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ECRI REPORT ON GERMANY

(fifth monitoring cycle)

Adopted on 5 December 2013

Published on 25 February 2014

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FOREWORD

The European Commission against Racism and Intolerance (ECRI), established by the Council of Europe, is an independent human rights monitoring body specialised in questions relating to racism and intolerance. It is composed of independent and impartial members appointed on the basis of their moral authority and recognised expertise in dealing with racism, xenophobia, anti-Semitism and intolerance.

In the framework of its statutory activities, ECRI conducts country-by-country monitoring work, which analyses the situation in each of the member States regarding racism and intolerance and draws up suggestions and proposals for dealing with the problems identified.

ECRI's country-by-country monitoring deals with all member States of the Council of Europe on an equal footing. The work takes place in 5-year cycles, covering 9-10 countries per year. The reports of the first round were completed at the end of 1998, those of the second round at the end of 2002 and those of the third round at the end of 2007, and those of the fourth round will be completed at the beginning of 2014. Work on the fifth round reports started in November 2012.

The working methods for the preparation of the reports involve documentary analyses, a visit to the country concerned, and then a confidential dialogue with the national authorities.

ECRI's reports are not the result of inquiries or testimonial evidence. They are analyses based on a great deal of information gathered from a wide variety of sources. Documentary studies are based on a large number of national and international written sources. The in situ visit provides the opportunity to meet with the parties directly concerned (both governmental and non-governmental) with a view to gathering detailed information. The process of confidential dialogue with the national authorities allows the latter to provide, if they consider it necessary, comments on the draft report, with a view to correcting any possible factual errors which the report might contain. At the end of the dialogue, the national authorities may request, if they so wish, that their viewpoints be appended to the final ECRI report.

The fifth round country-by-country reports focus on four topics common for all member States: (1) Legislative issues, (2) Hate speech, (3) Violence, (4) Integration policies and a number of topics specific to each one of them. The fourth-cycle interim recommendations not implemented or partially implemented during the fourth monitoring cycle will be followed up in this connection.

In the framework of the fifth cycle, priority implementation is requested again for two specific recommendations chosen from those made in the report. A process of interim follow-up for these two recommendations will be conducted by ECRI no later than two years following the publication of this report.

The following report was drawn up by ECRI under its own full responsibility. It covers the situation as of 21 June 2013 and any development subsequent to this date is not covered in the following analysis nor taken into account in the conclusions and proposals contained therein.

SUMMARY

Since the adoption of ECRI's fourth report on Germany on 19 December 2008, progress has been made in a number of fields.

Germany has ratified the Additional Protocol to the Convention on Cybercrime. The authorities are currently considering the possibilities for including in the guidelines for criminal proceedings an obligation to investigate the presence of a "racist, xenophobic or other particularly reprehensible" motive. Several Länder have set up their own anti-discrimination agencies.

Preventive action to make young people more aware of the dangers stemming from neo-Nazi and extreme right-wing organisations has been stepped up. The second federal chamber (Bundesrat) decided on 14 December 2012 to file another formal application for the NPD (National Democratic Party) to be banned. A fresh look is being taken at murders with a possible racist motive. The Land of Brandenburg has entrusted an outside agency with this task.

The National Action Plan on Integration (Integration Plan) has been updated. Several reports setting out key indicators of integration have been published. All children aged one and over are entitled to a place in a pre-school facility. The plan includes the aim of improving individual support for children from migrant backgrounds.

The Federal Anti-Discrimination Agency (ADS) has started up a project on the use of anonymous recruitment procedures. The positive results have prompted a large number of organisations to test these procedures. The number of employers who have signed the Charter for Diversity is increasing.

The Constitutional Court has played an important role in improving the legal situation of LGBT persons. Several Länder have adopted measures and action plans to increase tolerance towards LGBT lesbian, gay, bisexual and transsexual persons (LGBT) and combat homo/transphobia. The great majority of the population are in favour of bringing the status of same-sex couples fully into line with that of married couples.

ECRI welcomes these positive developments in Germany. However, despite the progress achieved, some issues give rise to concern.

Despite repeated recommendations from ECRI, Germany has still not ratified Protocol No. 12 to the European Convention on Human Rights. In 2012, the Bundesrat failed in a further attempt to have racist motivation included in the Criminal Code as an aggravating circumstance. In the field of incitement to hatred, there is a considerable degree of impunity.

There is a lack of support for victims of racist acts or racial discrimination on the part of government bodies, for example through racial profiling. The ADS and the specialised agencies in the Länder lack the necessary resources to be effective throughout German territory and most of the Länder do not have their own specialised body.

Since the reunification the number of murders and the level of violence motivated by racism and homo/transphobia are high in Germany. There is no reliable statistical tool for measuring the scale of violence and hate speech motivated by racism and homo/transphobia. The high rate of "under-reporting" of offences involving racism and homo/transphobia reflects a lack of confidence on the part of vulnerable groups in the effectiveness of criminal proceedings brought by the police and the prosecution services. This ineffectiveness was highlighted by the failings in the investigation of the murders committed by the National Socialist Underground (NSU) movement. A racist motivation is recognised in only a small number of judgments.

The notion of racism is often interpreted too narrowly in Germany and is linked to organised groups. The racist, and particularly xenophobic, character of some public discourse is still not established clearly enough in public debates.

The Action Plan against Racism and Intolerance has not been updated since 2008. The National Action Plan on Integration also does not include a section on the fight against racism and intolerance. The minorities historically present in Germany are only briefly mentioned, although the Sinti and Roma in particular still suffer considerable discrimination.

The strategic and operational objectives set out in the National Action Plan on Integration are not accompanied by indicators and target values, although such indicators are published along with information on the trends they show. The plan lacks quantified commitments on the part of the Länder to take effective measures to achieve objectives set.

The enrolment rate of children of migrant background in pre-school facilities, the provision of support to them throughout their educational path and the number of them attending Gymnasium (the type of secondary education preparing pupils for university) are still insufficient. Teachers are three times more likely to recommend Gymnasium, if the child is from a higher socio-economic status, which is detrimental for children of migrant background. Prejudice and a considerable amount of hidden discrimination jeopardise access to the labour market for persons from migrant backgrounds.

There is considerable discrimination towards LGBT persons, which contributes to the tendency for LGBT persons to conceal their sexual orientation. Particularly in schools, there is a high level of homo/transphobia. The situation of transgender persons is particularly bad in the employment field. Transsexualism is classed as a “disorder of personality and behaviour”. Many LGBT persons suffer discrimination from health professionals. There are significant differences in law between recognised same-sex couples and married couples.

At federal level and in several Länder, there is no strategy for raising awareness of these issues among the majority population, increasing tolerance towards LGBT persons and countering discrimination.

In this report, ECRI requests that the German authorities take action in a number of areas; in this context, it makes a series of recommendations, including the following.

The German authorities should ratify Protocol No. 12 to the European Convention on Human Rights as soon as possible.* They should bring the provisions of the Criminal Code into line with §§ 18 and 21 of ECRI’s General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination. The scope of the Law on Equal Treatment should be extended to the public sector. The law should contain a prohibition on racial profiling and make it obligatory to discontinue public funding of organisations, including political parties, which promote racism.

The German authorities should ensure that the ADS is able to discharge its functions and responsibilities throughout German territory or set up a specialised independent authority in all the Länder. They should increase the budget of the ADS.

The system for recording and following up “racist, xenophobic, homophobic and transphobic” incidents should be reformed to ensure that all cases involving such a

* This recommendation will be subject to a process of interim follow-up by ECRI no later than two years after the publication of this report.

motive are recorded.* The police and prosecution services in all the Länder should set up contact points to register such complaints.

The National Action Plan against Racism should be updated and incorporated into the Integration Plan in order to receive the same support as the latter. The federal authorities and the Länder should define indicators and target values for the strategic and operational objectives of the Integration Plan. The Länder and local authorities should include in this plan the measures they are committed to taking in order to meet objectives in the fields falling within their legislative and administrative competence. The Integration Plan should include the objective with measures to combat the practice whereby children from higher socio-economic status are three times more likely to obtain a favourable opinion on continuing their schooling at Gymnasium.

In procedures for awarding contracts, loans, grants and other benefits, the authorities should motivate contractors and beneficiaries to use anonymous recruitment procedures and to sign and comply with the Charter for Diversity. Any obligation to participate in language and orientation classes or tests should, in the first instance, be accompanied by incentives and rewards. Sanctions should be confined to cases in which these measures were unsuccessful.

The federal government and those Länder which have not yet adopted an action plan or a comprehensive programme to promote tolerance towards LGBT persons and combat homo/transphobia should take inspiration from existing plans in this field and draw up their own measures or action plan.

The right of transsexuals to change their gender marker in documents such as educational diplomas and employment certificates should be inserted into legislation. Issues specific to transgender persons should be systematically included in action plans to promote equality. Financial support for organisations campaigning for their rights should be increased.

* This recommendation will be subject to a process of interim follow-up by ECRI no later than two years after the publication of this report.

