure for reporting is that filed by the victim, in written, in person, at the police station, or by post, by fax or by e-mail to the police station or to the prosecutor’s office. The person does not receive the registration number of the report on the spot, but sometimes months later, upon the person’s request, which makes it more difficult to ensure further communication regarding the

¹¹⁵ Law 190/2018 on measures to transpose the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (The General Data Protection Regulation)) (*Legea 190/2018 privind măsuri de punere în aplicare a Regulamentului (UE) 2016/679 al Parlamentului European și al Consiliului din 27 aprilie 2016 privind protecția persoanelor fizice în ceea ce privește prelucrarea datelor cu caracter personal și privind libera circulație a acestor date și de abrogare a Directivei 95/46/CE (Regulamentul general privind protecția datelor)*), of 18 July 2018, Article 8.(1), published in the Official Journal no.651 of 26.07.2018.

¹¹⁶ Law 544/2001 on free access to public information (*Legea 544/2001 privind liberul acces la informații de interes public*), published in the Official Journal no.663 of 23.01.2001.

report and creates uncertainty that the report is actually taken into account. In case of complaints that are not filed in person, the police invite the complainant to the police station to declare if he/she wants to maintain the complaint and to give a witness's statement, a procedure that is sometimes carried out a long time after the victim's first contact with the police. This is also disengaging for the victim and potentially detrimental for the accuracy of information provided by the victim and other witnesses.

In theory, third-party reporting is admissible by the law enforcement, except for criminal offences that can only be investigated upon the victim's complaint, like rape, for example.¹¹⁷ However, in practice, there are no services available with the NGOs or other entities consisting of forwarding the complaint to the police, with the permission of the victim, when the victim is afraid to talk to the police directly.

Online reporting is available on the website of the Romanian Police,¹¹⁸ but the person must identify themselves and provide their personal data; anonymous reporting is not taken into account.¹¹⁹ The title of the form that can be accessed online is "petition" (in Romanian *petiție*), which for an ordinary citizen is wider and less specific than "report" (in Romanian *sesizare*). This last term is actually the legal term used by the Criminal Procedure Code. Moreover, there is no information attached to the petition form, explaining that the persons can report online, in the respective form, any criminal incidents. This creates confusion among the third parties willing to report online a case. In the same time, the police consulted by the author of this report indicated that when a petition filled in the online form contains elements that are indicative of a criminal offence, in accordance with Articles 288 and 292 of the Criminal Procedure Code, the criminal investigation body has the possibility to consider it is notified ex officio, and register the petition and communicate an answer to the petitioner according to the provisions of Order no.33 of 21 February 2020 regarding the activities of solving petitions, granting of audiences and counselling citizens within the Ministry of Internal Affairs.¹²⁰

b) Victim support for reporting

ACCEPT Association has the practice of accompanying victims when they report to the police, invoking a provision from the Law 211/2004 on the protection of victims of criminal offences, allowing the victims to be accompanied by a person of their choice at the first contact with the authorities in order to facilitate communication.¹²¹ Not all law enforcement know about this right of the victim and they request instead the presence of a lawyer having a power of attorney, which is not always affordable for the victim or the supporting organization. ACCEPT has not published information about the number of victims they accompany to the police per year, a service that they are providing based on limited resources from private funds. There is no public funding available for such work. On the other side, NGO participation to criminal court proceedings is admissible only based on a power of attorney provided to a lawyer that is hired by the NGO who has a mandate of representation from the victim; there are no public funds accessible to NGOs that can provide this type of support to victims of hate crimes either. Even more, there is no legal procedure of third party intervening in criminal law procedures, only in civil law procedures and it is unclear if under these circumstances the judge would allow an amicus brief from an NGO that is not a party or a representative of a party.

¹¹⁷ Romania, Criminal Procedure Code, Law 135/2010, Arts.288, 290.

¹¹⁸ <https://politiaromana.ro/ro/petitii-online>.

¹¹⁹ Romania, Criminal Procedure Code, Law 135/2010, Art.290.

¹²⁰ Consultation with the Romanian Police, based on the first draft of the 2022 Thematic review, 26.09.2022.

¹²¹ Romania, Law 211/2004 on certain measures to ensure the information, support and protection of the victims of crimes (*Legea 211/2004 privind unele măsuri pentru asigurarea informării, sprijinirii și protecției victimelor infracțiunilor*), Article 4.(6), published in the Official Journal no.505 of 27.05.2004.

c) *Involvement of the national equality body*

There have been instances when the prosecutors working on alleged hate crime complaints consulted the National Council for Combating Discrimination in order to clarify the content of the criminal offence, if it resorts to criminal law or administrative law. For example, in a 2013 case concerning a Facebook post by an informal group from Timișoara offering an amount of money to every Roma origin woman that undergoes sterilization, the prosecutor consulted the national equality body with respect to the criminal law nature of the hate speech.¹²² In a similar case taking place the same year, concerning the public statements made by a local representative on sterilization of Roma origin women as a proposed public policy, the National Council for Combating Discrimination referred the case to the prosecutor's office, which referred the case back to the NCCD, that ended up punishing the local representative for an administrative offence instead of a criminal offence.¹²³ A systemic dialogue between the prosecution services and the NCCD could lead to improved understanding of the phenomena of racism, homophobia, transphobia, especially under the condition that the NCCD strengthens its internal expertise and capacity on the last two areas. Nevertheless, in time, the prosecution services and the police should develop their own expertise and capacity to address hate crime and begin prosecuting cases in court, instead of sending them to the NCCD where the potential highest punishment may not be proportionate to the gravity of the crime. As to the hate crimes against the LGBTI community, there is no similar dialogue between the national equality body and the law enforcement and the prosecutors have not open any criminal investigation regarding a person (*in personam*), only criminal investigations regarding facts (*in rem*), that were discontinued years after the hate crime took place, showing a pattern of ineffective investigation due to bias against the LGBTI persons, found by the European Court of Human Rights in two judgments in the last 6 years – *M.C. and A.C. v. Romania*¹²⁴ and *ACCEPT Association and Others v. Romania*¹²⁵ (discussed above in Section I.A.2).

d) *Underreporting*

Underreporting, which was mentioned by the civil society organization to exist due to the victims' reluctance to report hate incidents to the police,¹²⁶ is not being addressed by the authorities. This was underlined in the 2021 Conclusions to Romania by ECRI.¹²⁷ The organization raised concerns that the authorities made no progress on the level of cooperation between impacted communities and law enforcement officials, which is indicated by the lack of specific measures on enhancing cooperation between the police and vulnerable groups, in particular Roma and LGBT communities, focused on improving reporting of hate crimes.¹²⁸

¹²² Hotnews, '[Timișoara: Criminal case on racism, after a nationalistic group announced a reward for Roma women that undergo sterilisation](#)' ('Timișoara: Dosar penal pentru rasism, după ce o grupare naționalistă a anunțat că recompensează femeile rome care se sterilizează'), 11.01.2013.

¹²³ Romania, the National Council for Combating Discrimination, [Annual Report 2013](#), p.24.

¹²⁴ European Court of Human Rights, *M.C. and A.C. v Romania*, application no.1260/12, judgment of 12 April 2016.

¹²⁵ European Court of Human Rights, *Asociația ACCEPT and Others v. Romania*, application no.19237/16, judgment of 1 June 2021.

¹²⁶ ECRI, [Conclusions on the implementation of the recommendations in respect of Romania Subject to interim follow-up](#), 3.03.2022, CRI(2022)04.

¹²⁷ Ibid.

¹²⁸ Ibid.

B. Investigating

In 16 years since the adoption of the first legal provisions relevant for hate crimes and 7 years from the adoption of the current versions, there has been no conviction of a person for committing hate crimes against LGBTI persons and no criminal investigation opened (only preliminary investigations). This situation led the Committee of Ministers of the Council of Europe to declare, five years into the process of execution of the ECtHR judgment in *M.C. and A.C.*, that the legal provisions related to hate crime “have rarely been applied and the response of the criminal justice system to such crimes remains, for the time being inadequate.”¹²⁹ We will emphasize below some of the shortcomings of the criminal law response to hate crimes.

a) *At the level of the police*

The criminal investigation into the cases of alleged hate crimes is usually carried out by the police, that gathers all evidence and forwards the file to the prosecutor, with a proposal of opening or not the criminal investigation, decision that belongs to the prosecutor. In 2021, the General Inspectorate of the Romanian Police set up a specialized unit for the investigation of hate crimes, within the national police, called the Bureau for the investigation of hate crimes (*Biroul de Investigare a Infraacțiunilor Motivate de Ură (BIIMU)*) and one specialized police officer in each territorial police unit, working in the Criminal Investigation Service (they have other tasks, too).¹³⁰

At the time of drafting the report, the Bureau for the investigation of hate crimes was working with 5 police officers (4 in executive functions and one officer assigned to the command of the office)¹³¹. The main activity is currently the implementation of the activities provided for in the Project "Integrated action to combat discriminatory mobile crimes, especially those directed against Roma communities, and ensuring a high-quality standard of the police service - PDP3", financed by the Norwegian Financial Mechanism 2014-2021. This project was the basis for the establishment of this office and included, among other activities, specialized training in the field of investigating hate crimes, including on bias indicators, attended by officers from the territory with attributions on this line of work (see below detailed information at Section VI.B). BIIMU officers were involved in the development of the template for the collection of statistical data on hate crimes and are also part of inter- and intra-ministerial working groups whose object is to investigate hate crimes. In addition, the office has the role of coordination and monitoring at the national level of the issues in this field, having also the attributions of investigating the facts of a criminal nature that have as their object crimes motivated by hate. At the end of 2022, at the BIIMU level, a number of 11 criminal cases were pending.¹³²

The police consulted for this report indicated¹³³ that during the investigation of hate crimes, the police are using a list of indicators of discrimination, enumerated at page 85 of *The Criminal Investigation Policeman's Guide* edited in 2019 by the Directorate of Criminal Investigations within the General Inspectorate of the Romanian Police, and distributed to all criminal investigation services, where the following indicators are listed:

¹²⁹ Committee of Ministers of the Council of Europe, 1419th meeting (30 November – 02 December 2021), CM/Notes/1419/H46-27.

