CRIMINALISING HATE CRIME AND SPEECH: THE EUROPEAN COMMISSION'S PROPOSAL THROUGH THE LENS OF ARTICLE 8 ECHR

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This comment responds to the European Commission's proposal to extend the list of EU-crimes in Article 83 (1) TFEU to include hate crime and hate speech. It analyses the case law of the ECtHR regarding the right to respect for private and family life, considering how this could be valuable in respect of legal initiatives in this area.

In December 2021 the European Commission issued a proposal to extend the list of EU-crimes in Article 83 (1) TFEU to include hate crime and hate speech. If the Commission's proposal is followed, the EU will be able to make new directives containing minimum rules regarding hate crime and hate speech.

However, the proposal does not give adequate consideration to the case law of the ECtHR regarding the right to respect for private and family life (Article 8 ECHR). On the basis of that right, the ECtHR has hinted at a positive obligation for states to prevent certain forms of hate crime and hate speech, including negative stereotyping of certain groups.

Considering the relationship between the EU Charter of Fundamental Rights and the ECHR stipulated in Article 52(3) of the Charter, the EU legislator is bound to the same standards contained in the ECHR when laying down limitations to any Charter rights with an ECHR-counterpart. In particular, case law on the relationship – or rather, tension – between the right to respect for private and family life (Article 8 ECHR) and the freedom of speech (Article 10 ECHR) could be of use in drafting future EU directives on hate speech that could be proposed based on this possible new EU-crime.

This comment analyses the ECtHR-case law on this positive obligation, to find out what the exact extent of this obligation is, and thereby aims to explore how the case law of the ECtHR can inform EU-level initiatives in this area. The key question is whether and how the ECtHR's jurisprudence on positive obligations to combat hate speech and hate crime may inspire or guide the EU's legislative approach.

Amongst other recommendations, this comment culminates by advising the Council to anchor Article 8 ECHR case law more explicitly in the preamble of the (potential) Council decision, and to limit criminalisation of hate crime and hate speech on the EU level to the protection of clearly outlined legal interests inspired by Article 8 ECHR case law.

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CRIMINALISING HATE CRIME AND SPEECH: THE EUROPEAN COMMISSION'S PROPOSAL THROUGH THE LENS OF ARTICLE 8 ECHR

In December 2021 the European Commission (hereafter: "the Commission") issued a proposal to extend the list of EU-crimes in Article 83 (1) TFEU to include hate crime and hate speech.[1] This list of EU-crimes concerns the areas of crime regarding which the European Union ("EU") is allowed to establish minimal rules that harmonise the criminal law of member states. Some examples of the current list include terrorism, human trafficking and illicit drug trafficking. If the Commission's proposal is followed, 'hate crime and hate speech' will be added to this list, meaning that the EU will be able to make new directives containing minimum rules regarding hate crime and hate speech, in addition to the existing harmonisation framework on this topic.[2]

Interestingly enough, the proposal does not give much consideration to the case law of the European Court of Human Rights ("ECtHR" or "the Court") regarding the right to respect for private and family life (Article 8 of the European Convention of Human Rights ("ECHR")).[3] On the basis of that right, the ECtHR has hinted at a positive obligation for states to prevent certain forms of hate crime and hate speech, including negative stereotyping of certain groups.[4] This obligation may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. This could point to a general obligation for states to ban hate speech, flowing from Article 8 ECHR.[5] Considering the relationship between the EU Charter of Fundamental Rights ("the Charter") and the ECHR stipulated in Article 52(3) of the Charter, the EU legislator is bound to the same standards contained in the ECHR when laying down limitations to any Charter rights with an ECHR-counterpart. The same goes, of course, for limitations to any Charter rights,[6] but the lack of relevant case law of the Court of Justice of the European Union ("CJEU") in this area indicates that the ECtHR case law on this topic can provide some helpful guidance to the EU legislator. In particular, case law on the relationship – or rather, tension – between the right to respect for private and family life (Article 8 ECHR) and the freedom of speech (Article 10 ECHR) could be of use in drafting future EU directives on hate speech that could be proposed based on this possible new EU-crime. Perhaps this could even prevent difficulties in finding consensus

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[1] COM(2021) 777 final.

[2] This includes Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, and more recently, Article 8 of the Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence.

[3] Only two of these cases are referred to in passing, namely ECtHR 14 January 2020, ECLI:CE:ECHR:2020:0114JUD004128815 (*Beizaras and Levickas v. Lithuania);* ECtHR 17 January 2017, ECLI:CE:ECHR:2017:0117JUD001085113 (*Király and Dömötör v. Hungary*).

[4] See e.g. ECtHR 15 March 2012, ECLI:CE:ECHR:2012:0315JUD000414904 (*Aksu/Turkey*), §58-61.

[5] A.J. Nieuwenhuis, 'A Positive Obligation under the ECHR to Ban Hate Speech?', *Public Law* (2) 2019, p. 335.