FINDINGS AND RECOMMENDATIONS

I. Common topics

1. Legislation against racism¹ and racial discrimination²

- Protocol No. 12 to the European Convention on Human Rights

1. ECRI regrets to have to note that Germany has still not ratified Protocol No. 12. The authorities informed ECRI that they want to observe the progress made by the other Council of Europe member States towards its ratification and the interpretation of its provisions by the European Court of Human Rights (ECtHR). They think that this Protocol would not improve the legal framework; they are also concerned that some distinctions in German law based on nationality, e.g. in connection with certain social benefits, might not comply with Protocol No. 12.
2. ECRI draws the attention of the authorities to §§ 18 and 19 of the explanatory report to the Protocol, which state that the law of most member States provides for certain distinctions based on nationality. The situations where such distinctions are perfectly acceptable are sufficiently safeguarded by the very meaning of the notion of "discrimination" as described in § 8 of the explanatory report to ECRI General Policy Recommendation (GPR) No. 7 on national legislation against racism and racial discrimination, since distinctions for which an objective and reasonable justification exists do not constitute discrimination.
3. The notion of discrimination has been interpreted consistently in the case law of the ECtHR. The Court has said that it does not see any reason to depart, in the context of Article 1 of Protocol No. 12, from this settled interpretation.³ As all discrimination on the grounds covered by ECRI's mandate is prohibited by Article 3 of the Basic Law (GG) and by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁴, Germany should not fear scrutiny by the ECtHR in this field. ECRI therefore invites Germany to set an example at international level by ratifying Protocol No. 12.
4. ECRI reiterates its recommendation to the authorities to ratify Protocol No. 12 to the European Convention on Human Rights as soon as possible.

- Criminal law

5. As ECRI has already studied whether German legislation is in line with its GPR No. 7 on four occasions, in this fifth report it will only address the persistent shortcomings.
6. Article 130 (1) of the German Criminal Code prohibits public incitement to violence, hatred or any arbitrary measure, and public insults and defamation. These acts must be "liable to disturb public order". ECRI was told that this causal link is difficult to prove and that this restriction constitutes a significant impunity

¹ According to General Policy Recommendation (GPR) No. 7 racism means the belief that a ground such as "race", colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons or the notion of superiority of a person or a group of persons.

² According to GPR No. 7 racial discrimination is any differential treatment based on a ground such as "race", colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification.

³ Maktouf et Damjanović c. Bosnie-Herzégovine, nos. 2312/08 and 34179/08, 18 juillet 2013, § 81.

⁴ Germany ratified this convention on 16.5.1969; it has also ratified the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which also provide for remedies in the event of allegations of discrimination.

gap in the law. Moreover, it is not provided for in § 18 of GPR No. 7 and is only optional under Article 1 of Framework Decision 2008/913/JHA of the Council of the European Union on combating racism and xenophobia. The United Nations Committee on the Elimination of Racial Discrimination (CERD) considers that Article 130 (1) of the Criminal Code is not consistent with Article 2 (1) d ICERD. Furthermore, Article 130 of the Criminal Code does not contain a prohibition on all incitement to racial discrimination (§ 18 of GPR No. 7), but only a prohibition on incitement to any arbitrary measure. This article of the Code does not specify colour and language as grounds for offences.

7. ECRI regrets the failure of the two attempts by the Bundesrat⁵ in 2008 and 2012 to include a provision in Article 46 of the Criminal Code making racist motivation an aggravating circumstance (§ 21 of GPR No. 7). ECRI notes that the notion of racism is not very present in criminal law case law and literature particularly the commentaries on Article 46 of the Criminal Code. In this connection, ECRI stresses that a survey of 120 cases involving racially motivated offences showed that only 16 of the 79 judgments and sentence orders mentioned this motivation.⁶ This confirms ECRI's belief that all criminal codes should provide expressly that racist motivation constitutes an aggravating circumstance.
8. ECRI nevertheless welcomes the fact that the Ministries of Justice are in the process of considering the inclusion in the guidelines for criminal proceedings and administrative fines of three provisions concerning the obligation to investigate a possible "racist, xenophobic or other particularly reprehensible motive" on the part of offenders: if there is evidence of such a motive, the investigation must henceforth focus on these circumstances (guideline No. 15). In principle, if such a motive is present, the prosecution authorities will be required to find that there is a public interest in bringing a prosecution (guidelines Nos. 86 (2) and 234 (1)). It should, however, be noted that these guidelines are not binding on judges.
9. ECRI also considers that the German Criminal Code is not entirely consistent with §§ 18c and h and 22 of its GPR No. 7 because racially motivated threats⁷ and racial discrimination in the exercise of a public office or occupation are not expressly established as offences and no provision is made for legal persons to be held responsible under criminal law for racially motivated offences.⁸
10. ECRI again reiterates its recommendation that the German authorities provide expressly in the Criminal Code that racist motivation for an ordinary offence constitutes an aggravating circumstance. It further recommends that they remove from Article 130 (1) of the Criminal Code the proviso that the acts in question must be liable to disturb public order, include the grounds of colour and language and provide that any public incitement to racial discrimination is punishable (§§ 18 and 21 of General Policy Recommendation No. 7). It also encourages them to consider the possibility of remedying the gaps identified in § 9 of this report.

⁵ The Bundesrat is an independent constitutional body composed of members of the governments of the Länder and participating in the legislative process.

⁶ Concerning published studies in this area cf. the opinions of seven experts heard by the legal committee of the Bundestag on 13.6.2012, <http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=2406&id=1193> and Der Spiegel, Kommen Täter mit rechter Gesinnung vor Gericht zu leicht davon?, 25.11.13.

⁷ They are only punishable under Articles 126 and 241 of the Criminal Code.

⁸ In Germany, legal persons can only be punished with an administrative fine, Articles 30 and 130 of the Law on Administrative Penalties; see also Bundestag printed paper no. 17/3124, p. 8, and § 32 of the 4th ECRI report on Germany. The authorities did not give any examples of the application of these articles to a case involving racism.

- **Civil and administrative law**

11. The General Law on Equal Treatment (Allgemeines Gleichbehandlungsgesetz – AGG) does not explicitly set forth the criteria of language⁹ and nationality¹⁰ as grounds of discrimination. ECRI considers that they should be included in the AGG (§§ 4 and 1a of GPR No. 7).
12. Because victims of discrimination may suffer serious trauma, ECRI considers that the two-month time limit in Articles 15 (4) and 21 (5) AGG for bringing a claim is too short to ensure that easily accessible judicial proceedings are available to them (§§ 10 and 12 of GPR No. 7).
13. ECRI notes that there are still few legal actions based on the AGG. To combat racial discrimination more effectively, Germany should consider the possibility of granting organisations such as associations and trade unions the right to bring civil actions (§ 25 of GPR No. 7).¹¹
14. In the public law sphere, discrimination is admittedly prohibited by Article 3 GG. However, victims of discrimination by a government body, e.g. through racial profiling, do not benefit from the same legal instruments as the AGG provides for the private sector.¹² The scope of the AGG should therefore be extended to the public sector (§§ 4-15 and 24 of GPR No. 7).¹³ The statutes of the German Institute for Human Rights (GIHR) do not allow it to provide such assistance to victims either.¹⁴
15. On 29 October 2012, the Koblenz higher administrative court¹⁵ ruled that an identity check carried out by the federal police had violated the prohibition of discrimination (Article 3 (3) GG) because the police had used skin colour as the selection criterion. ECRI was told that this was not an isolated case. The federal police and the police of the Länder are allowed to carry out identity checks even where there are no grounds for suspicion¹⁶, which encourages discriminatory practices.

⁹ See however Labour Court of Berlin, 55 Ca 16952/08, 11.2.2009, and Hamburg, 25 Ca 282/09, 26.1.2010.

¹⁰ According to the explanatory memorandum, there may be discrimination on grounds of ethnic origin if the distinction is actually based on ethnic origins and only apparently on nationality, Bundestag printed paper no. 16/1780, p. 31.

¹¹ Article 23 (1) and (2) AGG only grants a right of intervention to associations with at least 75 members or comprising at least seven member associations, but not the right to bring actions themselves. Concerning the right to be assisted cf. also § 67 (2) et (7) of the Law on the organisation of the administrative courts (VwGO). The authorities informed ECRI of the victims' possibility to assign rights to an association which may subsequently pursue their claims by judicial process. ECRI nevertheless refers to § 56 of the explanatory memorandum to its GPR No. 7.

¹² For example, assistance by an independent specialised body and lightening of the burden of proof.

¹³ Cf. §§ 25 and 28 of the 4th ECRI report on Germany; Uslucan/Yalcin, Wechselwirkung zwischen Diskriminierung und Integration – Analyse bestehender Forschungsstände, 2012, p. 49.

¹⁴ ECRI notes that the ADS and the GIHR have commented on this subject on several occasions.

¹⁵ Press release and decision on legal fees, 29.10.2012, 7 A 10532/12.OVG; see also the statement by the GIHR on the case, October 2012.

¹⁶ ADS press release of 30.10.2012, Illegal police checks based on skin colour; Süddeutsche Zeitung, Skin colour as the main criterion, 22.11.2012.