¹³⁰ Romania, Order of the Ministry of Internal Affairs no. I/1823/26.04.2021, entering into force on 15.05.2021. See General Inspectorate of the Romanian Police, Response no.511.468/07.07.2022, points 43, 46.

¹³¹ The information provided in February 2023, directly to the authors of the report, indicates that after the drafting of the report, BIIMU completed its staff scheme that includes a total of 6 police officers.

¹³² Consultation with the Romanian Police, based on the first draft of the 2022 Thematic review, 26.09.2022. and information provided in February 2023.

¹³³ Consultation with the Romanian Police, based on the first draft of the 2022 Thematic review, 26.09.2022.

- a. references about the victim: s/he is a person who belongs to a protected community;*
- b. references about the author: the mode of action is known to the authorities as specific to groups that commit crimes with a discriminatory motive, has he been involved in such incidents or is a member of a group that promotes hatred, extreme right, is nationalist, etc.;*
- c. circumstances related to the author's behaviour: certain words spoken at the scene of the crime, comments, gestures, signs, symbols, graffiti or drawings at the scene of the crime;*
- d. circumstances related to the target of the crime: the act took place in cemeteries or other common meeting spaces for people belonging to certain minority groups;*
- e. circumstances related to the place or time of committing the act: it coincides with a holiday or date relevant to the victim or it was committed in a place that is generally known or perceived as an area belonging to or frequented by a certain minority group;*
- f. the victim or the witnesses perceived the act as motivated by prejudice;*
- g. absence of a reason (even apparent)."¹³⁴*

This is a very useful list of indicators that could be improved by concrete examples of circumstances where hate crimes against LGBTI persons are committed, for example when talking about place or time, the guide could identify cruising areas for gay men, gay clubs, gay pride events; when talking about words spoken at the scene of crime, it would be relevant for the police to have a list of derogatory words used for the LGBTI community. Moreover, the indicators must identify the protected communities – in our case, to give definitions of what LGBTI acronym means and who is identified under this acronym. As a good practice, it is important that these definitions are identified in consultation with the representatives of the LGBTI community. Following the consultation on this report, the IGPR announced that it will take into account the suggestion stated above when developing the Methodology for the investigation of hate crimes.¹³⁵

Nevertheless, it is unclear the extent to which the police are using the above-mentioned guide and what its legal force is, given that in previous consultation, the police responded that they are basing the investigation exclusively on the provisions of the Criminal Procedure Code, that apply in general to the investigation into all criminal offences.¹³⁶ In the same time, two years after the publication of the guide, both ECRI¹³⁷ and the Committee of Ministers of the Council of Europe¹³⁸ criticized the authorities for “not [having] yet developed improved procedures for recognising bias motivations and recalls that the proper qualification of hate crimes is imperative for ensuring the effective functioning of the criminal justice system against such acts”¹³⁹. The statistical matrix and methodology for data collection in the field of hate crimes, that the General Inspectorate of the Romanian Police adopted in May 2022¹⁴⁰ represent only data collection tools, and not a methodology of investigation, containing bias indicators and evidentiary requirements (see detailed information above, in Section II.B). These

¹³⁴ General Inspectorate of the Romanian Police, Directorate of Criminal Investigations *The Criminal Investigation Policeman's Guide* (2019), cited in the Consultation with the Romanian Police, based on the first draft of the 2022 Thematic review, 26.09.2022.

¹³⁵ This clarification was provided by the IGPR, following the Consultation Round Table on the Preliminary Thematic Analysis, October 4, 2022, National Library, Bucharest.

¹³⁶ General Inspectorate of the Romanian Police, Response no.511.468/07.07.2022, point 49.

¹³⁷ ECRI, Report on Romania (fifth monitoring cycle), 5.06.2019 and ECRI, Conclusions on the implementation of the recommendations in respect of Romania Subject to interim follow-up, 3.03.2022, CRI(2022)04.

¹³⁸ Committee of Ministers of the Council of Europe, 1406th DH meeting (07-09 June 2021) – Notes, point 3, on the execution of the ECtHR judgment in *Lingurar v. Romania*, 16 April 2019, 48474/14.

¹³⁹ ECRI, Conclusions on the implementation of the recommendations in respect of Romania Subject to interim follow-up, 3.03.2022, CRI(2022)04, point 2, page 5.

¹⁴⁰ General Inspectorate of the Romanian Police, Response no.511.468/07.07.2022.

shortcomings are key to creating the premises for an effective investigation into hate crimes at the level of the police.

b) At the level of the prosecutors

As to the level of the prosecutor's office, there are no specialized prosecutors in the field of hate crime, but there is a methodology of investigating hate crimes. In particular, the General Prosecutor's Office adopted the Order 184/2020 approving the Methodology of investigating hate crimes aimed for prosecutors to use in their own investigating activity and in the supervision of the investigation carried out by the police.¹⁴¹ The methodology was not published in the Official Journal and it was accessed only for research purposes from the Public Ministry. This methodology was supposed to be adopted jointly by the Public Ministry and the Ministry of Internal Affairs, to be used by police and prosecutors together when they investigate hate crimes.¹⁴² Since it was adopted only at the level of General Prosecutor's Office, the methodology can only be indirectly applied to the judicial police investigating hate crimes, within the surveillance activity of the prosecutor under Articles 55-56 of the Criminal Procedure Code, an activity that the police consulted for this report indicated as "methodological orientation in terms of investigative standards in the surveillance activity of the criminal investigation carried out by the judicial police bodies."¹⁴³ We do not have information if there has been any progress registered in the adoption of this methodology also at the level of the Ministry of Internal Affairs.

The explanatory note to the methodology details the reasons why there was a need to adopt this special guidance in investigating hate crime, referring to the message of intolerance that the perpetrators of hate crimes send to the community as a whole, the special attention that the law enforcement must pay in relation to the victim in order to avoid committing discrimination or secondary victimization and the role of the prosecutors in proving bias as motive for committing hate crime. According to the methodology bias can result *ex re*, from the way the offence was committed or from a series of indicators, enumerated in the list of indicators, that should be checked by the law enforcement. There are only two specific bias indicators regarding anti-LGBTI hate crime exemplified in the methodology: the victim belongs to a sexual minority; the suspect is a member of a group that promotes homophobia. As such, other common indicators, such as coincidence with an LGBT event, homophobic language or proximity to an LGBT venue, are not specifically listed as bias indicators. The methodology also contains practical guidance on collecting evidence about the motive of the hate crime. The methodology contains provisions regarding the procedure to follow in relation to the victims of hate crime, including referring them to victim support services, ensuring confidentiality during the investigations, and maintaining communication with the victims and access to information about the progress of investigations. It provides a specific set of steps in the relation with the victim of physical violence. At the end of the investigation, when the criminal liability was not established, the methodology directs the prosecutor to refer the case to other competent authorities, among which the National Council for Combating Discrimination.¹⁴⁴

c) Hate crime committed by law enforcement

There are no specific provisions for ensuring an independent procedure for hate crimes and/or hate motivated incidents allegedly committed by law enforcement staff, besides the criminal investigation carried out by the prosecutors. As a general rule, only prosecutors (not police officers) will investigate

¹⁴¹ General Prosecutor's Office, Order 184/2020 approving the Methodology of investigating hate crimes.

¹⁴² Committee of Ministers of the Council of Europe, 1355th meeting (23-25 September 2019), point 4, CM/Notes/1355/H46-30.

¹⁴³ Consultation with the Romanian Police, based on the first draft of the 2022 Thematic review, 26.09.2022.

¹⁴⁴ *Ibid.*

alleged criminal offences committed by police officers who are carrying out criminal investigations.¹⁴⁵ For the rest of police officers, criminal investigations can be carried out by other police officers under the supervision of prosecutors. The indictment is filed to courts which decide on the conviction. All disciplinary procedures are suspended until the end of the criminal investigation. In 2021, an order was issued by the General Prosecutor attached to the High Court of Cassation and Justice, which seeks to streamline criminal investigations in cases where state agents are investigated for ill-treatment committed in connection with the performance of their duties. The order introduces the special monitoring of these cases and the taking over of the investigation at the level of higher prosecution units, following the analysis of the instrumenting method.¹⁴⁶ The order concerns the cases in which the criminal investigation is carried out, having as its object the offenses of abusive investigation provided by art. 280 Criminal Code, subjection to ill-treatment provided by art. 281 Criminal Code, torture provided by art. 282 Criminal Code and abusive behaviour provided by art. 296 Criminal Code, committed by police officers, civil servants with special status from the penitentiary administration system and/or gendarmes.¹⁴⁷

d) *Ineffective investigation of hate crime*

In the last 16 years, none of the complaints of hate crime filed by LGBTI persons with the support of NGOs in and outside Bucharest have led to opening of criminal investigations, not to say about indictments and convictions. Moreover, the NGOs declare that the criminal investigations in rem take a long time (over the timeframe that is reasonable for collecting and bringing out all evidence) and not all available evidence is taken into account by the law enforcement.¹⁴⁸ Illustrative of this conclusion is the finding of the European Court of Human Rights in the cases concerning homophobic incidents, that we are presenting below.

First, in *M.C. and A.C.*, cited above, the Court found the investigation that took 6 years was too long compromising the chances of being ever completed:

“120. ...the Court cannot ignore that during the investigation there were significant periods of inactivity on the part of the authorities. The whole process lasted until 9 August 2012, that is to say a total period of more than six years, a passage of time which is liable not only to undermine an investigation, but also to compromise definitively its chances of being ever completed... .”