[6] See Article 52(1) of the EU Charter of Fundamental Rights.

between Member States on restricting the freedom of speech, like those encountered with previous harmonisation instruments on hate speech.[7] Moreover, the ECtHR case law can be useful for the CJEU in possible future rulings on issues of effective compliance of future directives, and especially on compliance of those directives with the Charter. Lastly, when the EU eventually accedes to the ECHR,[8] the relevance of ECHR case law will be unequivocal for any EU-institution, as applications before the ECtHR could then also be directed against the EU, either directly or as a co-respondent.[9]

These points underline the relevance of further research on the extent of the positive obligations flowing from Article 8 ECHR that regard the prevention and banning of hate crime and hate speech. This comment will therefore analyse the ECtHR-case law on this positive obligation to find out what the exact extent of this obligation is, and thereby aims to explore how the case law of the ECtHR can inform EU-level initiatives in this area. The key question is whether and how the ECtHR's jurisprudence on positive obligations to combat hate speech and hate crime may inspire or guide the EU's legislative approach, particularly in light of the Commission's proposal and any future harmonisation that might follow.

This comment will start off by providing some further context to the Commission's Proposal. Secondly, the legal relationship between the ECHR and the Charter will be explained in light of Article 52(3) of the latter. Subsequently, the scope of the obligations set by Article 8 ECHR regarding hate speech and hate crime will be determined through a case law analysis. Lastly, the reasons given by the Commission for the proposal will be examined in light of the case law on Article 8 ECHR.

The Commission proposal

The Commission's Proposal to add hate speech and hate crime to the list of EU crimes did not appear in a vacuum. Instead, it aims to complement other measures which are already in place to protect minority groups at the EU level. Among the most salient ones, the Commission includes: the Framework Decision on Racism and Xenophobia, the EU anti-racism action plan, the LGBTIQ+ Equality strategy, the Rights of persons with disabilities strategy, and, lastly, the Digital Services Act.[10]

The latter is of particular importance for addressing the hate speech phenomenon in its online form, undoubtedly one that is on the rise.[11] This aspect is also especially relevant for the

[7] This was the case with Council Framework Decision 2008/913/JHA, leading to years of negotiations before landing on a final proposal. See L. Cajani, 'Criminal Laws on History: The Case of the European Union', *Historein* (11) 2011, p. 26-29.
[8] As obliged by Article 6(2) TEU.
[9] See Article 3 of the *Final consolidated version of the draft accession instruments* (Council of Europe, 46+1(2023)36).
[10] COM(2021) 777 final, p. 5.
[11] UN News, 'Hate speech: A growing, international threat' (UNiting Against Hate, episode 5), 28 Januart 2023, available at: https://news.un.org/en/story/2023/01/1132597.

Commission, as it touches upon the most evident way in which the cross-border dimension of these crimes can be observed, and thereby justifying the need for EU action. However, the cross-border dimension of these crimes has also been identified in the Proposal as part of a spillover effect of offline hate speech being propagated by networks with members in several different Member States. In this sense, evidence[12] showed an increase in groups with members from several Member States who use traditional communication methods (e.g. press, television or political speech) to develop and spread hate speech.

Moreover, the Commission stressed the importance of protecting the common values of the EU enshrined in Article 2 Treaty on European Union ("TEU"), which are undermined by the phenomena of hate crime and hate speech; the goal of the proposed instrument would, therefore, also be to protect the legal and democratic foundations of the EU.[13] The Commission highlighted the importance of doing so and used the ECtHR as an example, in that it has already taken action to tackle this problem; in fact, the Commission acknowledged that "*the ECtHR consistently recognised in case-law that the right to freedom of expression does not prevent criminal law responses to certain forms of hate speech".*[14] As such, the Proposal aims to address these issues to mitigate the impacts they can have on individuals and on society at large.[15]

The relationship between the CJEU and the ECtHR

In order to fully grasp the exact relevance of the case law analysis in this comment, the relationship between the Charter and the ECHR, including their respective judicial institutions, needs to be studied. Whilst the two courts developed separately and independently from each other in the second half of the twentieth century, an interplay has been observed following the EU's talks regarding accession to the ECHR at the start of the twenty-first century. Nevertheless, these accession talks have faced judicial obstacles and saw a confrontative era between the two bodies. In *Opinion 2/94,* delivered in 1996, the CJEU took issue with the lack of EU competence to accede to the ECHR, arguing that the EU treaties would first require amendments.[16] Considered by some to be a hostile response, the ECtHR ruled in *Matthews v. UK* that EU Member States, as Contracting Parties to the ECHR, still could be held responsible

[12] Study supporting a Commission initiative to extend the list of EU crimes in Article 83(1) of the TFEU to hate speech and hate crime (2021), available at: https://op.europa.eu/en/publication-detail/-/publication/f866de4e-57de-11ec-91ac-01aa75ed71a1/language-en.
[13] COM(2021) 777 final, p. 1.
[14] In particular, the Proposal refers to: ECtHR 24 June 2003, *Garaudy v. France*, §1; ECtHR 13 November 2003, *Gündüz v. Turkey*, §37; ECtHR 16 November 2004, *Norwood v. the United Kingdom*; ECtHR 10 July 2008, *Soulas and Others v. France*, §47; ECtHR 9 February 2012, *Vejdeland and Others v. Sweden*, §59.
[15] COM(2021) 777 final, p. 8.
[16] Maria-Louise Deftou, 'The Road to the EU's Accession to the ECHR: Reshaping the ECtHR-CJEU Judicial Interaction in Cases of 'Unwanted Migration'?' (2022) 24 *International Community Law Review* 377, 380.

for acts of EU primary law despite the transfer of competences.[17] In *Bosphorus v. Ireland* the ECtHR restricted this earlier expansive interpretation, "*reflect[ing] a faith in the capacity of the [CJEU] to ensure effective protection of human rights in the EU*".[18] Fast-forward to 2014, the CJEU struck down the draft accession agreement due to incompatibility with EU treaties and EU law primacy.[19] Nonetheless, the EU has resumed accession talks, resulting in a revised agreement on accession in 2023.[20]