16. ECRI recommends that the authorities extend the scope of the Law on Equal Treatment (AGG) to the public sector (§§ 4-15 and 24 of General Policy Recommendation No. 7). It further recommends that they include, in the AGG and in laws relating to the police at federal level and at the level of the Länder, provisions defining and expressly prohibiting racial profiling and establishing a reasonable suspicion standard for the carrying out of control, surveillance and investigation activities (§§ 1-4 of General Policy Recommendation No. 11 on combating racism and racial discrimination in policing).¹⁷

17. ECRI considers that Germany should use and strengthen existing means for ensuring that parties to whom the authorities award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination (§ 9 of GPR No. 7).¹⁸ Article 97 (4) of the Law against Restraint of Competition provides that the authorities may require enterprises wishing to obtain public contracts to comply with the law. Other laws may stipulate further conditions if there is a direct connection with the purpose of the contract. ECRI encourages the German authorities to specify in the law that might be imposed conditions such as signing of the Charter for Diversity or the use of anonymous application procedures.¹⁹

18. ECRI suggests in § 16 of its GPR No. 7 that the law should provide for an obligation to suppress public financing of organisations, including political parties, which promote racism. Under German law, public funding of a political party ceases only if the party has been banned by the Constitutional Court (Article 18 (7) of the Law on Political Parties). ECRI was informed that the procedure for banning a political party is extremely complex. No application has been successful since 1956.

19. ECRI recommends that the German authorities introduce into the law an obligation to discontinue public financing of organisations, including political parties, which promote racism (§ 16 of General Policy Recommendation No. 7).²⁰

- **Independent specialised authorities (GPRs Nos. 2 and 7)**

20. The Federal Anti-Discrimination Agency (ADS) was set up in 2006. Other functions falling to specialised bodies are performed by the GIHR, which was established in 2001.²¹ The low level of financial and human resources allocated to the ADS²² contributed to the decision by several Länder to set up their own specialised agencies to combat racism and racial discrimination. The federal agency has taken advantage of the existing legal framework to start up anti-discrimination networks in 9 of the 16 Länder.

¹⁷ See also §§ 27-47 of the explanatory memorandum.

¹⁸ Baer/Ölcüm, Diskriminierungsschutz im Rahmen der öffentlichen Auftragsvergabe, 2008, p. 56.

¹⁹ Cf. §§ 94 et seq., ECRI Conclusions on the implementation of the recommendations in respect of Germany subject to interim follow-up, adopted on 23.3.2012 and the explanatory memorandum to § 1 to ECRI's GPR No. 14.

²⁰ Concerning the justification for such interference with the freedom of association on the basis of Article 11 (2) of the European Convention on Human Rights, see in particular ECtHR, Chassagnou and Others v. France [GC], nos. 25088/94, 28331/95 and 28443/95, 29.4.1999; Herri Batasuna and Others v. Spain, nos. 25803/04 and 25817/04, 30.6.2009; Eusko abertzale ekintza – Accion nacionalista vasca (EAE-ANV) v. Spain (No. 2), no. 40959/09, 15.1.2013.

²¹ Cf. principle 3 a, b, c, h, l, j, l and m of ECRI's GPR No. 2.

²² Cf. §§ 90 et seq.

21. ECRI considers that there should be one or more independent specialised authorities able to assist victims of racism and racial discrimination throughout German territory.²³ There are huge gaps in the anti-discrimination networks: in large parts of Germany, the nearest support organisation for victims of racism or racial discrimination is over 100 km away.²⁴

22. ECRI recommends that the German authorities set up in all the Länder an independent authority to combat racism and racial discrimination or that they ensure that the Federal Anti-Discrimination Agency performs throughout German territory all the functions and responsibilities provided for in principle 3 of General Policy Recommendation No. 2 on specialised bodies.

23. Under Articles 27 and 28 AGG, the ADS assists persons seeking protection from discrimination by enforcing their rights throughout German territory. It can seek a friendly settlement through conciliation and, for this purpose, ask the persons concerned to make submissions. ECRI, referring to principle 3f and g of its GPR No. 2 and to §§ 50 et seq. of the explanatory memorandum to its GPR No. 7, considers that the ADS should have wider powers to carry out investigations and provide legal assistance to victims.

2. Hate speech²⁵

24. In Germany, hate speech is prohibited by Articles 130 (1) (see above) and 185 (insults) of the Criminal Code, as well as by the German Civil Code²⁶ and the AGG.

- Data

25. To measure the scale of hate speech, the authorities refer to the police statistics on politically motivated crimes.²⁷ The ideas put forward by the ADS for the development of a statistical tool which might cover hate speech have not been put into practice.²⁸ There are no statistics for measuring the scale of hate speech in the civil law field either.²⁹

26. The statistics on politically motivated criminal offences³⁰ exhibit several shortcomings. ECRI was informed that only a small proportion of racist and homo/transphobic insults are recorded in them. For 2012, for example, they show only 186 cases of hate speech motivated by sexual orientation in all 16 Länder, whereas the Berlin prosecution department recorded 90 cases until 16 October

²³ See in the same direction United Nations, Human Rights Council, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Addendum, Mission to Germany, 2010, A/HRC/14/43/Add.2.

²⁴ Cf. the ADS database, http://www.antidiskriminierungsstelle.de/SiteGlobals/Forms/Suche/UmkreisSuche/UmkreisSucheHauptSeite/UmkreisSuche_formular.html, accessed on 28.3.2013.

²⁵ Here, ECRI is referring to discourse motivated by racism and/or homo/transphobia. For a definition of the term "hate speech", see Recommendation no. R (97) 20 of the Committee of Ministers to member states on "hate speech", adopted on 30.10.1997.

²⁶ The Federal Court of Justice (BGH) ruled, however, that the German post office must distribute printed material produced by the National Democratic Party, BGH, I ZR 116/11, judgment of 20.9.2012.

²⁷ For the definition of this term see the web pages of the federal Ministry of Interior.

²⁸ Documentation relating to the debate launched by the ADS on the "Collection of standardised data to prove discrimination!?", 2010, pp. 8 and 34.

²⁹ Legal data bases do not provide a clear picture either.

³⁰ The table shows offences committed by persons from left-wing circles (PMK-links: 70 in 2012), persons from right-wing circles (PMK-rechts, 4 112 in 2012), foreign nationals (PMK-Ausländer, 120 in 2012), others (PMK-sonstige, 212 in 2012) and the total (PMK Gesamt, 4 514 in 2012).

2013 alone. According to a survey of 24 000 LGBT persons carried out by an NGO in 2006 and 2007, 39.4 % of them had been insulted or bothered during the last 12 months, 14.4 % had received threats and 13.6 % had been subjected to harassment or pressures.³¹ The title of the official statistics suggests that they should only cover “politically motivated” offences, although a good many racist and homo/transphobic offences are not based on any political motivation. Even if the definition given by the German police of the concept of “political motivation” specifies that the statistics should include all racist and homo/transphobic hate speech, police officers may be misled by this title when recording offences.³²

27. ECRI considers, however, that comprehensive recording of these offences is especially important as they are often a stage on the way to a gradual radicalisation culminating in the use of violence. This would also ensure a permanent discussion of these offences. The authorities also informed ECRI that there are geographical differences regarding the qualification of an offence as racist and that there is significant “under-reporting” of hate speech motivated by sexual orientation.³³ In the light of these shortcomings, ECRI recommends an in-depth reform of these statistics in § 56 of this report.

- **Neo-Nazi and extreme right-wing groups**

28. The most conspicuous source of hate speech is the extreme right wing, and particularly the NPD (National Democratic Party). The reports on protection of the Constitution put the number of extreme right-wing organisations and groupings at 225 (2011 figure), with 22 150 members (2012 figure). The NPD is represented in the parliaments of the Länder of Saxony and Mecklenburg-Vorpommern, but membership is falling.³⁴ Whereas the percentage of the population supporting extreme right-wing groups fell from 7.6 % in 2010 to 7.3 % in 2011 in the western part of the country, the figure increased significantly in the East, from 10.5 % to 15.8 %.³⁵
29. ECRI welcomes the fact that the authorities have continued and stepped up their preventive work to make children and young people more aware of the dangers of these organisations and encourage them to become involved in the fight against right-wing extremism.³⁶ This also includes activities at local level.³⁷ A few days after ECRI’s visit to Germany, a new structure was set up for the funding of the Exit project, which provides assistance to members of neo-Nazi and extreme right-wing organisations wishing to leave those circles.
30. In the context of their law enforcement activities, the relevant authorities of the Federation and the Länder have banned several dozen neo-Nazi organisations since 1990. Where the NPD is concerned, an initial action in the Constitutional Court to have this party banned failed in 2003. The Bundesrat considers that the NPD has “anti-Semitic, racist and xenophobic” attitudes and is akin to Nazism.

³¹ Maneo, Experiences of violence by gay and bisexual adolescents and men in Germany – Findings of the MANEO survey 2006/2007, p. 16.

³² Another obstacle to recording could be the fairly cumbersome formalities involved.

³³ Cf. § 49 below.

³⁴ Report of the BfV 2011, pp. 56 et seq.; 6 300 members in 2011 and 6 600 in 2010.

³⁵ Decker/Kiess/Brähler, Friedrich-Ebert-Stiftung, Die Mitte im Umbruch – Rechtsextreme Einstellungen in Deutschland 2012, p. 54.

³⁶ Cf. §§ 81 et seq. of the 4th report on Germany and the webpages of the Network for the Prevention of Right-Wing Extremism run by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth.

³⁷ See the example of the town of Greifswald and the “School without Racism” project.