The Court also identified several shortcomings in the investigation which deemed the law enforcement’s response inappropriate towards identifying and punishing those responsible for the incident:

“121. ...In particular it is to be noted that throughout the investigation the police did no more than hear evidence from one witness, R.A.S., as well as attending 29 football matches and making random checks at the metro stations on five occasions (see paragraphs 25 and 27 above). It does not appear that they made use in any significant way of the evidence adduced by

¹⁴⁵ Romania, Law 218/2002 on the Statute of the police officer (*Legea nr. 218/2002 privind statutul polițistului*), Art.27.

¹⁴⁶ Order no. 59 of April 9, 2021 of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

¹⁴⁷ This clarification was provided by the General Prosecutor's Office, following the Consultation Round Table on the Preliminary Thematic Analysis, October 4, 2022, National Library, Bucharest.

¹⁴⁸ Committee of Ministers of the Council of Europe, 1419th meeting (December 2021) (DH) - Rule 9.2 - Communication from an NGO (Anti-Discrimination Coalition of Romania) (18/11/2021) in the case of *M.C. and A.C. v. Romania* (Application No. 12060/12).

the applicants, specifically statements, photographs and the identification of some individuals in the group of attackers (see paragraphs 18 and 19 above). The Court in particular notes that, even though the applicants had identified some of the attackers, the domestic authorities (see paragraph 28 above) and the Government in their pleadings before the Court (see paragraph 90 above) have continued to assert the impossibility of conducting an investigation in the present case due to the failure to identify the perpetrators of the violence (see Members of the Gldani Congregation of Jehovah's Witnesses and Others, cited above, § 118). Moreover, the Court cannot accept that the investigative actions undertaken by the domestic authorities could be deemed appropriate steps towards identifying and punishing those responsible for the incident, in particular as these measures took place such a long time after the initial events."

Second, in *ACCEPT Association and Others*, cited above,¹⁴⁹ the Court went further and underlined bias against homosexuals as a reason why the authorities did not intervene to protect the participants to the cultural event and did not carry out an accurate and effective criminal investigation:

"112. More than a failure to intervene, the authorities' attitude and decision to remain aside despite being aware of the content of the slurs being uttered against the applicants seems to indicate a certain bias against homosexuals, which also permeated their subsequent reporting on the incident at the cinema. In this respect, the Court notes that the reports drafted by the police and gendarmes contained no reference to the homophobic insults suffered by the individual applicants and describe the incident in terms that completely disregard any such manifestations of homophobia (see paragraphs 13 and 15 above)."

"121. The Court cannot but note that the authorities consistently referred to the verbal abuse that was targeted against the individual applicants as constituting mere "discussions" or an "exchange of views" (see paragraphs 15 and 24 above). The perpetrators were described as "sympathisers" of far right organisations and the victims as "followers" of same-sex relations (see paragraph 28 above). This language, far from being neutral or accidental, can suggest bias on the part of the authorities against the individual applicants, which may be seen as indicating that the authorities turned a blind eye to the homophobic overtones of the acts perpetrated, thus jeopardising the accuracy and effectiveness of the domestic proceedings as a whole."

*"126. The foregoing considerations are sufficient to enable the Court to conclude that the authorities failed to discharge their positive obligation to investigate in an effective manner whether the verbal abuse directed towards the individual applicants constituted a criminal offence motivated by homophobia (see, mutatis mutandis, *Beizaras and Levickas*, cited above, § 129). In doing so, the authorities showed their own bias towards members of the LGBT community."*

¹⁴⁹ European Court of Human Rights, *Asociația ACCEPT and Others v. Romania*, application no.19237/16, judgment of 1 June 2021.

C. Prosecution and sentencing policy

a) *Prosecution ex-officio*

Self-standing hate crimes like *Torture, Abuse of office by limiting certain rights based on discrimination* and *Incitement to hate, violence and discrimination* can be prosecuted *ex-officio*, without the need for the victim to make a complaint or accusation, for the rest of the criminal offences that have an aggravating circumstance of being committed under the motive of discrimination, this depends on the particular criminal offence – for example rape committed as a hate crime cannot be prosecuted *ex-officio*, which means that the victim must file a complaint for the law enforcement to start any criminal investigation in rem into the respective hate crime.

b) *Sentence aggravation model*

Aside from the three self-standing hate crimes mentioned above, the predominant model is the sentence aggravation model, when the motive related to sexual orientation is taken into account as an aggravating circumstance. With respect to gender identity, it remains unclear if this ground is protected by law, a topic that was detailed in Section I.A. There are no cases of hate crime against the LGBTI persons that have been prosecuted, so that we cannot say how this system works in practice and if there is or not a general penalty enhancement for crimes committed with a LGBTI-bias motive. However, there are particular weaknesses that result from choosing the sentence aggravating model instead of the substantive offence model, that we will detail below.

In case of finding the defended guilty of the criminal offence with the application of the aggravating circumstance of Article 77.h, the court has the option of ordering the maximum punishment or, if this is not enough, the court may add to this maximum punishment a supplement of up to 2 years, but not more than one third of the maximum punishment, in case of imprisonment and a supplement of up to one third of the maximum, in case of penal fine.¹⁵⁰ The fact that the aggravating circumstance is only relevant at the end of the criminal procedures, for the judge's decision on the extent of the penalty, should not make the police and the prosecutors less involved in the determination of the aggravating circumstance because their role is key in collecting evidence that illustrates the motive of the criminal offence.

In the same time, the rule is that the increase of the special limits of the punishment is not mandatory for the court and it can be done only once, regardless of the number of aggravating circumstances that apply in the case.¹⁵¹ This gives a large power of appreciation to the judge in the application of the law – the judge can choose whether to emphasize or not that it was a hate crime and to penalize it accordingly or not. Moreover, in cases when the hate crime was committed by a group of persons (Art.77.a), or by subjecting the victim to cruel and degrading treatments (Art.77.b), which is oftentimes the case with LGBTI hate crimes, the above-mentioned rule, that holds the judge to apply the increase of penalty only once, is creating the impression of impunity since the law establishes a sort of “competition” between aggravating circumstances.

¹⁵⁰ Romania, Criminal Code of 2009 (Law 286/2009) (*Codul Penal din 2009 (Legea nr. 286/2009)*), of 17 July 2009, Article 78.(1), published in the Official Journal no.510 of 24.07.2009.

¹⁵¹ Romania, Criminal Code of 2009 (Law no. 286/2009) (*Codul Penal din 2009 (Legea nr. 286/2009)*), of 17 July 2009, Article 78.(2), published in the Official Journal no.510 of 24.07.2009.

c) *Issues of implementation regarding hate speech*

As to the prosecution and sentencing policy of the criminal offence of *Incitement to hate, violence or discrimination*, two analyses published in the last seven years lead to the conclusion that the law enforcement and the judiciary are not taking seriously cases of hate speech because they are minimizing the social danger of this criminal offence compared to other criminal offences. First, a non-governmental analysis carried out in 2015 criticized the judiciary for the approach of minimizing the social danger of the acts that fall under the *Incitement to hatred or discrimination*.¹⁵² This conclusion resulted from the prosecutor's decisions not to prosecute many of the cases reported in 2014 and 2015 and from the cases that have been decided by courts between 2007-2015, where judges found that the social danger necessary for engaging criminal liability was not present – either the impact of the alleged hate speech was not wide enough or the act of hate was spontaneous and it was not based on an ideology or inter-ethnic tensions.¹⁵³ Second, six years later, a thematic review carried out by the General Prosecutor's Office on the criminal investigations carried out between 2017-2020 into the criminal offence of *Incitement to hatred or discrimination* (Article 369 of the Criminal Code) and the specific provisions of the Emergency Ordinance 31/2002 also found no prosecution of *Incitement to hatred or discrimination* against the LGBTI community and scarce activity on other protected criteria. In order to address this situation, the report recommended the following measures: introducing certain objectives regarding hate crimes' investigations in the semestrial programs of activities of each prosecutor's office, introducing topics regarding hate speech from the perspective of freedom of expression and the use of internet in the continuous professional education program of prosecutors, discussing at the level of each prosecutor's office on the results of this review and the provisions of High Court of Cassation and Justice's decisions about recording a criminal case.¹⁵⁴ We are not aware if the General Prosecutor's Office has a general picture about the way in which it is implemented the activity of internal evaluation and reporting of the prosecutors that was recommended in the thematic review mentioned above, but she informed us during the consultation for this report that she introduced some specific objectives aimed at verifying the way to implement the category of files regarding the crimes targeted in the activity programs of the prosecution units.¹⁵⁵ Also, a similar analysis related to the 2020-2021 period is being finalized at the General Prosecutor's Office.¹⁵⁶

Such an approach of “turning a blind eye” to hate speech and downplaying the seriousness of verbal abuse, criticized in the two assessments mentioned above was qualified by the European Court of Human Rights in *ACCEPT Association and Others*, cited above: “can suggest bias on the part of the authorities against the individual applicants” and was the basis for finding a violation of Article 14 of the European Convention taken together with Article 8.¹⁵⁷

As opposed to the previous approach described above, in the few cases decided by the courts in 2019-2022, the judges found the social danger necessary for engaging criminal liability and convicted the perpetrators for *Incitement to hate or discrimination*, in cases related to other protected criteria than

¹⁵² Romanian Academic Society, [Comparative analysis of the legislation and jurisprudence in the field of discriminatory or hate speech](#), September 2015.

¹⁵³ *Ibid.*

¹⁵⁴ Superior Council of Magistracy, Judicial Inspection, Report on the review of the investigation of cases under the criminal offence stipulated by Article 369 of the Criminal Code and the criminal offences stipulated by Emergency Governmental Ordinance 31/2002, amended by Law 157/2018, 14.05.2021, available at <http://www.inspectiajudiciara.ro/mix-content/assets/inspectia-judiciara/uploads/2021-05/raport-21424-1-637565217578107374.pdf>.