Within EU law, it is established case law that, despite fundamental rights – including those contained in the ECHR – forming an integral part of EU law (Article 6(3) TEU), the ECHR does not constitute a legal instrument within this legal order. According to the CJEU, it is up to national courts then to decide how to rule in cases of conflict between national provisions and human rights law flowing from the ECHR.[21]

In terms of enforcement, differences emerge as well. While at the ECtHR, judgments are binding on the state that is party to the case, enforcement of these judgments must be achieved through national judgements or diplomatic means. Reputation is often mentioned to help enforcement, as states arguably seek to be viewed as compliant with human rights obligations.[22] EU law has, arguably, stronger means of enforcement, partially due to the primacy of EU law over the national laws of Member States.[23] These include financial penalties set by the CJEU itself.[24] Hence, while there may be positive obligations for EU Member States arising from the ECHR, compliance can be better enforced through EU law.

Positive obligations regarding hate speech and hate crime under Article 8 ECHR

Traditionally, fundamental rights pertain to an obligation for the state *not* to interfere.[25] For example, freedom of speech generally requires the state to not prosecute or otherwise silence

[17] Federico Fabbrini and Joris Larik, 'The Past, Present and the Future of the Relation between the European Court of Justice and the European Court of Human Rights' (2016) 35(1) *Yearbook of European Law* 145, 151 and Application no. 24833/94, Matthews v. UK, ECLI:CE:ECHR:1999:0218JUD002483394.
[18] *Ibid*. See also the case Application no 45036/98, *Bosphorus v. Ireland*, ECLI:CE:ECHR:2005:0630JUD004503698.
[19] Maria-Louise Deftou, 'The Road to the EU's Accession to the ECHR: Reshaping the ECtHR-CJEU Judicial Interaction in Cases of 'Unwanted Migration'?' (2022) 24 *International Community Law Review* 377 382, Opinion 2/13 [2014] ECLI:EU:C:2014:2454.
[20] See *Final consolidated version of the draft accession instruments* (Council of Europe, 46+1(2023)36).
[21] See for instance Opinion 2/13 [2014] ECLI:EU:C:2014:2454 par. 179, Case C-571/10, ECLI:EU:C:2012:233 pars. 60-63, and Case C-617/10, ECLI:EU:C:2013:105 par. 19.
[22] J.M. Reis, *Information in International Law: An Empirical Study* (Springer Cham), 145-147.
[23] Case 6/64 Costa v ENEL EU:C:1964:66.
[24] See Article 260 TFEU.
[25] V. Stoyanova, *Positive obligations under the European convention on human rights : within and beyond boundaries*, Oxford: Oxford University Press 2023, p. 10. See also M. Pinto, 'Awakening the Leviathan

citizens for voicing their views and opinions: this civil right is therefore protected by a lack of action by the state. The ECtHR has, however, formulated certain exceptions to this traditional view on civil rights, in which state action is required to best protect ECHR rights. This was done for the first time regarding Article 8 ECHR in *Marckx* v. *Belgium*, where the Court held that while the object of Article 8 ECHR essentially is to protect individuals from arbitrary interference by public authorities, "*it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life"*.[26] While this doctrine has since been applied to almost all Convention rights,[27] this comment will largely focus on Article 8 ECHR, and more specifically, the cases regarding hate speech and hate crime.

The Court considers the concept of 'private life' to be broad and not limited to a strict definition; it can therefore encompass elements like the physical and psychological integrity of an individual, as well as multiple aspects of a person's physical and social identity.[28] These are the elements of private and family life that are typically referred to in Article 8 case law surrounding hate speech and hate crime, with the latter – physical and social identity – mostly being the subject of hate speech cases.[29] In any event, for Article 8 to be applicable, the interference or attack on a person's private life must reach a certain level of seriousness and must cause prejudice to the person's ability to enjoy their private life.[30] Also, the burden of proof lies with the applicant to provide evidence that this threshold of severity has been met.[31]

This level of severity is also relevant in the specific manner that the ECtHR requires states to combat attacks on the respect for private and family life. While the Court generally requires an effective legal system that operates for the protection of Article 8 ECHR, it is considered that the nature of the state's obligation will depend on the particular aspect of private life that is at issue.[32] The state thereby retains a margin of appreciation in selecting mechanisms to uphold individuals' right to private life, but this discretion seems to be constrained when fundamental aspects of personal integrity are at stake. Specifically, in cases involving *"grave acts where essential aspects of private life are at stake"*, the Court emphasizes the necessity for effective

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through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law', *Utrecht Journal of International and European Law* (2018) 34(2), p. 165.

[26] ECtHR 13 June 1979, ECLI:CE:ECHR:1979:0613JUD000683374 (*Marckx/Belgium*), §31.

[27] For an overview, see Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights*. *A guide to the implementation of the European Convention on Human Rights* (Human rights handbooks, No. 7), Council of Europe 2007.

[28] ECtHR 14 January 2020, ECLI:CE:ECHR:2020:0114JUD004128815 (*Beizaras and Levickas v. Lithuania*), §109, and the case law cited therein.

[29] For an overview of cases specifically surrounding this sense of identity of social or ethnic groups, see ECtHR 16 February 2021, ECLI:CE:ECHR:2021:0216JUD001256713 (*Budinova and Chaprazov v. Bulgaria*), §50-63.