ECRI welcomes the decision of the Bundesrat on 14 December 2012 to file another formal application for the party to be banned.³⁸

31. The extreme right wing continues to pursue its communication strategy based on music and the Internet. In this context, ECRI welcomes the fact that Germany has ratified the Additional Protocol to the Convention on Cybercrime which came into force on 1 October 2011. In 2012, the Federal Agency for the Control of Media Harmful to Young People banned the distribution to minors of 104 products (20 were on-line offers; 79 were CDs and five paper publications).
32. ECRI is satisfied that the judicial system also contributes to the prevention of hate speech. In 2011, convictions were handed down against individuals who had incited hatred on the Altamedia and Whiteknightseuropa websites and 18 operators of the web radio station Radio Resistance. The Munich Public Prosecutor's Office started judicial proceedings against one of the most active members of the "Politically Incorrect" website, Michael Stürzenberger.³⁹ In January 2013, a British Catholic bishop was fined 1 800 € for denying the Holocaust in a television interview.
33. ECRI strongly encourages the authorities to continue taking preventive and law enforcement measures against these organisations and the hate speech produced by them.

- **Other public discourse**

34. ECRI was informed of the existence of hidden racism among broader sections of the population.⁴⁰ According to a 2012 survey, "xenophobic" remarks meet with the approval of 25.1 % of the population, and 8.6 % of the population approve of "anti-Semitic" remarks.⁴¹ In another survey, 16 % of those questioned said that "white people rightly rule the world"⁴² and 20 % tend to have homophobic attitudes.⁴³ ECRI reiterates in this context that the terms racism and hate speech are to be understood in a broad sense as including such phenomena as xenophobia, anti-Semitism and intolerance.⁴⁴

³⁸ Bundesrat printed paper no. 770/12. After reflection, the federal government decided to support this application, but not to file an application of its own. The Constitutional Court dismissed an application from the NPD asking it to find that it was not unconstitutional, 2 BvE 11/12, 5.3. 2013. See also §§ 18 et seq.

³⁹ See also Fekete, Pedlars of hate: the violent impact of the European far right, 2012, pp. 8 et seq.

⁴⁰ See in this connection a press statement made in February 2013 by the Justice Minister of the Land of Hessen, Jörg Uwe Hahn, who is also responsible for integration issues. Following an interview in which he had asked how much longer Germans were going to put up with an Asian-looking Vice-Chancellor, he stated that his intention had been to stress the existence of widespread racism of an often subliminal nature and that it was important to not choke it off but to talk openly about it in order to be able to fight it. For his part, the Interior Minister of the Land of Saxony-Anhalt pointed out, when presenting the statistics for politically motivated crime in 2012, that a good many offenders were not extremists.

⁴¹ Decker/Kiess/Brähler, Friedrich-Ebert-Stiftung, Die Mitte im Umbruch – Rechtsextreme Einstellungen in Deutschland 2012, p. 39; see also Decker/Weißmann/Kiess/Brähler, Die Mitte in der Krise – Rechtsextreme Einstellungen in Deutschland 2010, pp. 91 et seq.

⁴² University of Bielefeld, Das Projekt Gruppenbezogene Menschenfeindlichkeit in Deutschland - Eine 10-Jährige Langzeituntersuchung mit einer jährlichen Bevölkerungsumfrage zur Abwertung und Ausgrenzung von schwachen Gruppen, Laufzeit: 2002-2012, p. 6. According to this survey, 49 % of those questioned approved of "xenophobic" remarks.

⁴³ Küpper/Zick, Homophobie in Nordrhein-Westfalen, 2012, p. 4.

⁴⁴ § 6 of the explanatory memorandum to its GPR No. 7 and footnote 25. See also the planned reform of the German guidelines for criminal proceedings, which will make it obligatory to investigate a possible racist or xenophobic motivation, in § 8 above. Regarding the circumstances in which xenophobic remarks are punishable as incitement to hatred (Article 130 (1) of the Criminal Code), see BGH, 4 StR 129/11, judgment of 20.9.2011; Krauß, in Leipziger Kommentar zum Strafgesetzbuch, § 130, 12th edition 2009,

35. ECRI regrets that the hate speech fuelled by this racism manifests itself in public debates without always being clearly condemned. Already in its fourth report it expressed concern at certain statements about Muslims focusing on security issues or a supposed “integration deficit”. ECRI regrets that Thilo Sarrazin, a former member of the Executive Board of the German Federal Bank and a politician belonging to the Social Democratic Party (SPD), made similar remarks notably in his book “How Germany abolishes itself”.⁴⁵
36. ECRI is deeply concerned at the fact that several publications, including Bild-Zeitung and Spiegel, carried excerpts from this book. Furthermore, these racist remarks received a great deal of support in the debate which followed their publication, and which was extensively covered by the media, although the arguments put forward were shown to be close to the theories of eugenics espoused by the National Socialists.
37. It is true that T. Sarrazin was dismissed from his post at the Federal Bank shortly after the book was published. But the request by the bureau of the SPD for his exclusion from the party was withdrawn on 23 April 2011 after he had stated that he had not intended to discriminate against migrants or any other group. Furthermore, the criminal complaint lodged by a Turkish association with the Berlin prosecution service was dismissed.
38. ECRI understands German society’s vigilance in ensuring respect for freedom of expression. But it draws attention to the case law of the ECtHR, according to which tolerance and respect for the equal dignity of all human beings are the foundation of a democratic and pluralist society. It follows from this that, in principle, it may be deemed necessary, in democratic societies, to sanction or even prevent all forms of expression which spread, encourage, promote or justify hatred based on intolerance (including religious intolerance), if care is taken to ensure that the restrictions imposed are proportional to the aim pursued.⁴⁶
39. In view of the similarity of T. Sarrazin remarks with those of the case Le Pen⁴⁷, ECRI considers that the response by the authorities and the SPD is insufficient. It was with good reason that the CERD decided that the lack of an effective investigation following Mr Sarrazin’s remarks constituted a violation of Articles 2 (1) d, 4 and 6 ICERD.⁴⁸

para. 40; Lenckner/Sternberg-Lieben, in Schönke/Schröder, Criminal Code, § 130, 28th edition 2010, paras. 1 to 11.

⁴⁵ “All Jews share a particular gene; Basques have certain genes which distinguish them from other people.”, Welt am Sonntag, 29.8.2010; “Immigrants from former Yugoslavia, Turkey and the Arab countries are at the heart of the integration problem.”, book, 13th ed. 2010, p. 59; “Many Arabs and Turks in this city have no productive function, except for the fruit and vegetable trade.”, Lettre Internationale No. 86, 1.10.2009, p. 197 et seq.; “If the least intelligent people have a higher fertility rate, the average intelligence of the population decreases.”, book p. 85; “I do not want the country of my grandchildren and great grandchildren to be mainly Muslim, that Turkish and Arabic are largely spoken, that women wear headscarves and the daily routine is determined by the call of the muezzins.”, book p. 234; quotations from <http://www.zukunftskinder.org/?p=3078>, site accessed on 19.6.2013. 1.5 million copies of the book have been sold.

⁴⁶ Cf. ECtHR, Féret v. Belgium, no. 15615/07, 16.7.2009, §§ 63, 64 and 72-74.

⁴⁷ In the case of Le Pen against France, [decision on admissibility], no. 18788/09, 20.4.2010, it held that a conviction was justified because the applicant’s remarks had unquestionably presented the entire Muslim community in a negative light, which was likely to give rise to feelings of rejection and hostility. In the Court’s view, the applicant had set the French in opposition to a community whose religious affiliation was expressly mentioned and whose rapid growth was presented as a latent threat to the security of the French people.

⁴⁸ CERD, Communication no. 48/2010 of 4.4.2013, CERD/C/82/D/48/2010, §§ 12.9 and 13.

40. ECRI is of course aware that all hate speech cannot be combatted only through law enforcement channels. Other mechanisms must therefore be developed to counter its harmful effects. This applies, for example, to the debate triggered by a statement from the Association of German Towns about the granting of the right of free movement to Romanian and Bulgarian citizens as from 1 January 2014 and the increase in immigration from those two countries. ECRI considers that use of the term “poverty migration” by mass-media in headlines has contributed needlessly to an increase in xenophobic sentiments.⁴⁹ Little mention has been made of the fact that many of these migrants are highly qualified people. ECRI also deplores the fact that this debate and the media coverage have turned against the Roma, who were only mentioned in passing in the statement.
41. ECRI considers that the xenophobic and therefore racist character of such discourse is still not established clearly enough in public debates. As already observed by ECRI in its fourth report, in Germany, the notion of racism is linked too closely with right-wing extremism. It is often only used for remarks with a “biological” component⁵⁰, although it should also be used to refer to xenophobic and intolerant attitudes.