¹⁵⁵ This clarification was provided by the General Prosecutor's Office, following the Consultation Round Table on the Preliminary Thematic Analysis, October 4, 2022, National Library, Bucharest.

¹⁵⁶ *Ibid.*

¹⁵⁷ European Court of Human Rights, *Asociația ACCEPT and Others v. Romania*, application no.19237/16, judgment of 1 June 2021, para.121.

sexual orientation and gender identity. These cases consisted of: several Facebook comments inciting to violence against Hungarians and promoting a manifestation against this group at a particular time and place, in a context of inter-ethnic disputes, at the International Cemetery of Heroes from Valea Uzului,¹⁵⁸ a music video called “Curwa”, depicting women in submissive roles, portrayed as sex slaves, wearing a leash like a dog, subjected to physical violence by men, while the lyrics talk about women being inferior to men and who should be subjected to violence,¹⁵⁹ vandalization of a tent, in a central square in Bucharest, at the International Day of the Roma, and writing derogatory messages regarding Roma and the messages “Death to Gypsies” and “Romania does not want you here”,¹⁶⁰ and publishing on Facebook several photographs depicting fascist symbols, including swastika, messages of death to people of Roma ethnicity and derogatory messages regarding these.¹⁶¹

VI. Section IV: Victims’ rights

CM/Rec (2010)5, Section I.A.3

3. “[...] for this purpose, member states should take all necessary steps to [...] provide adequate assistance and support to victims and witnesses.”

A. Content of the legal and policy provisions relating to victims’ rights

The Law 211/2005 on certain measures to ensure the information, support and protection of the victims of crimes provides for confidential and free of charge services addressed to crime victims, including referrals and evaluation, information, support and protection, legal aid, financial compensation.¹⁶² By crime victim, the law understands “a person that suffered harm, of any nature, including physical integrity or emotions harm or economic harm, inflicted directly through a criminal offence, as well as family members of the deceased person as result of a criminal offence that suffered harm as a consequence of this death.”¹⁶³ There is no legal definition of “vulnerable victim” in the Law 211/2005¹⁶⁴ or in the 2021 Methodology of evaluation and multidisciplinary inter-institutional intervention of providing support services and protection to the victims of crimes.¹⁶⁵ This last document details the provisions of the Law 211/2005 with respect to support services and protection to the victims of crimes, the mandate of the institutions involved and the cooperation between these institutions, the steps that must be followed upon assisting a victim, etc. The amendments adopted in 2019 to Law 211/2004 provide that the evaluation of victims, respectively the process of identifying

¹⁵⁸ Romania, First Instance Court Miercurea Ciuc, Criminal Judgment no. 723/2021, of 10.11.2021.

¹⁵⁹ Romania, First Instance Court Pitești, Criminal Judgment no.669/2021, of 29.04.2021.

¹⁶⁰ Romania, Bucharest Court of Appeal, Decision no.1430/2019, of 29.10.2019.

¹⁶¹ Romania, Bucharest Court of Appeal, Decision no.17/2021, of 18.01.2021.

¹⁶² Law 211/2004 on certain measures to ensure the information, support and protection of the victims of crimes (*Legea 211/2004 privind unele măsuri pentru asigurarea informării, sprijinirii și protecției victimelor infracțiunilor*), published in the Official Journal no.505 of 27.05.2004.

¹⁶³ Law 211/2004 on certain measures to ensure the information, support and protection of the victims of crimes (*Legea 211/2004 privind unele măsuri pentru asigurarea informării, sprijinirii și protecției victimelor infracțiunilor*), Article 3⁴, published in the Official Journal no.505 of 27.05.2004.

¹⁶⁴ Law 211/2004 on certain measures to ensure the information, support and protection of the victims of crimes (*Legea 211/2004 privind unele măsuri pentru asigurarea informării, sprijinirii și protecției victimelor infracțiunilor*), published in the Official Journal no.505 of 27.05.2004.

¹⁶⁵ Methodology of evaluation and multidisciplinary inter-institutional intervention of providing support services and protection to the victims of crimes (*Metodologie din 12.02.2021 de evaluare și intervenție multidisciplinară și interinstituțională în acordarea serviciilor de sprijin și protecție pentru victimele infracțiunilor*), published in the Official Journal no.587 of 13.05.2021.

the needs for assistance and protection, as well as the appropriate support and protection services, will take into account the personal characteristics of the victim.¹⁶⁶ There is no detailing of these personal characteristics in the law and no reference to them in the 2021 Methodology. Furthermore, we have no information that including gender identity and sexual orientation are in any way not taken into account, with consequences in practice, since victim support services do not specifically target victims of hate crime in general and anti-LGBTI hate crime in particular. Victims of hate crimes are not recognized as a distinct and particularly vulnerable category of crime victims. The fact that also in 2019, the general principle of non-discrimination was introduced, the criterion of sexual orientation being explicitly mentioned, but not gender identity, does not cover the need for special measures for victims of anti-LGBTI hate crimes.

The existing public victim support system does not have specific protocols or other measures dedicated for victims of anti-LGBTI hate crimes, not even for specific LGBTI groups with heightened vulnerability, like LGBTI people with disabilities or LGBTI adolescents.¹⁶⁷ At the same time, the Ministry of Labour, consulted for this report, indicated that the services of information, support and protection of crime victims provided under Law 211/2004 must comply with the general principles of respecting the needs of the victim, avoiding secondary victimization and respecting human dignity and non-discrimination and participation of the victim in the decision-making process.¹⁶⁸ By non-discrimination, the Ministry of Labour understands: “recognizing the status of a victim and ensuring that access to support and protection services is carried out without discrimination based on criteria such as: race, nationality, citizenship, ethnic or social origin, language, religion or belief, political or any other opinions, assets, disability, age, gender, sexual orientation, their status in terms of residence or health.”¹⁶⁹

The legal aid services are available to victims of anti-LGBTI hate crimes, similar to other victims of crimes under the conditions that their monthly income per family member is not bigger than the gross minimum monthly salary, in the year when they filed the request, and that the victim filed a criminal complaint in 60 days from the time of the incident.¹⁷⁰ Shelters are conceived for women and children who are victims of domestic violence (in a heterosexual couple) and for homeless persons, not for LGBTI victims of violence.¹⁷¹ The Ministry of Labour indicated that according to Art.3 of the Law 217/2003 for the prevention and combating of family violence and the principles of non-discrimination, self-determination and equal opportunities stipulated in the Law 292/2011 on social assistance, a woman fleeing violence from a lesbian partner must be accepted in a shelter for victims of domestic violence; though, they could not indicate how many cases of lesbians were assisted in the last five years.¹⁷² A heteronormative approach automatically excludes and discriminates against other categories of victims of domestic violence that belong to the LGBTI community: trans women victims of domestic violence who did not undergo legal gender reassignment are not accepted in the shelter

¹⁶⁶ Emergency Ordinance 24/2019 for the amendment and completion of Law no. 211/2004 regarding some measures to ensure the protection of crime victims, as well as other normative acts, Art. I point. 9, art. 39 paragraph 2 letter c published in the Official Journal no. 274 of 10.04.2019.

¹⁶⁷ Law 211/2004 on certain measures to ensure the information, support and protection of the victims of crimes (*Legea 211/2004 privind unele măsuri pentru asigurarea informării, sprijinirii și protecției victimelor infracțiunilor*), published in the Official Journal no.505 of 27.05.2004.

¹⁶⁸ Consultation with the Ministry of Labour, based on the first draft of the 2022 Thematic review, 26.09.2022.

¹⁶⁹ Consultation with the Ministry of Labour, based on the first draft of the 2022 Thematic review, 26.09.2022.

¹⁷⁰ Law 211/2004 on certain measures to ensure the information, support and protection of the victims of crimes (*Legea 211/2004 privind unele măsuri pentru asigurarea informării, sprijinirii și protecției victimelor infracțiunilor*), Arts.15-16, published in the Official Journal no.505 of 27.05.2004.

¹⁷¹ See Romania, National Authority for the Protection of the Rights of the Child and Adoption (*Autoritatea Națională pentru Protecția Drepturilor Copilului și Adopție (ANPDCA)*), Response of 18 July 2022 to Questions 2 and 5.

¹⁷² Consultation with the Ministry of Labour, based on the first draft of the 2022 Thematic review, 26.09.2022.

because only victims that have the sex female in their ID qualify; LGBTI youth also do not qualify for shelter despite them being victims of violence in the family, from their parents. Social workers, police officers and court staff are not mandated to receive training to a level appropriate to their contact with victims.

NGOs working for the LGBTI community are providing legal and psychological support to LGBTI victims, but these services depend on professionals to work *pro bono* or on project-based funding from private donors or EU funding. Public funding from the State is not available for victim support services for LGBTI persons. In general, State funding for NGOs that provide victim support for victims of domestic violence, trafficking or child victims is project based, when the NGO has a partnership with a particular public authority or has won a call for proposals, usually for social services or information campaigns. The support is scarce and short-term, which affects sustainability and planning of NGOs' activities. The public authorities do not collect information about the general picture of State aid provided to NGOs that offer victim support services, which suggests a somewhat unsystematic and scarce funding of support organisations.

B. Implementation issues

There are no policy measures regarding victim protections, except for a provision introduced in the Strategy for the development of the judicial system 2022-2025, adopted by the Ministry of Justice, planning trainings for judges and prosecutors on methods of hearing victims of crimes with a particular focus on sexual crimes victims and on the impact of complex trauma, as part of the specific objective of developing practical skills for these categories of law professionals.¹⁷³ The above-mentioned strategy does not stipulate a particular focus on LGBTI victims of hate crimes.