[30] *Ibid*.

[31] ECtHR 25 September 2018, ECLI:CE:ECHR:2018:0925JUD007663911 (*Denisov v. Ukraine*), §114.

[32] ECtHR 30 May 2023, ECLI:CE:ECHR:2023:0530JUD003995409 (*Nepomnyashchiy and Others v. Russia)*, §73, 76.

criminal-law measures to deter and address such violations.[33] The Court thereby does emphasize how criminal sanctions, even in the most serious cases, should be used only as an *ultima ratio* measure.[34] Still, the Court considers that "*where acts that constitute serious offences are directed against a person's physical or mental integrity, only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor*".[35] Similarly, the Court has accepted the necessity of criminal law measures in certain cases of direct verbal assaults and physical threats motivated by discriminatory attitudes.[36]

In short, under Article 8 ECHR, states are obliged to protect individuals' physical and psychological integrity and their physical and social identity from attacks reaching a certain level of severity. This same level of severity is utilized to substantiate the necessity of criminal law remedies in certain cases. While these considerations highlight the importance of criminal law measures as part of the positive obligations under Article 8 ECHR, a bit more context is needed to further outline the level of severity that activates these positive obligations. To that end, the following two subsections offer a more detailed account of the relevant jurisprudence, differentiating between hate speech and hate crime cases.

Hate speech

Hate speech lacks a single, universally accepted definition. While the ECtHR has often cited the definition provided in the 2015 ECRI General Policy Recommendation on combatting hate speech,[37] in more recent cases the Court has also referred to the Council of Europe's 2022 recommendation on combatting hate speech, which describes hate speech as:

> *"[...] all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status such as 'race', colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation".*[38]

Noting the possible variation in severity and impact of these types of statements, the Council of Europe underlines the need for different types of measures to combat hate speech and

[33] ECtHR 14 January 2020, ECLI:CE:ECHR:2020:0114JUD004128815 (*Beizaras and Levickas v. Lithuania*), §110.
[34] *Ibid.*, §111.
[35] *Ibid.*, §110.
[36] See ECtHR 12 April 2016, ECLI:CE:ECHR:2016:0412JUD006460212 (*R.B. v. Hungary*), §80, 84–85; ECtHR 17 January 2017, ECLI:CE:ECHR:2017:0117JUD001085113 (*Király and Dömötör v. Hungary*), § 76; ECtHR 5 December 2017, ECLI:CE:ECHR:2017:1205JUD006689510 (*Alković v. Montenegro)*, no. 66895/10, § 8, 11, 65, 69, as cited in *Beizaras and Levickas v. Lithuania,* §111.
[37] See ECRI 8 December 2015, *General Policy Recommendation No. 15 on Combating Hate Speech*, §9.
[38] Council of Europe, *Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech*, §2. See e.g. ECtHR 15 May 2023, ECLI:CE:ECHR:2023:0515JUD004558115 (*Sanchez v. France*), §62.

thereby differentiates between hate speech that is severe enough to be combatted through criminal law and hate speech that is less severe but can still be subject to civil or administrative procedures.[39] A clear alignment with the abovementioned principles of the ECHR in this regard is noticeable there. Furthermore, the Council of Europe highlights the importance of safeguards against the misuse of hate speech legislation to inhibit public debate or silence critical voices, ensuring that restrictions are lawful, necessary, and proportionate.

This point touches on the tension between two fundamental rights that are often at stake in hate speech cases: the right to respect for private life (Article 8 ECHR) and freedom of speech (Article 10 ECHR). In this regard it is also important to preliminarily note an essential difference between cases alleging violations of Article 8 and of Article 10 ECHR. The applicants in Article 10 ECHR cases will be the person who made the hateful expression, as the Court will have to decide whether the state rightfully restricted the applicant's freedom of speech. These cases help in outlining the types of speech that the ECtHR qualifies as hate speech. In *Gündüz v. Turkey*, for example, the Court considers that it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.[40] And in *Féret v. Belgium* the Court further clarified that speech does not need to incite violence to be hate speech, as insults, ridicule, or slander aimed at groups can be harmful in themselves.[41] From these cases concerning Article 10 ECHR, however, do not flow any positive obligations to prevent or restrict these types of speech. In other words: allowing a restriction on a certain type of speech is not the same as *obligating* a state to ban them.[42] Hate speech-cases based on Article 8 ECHR differ in that sense: the applicants in these cases will be the ones affected by the hateful expression, and the court will have to decide if the expression was severe enough that it warranted state action to restrict it.

That being said, Article 10 ECHR still plays a significant role in the cases on Article 8 ECHR that *do* concern positive obligations to ban certain forms of hate speech. After all, an obligation to ban or punish a certain utterance automatically implies a restriction on the freedom of speech of the person(s) that made the utterance.[43] In these cases, a balance must therefore be struck between the applicant's right to respect for their private life and "*the public interest in protecting freedom of expression, bearing in mind that no hierarchical relationship exists between the rights guaranteed by the two Articles*".[44]

This balancing act can also be done by national authorities in conformity with the Court's case law by the national government. This does require the abovementioned effective legal system