- **Action plan against racism**

42. Regarding measures needed to prevent and combat hate speech, ECRI regrets that the National Action Plan against Racism, Xenophobia, Anti-Semitism and Related Intolerance (Action Plan against Racism) has been relegated to the background. This plan published in October 2008 ends with an acknowledgement of the need to evaluate and re-adjust its measures (see § 70).
43. ECRI encourages the authorities, when updating the Action Plan against Racism, to discuss and adopt measures to encourage politicians, political parties and the media, while respecting their independence and freedom of expression, to take a firm stance against discourse of the type mentioned above. The authorities should be guided by the standards set in the Charter of European Political Parties for a Non-Racist Society⁵¹ and encourage the media, without encroaching on their independence, to draw up codes of conduct or amend existing codes in order to include rules for preventing all racist coverage.⁵²
44. ECRI considers that civic commitment⁵³ against racism is particularly important in the eastern Länder, where extreme right-wing organisations have a strong

⁴⁹ According to a recent survey, 50 % of the population consider the integration debate to be too negative, Expert Council of German Foundations on Integration and Migration, Annual Report 2012, p. 26. The majority is of the opinion that media portrayal of the different immigrant groups was too negative, Expert Council of German Foundations on Integration and Migration, Muslims in Germany – media portrayal and everyday experiences, 2013, pp. 11 et seq.

⁵⁰ See, for example, SpiegelOnline, Sarrazin-Debatte: Angriff auf die Unschuldsvermutung, 22.9.2010.

⁵¹ ECRI welcomes the exclusion of Martin Korol from the SPD parliamentary group in the Land of Bremen. On his website he had described Roma as “tramps” in the Balkans who came to Bremen for the sole purpose of “filling their stomachs”.

⁵² No. 12 of the Press Code merely prohibits discrimination and describes the circumstances in which an offender’s nationality and ethnic origin may be mentioned. Article 41 (1) of the treaty between the Länder on broadcasting recommends promoting international understanding and co-existence without discrimination.

⁵³ ECRI also encourages the police and judicial authorities to review their management of neo-Nazi gatherings and ensure that restrictions placed on the civic commitment of counter-demonstrators are not disproportionate (cf. ECtHR, Öllinger v. Austria no. 76900/01, 29.6.2006). In February 2011, following clashes between the police and people protesting against a neo-Nazi demonstration in Dresden, the President of the Bundestag made the following comments “The sole concern of the police is to protect the neo-Nazis. [...] That’s Saxon democracy.” Despite the controversy over these comments, nearly 1 500 investigation procedures were started against counter-demonstrators. In this context, the police

foothold. The review of the Action Plan will be an opportunity to bring together and ensure funding for initiatives and projects to prevent racism, such as, for example, “School without Racism” or Exit, a project to help right-wing extremists wishing to leave those circles.

45. Regarding hate speech directed at Sinti and Roma, ECRI considers that the authorities should defend these groups at all levels.⁵⁴ Measures to combat intolerance directed at LGBT persons should also be included in the action plans.⁵⁵

3. Racist and homo/transphobic violence

46. The statistics for politically motivated offences show 528 cases of violence motivated by hatred in 2011 and 524 in 2012. This figure is 12.2% up on the 467 cases recorded in 2010.⁵⁶ The scale of violence motivated by hatred is highlighted by the number of persons killed by offenders with a right-wing background: at the time of the contact visit, official statistics put the number of murders committed between 1990 and 2011 at 63. For the period 1990-2008, another 141 attempted murders were recorded, in which 112 victims suffered physical injuries.⁵⁷
47. These figures are hotly disputed. A coalition of NGOs publishes its own statistics. For the five Länder of eastern Germany and Berlin alone, it reports 706 cases of violence in 2011 and 704 in 2010.⁵⁸ A file created by the Amadeu Antonio Foundation on persons killed by right-wing extremists gives the figure of 182 murders between 1990 and 2011.⁵⁹ Two journalists who reviewed this list put the figure at 152 deaths between 1990 and 2013⁶⁰, including 62 killed on racist grounds and two on homophobic grounds.
48. According to the authorities, the number of right-wing extremists prepared to use violence or in favour of its use was 9 800 in 2011.⁶¹ Arrest warrants have been issued for 250 right-wing extremists, including 46 sought for offences related to political extremism.
49. The level of violence against LGBT persons is also high.⁶² Whereas the authorities only recorded 38 offences involving physical violence in 2011 and 42 others in 2012, NGOs reported a much higher figure including three murders

checked over a million pieces of mobile phone connection data. These events led to the transfer of the president of the Dresden police.

⁵⁴ See § 66 and the Berlin Action Plan for Roma published in June 2013. Like some other German cities, Berlin is experiencing a high level of immigration from Bulgaria and Romania. Many of these immigrants are currently in a situation of illegality and extreme dependence on their employers, which may result in a modern form of slavery. Their entitlement to freedom of movement at the end of the transitional period on 1 January 2014 may have the positive effect of putting an end to the abuses committed against these undeclared workers and facilitate their access to the regular labour market.

⁵⁵ See §§ 105 et seq.

⁵⁶ ODIHR, Hate crimes in the OSCE region: incidents and responses, Annual report for 2011, p. 24.

⁵⁷ Bundestag printed paper no. 16/14122, 7.10.2009.

⁵⁸ <http://www.opferperspektive.de/Presse/1106.html>, site accessed on 17.4.2013; 2009: 739 cases; 2008: 997.

⁵⁹ <http://www.amadeu-antonio-stiftung.de/wir-ueber-uns/>; http://de.wikipedia.org/wiki/Todesopfer_rechtsextremer_Gewalt_in_Deutschland, sites accessed on 17.4.13.

⁶⁰ <http://www.tagesspiegel.de/politik/todesopfer-rechter-gewalt/>, site accessed on 5.4.13; this figure includes one murder motivated by homophobia.

⁶¹ BfV 2011 report, pp. 56 et seq.; the figure for 2010 is 9 500.

⁶² On violence against transgender persons, see ADS, Discrimination against transgender persons, especially in the workplace, 2010, p. 58.

and several dozen physical assaults in 2011.⁶³ According to a survey carried out by an NGO in 2006 and 2007⁶⁴, 15.6 % of the 24 000 participants had been victims of physical assault in the previous twelve months. In 5.6 % of the incidents, a weapon had been involved. The rate of under-reporting is particularly high: the Berlin police put the figure at 50 % for assault and 90 % for insults.⁶⁵ According to a second survey by the same NGO, only 57.5 % of serious bodily injuries were reported to the police. ECRI is concerned about the fact that LGBT adolescents are particularly affected by this violence. These surveys also show a lack of confidence on the part of LGBT persons in the police.

50. All Europe was shocked when discovering the existence of the NSU (National Socialist Underground) in November 2011 and the series of racist murders committed by its members. The victims included eight Turkish immigrants and a Greek immigrant. The NSU is also blamed for the murder of a policewoman, several bomb attacks, including two in Cologne in 2001 and 2004 close to Turkish shops which left more than 20 injured, and several hold-ups
51. The authorities responsible for investigating these crimes were severely criticised for having grossly underestimated the scale of the violence stemming from right-wing extremists and for having failed to give serious consideration to the possibility of a racist motivation following this series of murders. During the investigations, not only the victims' families but also the Sinti and Roma suffered greatly for having been wrongly suspected of being responsible for the murders. After the group had been dismantled, some potentially compromising files were destroyed by the services responsible for the protection of the constitution. A ruling from the Constitutional Court was needed for the Court of Appeal to reserve places in the courtroom for the Turkish and Greek press, which further delayed the start of the proceedings.
52. These events led to the departure of the heads of several agencies for the protection of the constitution. The Bundestag and the Parliaments of several Länder⁶⁶ set up an Investigation Commission inquiring into the failings of the authorities involved in the investigations. ECRI welcomes the fact that Germany has appointed an Ombudsperson for the victims.
53. The Ministry of Interior has set up two new bodies. The Centre of defence against right-wing extremism (Gemeinsames Abwehrzentrum Rechtsextremismus) was established in December 2011 to assess the threat from right-wing extremism and facilitate measures such as arrests and, above all, exchanges of information. A data base (Rechtsextremismusdatei) was set up in September 2012 to combat more effectively violence emanating from right-wing extremism. 36 police departments and agencies for the protection of the constitution at the level of the Federation and the Länder use it to pool information on right-wing extremism. The authorities also decided to conduct a review of murders included in civil society statistics which might have been motivated by racism. ECRI welcomes the fact that the Land of Brandenburg has assigned this task to an outside body, an institute at the University of Potsdam.

⁶³ ODHIR, Hate crimes in the OSCE region – incidents and responses, Annual report for 2011, p. 82.

⁶⁴ Maneo, see footnote 31, p. 16. 35 % of participants said they had been subjected to violence (physical or verbal) in the previous year. Among young people under the age of 18, the percentage rises to 63 %; according to the survey, 90 % of the victims did not lodge a complaint. These findings were corroborated by a second survey conducted in 2007/2008 and by the FRA LGBT Survey data explorer.

⁶⁵ The president of the Berlin police, 4. Straftaten gegen Homosexuelle - Konzept und Tätigkeitsbericht der Ansprechpartnerin und des Ansprechpartners für gleichgeschlechtliche Lebensweisen, 2009, p. 4.

⁶⁶ Interim report of the Thüringen Investigation Commission, printed paper no. 5/5810.