The "Protection of victims of crimes" project, implemented by the Public Prosecutor's Office attached to the High Court of Cassation and Justice (part of the Norwegian Financial Mechanism 2014-2021) in partnership with the Ministry of Justice, the European Union Agency for Fundamental Rights (FRA) and the General Directorates of Assistance Social and Child Protection in Bucharest, sectors 2-5, has as its general objective to contribute to ensuring an efficient, accessible and qualitative criminal justice system for child victims of crimes, respectively for victims of hate crimes, with a special focus on the population of Roma ethnicity. As regards the victims of hate crimes, the aim is to improve the response of the criminal justice system to hate crimes and the protection and assistance mechanisms for victims of hate crimes, by combining the activities of research, analysis, data collection, professional training and the involvement of civil society representatives. FR A's contribution to this project will be substantial, given the Agency's experience in the matter, the technical assistance provided ensuring the objectivity and neutrality of the project's deliverables. The results of the thematic analysis will form the basis of the construction of the other activities related to the development of guidelines on the identification, investigation and prosecution of hate crimes, the development of the professional training program, respectively the establishment of a high-level working group on hate crimes.¹⁷⁴

Two projects currently implemented by the Superior Council of Magistracy are aimed at improving the level of trust in the judiciary and raising awareness on the rights of the petitioners, in particular the rights of the vulnerable groups.¹⁷⁵ However, hate crime victims and LGBTI persons are not identified as vulnerable groups by these initiatives. In the first project, the Superior Council of Magistracy

¹⁷³ Romania, Ministry of Justice, Strategy for the development of the judicial system 2022-2025 (*Strategia de dezvoltare a sistemului judiciar 2022-2025*), Action 3.2.1 page 45, approved by Government Decision no.436 of 30 March 2022, published in the Official Journal no.322bis of 2 April 2022.

¹⁷⁴ Informations about this project are available [here](#).

¹⁷⁵ Romania, Superior Council of Magistracy, Response no.8622/2022 of 19 July 2022.

updated and published¹⁷⁶ in 2019 an informative package containing information focusing on the rights of vulnerable groups and an information campaign was lodged on 12 August 2022, which also addresses the rights of vulnerable groups and free access to justice¹⁷⁷; there is no indication that hate crime victims and LGBTI persons are covered by the definition of the vulnerable group used in this project.¹⁷⁸ In the second project, the Superior Council of Magistracy is organizing 9 training sessions on access to justice of vulnerable groups for non-legal professionals, for example staff from local authorities or representatives of NGOs, in order to raise awareness of the challenges faced by Roma communities and other vulnerable groups and increase the capacity to disseminate information about mechanisms of legal aid available to these groups.¹⁷⁹ Also, 2 conferences will be organized on the same topic, with the participation of professionals from the legal field (judges, prosecutors, etc.) and from the non-legal field.¹⁸⁰

VII. Section V: Protection against anti-LGBTI hate crimes in detention

CM/Rec (2010)5, Section I.A. 4

4. “Member states should take appropriate measures to ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons, and in particular take protective measures against physical assault, rape and other forms of sexual abuse, whether committed by other inmates or staff; measures should be taken so as to adequately protect and respect the gender identity of transgender persons.”

A. Measures in place to ensure the safety and dignity of detainees

The rules on the execution of punishments¹⁸¹ establish a separate status for vulnerable inmates and sexual orientation is one of the first criteria of vulnerability explicitly identified by the regulation. The Commission for the establishment, individualization and change of the execution regime of custodial sentences takes the decision of considering an inmate vulnerable, based on identifying him/her as belonging to one of the protected criteria, cumulative with the presence of a danger for the respective person, the others or the detention centre.¹⁸² This decision can occur at the beginning or during the time spent in detention, upon motivated request of the inmate, of other inmates or *ex officio* when the danger described above appears, established on the basis of the analysis documents, specialists’

¹⁷⁶ <https://drive.google.com/file/d/1IVUIKFFZ8WwGBBQ1xOfWZ-n-RxPiJu3/view>

¹⁷⁷ <https://www.csm1909.ro/ViewFile.ashx?guid=b4b1b782-c285-4682-8f48-dcf5546c61c8-InfoCSM>

¹⁷⁸ The title of the project is “TAE- Transparency, accessibility and legal education through improving public communication at the level of the judiciary”. See Romania, Superior Council of Magistracy, Response no.8622/2022 of 19 July 2022.

¹⁷⁹ Romania, Superior Council of Magistracy, Response no.8622/2022 of 19 July 2022.

¹⁸⁰ Consultation with the Superior Council of Magistracy, based on the first draft of the 2022 Thematic review, 26.09.2022.

¹⁸¹ Romania, Regulation of 2016 on the application of the Law 254/2013 on the execution of punishments and custodial measures ordered by judicial bodies during the criminal process (*Regulament din 2016 de aplicare a Legii nr. 254/2013 privind executarea pedepselor și a măsurilor privative de libertate dispuse de organele judiciare în cursul procesului penal*), Arts.34-36, published in the Official Journal no.271 of 11.04.2016.

¹⁸² Romania, Regulation of 2016 on the application of the Law 254/2013 on the execution of punishments and custodial measures ordered by judicial bodies during the criminal process (*Regulament din 2016 de aplicare a Legii nr. 254/2013 privind executarea pedepselor și a măsurilor privative de libertate dispuse de organele judiciare în cursul procesului penal*), Art.35, published in the Official Journal no.271 of 11.04.2016.

observations who ensure the multidisciplinary assessment of the detainees or the information received from the staff of the unit, following the written request made by the person deprived of liberty. The identification of vulnerability, based on the criterion of sexual orientation, is carried out, at the level of subordinate penitentiary units, according to internal procedures regarding the identification of persons deprived of liberty with the potential for discrimination/risk of vulnerability.¹⁸³ The purpose of the procedure is to define the concept of vulnerability, establish the criteria for identifying vulnerable people, how to work with them and record data in specific documents, as well as the safety and monitoring measures ordered by the administration of the place of detention, when required. Sexual orientation and what the procedure calls "sexual identity" are correctly defined: "Sexual orientation - is defined as the constant emotional, sexual or affective attraction towards individuals of a certain gender. (...). Sexual identity - how each individual perceives themselves psychologically as male or female. (...)".¹⁸⁴ In support of the application of protection measures, the psychologist has the responsibility of completing, in the psychological record of the prisoner's Education and Psychosocial Assistance File, the potential for discrimination/vulnerability, in the case of those with vulnerabilities generated by sexual orientation, as well as monitoring them during execution custodial measures or punishments.¹⁸⁵

The protection measures consist of: temporary placing the vulnerable person in a different detention room in order to eliminate the risk factors, upon decision of the director of the detention centre, establishing the places, periods of time, itineraries and persons that come across the particular inmate, assigning experienced personnel for the protection, escort, supervision, monitoring or operative intervention, putting in place a system of rapid response by the persons with power of decision in case of manifestation of the potential danger, rapid review of all petitions regarding allegations of acts of violence filed by inmates, their families or third parties, carrying out adequate educational programs, as well as psychological and social assistance. In case these measures are not enough, the transfer to another penitentiary or to a hospital-penitentiary can occur.¹⁸⁶ There is no explicit provision introducing the rule that the protective measures should avoid placing LGBTI detainees in solitary confinement, but the way the status is construed appears it is not meant to be an isolation measure, but a protective measure. Moreover, the National Administration of Penitentiaries (ANP) informed us following the consultations for this report that the measures taken by the prison administration aim to protect rights and avoid discrimination, not having a punitive nature (such as isolation) and that during the classification, these measures of protection are monitored by the responsible specialized personnel. More information is needed from the authorities about if and how these protection measures are actually accessed in practice and if LGBTI inmates are routinely placed in solitary confinement. For example, we are missing information in how many cases was adopted the protection measure of temporary placing in a different detention room based on sexual orientation and the percentage of the total number of cases where such protection measure is adopted; ANP informed us in the consultations on this report that at the level of the institution there are no centralized statistical data related exclusively to the sexual orientation vulnerability criterion.¹⁸⁷

¹⁸³ National Administration of Penitentiaries, Procedure P.S./DRS-DM-DSDRP-005 regarding the identification of persons deprived of liberty with potential for discrimination/risk of vulnerability.

¹⁸⁴ *Id.* Statement of reasons.

¹⁸⁵ National Administration of Penitentiaries, Procedure P.S./DRS-DM-DSDRP-005 regarding the identification of persons deprived of liberty with potential for discrimination/risk of vulnerability.

¹⁸⁶ Romania, Regulation of 2016 on the application of the Law 254/2013 on the execution of punishments and custodial measures ordered by judicial bodies during the criminal process (*Regulament din 2016 de aplicare a Legii nr. 254/2013 privind executarea pedepselor și a măsurilor privative de libertate dispuse de organele judiciare în cursul procesului penal*), Art.36, published in the Official Journal no.271 of 11.04.2016.

¹⁸⁷ This clarification was provided by the National Administration of Penitentiaries, following the Consultation Round Table on the Preliminary Thematic Analysis, October 4, 2022, National Library, Bucharest.

Also, we do not have information on the measures adopted to avoid turning this protection measure into isolation or solitary confinement measure.

Transgender prisoners who have not changed their sex in the civil status documents are not given the possibility to be allocated to either a male or female facility based on their self-determined gender identity. Gender identity is not explicitly mentioned in the list of vulnerability criteria in the regulation above, but the terms "sexual identity"¹⁸⁸ and "transgender"¹⁸⁹ are broadly defined in the procedure for identifying persons deprived of liberty with potential for discrimination/risk of vulnerability. Therefore, and it can only be protected if the penitentiary units are willing, the authorities must also read this reason criterion in the open list that ends with the phrase "any other situations, conditions or similar circumstances that may create a vulnerability for the detainee" from the Regulation and apply the procedure above.¹⁹⁰ More information is needed from the authorities about if and how these protection measures are applied to trans inmates, too. For example, we do not have information how many transgender persons asked and received protection measures described above or other protection measures, if any, and how many transgender persons have been transferred to protection rooms in the last five years.

