EXECUTIVE SUMMARY
Study for LIBE committee

Hate speech and hate crime in the EU and the evaluation of online content regulation approaches

ABSTRACT
This study was commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the LIBE Committee. The study argues that hate speech and hate crimes poison societies by threatening individual rights, human dignity and equality, reinforcing tensions between social groups, disturbing public peace and public order, and jeopardising peaceful coexistence. The lack of adequate means of prevention and response violates values enshrined in Article 2 of the TEU. Member States have diverging rules, and national public administrations are torn by disagreement in values. Therefore, EU regulation is needed to reinforce the existing standards and take measures to counter hate speech and counter-act against hate speech and hate crime. The study – on the basis of a cross-country comparison conducted – proposes concrete, enforceable and systematic soft and hard law measures to counter hate speech and hate crimes EU-wide efficiently.

Hate speech and hate crimes poison societies by threatening individual rights, human dignity and equality, reinforcing tensions between social groups, disturbing public peace and public order, and jeopardising peaceful coexistence. They effect private lives, or in cases of violent bias crimes, even victims’ life and limb. They stigmatise and terrify whole communities. They erode social cohesion, solidarity, and trust between members of society. Hate speech blocks rational public debate, without which no democracy can exist and leads to an abuse of rights that endangers the rule of law.

Hate speech and hate crime have been steadily on the rise during the past decade. Most importantly, hate speech has also appeared at the highest level of the public administration of some Member States, where transformation into policy is just one step away. The liberal stance towards hate speech was built on the presumption that the state and the social majority would uphold democratic standards under all circumstances, and distance themselves from hate speakers, who would inevitably remain outcasts. But when state representatives remain silent or openly support hate speech and hate crimes, this assumption holds no longer. The non-organised, individual haters derive authority from the failure of the state to intervene.

No society is immune from the signs of hatred, but whether they get tamed or deepened, depends on the social measures that are applied vis-à-vis the phenomenon. Whether by speech, action or omission, the state’s reaction creates norms, and informs society about the current acceptable standards. According to recent academic literature, counter-speech is crucial in the fight against racism and other forms of intolerance. Counter-speech should be backed up also by action: official policy on social inclusion, such as education, awareness-raising, and social programmes to level economic and other inequalities. Besides, counter-action is also recommended: strengthening the institutional system to combat hate speech and hate crime.

EU Member States (MSs) have diverging rules, and apply different standards to counter hate speech and hate crimes. In order to ensure that the representation of EU values is mainstreamed, EU regulation is needed to reinforce the existing standards and to encourage measures to counter-speech and counter-act against hate speech and hate crime. Primarily, the EU should declare that hate speech at the level of the public administration, government and governmental officials, authorities, schools and all public institutions deeply violates the basic values of the European Union and that MSs are obliged to use all legal means to eliminate this phenomenon, even in its forms which do not reach the criminal threshold. MSs – and the European institutions – should be obliged by EU law to withdraw funding provided to, and prohibit political coalition with political parties and other organisations whose members repeatedly represent views that are irreconcilable with the values of the European Union, provided that the party or other entity fails to sanction this.

In order to build social resilience, notice should be taken of the fears and concerns that make people susceptible to populistic, discriminative or even racist views. Linguistic and psychological research could greatly contribute to yielding fresh knowledge about the intriguing success of hate speech and populism. Research to process and decode the ‘hate narrative’ and to define what is the real concern behind hate should be supported by the EU. Those concerns should be addressed and managed with adequate and substantial social policy, and also addressed with credible EU narratives which respond to the fears, inform citizens and reinforce the values of human rights, equality, tolerance and solidarity. Giving a narrative means to tell the story of Europe, the values and the choices that EU institutions make day by day.

It is recommended that the EU puts further resources in social programmes which directly improve awareness of the European culture and values, sensitisation to hate speech and discrimination, among others also through gamification and entertainment. Similarly, support is recommended for local governments and NGOs to organise local mediation and conflict solving sessions between majority and minority groups and to address matters of social injustice. Particular attention should be given to education programmes: European values, diversity and tolerance should be included in the curriculum. The EU should not tolerate school segregation in any MS. Student exchange programs across cultural boundaries are recommended to break students’ social bubbles.

Beside soft measures that serve to build social resilience against hate speech, hard measures are also recommended to create a solid framework and institutional network to tackle hate speech and hate crime. Enforcement of legal prohibitions of hate crimes and hate speech should be more consequent on the level of investigation, prosecution and the judiciary.