54. ECRI considers that current statistics do not permit an assessment of the extent of racism and homo/transphobia.⁶⁷ The huge disparities between official and civil society figures should lead the police and judicial authorities in the first instance to question their statistics on racism. They should also consider whether the judicial system is sufficiently accessible for victims of racism and homo/transphobia.
55. As the judiciary considers amending the guidelines for criminal proceedings by making it obligatory to investigate a possible “racist, xenophobic or other particularly reprehensible motive”, it would make sense to compile separate statistics both in the police and in the justice system for offences with a “racist, xenophobic or other particularly reprehensible motive”.
56. ECRI recommends that the German authorities reform their system for recording and following up “racist, xenophobic, homophobic and transphobic” incidents in order to ensure that all cases involving such a motive are recorded (§ 12 of General Policy Recommendation No. 11).⁶⁸
57. In this context, ECRI is very concerned about the fact that, even after the shortcomings found in the investigations into the crimes committed by the NSU, some police departments are still too quick to rule out the possibility of a racist motive. As recently as 2013, Turkish authorities had to remind the police on several occasions that this possibility had to be taken seriously following fires which caused fatalities in houses where people of Turkish origin were living.
58. ECRI was also informed that some police officers are reluctant to register complaints of offences with a racist or homo/transphobic motive. This applies not only to insults, but also to damage to property. Some police officers fear the formalities involved in registering complaints of this type. Other information suggests that racist ideas and sympathy towards extreme right-wing organisations are widespread in the police.⁶⁹
59. The Chief Prosecutor of the Land of Saxony-Anhalt has noted a lack of awareness and knowledge of the existing tools in the authorities responsible for prosecuting offences of “racism and discrimination”.⁷⁰ Another expert mentions the case of a prosecutor who considered that it was not in the public interest to bring a criminal prosecution against an assailant who had insulted his victim with expressions such as “bum-fucker”, “fucking queer” and “disgrace to Germany” and had told him to “go to Auschwitz to be gassed”. However, as provided for under the proposed amendments to the guidelines for criminal proceedings, the prosecuting authorities should systematically find that there is a public interest in bringing a criminal prosecution where there is a racist or homo/transphobic

⁶⁷ See also §§ 26 et seq.

⁶⁸ See also §§ 68-71 of the explanatory memorandum. For assessment purposes, the new statistics will need to be compared with those of civil society.

⁶⁹ Mention should be made, inter alia, of the transcript of a telephone conversation disclosed in the trial of the police officer held responsible for the death of Oury Jalloh, who died in a fire in a police cell in Dessau (judgment of the Magdeburg regional court on 13.12.2012, p. 7): Police officer: “Can you stick a needle in a black African?” Doctor: “Oh shit.” Police officer: laughter. Doctor: “I can never find a vein in dark skin.” Police officer: “You’ll just have to bring a special needle.” Doctor: “I’ll do it, OK, I’m on my way.” - In 2012, the president of the Munich police had to ban a calendar produced by a police trade union because it contained racist caricatures. In 2010, Amnesty International published a report on police violence containing several cases of racism. A police reporter dubbed the series of murders committed by the NSU the “döner kebab murders”, and the police working group was given the name “Bosphorus”. These terms were widely taken up by the media.

⁷⁰ Concerning §§ 59-60 cf. the expert opinions referred to in footnote 6.

motive, because hate crimes not only affect the victim, but also spread fear throughout the whole group in question.

60. The survey referred to in § 7 above shows that the recording of an offence as a hate crime is, however, decisive to ensure that racist motivation is taken into account in sentencing. In practice it would seem that the onus is often on the victim's lawyer to prove the offender's racist motivation. These findings confirm ECRI's belief in the importance of the police making the necessary effort to ensure that all offences with a racist or homo/transphobic motive are recognised and registered as such and that this registration is followed by an effective investigation.⁷¹ It should also ensure that the changes under preparation in the guideline requiring an investigation into the presence of a "racist, xenophobic or other particularly reprehensible motive" are systematically complied with.
61. ECRI considers that the best way of achieving these objectives will be to set up in all the Länder contact points with special responsibility for recording and investigating complaints from persons of migrant background, an ethnic, religious or linguistic minority historically present in Germany, LGBT persons (vulnerable groups), an individual or an association campaigning for their rights. These services should be set up in particular in cities where these groups are extensively present. The effectiveness of this measure could be further increased through the recruitment of a substantial number of persons from these vulnerable groups to staff these contact points.⁷² The latter should also establish a regular dialogue with the groups in question and take inspiration from §§ 15-20 of ECRI's General Policy Recommendation No. 11.⁷³
62. ECRI calls on the authorities to take inspiration from positive experiences with such contact points for LGBT persons.⁷⁴ Their setting up within the Berlin police and prosecution authorities has led to a significant increase in the number of complaints. This specialisation will also enable the services concerned to gain wider experience of combating racism and intolerance and ensure that statistics are properly recorded.
63. ECRI recommends that the authorities set up contact points or persons in police stations and prosecution authorities in all the Länder to record complaints from persons belonging to a vulnerable group and to conduct effective investigations following such complaints.

4. Integration policies

64. Integration policy is under the competence of the Federation and the Länder. Nationality, freedom of movement and settlement, immigration and emigration, and extradition come under the legislative competence of the Federation, while the Länder have exclusive competences in the fields of education, policing, justice, health and housing. The Länder, in principle, also implement Federal legislation and therefore run most government departments. Some Länder have

⁷¹ Concerning offences involving violence there is such an obligation in international law, ECHR *Natchova and others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, 6.7.2005, §§ 160 to 168; *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14.09.2010, § 81. On the need for a reform of police work, see the article "Augenmerk auf Rassismus" containing an interview with the Council of Europe's Commissioner for Human Rights, *Süddeutsche Zeitung*, 27.2.2013.

⁷² On the importance of giving them the opportunity to play an exemplary role, see *Uslucan/Yalcin*, footnote 13, p. 53; see also OSCE, *The Ljubljana Guidelines on Integration of Diverse Societies*, November 2012, p. 57.

⁷³ See also §§ 76 et seq. of the explanatory memorandum thereto.

⁷⁴ See for example the report on the results of the overall evaluation of the initiative "Berlin promotes self-determination and acceptance of sexual diversity", 2012, p. 6.

set up Ministries for Integration and drawn up action plans or strategies in this field. Berlin and North Rhine-Westphalia have adopted laws on participation and integration.

65. After the presentation of a first National Integration Plan in 2007⁷⁵, the Federal Government adopted a new National Action Plan on Integration (Integration Plan) in January 2012. The Länder, local authorities and civil society representatives attended 11 forums to help update the integration policies. The 471-page Plan covers 11 fields and contains a multitude of strategic and operational objectives and practical measures.⁷⁶ The measures specify those responsible for their implementation and set out timetables and control indicators.
66. The Plan is aimed at persons from a migrant background.⁷⁷ The minorities historically present in Germany are only briefly mentioned. Questions relating to such minorities come under the jurisdiction of the Commissioner for matters related to Repatriates and National Minorities. However, there is no strategy for these minorities comparable to the Integration Plan, even though notably the Sinti and Roma still suffer severe discrimination. As part of the EU evaluation of strategies for the integration of Roma, Germany has been sharply criticised by Sinti and Roma organisations for failure to present a strategy and measures for the integration both of the national minority and of Roma migrants. This is why the German progress report for 2012 sets out the measures which are being prepared and implemented for a better integration of this minority.
67. ECRI encourages the German authorities to continue developing strategies and to include measures in favour of ethnic, religious and linguistic minorities historically present in Germany, especially Roma and Sinti, in the National Action Plan on Integration.

- **Combating racism and intolerance**

68. ECRI regrets the fact that the Integration Plan does not comprise a chapter on action against racism and intolerance. It considers, like the OSCE, that such action is a key field for any successful integration policy⁷⁸, because the social integration of vulnerable groups⁷⁹ is impeded by discrimination: discrimination undermines individuals' self-esteem and then their cognitive capacities, can cause vulnerable groups to close in on themselves, triggers a rise in violence,

⁷⁵ In view of the immigration dynamics in Germany and the reservations on the part of a sizeable section of the majority population on this subject (Bielefeld University, cf. footnote 42, pp. 1-10; TNS Emnid, Willkommenskultur in Deutschland, 2012, p. 3; Appendix 1 to the Report by the Federal Republic of Germany to the European Commission, 2011, pp. 4 et seq., http://ec.europa.eu/justice/discrimination/files/roma_de_strategy_annexes_fr.zip, site accessed on 10.6.2013), ECRI welcomes the fact that Germany officially acknowledged its status as a country of immigration in 2005. In connection with the first National Integration Plan, see 4th ECRI report on Germany, §§ 137 et seq.

⁷⁶ The first field, early childhood education, lists three strategic goals (equal opportunities for all children, improving the quality of teaching and parent participation), 11 operational objectives (eg reinforcing intercultural competences and improving the educational competences of parents from a migrant background) and more than 60 measures (eg introduction and implementation of training programmes).

⁷⁷ In Germany, this term refers to persons born abroad and persons with one parent or a grandparent born abroad.

⁷⁸ The Ljubljana Guidelines, footnote 72, pp. 38 et seq.

⁷⁹ ECRI uses this term to mean groups which are particularly vulnerable to acts of racism, eg groups of immigrants or ethnic, religious and linguistic minorities historically present in Germany, Explanatory memorandum to GPR No. 14.

impedes integration in the labour market and can have negative effects on physical and mental health.⁸⁰

69. As stated in § 43, Germany has an Action Plan against racism. This Plan, however, dates back to 2008, is not well known and, unlike the Integration Plan, has not been revised using a participatory approach. The authorities have informed ECRI that certain measures have been evaluated and adapted. However, neither practical measures, nor officials responsible for their implementation, nor timetables or control indicators have been included in the Plan.⁸¹ Furthermore, it does not enjoy the same level of support as the Integration Plan, which is placed under the responsibility of the Federal Chancellery, is widely publicised and regularly assessed, and attracts substantial funds.
70. ECRI recommends that the German authorities update their National Action Plan against Racism, Xenophobia, Anti-Semitism and the related Intolerance and to incorporate it in the National Action Plan on Integration to ensure that it receives the same level of support as the latter.