B. Implementation issues

There are no specific trainings on safety and dignity of LGBTI detainees for prison officers. There is no particular monitoring program of the rights of detainees focusing on non-discrimination based on sexual orientation and gender identity so the issues affecting these persons are unknown.

¹⁸⁸ National Administration of Penitentiaries, Procedure P.S./DRS-DM-DSDRP-005 regarding the identification of persons deprived of liberty with the potential for discrimination/risk of vulnerability, Section 1. Statement of reasons, "Sexual identity - the way in which each individual perceives himself from psychologically, as a man or as a woman."

¹⁸⁹ National Administration of Penitentiaries, Procedure P.S./DRS-DM-DSDRP-005 regarding the identification of persons deprived of liberty with the potential for discrimination/risk of vulnerability, Section 1. Explanation, "Transgender - is an umbrella term used to describe those persons whose gender identity or expression differs from the conventional expectations given by their assigned sex at birth. This category includes: transsexuals - who live or want to live permanently as members of the opposite sex, transvestites - who dress in the clothes of the opposite sex, intersex people - who from a genetic point of view cannot be classified as either of the two genders (male, female), androgynous, very masculine lesbians, effeminate gay men, people who would prefer to use other pronouns or none of them, atypical heterosexuals, etc. Being transgender doesn't mean you're gay. Many transgender people are heterosexual. Sexual identity and sexual orientation are two separate matters. For example, a person registered in the identity document as a woman, but who feels like a man, if he feels attracted to women, will consider himself a heterosexual man and not a lesbian woman. Persons deprived of liberty who have a different sexual orientation than the majority or are suspected of having a different sexual orientation (homosexual or bisexual orientation, transgender) constitute a category with the potential for discrimination, characterized by the lack of equal treatment. A person may be discriminated against even when he is associated or related to a person of a different sexual orientation."

¹⁹⁰ Romania, Regulation of 2016 on the application of the Law 254/2013 on the execution of punishments and custodial measures ordered by judicial bodies during the criminal process (*Regulament din 2016 de aplicare a Legii nr. 254/2013 privind executarea pedepselor și a măsurilor privative de libertate dispuse de organele judiciare în cursul procesului penal*), Art.34.(1).j, published in the Official Journal no.271 of 11.04.2016.

C. Available complaints mechanism

The general legal complaint mechanism in front of the judge supervising the rights in detention is available to all detainees.¹⁹¹ There are no special protection measures for LGBTI detainees, except the ones described above.

Art. 52 of Law no. 254/2013 on the execution of punishments and custodial measures ordered by judicial bodies during the criminal process, with subsequent amendments and additions, provides that if the convicted person's health or bodily integrity has been seriously affected, the medical staff has the obligation to draw up a medical report, to record the findings in the medical record, as well as the statements of the convicted person in relation to these or any other aggression and to notify the management of the unit. In addition, the prison administration has the legal obligation to notify, immediately, the judge supervising the deprivation of liberty, the prosecutor's office and the National Penitentiary Administration, the family of the convicted person, a person close to him or, as the case may be, the legal representative regarding the respective situation. Moreover, if traces of violence are found or the convicted person accuses violence, the doctor who performs the medical examination has the obligation to record in the medical record the findings and the statements of the convicted person in relation to these or any other aggression and to notify the immediately the prosecutor, and the convicted person has the right to request to be examined, in the penitentiary, by a forensic doctor.

ANP informed us during the consultations based on this report that in order to combat torture, inhuman or degrading treatment and other ill-treatment, starting from February 1, 2022, the operational room was established at the level of the central apparatus, which represents a mechanism through that the specialist officers for detention security and penitentiary regime check all the incidents produced in the subordinate units, the way they are managed, the video images captured and the compliance of the documents drawn up. The staff assigned to this operational room decides when a negative event can be declared resolved, and in cases where additional checks are necessary or the transmission of new documents and video images, they have the possibility to order prison officers from the units not to leave service until the incidents are clarified in all respects.¹⁹² We do not have more information about the legal and regulatory basis of this mechanism and its practical effectiveness.

VIII. Section VI: Awareness-raising and training

CM/Rec (2010)5, Section I.A.3

3. (...) for this purpose, member states should take all necessary steps to ensure that law enforcement structures, including the judiciary, have the necessary knowledge and skills to identify such crimes and incidents [...]."

¹⁹¹ Law 254/2013 on the execution of sentences and the detention measures ordered by the judiciary during the criminal trial (*Legea 254/2013 privind executarea pedepselor și a măsurilor privative de libertate dispuse de organele judiciare în cursul procesului penal*), Art.56, published in the Official Journal no. 514 of 14.08.2013.

¹⁹² This information was provided by the ANP, following the Consultation Round Table on the Preliminary Thematic Analysis, October 4, 2022, National Library, Bucharest.

A. Awareness-raising measures

Since the first sociologic researches of the Romanian society asking questions about gay people, in 1993, a significant and constant progress in social attitudes has been registered, from 75% of the population who did not want to have a gay neighbour¹⁹³ to 65% in 1999-2000, and 56% in 2010-2012.¹⁹⁴ The most recent national survey conducted by the National Council for Combating Discrimination, from 2018, registered that 52% of the respondents indicated that sexual orientation is not important to them when they refer favourably or unfavourably to another person and 80% of the respondents would accept that a person with a homosexual orientation to live in Romania, 73% to live on the same street, and 63% to be a work colleague.¹⁹⁵

There are no awareness and education campaigns targeting the general public on anti-LGBTI hate crimes (as part of a general anti-hate crime campaign or LGBTI specific). Unlike other European countries, Romania did not organise a national No Hate Speech campaign under the auspices of the Council of Europe. Conversely, a campaign was organised by the so-called “Coalition for Family” to promote the referendum on the amendment of the definition of family in the Romanian Constitution to be restricted to marriage between a man and a woman, which the civil society interpreted as a hate campaign against the LGBTI.¹⁹⁶ After the referendum failed, there have been several attempts to make illegal any conversation about sexual orientation, gender identity and gender different than sex in the educational sector irrespective of the age of the persons. For example, after the adoption of the anti-gay laws in Hungary, a similar bill was proposed in the Romanian Parliament, supported by the Hungarian minority political parties¹⁹⁷ and the Alliance for the Union of Romanians, a minority party in the Romanian Parliament that has been repeatedly described as an extreme-right party, announced that it will also introduce a bill to ban what it calls “gay propaganda” among children, understood as any information about homosexuality or gender identity provided to minors.¹⁹⁸ No public authority or political party has expressed public opposition to such public statements, except for an MP from USR-PLUS, an opposition party.¹⁹⁹ The bill is currently under debate in the Parliament.²⁰⁰ Such initiative comes in spite a decision from the Constitutional Court of Romania, published in the Official Journal on 21 January 2021, which found unconstitutional legal provisions banning education regarding

¹⁹³ Ovidiu Voicu, Dynamics of the degree of acceptance/rejection of homosexual persons in the Romanian society, during the last 20 years, 2017.

¹⁹⁴ Dagmar Herzog, *Sexuality in Europe*, Cambridge University Press, 2011, p.185.

¹⁹⁵ Romania, National Council for Combating Discrimination, National level survey on discrimination in Romania and current perceptions on hate crimes, 2018.

¹⁹⁶ Committee of Ministers of the Council of Europe, 1348th meeting (June 2019) (DH) - Rule 9.2 - Communication from an NGO (Anti-Discrimination Coalition of Romania) (02/04/2019) in the case of M.C. and A.C. v. Romania (Application No. 12060/12).

¹⁹⁷ The Hungarian People’s Party of Transylvania and the Hungarian Civic Party. See DW (2021) ‘Romania following the footsteps of Viktor Orban?’ (‘România pe urmele lui Viktor Orban?’), 11.08.2021, available at <https://www.dw.com/ro/rom%C3%A2nia-pe-urmele-lui-viktor-orban/a-58829534>.

¹⁹⁸ Hotnews (2021) ‘AUR plans to initiate an anti-LGBT law based on the Hungarian model – Party supporters are being consulted on social media’ (*AUR vrea să inițieze o lege anti-LGBT pe modelul din Ungaria / Simpatizanții partidului, chestionați pe rețele de socializare*), 27.07.2021, available at <https://www.hotnews.ro/stiri-politic-24943363-aur-vrea-initieze-lege-anti-lgbt-modelul-din-ungaria-simpatizantii-partidului-chestionati-retele-socializare.htm>.

¹⁹⁹ G4Media (2021) ‘Iulian Bulai about the anti-LGBTQI bills announced by AUR: USR PLUS will oppose such aberration’ (*Iulian Bulai, despre pachetul legislativ anti-LGBTQI anunțat de AUR: USR PLUS se va opune unei asemenea aberații*), 28.07.2021, available at <https://www.g4media.ro/iulian-bulai-despre-pachetul-legislativ-anti-lgbtqi-anuntat-de-aur-usr-plus-se-va-opune-unei-asemenea-aberatii.html>.

²⁰⁰ BP778/2021 Propunere legislativă pentru modificarea și completarea Legii nr.272/2004 privind protecția și promovarea drepturilor copilului, available at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=19747.

gender and gender identity, adopted in 2020 by the Parliament. The Constitutional Court stated that such legal amendments conflict with constitutional and international human rights standards that reflect the changes over time in the social roles attached to women and men and the removal of gender stereotypes, as well as the recognition of gender identity in the case of transgender people.²⁰¹ The Constitutional Court explicitly acknowledged that biological sex and gender identity are not always the same, contrary to the idea put forward by the prohibition enshrined in the amendment, which was challenged and sent for constitutional review.²⁰²

In 2019, the amendments to National Education Law no. 1/2011 (LEN) expressly prohibited psychological violence - bullying in educational institutions and in all spaces intended for education and professional training. In the definition of psychological violence – bullying, the aspects of discrimination and social exclusion targeted by acts of violence against the victim include, among others, the victim's gender or sexual orientation.