[39] *Ibid*., §3.
[40] ECtHR 4 December 2003, ECLI:CE:ECHR:2003:1204JUD003507197 (*Gunduž v. Turkey*), §40.
[41] ECtHR 16 juli 2009, ECLI:NL:XX:2009:BJ9038 (*Féret v. Belgium*), §73.
[42] Nieuwenhuis 2019, p. 332.
[43] The same can be said vice versa: in hate speech cases that centre around Article 10 ECHR, the legitimate aim for restriction of the freedom of speech will typically be 'the rights of others', which could be the very same interests that the positive obligations from Article 8 ECHR aim to protect.
[44] ECtHR 15 March 2012, ECLI:CE:ECHR:2012:0315JUD000414904 (*Aksu v. Turkey*), §63.

that is available to the applicants and operates for the protection of Article 8 ECHR.[45] Still, the mere existence of such a system is not enough, as the importance or scope of both fundamental rights at stake must still be duly considered.[46] If the national authorities attach too much weight to the freedom of expression, without (seriously) considering the effect of the statements on the private life of the applicants, this might lead the Court to rule that there has been a violation of Article 8 ECHR. This can even be the case under circumstances that typically widen the margin of appreciation for restrictions of the freedom of speech, like the statement being made by a politician,[47] or journalist.[48] In the same vein, the Court has repeatedly considered in Article 10 ECHR-cases that criminal sanctions imposed on politicians and journalists can be compatible with their freedom of expression in extreme cases, while naming hate speech or incitement to violence as examples of such extreme cases.[49] Notably, it is not required that the statement explicitly consists of a call for violence or other crimes against the applicants, as statements that solely insult, hold up to ridicule, or slander specific social groups can still *"be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner*".[50] In *Atamanchuk v. Russia* the Court went a step further by considering that contracting states are "*permitted, or even obliged, by their positive obligations under Article 8 of the Convention, to regulate the exercise of freedom of expression so as to ensure adequate protection by law in such circumstances and/or where fundamental rights of others have been seriously impaired*".[51]

This returns us to the question when a statement is serious enough to activate this positive obligation. After all, an attack on a person must reach a certain level of seriousness in order for Article 8 ECHR, and consequently any positive obligations that might possibly follow from it, to come into play.[52] A relevant distinction to be made here regards the directness of the expression, more specifically if the statement is directed at a social or ethnic group as a whole

[45] ECtHR 30 May 2023, ECLI:CE:ECHR:2023:0530JUD003995409 (*Nepomnyashchiy and Others v. Russia*), §73.
[46] ECtHR 7 January 2025, ECLI:CE:ECHR:2025:0107JUD005918015 (*Minasyan and others v. Armenia*), §59.
[47] ECtHR 30 May 2023, ECLI:CE:ECHR:2023:0530JUD003995409 (*Nepomnyashchiy and Others v. Russia*), §78-79, 81-85; ECHR 16 February 2021, ECLI:CE:ECHR:2021:0216JUD001256713 (*Budinova and Chaprazov v. Bulgaria*), §93-95.
[48] ECtHR 14 January 2020, ECLI:CE:ECHR:2020:0114JUD004128815 (*Beizaras and Levickas v. Lithuania*).
[49] ECHR 16 February 2021, ECLI:CE:ECHR:2021:0216JUD001256713 (*Budinova and Chaprazov v. Bulgaria*), §90; ECtHR 11 February 2020, ECLI:CE:ECHR:2020:0211JUD000449311 (*Atamanchuk v. Russia*), §70; ECtHR 15 March 2011, ECLI:CE:ECHR:2011:0315JUD000203407 (*Otegi Mondragon v. Spain*), §59; ECtHR 17 December 2004, ECLI:CE:ECHR:2004:1217JUD003334896 *(Cumpănă and Mazăre v. Romania)*, §115.
[50] ECtHR 14 January 2020, ECLI:CE:ECHR:2020:0114JUD004128815 (*Beizaras and Levickas v. Lithuania*), §125.
[51] Note that Article 8 ECHR was not even at stake in the case at hand, as it concerned an alleged violation of Article 6 and 10 ECHR. See ECtHR 11 February 2020, ECLI:CE:ECHR:2020:0211JUD000449311 (*Atamanchuk v. Russia*), §70.
[52] ECtHR 14 January 2020, ECLI:CE:ECHR:2020:0114JUD004128815 (*Beizaras and Levickas v. Lithuania*), §109.

through negative stereotyping,[53] or if the statement constitutes a more direct attack on an individual belonging to such a marginalized group.

In *Behar and Gutman v. Bulgaria,* the Court provided three factors that might be relevant in deciding whether Article 8 ECHR is applicable to discriminatory statements that attack the physical and social identity of a certain ethnic or social group:

> "*(a) the characteristics of the group (for instance its size, its degree of homogeneity, its particular vulnerability or history of stigmatisation, and its position vis-à-vis society as a whole); (b) the precise content of the negative statements regarding the group (in particular, the degree to which they could convey a negative stereotype about the group as a whole, and the specific content of that stereotype); and (c) the form and context in which the statements were made, their reach (which may depend on where and how they have been made), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group's identity and dignity*".[54]

The above factors could help in deciding if the statement in question is severe enough to qualify as the 'certain level' of negative stereotyping that may affect the private life of group members to the extent that Article 8 ECHR is applicable. In this assessment, regard must be had to the overall context of the case, also taking into account the social and political climate surrounding the statements.[55] Further underlining the relation between Article 8 and 10 ECHR, the above factors from *Behar and Gutman* seem to bear resemblance to those formulated in *Perinçek v. Switzerland,* in which the Court provided factors that typically play a role in deciding on restrictions on the freedom of speech in instances of hate speech: the political or social context of the expression, if the statement could be seen as an (in)direct call to violence or justification of violence, hate or intolerance and the form of expression.[56]