- **Integration courses and access to nationality**

71. ECRI emphasises, like the OSCE, the importance of an inclusive and non-discriminatory nationality policy for integration.⁸² The figures on naturalisations, which had dropped between 2006 and 2008, have been rising again since 2009, totalling 106 897 in 2011. More than half of the 16 million persons from migrant backgrounds hold German nationality. In 2011, 50.4 % of all naturalised persons were able to retain their old nationality.
72. In its fourth report, ECRI recommended that Germany do its utmost to ensure that the obligation for specific groups of immigrants to attend language and orientation courses and language, integration and naturalisation tests do not have a counterproductive effect on integration.⁸³ Participation in the language test after the language courses has also been compulsory since the end of 2007. Since 2009, these tests have been carried out under the European Common Framework of Reference for Languages. In 2012, 55.9 % of the 93 010 participants passed the test at B2 level, and 35.4 % at A2 level. 92.8% of the participants passed the orientation test between 2009 and 2012.⁸⁴ The pass rate in the naturalisation test also exceeded 90 %.
73. Germany has retained its system of obligations, rewards and sanctions vis-à-vis participation in language and orientation courses and tests. Infringing the obligations can lead to an administrative enforcement procedure and sanctions when temporary residence permits come up for renewal. If the person in question is in receipt of basic benefits for job-seekers, failure to attend these courses and tests may also constitute a breach of the person's obligations and lead to a reduction in payments.⁸⁵

⁸⁰ Uslucan/Yalcinp, footnote 13, pp. 54 et seq.

⁸¹ Cf. eg GPR No. 14 § 10a.

⁸² This policy should also be part of the Integration Plan: the Ljubljana Guidelines, footnote 72, pp. 40 et seq.

⁸³ Cf. §§ 130-150 of the 4th report on Germany.

⁸⁴ Concerning §§ 72-86 cf. Engels et al., Second report on indicators of integration, 2011; Bericht zur Integrationskursgeschäftsstatistik 2012 and Autorengruppe Bildungsberichterstattung, Bildungsbericht 2012.

⁸⁵ Bundestag, printed paper no. 17/3339, p. 2.

74. ECRI considers that the integration process should be based on a two-way approach promoting mutual recognition between the majority population and the minority groups.⁸⁶ This is why ECRI recommends motivating members of these groups to participate in the measures designed to facilitate their integration by providing incentives and rewards. It welcomes, for instance, the reduction of the requisite period of residence for naturalisation laid down in Article 10 (3) of the Law on citizenship in cases where the applicant has attended the integration courses and has scored well in the language tests. On the other hand, imposing sanctions is difficult to reconcile with this approach and may seriously reduce the motivation of the persons concerned. For this reason, ECRI advocates imposing sanctions only as a last resort.

75. ECRI recommends that Germany accompany any obligation to participate in language and orientation courses or language and orientation tests first and foremost with incentives and rewards and confine sanctions to cases where such motivating measures have failed and integration is unlikely without participation in these measures.

- **Assessment of the implementation of integration policies**

76. ECRI welcomes the fact that between 2009 and 2012 Germany published several detailed, high-quality reports, the second of which comprises 64 key indicators relating to integration policies. These reports point to major progress in the integration field. This includes the increased number of persons holding long-term resident status, the above-average increase in the rate of enrolment of children from immigrant backgrounds in pre-school facilities (nursery schools and kindergartens) between 2008 and 2010, and the higher rate of young people from migrant backgrounds who have been admitted to vocational training.⁸⁷ These indicators also show that persons from migrant backgrounds are still generally under-privileged as compared to the rest of the population. This applies in particular to the key sectors of education (§§ 77-89 and 92-93) and employment (§§ 94-97). Not all of these differences can be put down to the more modest social backgrounds of immigrants.

77. Whereas the rate of enrolment of children from migrant backgrounds in pre-school facilities is on the increase (as mentioned above), it remains far below the average, as does their rate of enrolment in the Gymnasium, the highest of the three secondary education streams. The parents' standard of education still heavily influences their children's educational success⁸⁸, and this again affects children from migrant backgrounds. The latter are over-represented among students forced to repeat a year.⁸⁹ Cases of discrimination against immigrants from Africa and Muslim girls wearing headscarves have been recorded.⁹⁰ 70 % of the German population consider that the issues of tolerance, diversity and

⁸⁶ Germany sometimes applies the term of "inclusion" to this approach.

⁸⁷ Engels et al., footnote 84, pp. 10 et seq.; see also 9. Bericht der Beauftragten der Bundesregierung für Migration, Flüchtlinge und Integration über die Lage der Ausländerinnen und Ausländer in Deutschland, 2012; Bericht zur Umsetzung des Integrationskonzepts 2007 für den Zeitraum 2009 bis September 2011; Integrationsmonitoring der Länder 2005 – 2009. The European Union has rightly observed that instruments are missing to gauge the impact of the measures to promote the integration of Sinti and Roma people.

⁸⁸ Institut der deutschen Wirtschaft Köln, Bildungsmonitor 2012: Infrastruktur verbessern – Teilhabe sichern - Wachstumskräfte stärken, p. 11; Bildungsbericht 2012, footnote 84, p. 8.

⁸⁹ Germany's annual contribution to the FRA for 2012, § 31. Children with one parent born abroad had to repeat years twice as often as others, Bildungsbericht 2012, footnote 84, pp. 75 et seq.

⁹⁰ ENAR, Shadow report 2010/2011, p. 27.

respect for persons from migrant backgrounds should be more intensively covered at school.⁹¹

78. The number of children who do not learn German before attending pre-school increased by 13% between 2007 and 2010 to reach a total of 401 723. Despite the measures already introduced (fairly successfully) to motivate families from migrant backgrounds to send their children at an earlier age to pre-school facilities⁹², only 12.2 % of children 1 to 2 years old are enrolled in a day-nursery (as compared with 27.7 % for other children), and 85.7 % of children 3 to 6 years old in a kindergarten (as compared with 94.9 %). Moreover, because of de facto segregation, they are often placed in structures with a high ratio of children who do not speak German at home. This under-representation mainly concerns children whose parents immigrated from outside the EU.
79. The Integration Plan analyses the reasons for this under-representation and includes the objective to eliminate barriers limiting access to pre-school education and increasing applications for enrolment. This aim has not been quantified. The Plan envisages that the organisations running day-nurseries and kindergartens and the municipalities take steps to eliminate these barriers. Nevertheless, it only contains two rather vague measures to achieve this: trying to ensure that pre-school facilities are free of charge, and facilitating access to day-nurseries and kindergartens.⁹³ Nor does the Länder contribution mention any clear-cut action accepted by all 16 Länder for implementing this objective.
80. ECRI realises that Germany's federal structure hampers the implementation of a coherent integration strategy. It considers, however, that the Federation and Länder should expend additional efforts to agree on the indicators and target values for the strategic and operational objectives in such fields as education which involve Länder competences. One example of such a quantified objective for all Länder might be to achieve, within five years, an alignment of the rate of participation of children from migrant backgrounds to pre-school education with that of the majority population.
81. ECRI recommends that the Federal authorities and the Länder accompany all the strategic and operational objectives of the National Action Plan on Integration with target values and that the Länder and local authorities document with target values the measures which they are intending to adopt in order to achieve these objectives in all matters falling within the legislative and administrative competence of the Länder.
82. ECRI stresses the great importance of early and continued promotion of the linguistic competences⁹⁴, but also the personal and social skills of children from migrant backgrounds for the lasting success of their integration. This is why ECRI welcomes the fact that from 1 August 2013, all children over the age of twelve months will be entitled to a place in a day care facility for children. ECRI encourages the authorities to step up their efforts to persuade parents from migrant backgrounds to make use of this right.

⁹¹ TNS Emnid, Willkommenskultur in Deutschland - Ergebnisse einer repräsentativen Bevölkerungsumfrage in Deutschland, 2012, p. 12.

⁹² As an example, one can mention the "neighbourhood mothers" in Berlin-Neukölln. Mothers who are themselves from migrant backgrounds are trained to contact and assist families which have recently arrived or have few contacts in the neighbourhood in order to provide integration assistance. 6 000 families have benefited from a series of at least 10 visits each. Educational issues are often addressed.

⁹³ See pp. 34-36, 46, 393 of the Integration Plan.

⁹⁴ 9. Bericht der Beauftragten der Bundesregierung für Migration, footnote 87, 2012, p. 115.