The implementation of the anti-bullying plan at the level of each school unit includes information and awareness activities on the phenomenon of bullying for school staff, children and parents, information on the specific procedures for prevention, identification and intervention and encouraging participation in reporting bullying situations and their mediation, the responsibilities of teaching staff for the purpose of immediate intervention, along with activities that contribute to the promotion of the school's values and mission and to the achievement of the "school with zero tolerance to violence" objective provided by the internal order regulation.

Schools can also implement programs, projects and campaigns to increase the cohesion within the group of children and in the children-adults community, awareness of the consequences of bullying and elimination of possible causes, risks and vulnerabilities that can determine such behaviors.

ACCEPT Association is providing free legal assistance to LGBTI victims of hate crimes and they are promoting information about available remedies, including filing criminal complaints to the police.²⁰³

B. Training provisions

There is no research done on the level of knowledge about the legal definition of hate crimes among police, judiciary and prison staff. The lack of any prosecution of hate crime against LGBTI community in the last 16 years is an indication that the knowledge is scarce. There are no regulation obliging the law enforcement, judiciary and prison staff to undergo training on hate crimes. The existing initiatives resulted from the cooperation of the National Council for Combating Discrimination and, in some cases, the civil society organizations, with the national authorities dealing with the training of police, of judges and prosecutors. These are trainings on discrimination and hate crime in general, and in some cases, they focus on racial hate crime against the Roma community. In the context of the execution of the ECtHR judgment in *M.C. and A.C. Case*, cited above, the Committee of Ministers of the Council of Europe commended on such *"promising synergies with civil society, the national equality body and with specialised Council of Europe units, notably in the field of capacity building"*.²⁰⁴

²⁰¹ Constitutional Court of Romania, Decision No. 907 of 16 December 2020, published in the Official Journal No. 68 of 21 January 2021, para. 65, available at https://www.ccr.ro/wp-content/uploads/2021/01/Decizie_907_2020.pdf?fbclid=IwAR0IMwK6TiduuUKJ9tNSV8_ZuGy609UPKk6ej7jH4wKWycW8aoXVWYEs7sE.

²⁰² Constitutional Court of Romania, Decision No. 907 of 16 December 2020, published in the Official Journal No. 68 of 21 January 2021, para. 79, available at https://www.ccr.ro/wp-content/uploads/2021/01/Decizie_907_2020.pdf?fbclid=IwAR0IMwK6TiduuUKJ9tNSV8_ZuGy609UPKk6ej7jH4wKWycW8aoXVWYEs7sE.

²⁰³ <https://www.acceptromania.ro/consiliere-juridica/>.

²⁰⁴ Committee of Ministers of the Council of Europe, 1419th meeting (30 November – 02 December 2021), CM/Notes/1419/H46-27.

However, these are in-service trainings, of a small scale, covering not more than a few hundred of professionals per year, while the lecturers are exclusively from the national equality body and non-governmental organizations.

For example, with respect to police, the national equality body contributed with:

- In 2017, NCCD Seminar “15 years of non-discrimination in Romania. Jurisprudence and evolutions” (25 police officers from IGPR, the General Directorate against Corruption, Gendarmes, ISOP)²⁰⁵
- In 2018, participation to the training session within JUSTROM Program, Council of Europe (25 police officers IGPR)²⁰⁶
- In 2019, 4 training sessions within the Project NoHate 2018 (48 police personnel and gendarmes)²⁰⁷ and 8 training sessions, in partnership with Bucharest Police, “Seminar on the prevention and combating discrimination by the police officers of the Bucharest Police – good practice models” (300 police personnel)²⁰⁸
- In 2021, invitation to participate to the training session within Romact Program, implemented by the Council of Europe, based on the methodology of the Council of Europe (20 police personnel)²⁰⁹
- In 2019 and 2021, invitation to participate to the training session within the Program human rights in public order and safety institutions, post-university training on discrimination and hate crime (30 students at Police Academy)²¹⁰
- In 2021, invitation to participate to the training session organised by the Schengen Multifunctional Training Centre (Ministry of Internal Affairs, Ploiesti), on organisational culture and ways to approach Roma communities (50 persons from the personnel of the Ministry of Internal Affairs).²¹¹

With respect to judges and prosecutors, the national equality body cooperated with the National Institute for Magistracy (NIM):

- In 2017-2018, hate crime training consisted of 1.5 or 3 hours sessions out of a 3 days training on anti-discrimination occurring one time or three times a year.²¹²
- In 2019-2020, the training effort on hate crimes intensified to 3 days training occurring 3 or 5 times a year, within the project No to Hate 2018, implemented by the National Council for Combating Discrimination and the NGO Institute for Public Policies in partnership with the National Institute for Magistracy.²¹³
- In 2022, 2 training sessions on the topic of Combating Discrimination and Hate crimes were organised;²¹⁴

NIM has also expressed its availability to organize in cooperation with the German Ministry of Justice training sessions in 2023 for judges and prosecutors in the field of hate crime. In the beginning of

²⁰⁵ NCCD, 2017 Annual Report, p.64.

²⁰⁶ More information about Justrom 1 Program carried out by the Council of Europe in Romania is available at <https://pjp-eu.coe.int/en/web/access-to-justice-for-roma-women/justrom>, and about Justrom 2 Program at <https://pjp-eu.coe.int/en/web/access-to-justice-for-roma-women/about-justrom>.

²⁰⁷ NCCD, 2021 Annual Report, p.53.

²⁰⁸ Council of Europe, The Fifth Report of Romania based on Art. 25.(2) of the Convention on the Protection of National Minorities, ACFC/SR /V(2019)013, pp. 20-21.

²⁰⁹ Council of Europe, Set of Instruments for Police Officers, The Standards of the Council of Europe on racial hate crime and non-discrimination with a focus on Roma and Sinti (*Set de instrumente pentru ofițerii de politie. Standardele Consiliului Europei privind infracțiunile motivate rasial și nediscriminarea, cu accent pe problema romilor și nomazilor*).

²¹⁰ Ministry of Internal Affairs, Police Academy, Centrul pentru Promovarea Drepturilor Omului și Studii postuniversitare, Information regarding collaborations with the NCCD.

²¹¹ NCCD, Response of 18.03.2022, points 26-27.

²¹² Romania, National Institute of Magistracy, Response no.3329 of 7 July 2022.

²¹³ Ibid.

²¹⁴ Consultation with the National Institute of Magistracy, based on the first draft of the 2022 Thematic review, 26.09.2022.

2023, NIM entered into partnership with ACCEPT to ensure the training of approximately 120 judges during 6 training sessions within the project "*Partnership for the equality of LGBTI persons: the implementation of ECtHR jurisprudence on sexual orientation and gender identity*" (PN5017), carried out by ACCEPT in partnership with the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice and the Ombudsman's institution²¹⁵

Specifically on discrimination and hate crime affecting the LGBTI community, the non-governmental organization ACCEPT Association implemented the project "LGBTI Partnership" financed by the European Commission in partnership with the National Council for Combating Discrimination and organized two trainings in 2018 for 60 judges and prosecutors, with the cooperation of the National Institute for Magistracy. These were 3 days trainings on anti-discrimination regarding the LGBTI persons that included a 3 hours session on hate crime. In the last 10 years, ACCEPT Association was invited to participate with 1.5-3 hours sessions to the initial training of police agents by the Institute for Studies in the field of Public Order (*Institutul de Studii pentru Ordine Publică (ISOP)*), which is the institution mandated to organise the training of police agents who are entering the police from other professions, not from police schools or police academy. In addition, in March 2021, the newly established unit - the Bureau for the investigation of hate crimes – and the local specialized police officers referred above at Section III.B., went through training with the support of the Council of Europe's Sexual Orientation and Gender Identity (SOGI) Unit, which could be seen as a good practice at the international level.²¹⁶

In June 2021, in the context of the execution of the ECtHR judgment in the case *Lingurar and Others v. Romania*,²¹⁷ dealing with ineffective investigation of hate crime and racial police profiling, the Committee of Ministers of the Council of Europe recommended "more targeted and comprehensive capacity building"²¹⁸ for the specialized prosecutors, including "training on the requirements for an effective response to allegations of abuse by State agents when there are indications or suspicions of discriminatory motives, on detecting bias motivation, including racist, and on handling hate crime",²¹⁹ the use of the Council of Europe's relevant expertise and technical cooperation programmes, and strengthening the law enforcement's cooperation with the national equality body.²²⁰ The authorities are just starting to envisage a systematic effort of the respective training institutions to take over the training initiatives described in the paragraphs above, invest in the necessary resources and develop more consistent ones, and multiply the training, so that they cover in a given period of time a significant number of their personnel working in the field of combating hate crime:

- The General Prosecutor's Office is currently implementing two projects aimed at training a large number of prosecutors, police, and other professionals on hate crime, one of which is implemented in partnership with the Fundamental Rights Agency, and the other one in partnership with ACCEPT Association. The first project involves the development of a thematic analysis of the current situation regarding hate crime and the procedures for collecting data on victims of hate crime and the development of a training package, including some guidelines.²²¹ The second project from the following focuses on hate crimes against LGBTI people and also aims to train prosecutors and police

²¹⁵ Ibid.

²¹⁶ General Inspectorate of the Romanian Police, Response no.511.468/07.07.2022, points 43, 46.

²¹⁷ ECtHR, *Lingurar v. Romania*, 16 April 2019, 48474/14.

²¹⁸ Committee of Ministers of the Council of Europe, 1406th DH meeting (07-09 June 2021) – Notes, point 3.

²¹⁹ Ibid.

²²⁰ Committee of Ministers of the Council of Europe, 1406th DH meeting (07-09 June 2021) – Notes, point 2.