When it comes to more direct verbal attacks on individuals that belong to marginalized groups, an additional factor that seems relevant to the severity test is the presumed intent of the person making the statements. In *Minasyan and others v. Armenia*, concerning a string of libellous newspaper articles targeting a group of LGBT-activists, the Court observed that these articles were motivated by hostility and considered the author's "*obvious intention of frightening the applicants into desisting from their public expression of support for the LGBT community*".[57] The Court thereby referred to three hate speech-cases on the prohibition of torture (Article 3 ECHR) where a similar conclusion was drawn on the intent behind the expressions.[58] This

[53] See ECtHR 15 March 2012, ECLI:CE:ECHR:2012:0315JUD000414904 (*Aksu v. Turkey*), §58-61.
[54] ECtHR 16 February 2021, ECLI:CE:ECHR:2021:0216JUD002933513 (*Behar and Gutman v. Bulgaria*), §67.
[55] *Ibid*.
[56] ECtHR 15 October 2015, ECLI:CE:ECHR:2015:1015JUD002751008 (*Perinçek v. Switzerland*), §204-208.
[57] ECtHR 7 January 2025, ECLI:CE:ECHR:2025:0107JUD005918015 (*Minasyan and others v. Armenia*), §54, 68.
[58] ECHR 17 May 2022, ECLI:CE:ECHR:2022:0517JUD007136712 (*Oganezova v. Armenia*), §95; ECtHR 16 December 2021, ECLI:CE:ECHR:2021:1216JUD007320413 (*Women's Initiatives Supporting Group and*

focus on intent by the Court notably aligns with the Commission's proposal, wherein the bias motivation of perpetrators is stressed as a defining characteristic of hate speech.[59]

Regarding these more direct attacks, the ECtHR also provides some insight into the necessity of criminal law measures against hate speech in *Beizaras and Levickas v. Lithuania*.[60] The case at hand concerned undisguised calls for attacks on the applicants' physical and mental integrity, for which the Court had already required protection by criminal law in earlier case law.[61] Presumably based on the explicit violent nature of the statements in this case, the Court also considered *"it would have been manifestly unreasonable for the victims, and would also have downplayed the seriousness of the impugned comments"* to require the victims to first try to find resolve through other legal remedies.[62] While this reasoning was provided in reference to the circumstances of this specific case, it still carries the general implication that criminal law measures are required when the nature of the statements can reasonably cause reluctance for victims to address the issue through civil or administrative law.

Lastly, and regarding both forms of hate speech differentiated above, the Court frequently underlines the state's positive obligations under the Convention to uphold the principle of non-discrimination (Article 14 ECHR). This obligation is especially crucial for persons holding unpopular views or belonging to minorities, as these groups are more susceptible to victimization, discrimination, or marginalization.[63] This also means that where there is evidence of patterns of violence and intolerance against a minority group, there is a stronger obligation for states to respond to alleged bias-motivated incidents.[64]

Hate crime

In the Commission's proposal, 'hate crime' is defined as any criminal offence other than hate speech that is committed with a racist or xenophobic motivation,[65] with similar definitions – a prejudiced or bias motivated crime – provided in literature.[66] While hate crime and hate speech often seem to be conflated on a conceptual level, the approach of these concepts by the ECtHR

others v. Georgia), §60; ECtHR 12 May 2015, ECLI:CE:ECHR:2015:0512JUD007323512 (*Identoba and others v. Georgia*), §70.

[59] COM(2021) 777 final, p. 7.

[60] ECHR 14 January 2020, ECLI:CE:ECHR:2020:0114JUD004128815 (*Beizaras and Levickas v. Lithuania*).

[61] See ECtHR 12 April 2016, ECLI:CE:ECHR:2016:0412JUD006460212 (*R.B. v Hungary*), §80, 84–85; ECtHR 17 January 2017, ECLI:CE:ECHR:2017:0117JUD001085113 (*Király and Dömötör v. Hungary*), § 76; ECtHR 5 December 2017, ECLI:CE:ECHR:2017:1205JUD006689510 (*Alković v. Montenegro)*, no. 66895/10, § 8, 11, 65, 69, as cited in *Beizaras and Levickas v. Lithuania,* §111.

[62] ECHR 14 January 2020, ECLI:CE:ECHR:2020:0114JUD004128815 (*Beizaras and Levickas v. Lithuania*), §128.

[63] *Ibid.*, §108.

[64] ECtHR 12 April 2016, ECLI:CE:ECHR:2016:0412JUD006460212 (*R.B. v Hungary*), §85.

[65] COM(2021) 777 final, p. 7.