A predominant part of hate speech incidents ought to be tackled by administrative law rather than criminal law, so as to employ the least intrusive measures when it comes to speech restrictions, but also in order to avoid that those engaging in hate speech present themselves as martyrs or victims of the justice system.

With regard to violent hate crimes, MSs are obliged to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such bias is taken into account by the courts when imposing penalties. Preferably states go beyond these obligations and adopt sui generis provisions or qualifying circumstances with regard to a wide range of bias motivation, to show their denouncement of the phenomenon, and to express state solidarity with the victims. States may consider a combination of sui generis
provisions and penalty enhancements. Both closed and open lists of protected groups have advantages and disadvantages. Closed lists of protected groups mirror historical and/or existing social tensions and allow the legislator to take political responsibility for the choice of groups selected. However, certain individuals that fall victim to bias motivated crime might not be covered, and perpetrators may only be held liable for base crimes. An open list may cover an infinite number of potential victims that suffer due to the perpetrator's bias, but in this case, the symbolic nature of state denunciation of specific historical tragedies and social tensions might be lost.

Victims who are perceived by perpetrators – whether correctly or mistakenly – to be members of protected groups, and also persons affiliated with others belonging to protected groups should be covered by hate crime laws and provisions. Penalty enhancements in case of bias motivation should apply to the widest possible range of crimes.

Standards developed by the European Court of Human Rights on the obligations of national investigation authorities to show special vigilance to explore and unmask bias motives behind hate crimes are already binding all MSs, but a prospective EU Directive could incorporate and go beyond them.

Bias indicators, i.e. a pre-defined list of factors should be considered by the investigation authorities that might point to a bias motive. It is important to act promptly and consider bias indicators from the beginning of the investigation. Albeit they do not qualify as conclusive evidence to prove the motivation, bias indicators might also be revisited by the prosecution when establishing the motive in hate crime cases.

Hate crimes target people for their innate, unchangeable or other characteristics, which are part of their identity. These characteristics may be connected to marginalisation, vulnerability, sexuality or other sensitive aspects of life people do not wish to disclose or address at all, and certainly not in front of state authorities. The special needs of hate speech and hate crime victims in legal proceedings should be acknowledged in line with the EU Victims Directive, and if needed, more specific laws and recommendations could be laid down. At the minimum their enforcement should be closely monitored.

In countries adhering to the principle of expediency (Opportunitätsprinzip; le principe l’opportunité), where prosecutors have a wider room of manoeuvre to decide whether to take a case to court or not, victims should have the possibility to represent the charges. Victims should also be given a chance to oppose the dropping of a case. Should the prosecutor decide to discontinue the case, the victim should be able to press on with the charges. If a court decides not to apply the sui generis provision or the enhanced penalty and the victim disagrees with this decision, the victim should have possibility to avail of a legal remedy which could lead to a revision of the court’s decision by a higher court.

Courts should establish criminal responsibility in hate crimes and not just the base crimes, in case a criminal act was committed out of a bias motive. Bias indicators, albeit soft factors, are a good point of departure helping the prosecutor and the judge where to search for circumstantial evidence. Inferring motives – such as revenge, jealousy – from the words, actions and circumstances of the crime is an everyday practice in criminal proceedings. It should be no different with the bias motivation either. Courts should acknowledge bias motivations also in case motives are mixed.

Sanctions imposed by MSs should include the banning from public function those who committed hate speech, hate crimes or violated any rules of non-discrimination. For these purposes, the adoption of the Antidiscrimination Directive should be urged. Alternative punishments are recommended which promote social understanding and cohesion, rather than further deepen the problems of polarisation, stigmatisation and hostility. Along adequate victim protection measures and in parallel to ensuring voluntariness of all parties, victim-offender mediation or other forms of restorative justice could be introduced and applied.
A regular monitoring with regard to values the EU is based on and that MSs agreed to respect and promote should include a checklist whether the States have satisfied their obligations to fight against hate speech and hate crime. A special emphasis should be placed on the actual enforcement of black letter laws. Disregard of or disrespect for any EU law currently in force or the ones proposed in this study, should result in infringement proceedings, or if there are serious and persistent breaches by a MS of human dignity, equality, or the principle of non-discrimination, this should result in dissuasive EU responses, such as loss of privileges or the suspension of rights deriving from the application of the Treaties.