²²¹ The "Protection of Crime Victims" (HC) project has as partners: the Agency for Fundamental Rights of the European Union (FRA), the Ministry of Justice through the Crime Prevention Directorate, four General Directorates of Social Assistance and Child Protection (DGASPC) from Bucharest, with funding provided through the "Justice" program of the Norwegian Financial Mechanism 2014 - 2021, program managed by the Ministry of Justice, as program operator.

officers on the investigation of hate crimes, 280 magistrates, 160 policemen and 40 policemen will benefit from these professional training courses employees of public authorities.²²²

- ISOP is reporting for 2023 the implementation of HELP Training Session “Fighting against racism, xenophobia, homophobia and transphobia”, a training that is currently being developed at the level of the Council of Europe structures, in cooperation with Romanian institutions and civil society.²²³

- In 2022, the National Institute of Magistracy is cooperating with the CoE HELP Programme and the Spanish Judicial School (*Escuela Judicial del Consejo General del Poder Judicial*), for a cross-border launch and implementation of the HELP updated course on “Fighting against racism, xenophobia, homophobia and transphobia” within the HELP in the EU III Project.²²⁴

- In the same time, during 2021-2022, the General Inspectorate of the Romanian Police organized 44 hours of online in-service training sessions for 51 police officers from the specialized unit on hate crime and the local specialized police officers, with the cooperation of the Norwegian National Police – Oslo District Police, who invited experts and members of NGOs from the EU and the UK, in the Norwegian Funds project “Integrated action to combat hate crimes, especially directed against Roma communities and to ensure a high quality standard of police service – PDP3”.²²⁵

²²² The project "Partnership for the equality of LGBTI persons: the implementation of ECtHR jurisprudence regarding sexual orientation and gender identity" has as its partner the ACCEPT Association, and the financing is provided by the Romanian Social Development Fund (FRDS).

²²³ Romania, Institute for Studies in the Field of Public Order, Response no.4391830 of 05.07.2022.

²²⁴ Consultation with the National Institute of Magistracy, based on the first draft of the 2022 Thematic review, 26.09.2022.

²²⁵ Romania, Interview with ACCEPT Association on 9-12 March 2021.

IX. Concluding remarks

Romania registered two developments that could be considered good practices in the field of combating hate crime – introducing an explicit exception in the Data Protection Law to ensure that personal data which applies to protected grounds against hate crime can be used for data collection purposes and the cooperation of the police authorities with the Council of Europe’s Sexual Orientation and Gender Identity (SOGI) Unit to train the newly established Bureau for the investigation of hate crimes and the local specialized police officers on LGBTI hate crimes. At the same time, there are a series of shortcomings with respect to legislation and implementation that need to be addressed to ensure an effective response to hate crime and to improve the underreporting of LGBTI hate crimes.

Even though the legal framework in Romania addresses some types of anti-LGBTI hate crimes, there are significant gaps in the legislation which affect the state institutions’ ability to adequately address this type of criminal behaviour and the needs of the victims. Hate crime is not defined in the legal system, and together with the absence of co-ordination mechanisms leads to a fragmented response to hate crime, and data that is not comparable. The legislative approach of punishing hate crimes under an aggravating circumstance weakens the response of the criminal system, treating the punishment of hate crime as an add-on to the penalty at conviction, leaving it to the arbitrary of the judge. Gender identity is not explicitly covered in any of the criminal law provisions applicable to hate crime, an omission that limits the possibility of prosecuting transphobic hate crimes and hate speech. The fine line between administrative and criminal punishing of hate speech is creating, in some cases, an open-door to prosecutors’ passing on the responsibility of investigation to the National Council for Combating Discrimination. At the same time, the Constitutional Court offered some guidance and the definition of *Incitement to violence, hate or discrimination* has been recently amended. The efforts to improve the data collection of hate crime need further improvements to include indicators of bias, take into account the victim’s perception when recording the case as a hate crime, and ensure coordination between different institutions that collect data. Moreover, the standard procedure for reporting criminal offences is rigid and contains certain obstacles that potentially contribute to underreporting, such as lack of an automatic recording system, repeated interviews of the victims, and third-party reporting is unavailable in practice.

The authorities did not report any conviction of a person for committing hate crimes against LGBTI persons or any criminal investigation opened (only preliminary investigations), since the adoption of the first legal provisions in 2006, which suggests an inadequate response of the criminal justice system to such crimes, as assessed by the Committee of Ministers of the Council of Europe. Among the shortcomings identified there are: no guidance for the police on bias indicators and evidentiary requirements, no specialized prosecutors, no independent procedure for hate crimes and/or hate motivated incidents allegedly committed by law enforcement staff, the prosecutors’ downplaying the seriousness of verbal abuse, by invoking the lack of “social danger”.

The support services are in general available for all victims, including victims of hate crimes, under the same conditions, but not paying any attention to the LGBTI victims of hate crimes hinders their addressability to such services and in some cases implicitly excludes them from victim support services. As to the rules on the execution of punishments, there are protections for vulnerable inmates, including sexual orientation, while gender identity is inadequately covered.

The existing small-scale, in-service training initiatives in the field of training on hate crimes affecting the LGBTI have just began to inspire a systematic training effort from competent authorities in the field of training for the police and prosecutors. Nevertheless, there are no awareness and education campaigns targeting the general public on anti-LGBTI hate crimes, only initiatives against the LGBTI community, as the 2018 Referendum, and attempts to actually restrict any such education efforts on LGBTI community in the future, by banning any information about LGBTI.

X. Recommendations

To the Ministry of Justice, the Ministry of Internal Affairs, the General Prosecutor's Office and the General Inspectorate of the Romanian Police:

- Establish an agreed working definition of hate crime in secondary legislation or guidelines for the purposes of criminal investigation and data collection.
- Propose an amendment of the list of protected grounds stipulated by the aggravating circumstance of Art.77.h of the Criminal Code and the similar list of Art.369 of the Criminal Code (Incitement to violence, hate or discrimination) to explicitly cover gender identity.
- Establish a mechanism of coordination on hate crime in general and on data collection regarding hate crime that will periodically publish reports based on research of hate crime, including the protected grounds of sexual orientation and gender identity.
- Adopt an independent procedure for investigating hate crime and hate speech committed by law enforcement officers.
- Finance a victim survey at the national level on victims of hate crimes and reasons for underreporting, explicitly including LGBTI victims.
- Finance services of third-party reporting and third-party monitoring of hate crime by NGOs or other specialised entities, based on a set of minimum quality of services criteria, taking into account the needs and rights of the LGBTI victims of hate crime.

To the General Prosecutor's Office and the General Inspectorate of the Romanian Police:

- Strengthen cooperation with impacted communities to encourage reporting of hate crime and to inspire trust in the criminal legal system to combat hate crime.
- Establish independent mechanisms for exposing and challenging institutional homophobia and transphobia by the law enforcement.
- Introduce the obligation for the police and prosecutors to assess, fill in information, report and collect data on bias indicators upon receiving a complaint, taking into account the victim's perception and/or the witnesses' perception of hate crime, as well as the circumstances regarding facts (place, time, means of action, affirmation, gestures, etc) and the information regarding the alleged perpetrator.
- Limit the number of times they ask a victim of hate crime to give detailed declaration about the reported incident, which imply living for the second time the victimization.
- Introduce periodic administrative reporting on the status of investigations of hate crime and hate speech cases.

To the General Prosecutor's Office:

- Carry out thematic reviews of all criminal complaints recorded regarding *Torture that has a motive of discrimination* (Article 282.(1).(d) of the Criminal Code) and *Abuse of office by limiting certain rights based on discrimination* (Article 297.(2) of the Criminal Code) focusing on the reasoning why they were not prosecuted under these criminal offences. In particular, with respect to Torture, introduce guidelines regarding the correct application of the ECtHR case law in the field with respect to the degree of severity.
- Promote among the prosecutors the recent judgments of the national courts and the Constitutional Court on the conviction for the criminal offence of *Incitement to violence, hate or discrimination*, as opposed to the administrative punishment of hate speech.
- Develop and implement a plan of systematic training a significant number of prosecutors on hate crimes and hate speech, including the protected grounds of sexual orientation and gender identity.
- Amend the methodology adopted by the prosecutors to include more detailed information on common bias indicators of hate crime against LGBTI persons, such as coincidence with an LGBT event, homophobic language or proximity to an LGBT venue.

To the Ministry of Justice, the Superior Council of Magistracy and the National Institute of Magistracy:

- Promote among the judges the recent judgments of the national courts and the Constitutional Court on the conviction for the criminal offence of *Incitement to violence, hate or discrimination*, as opposed to the administrative punishment of hate speech.
- Develop and implement a plan of systematic training a significant number of judges and prosecutors on hate crimes and hate speech, including the protected grounds of sexual orientation and gender identity.

To the General Inspectorate of the Romanian Police:

- Amend the newly implemented statistic tools to include a list of bias indicators and a form that must be filled in by the police, report and collect data upon receiving a complaint, taking into account the victim's perception of hate crime.
- Every criminal investigation unit should instantly provide the registration number that will be used throughout the criminal procedures, irrespective of the kind of reporting.
- Publish periodically a report of activity of the Bureau for the investigation of hate crimes.
- Develop and implement a plan of systematic training a significant number of police on hate crimes and hate speech, including the protected grounds of sexual orientation and gender identity.

To the Ministry of Justice and the Ministry of Labour and Social Affairs

- Adopt the definition of vulnerable victim of a criminal offence and include the victim of hate crime.
- Adopt protocols for LGBTI victims of hate crime for the victim support services and mandate the personnel to undergo training on non-discrimination, hate crimes and the needs of victims of hate crimes, explicitly including the LGBTI victims of hate crime.
- Audit existing victim support services to check if they discriminate directly or indirectly against LGBTI victims of crimes.
- Allocate funding for the support services for LGBTI victims of hate crimes provided by NGOs.
- Finance education campaigns targeting the general public on anti-LGBTI hate crimes in consultation with the LGBTI civil society.
- Respond promptly to attempts to restrict freedom of expression on LGBTI issues by sending points of view according to their mandate in the legislative process and by opposing publicly to such initiatives.