[66] N. Persak, 'Criminalising Hate Crime and Hate Speech at EU Level: Extending the List of Eurocrimes under Article 83(1) TFEU', *Criminal Law Forum* 2022, p. 91.

does differ slightly. The first difference becomes clear when we compare the role of criminal law measures required by the Court. As previously noted, when a certain form of hate speech is insufficiently severe, civil law or administrative law measures can be considered adequate to provide remedy for the victim.[67] In hate crime cases, however, even minor physical injuries may require the state to adopt adequate positive measures in the sphere of criminal law protection.[68] The mere existence of criminal law measures is, however, insufficient. Criminal law measures must also provide adequate and effective legal protection.[69]

A second difference is the role of Article 10 ECHR in hate speech and hate crime cases. As previously explained, hate speech is inevitably linked with freedom of expression.[70] Article 10 ECHR consequently always plays a role in hate speech cases. This is not the case for hate crime.[71] Instead, Article 8 ECHR cases on hate crime often involve violent incidents, where Article 3 ECHR is of influence as well.[72] The issue thereby largely centres around the prejudice of the crime, once again aligning with the definition of hate crime provided in the Commission's proposal.[73]

The Court has formulated some specific positive obligations surrounding hate crime, of which some share resemblance to the abovementioned obligations on hate speech. When investigating violent incidents, state authorities have a duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.[74] Similar to instances of hate speech, evidence of patterns of violence and intolerance against an ethnic minority result in a higher standard for states to sufficiently address alleged bias-motivated incidents.[75] When violent acts are suspected of being motivated by discriminatory attitudes, the official investigation must be pursued with vigour and impartiality. Society's condemnation of such acts must be continuously reaffirmed.[76] Minority groups must be able to maintain their confidence in the ability of the authorities to protect them from violence motivated by discrimination. Therefore, a strict approach is needed that obliges the police and public prosecutors to charge and prosecute acts with (clear) hate elements. Without this strict approach, hate crime cases would be treated on equal footing with cases

[67] Council of Europe, Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech, §3.
[68] ECtHR 12 April 2016, ECLI:CE:ECHR:2016:0412JUD006460212 (*R.B. v Hungary*), §83.
[69] See *MC and AC v. Romania; Sabalic v. Croatia; Women's Initiatives Supporting Group and Others v. Georgia; Genderdoc-M and M.D. v. Moldova; Beus v. Croatia and Karter v. Ukraine.*
[70] P.Y. Kuhn, 'Reforming the Apporach to Racial and Religious Hate Speech under Article 10 of the European Convention on Human Rights', *Human Rights Law Review* 2019/19, p. 121.
[71] Betts et al., 'Mapping the scientific knowledge and approaches to defining and measuring hate crime, hate speech, and hate incidents: A systematic review', *Systematic Reviews Crime and Justice* 2024, p. 3.
[72] See e.g. ECtHR 12 April 2016, ECLI:CE:ECHR:2016:0412JUD006460212 (*R.B. v Hungary*), §83.
[73] COM(2021) 777 final, p. 7.
[74] ECtHR 6 July 2005, ECLI:CE:ECHR:2005:0706JUD004357798 (*Nachova and Others v. Bulgaria*), §160.
[75] ECtHR 12 April 2016, ECLI:CE:ECHR:2016:0412JUD006460212 (*R.B. v. Hungary*), §83-84.
[76] ECtHR 18 July 2024, ECLI:CE:ECHR:2024:0718JUD004086122 (*Hanovs v. Latvia*), §46.

lacking hate-motivated overtones. This indifference could amount to official approval or even complicity in hate crimes, as indicated by the Court's concern in *Király and Dömötör v. Hungary*: the failure of law enforcement to investigate and prosecute participants of an openly racist and sporadically violent demonstration might be perceived by the general public as "*legitimisation and/or tolerance of such events by the State*".[77]

Hanovs v. Latvia provides another example of such ineffective legal protection, wherein the sexually discriminatory motive of the attack on the applicant was not sufficiently recognized.[78] The male applicant and his male partner were repeatedly verbally harassed, physically assaulted and chased by two intoxicated men.[79] The police caught both of the aggressors. However, the aggressors only had to give up their name, of which one was false.[80] Only one attacker could be identified. During the interview at the police station, the attacker admitted that he acted because the applicant showed homosexual affection in public.[81] Latvian law is equipped with criminal law mechanisms designed to protect individuals from hate-motivated offences.[82] Despite *prima facie* evidence of the offence being based on the applicant's sexuality, the police and the prosecutors declined to prosecute the attack as hate-motivated offence.[83] Therefore, the hate motive behind the attack was not adequately researched, meaning the incident was treated as a non-hate motivated incident, while the hate motive is clearly present.[84] This led the Court to conclude that the applicant's dignity and private life was not adequately protected because effective prosecution did not occur, even though Latvian law made adequate protection possible in theory. Thus, Article 8 ECHR was violated.[85]

Conclusion

This comment has sought to examine whether and how the ECtHR's jurisprudence on positive obligations to combat hate speech and hate crime may inspire or guide the EU's legislative approach in their proposal to add these types of crime as Eurocrime. Under Article 8 ECHR, states have a positive obligation to protect individuals from serious interferences with private life, going beyond mere non-interference. This includes addressing racism and stereotyping, which can deeply affect personal identity, obliging states to combat discrimination and protect vulnerable groups. In the context of hate speech, this requires a careful balancing of the right to respect for private life under Article 8 with freedom of expression under Article 10, with criminal-law measures being an *ultima ratio* and civil or administrative remedies often regarded as sufficient as long as they provide real protection. Criminal law measures can

[77] ECtHR 17 January 2017, ECLI:CE:ECHR:2017:0117JUD001085113 (*Király and Dömötör v. Hungary*), §80.
[78] ECtHR 18 July 2024, ECLI:CE:ECHR:2024:0718JUD004086122 (*Hanovs v. Latvia*).
[79] *Ibid*., §5-8.
[80] *Ibid*., §9.
[81] *Ibid*., §11.
[82] *Ibid*., §49.
[83] *Ibid*., §12.
[84] *Ibid*., §50.
[85] *Ibid*., §53.

however be essential where acts are directed against a person's physical or mental integrity, and more specifically where it cannot reasonably be expected of victims to address the issue through other legal remedies. Regarding hate crime, states are obliged to investigate, prosecute, and prevent violent acts motivated by discrimination with diligence and impartiality, taking all reasonable steps to uncover any racist or prejudicial motives. This is especially important when there is a provable pattern of violence and intolerance against an ethnic minority. Failure to protect these minorities, even where legal provisions exist, constitutes a violation of Article 8. States must therefore maintain an effective criminal, civil, or administrative legal framework, proportionate to the nature of the interference and the vulnerability of the affected individuals or groups, thereby ensuring substantive protection of private life.

Despite these findings, one must observe the abstract and vague nature of most of these obligations. This formulation risks states incorrectly interpreting the obligations flowing from Article 8 ECHR, given the variety of case-law on this matter. Criminalisation of hate speech and hate crime at the EU-level is therefore not unwise and would provide clarity and harmonisation between Member States. Naturally, the efficacy of criminalisation depends on other factors, too. The degree of clarity of the legal texts and how different actors may use the legal basis provided by the EU might play a role, as well as interpretation of the harmonising instruments by the CJEU. The difference in enforcement possibilities should not be forgotten either. Whereas concerning ECtHR judgments it is national courts that oversee compliance with the ECtHR having a supervisory role, the European Commission has the option of initiating infringement procedures, should EU level obligations in the directive not be transposed correctly. Still, to harmonise the two legal regimes – especially considering the intended accession of the EU to the ECHR – it is desirable for the EU legislative process to take into consideration the developments within ECtHR jurisprudence.

Perhaps the most relevant guidance in that regard could be provided by the positive obligations pertaining to the necessity of criminal law measures. While maintaining their *ultima ratio* nature, the Court considers effective criminal measures necessary where essential aspects of private life are at stake, which is particularly the case with serious offences directed against physical or mental integrity. These obligations implicitly formulate the function of criminalisation of hate speech and hate crime, or more concretely: the most essential legal interests in this area that warrant criminal protection in the eyes of the ECtHR. This could be a helpful guideline to the EU legislator in deciding on the necessity of any future new minimum rules on hate speech or hate crime. The importance of this consideration becomes apparent when considering the *ultima ratio* nature of criminal law and the infringement criminal measures make on the freedom of speech.

In light of the latter point, the discussed case law on hate speech provides several relevant aspects that might inform the EU legislator for any possible future directives on hate speech based on this possible new eurocrime. The Article 8 ECHR-case law is arguably more helpful in this regard than cases that solely apply Article 10 ECHR, as the former explicitly considers the tension between these two rights that will play a similar role for any criminalisation of hate

speech, while also considering the necessity of criminal measures in this regard. The factors mentioned in these cases regarding the necessary level of severity of expressions to activate Article 8 ECHR – like those mentioned in *Behar and Gutman v. Bulgaria* – could thus be helpful in selecting the types of hate speech severe enough to warrant criminalisation. In this sense, the discussed cases invite a more reflective understanding of European criminal law: not merely as a supposed effective instrument against bigotry and intolerance, but as a carefully calibrated response to those forms of crime that threaten human dignity at its core.

Recommendations

The general conclusions above, as well as the findings of the ECtHR-case law analysis, lead to the following recommendations for the EU legislator in light of the Commission's proposal and any future harmonisation that might follow:

1. Anchor Article 8 ECHR case law more explicitly in the preamble of the (potential) Council decision to include hate speech and hate crime among the criminal offences listed in Article 83(1) TFEU. Preferably, the explanatory memorandum or preamble for any future directive based on these new EU-crimes also refers to the relevant positive obligations flowing from Article 8 ECHR, specifically those mentioning a necessity for criminal law measures. Examples of such cases include *R.B. v. Hungary, Király and Dömötör v. Hungary* and *Alković v. Montenegro,* as cited in *Beizaras and Levickas v. Lithuania*.
2. Limit criminalisation of hate crime and hate speech on the EU level to the protection of clearly outlined legal interests inspired by Article 8 ECHR case law. In that sense, EU minimum rules should primarily target conduct that seriously affects the physical or psychological integrity of individuals, or aspects of the physical and social identity of certain social groups.
3. Introduce a clear severity threshold for the criminalisation of hate speech, aligning with the factors provided in *Behar and Gutman v. Bulgaria* and the cases cited therein, while consistently remaining mindful of the *ultima ratio* nature of criminal law and the infringement these criminal measures make on the freedom of speech. To that end, future directives should explicitly acknowledge the need to balance Article 7 and 11 of the Charter in a manner analogous to Articles 8 and 10 ECHR.
4. In the event that hate crime and hate speech are indeed recognized as EU-crimes, ensure any future directive aligns with ECtHR positive obligations case law, like in the following areas:
    a. The investigation and prosecution of hate crime and hate speech, specifically regarding the uncovering of any discriminatory motives as required by the ECtHR in cases like *Nachova and Others v. Bulgaria* and *R.B. v. Hungary*. In this context, investigations by independent European organisations to establish possible patterns of violence or intolerance are of particular importance, as these patterns should trigger heightened vigilance in criminal investigations of hate crime and hate speech.

b. Effective access to criminal justice for victims of hate speech and hate crime, recognising the positive obligation under Article 8 ECHR to provide an effective legal system. This obligation is specifically important in instances where the pursuit of civil or administrative remedies cannot be reasonably expected from victims.