83. Following the assessment of the linguistic competences of four- to six-year-olds, 39 % of the children who did not speak German at home were advised to participate in linguistic support measures before beginning primary school. This shows, firstly, that the measures and the level of language training integrated into everyday school life by pre-school facilities are not yet sufficient to guarantee proper learning of German for all children. Pre-school facilities, which are traditionally considered more as care institutions⁹⁵, should evolve into educational institutions. On the other hand, these results confirm the need for a major increase in the ratio of children from migrant backgrounds attending pre-school at an early age. Experts have also noted a lack of funding in this field.
84. The figures mentioned in § 83 also show that child care workers and pre-school teachers have to cope with increasing requirements in the field of pre-school education: in groups with high numbers of children from migrant backgrounds, they have to teach German as a second language. Such teaching should preferably be integrated with day-to-day activities. Child care workers and pre-school teachers must guarantee a sufficiently high level of language learning to ensure the subsequent educational success of children from migrant backgrounds. One of the objectives of the Integration Plan is therefore to improve language teaching.
85. On the other hand, the level of training for child care workers and pre-school teachers is apparently insufficient for taking up this challenge: only 67% in Western and 78% in Eastern Germany have teacher training and only 3 % a university education. For this reason, ECRI encourages the authorities to tailor the training and remuneration system for such employees to this development, which has led other countries to provide them with the same training as primary school teachers. A considerable number of existing posts will have to be upgraded in order to recruit or train pre-school teachers capable of providing high-quality language teaching tailored to the specific needs of the children in question. Furthermore, additional posts must be created in order to cater for an increased rate of enrolment of children from migrant backgrounds.⁹⁶ ECRI encourages the Federal Government to invest in this field a fair proportion of the additional funds planned for the education sector.⁹⁷
86. ECRI recommends that the German authorities clarify and quantify, in the National Action Plan on Integration, the two aims of considerably increasing the rate of enrolment of children from migrant backgrounds in pre-school facilities and raising the standard of training and the educational and intercultural competences of child care workers and pre-school teachers; the Plan should also describe the measures which all Länder should undertake in order to achieve these two aims.
87. The continuing split between children from migrant backgrounds and other children re-emerges when they move up to secondary education. The two lower secondary streams (Hauptschule and Realschule⁹⁸) are attended by twice as many children from migrant backgrounds as the Gymnasium, the third stream,

⁹⁵ Bullinger, Rechtliche Möglichkeiten des Bundesgesetzgebers zur Verbesserung der Qualität (Betreuungsschlüssel, Gruppengrößen, Qualifikation des Personals) in Kindertagesstätten, Bundestag Scientific Service, WD 9 - 3000 - 017/09.

⁹⁶ ECRI doubts whether the creation of 4 000 half-posts for 3 years will be sufficient.

⁹⁷ Cf. the findings and recommendations of the 9. Bericht der Beauftragten der Bundesregierung für Migration, footnote 87, pp. 107-115.

⁹⁸ In connection with these three secondary-school streams, cf. 4th ECRI report, § 46.

which is still the elite school for the majority population.⁹⁹ This is why ECRI encourages the authorities to provide children from migrant backgrounds, throughout their primary and secondary education, with the requisite linguistic and educational support for lasting educational success. ECRI welcomes the fact that the authorities have included in the Integration Plan the objective of reinforcing individual support and further promoting full-time schools which find it easier to incorporate such support into their timetables. Schools must themselves have all the requisite instruments for securing such support, because many families from migrant backgrounds are not in a position to supply such assistance to their children.

88. Students from migrant backgrounds are still encountering a wide variety of problems, and they also lack support: they are often from families with a low standard of education and consider that they have language problems and lack certain key competences such as the ability to organise their studies autonomously. They do not feel properly integrated in university life and face major financial problems. They are less successful than German students and their drop-out rate is twice as high. This is why ECRI considers that these students also need intensive support during their studies.¹⁰⁰
89. ECRI recommends that the authorities clarify and quantify, in the National Action Plan on Integration the objective of providing children from migrant backgrounds, throughout their school and university careers, the necessary individual support to realise their potential. Specification is required of the actions to be undertaken by the Länder to achieve this aim.

II. Topics specific to Germany

1. Interim follow-up Recommendations of the fourth cycle

90. The first interim follow-up recommendation which ECRI addressed to Germany in its fourth report concerned improving knowledge of the current legislation against racial discrimination. In its conclusions¹⁰¹, ECRI considered that Germany's response to this recommendation was positive, although incomplete. It voiced concern about the reduction of the already low budget of the ADS. ECRI considers that the ADS has made excellent use of its low budget, which will total 2.99 million Euros in 2013. This applies, for instance, to the marketing of its project on using anonymous recruitment procedures.¹⁰² The exceptional media coverage motivated a considerable number of other organisations, particularly in the public sector, to try out these procedures. The ADS informed ECRI that its recognition rate increased from 25.2 % in 2010 to 47 % in December 2011.¹⁰³
91. However, with only 26 posts the ADS is clearly unable to be present nationwide or to perform all its tasks. ECRI recalls that the ADS, as a body specialising in action against racism and intolerance, should alert the general public to discrimination issues, produce and publish information and provide aid and assistance to victims throughout Germany (Principles 3d-g, k and 5 (1) of GPR

⁹⁹ Deutscher Akademischer Austauschdienst (DAAD), *Bildungsinländer*, 2011, p. 6 and ENAR, *Shadow Report 2010-2011*, p. 28; for Berlin, see Open Society Justice Initiative, submission to the UN Human Rights Committee, October 2012.

¹⁰⁰ In connection with students not holding German nationality, cf. DAAD, footnote no. 99, pp. 6 et seq.

¹⁰¹ Adopted on 23.3.2012, CRI(2012)28.

¹⁰² See §§ 94 et seq.

¹⁰³ However, the results of the FRA survey of LGBT persons highlight a considerable lack of awareness in connection with legislation and institutions for protection against discrimination.

No. 2).¹⁰⁴ That is why ECRI refers to the recommendation set out in § 22 of this report. It considers that financial resources devoted for combating racism and racial discrimination should be multiplied. In order to gain an idea of the resources needed, ECRI refers to the positive example of the Land of Berlin, which, for a population of 3.5 million, has increased the number of posts in its ADS to 10 and secured a large budget for implementing projects.

92. The second interim follow-up recommendation concerned implementing targeted training programmes to ensure that all teachers have the capacity to assess objectively the skills of students due to enter the secondary school system. ECRI considered that this recommendation had only been partly implemented. It is pleased to learn that the school's opinion on moving up to secondary education is now binding in six of the 16 Länder. In 2011, however, teachers were still recommending children to continue their studies at Gymnasium three times more frequently if they were from higher socio-economic status.¹⁰⁵ This disadvantages another time children from migrant backgrounds.¹⁰⁶ ECRI considers that the authorities should continue to combat this inappropriate link-up. The families affected take these opinions seriously, even though they are no longer binding. That is why ECRI is concerned about the fact that the Integration Plan does not set out any objectives or actions in this field.
93. ECRI recommends that the German authorities insert into the National Action Plan on Integration the objective, with measures to be taken, to combat the practice whereby children from higher socio-economic status are three times more likely than others to obtain favourable opinions on the continuation of their schooling at Gymnasium.
94. The third interim follow-up recommendation concerned launching a campaign to highlight the positive aspects of diversity, geared to changing employers' attitudes to persons from migrant backgrounds. ECRI considered that additional efforts were needed. It notes that the unemployment rate among foreigners is still twice as high as among German nationals. Despite the decrease in overall unemployment rates in recent years, this gap has widened: while the unemployment rate for foreigners was 2.15 times higher in 2005, this coefficient rose to 2.35 in 2011.¹⁰⁷ A study shows that an application under a Turkish name reduces the chances of recruitment by 14 %, and in SMEs by as much as 24 %. Sinti and Roma and persons of African origin are also seriously affected by such discrimination.¹⁰⁸
95. In view of this finding, ECRI welcomes the ADS's pilot project on the use of anonymous recruitment procedures: 8 550 job applications without mention of name, sex, age, civil status or identity photos were considered by the eight enterprises and public authorities participating in the project. The evaluation by human resource managers shows that appropriate applicants were identified without difficulty. As for the job applicants, 41 % considered that their chances of

¹⁰⁴ See also § 24 of GPR No. 7 and §§ 50-52 of the explanatory memorandum.

¹⁰⁵ IGLU 2011, Reading competence of primary school children in Germany and in international comparison, p. 219 concerning children having the same performance and cognitive abilities.

¹⁰⁶ A doctoral thesis concludes that children from migrant backgrounds receive a recommendation to continue their studies at the Gymnasium as often as other children from similar social background, Gresch, Migrantenkinder auf dem Weg zum Abitur: Wie kommen die Übergangsempfehlungen nach der Grundschule zustande?, WZ Brief Bildung 21, p. 6.

¹⁰⁷ 9. Bericht der Beauftragten der Bundesregierung für Migration, footnote 87, p. 243.

¹⁰⁸ Cf. the Additional Report by representatives of Roma civil society and other contributors and experts supplementing the German report to the European Union concerning the EU Framework for National Roma Integration Strategies up to 2020, 12.3.2012, p. 2; ENAR Shadow report 2010-2011, pp. 17-18.

being invited to a recruitment interview were higher than under the conventional systems. Applicants from migrant backgrounds had the same chances of being invited to the second stage of the procedure as all the others.¹⁰⁹ ECRI encourages the German authorities to promote the use of anonymous recruitment procedures.¹¹⁰

96. ECRI also welcomes the fact that more and more employers are signing the Diversity Charter¹¹¹, although the great majority of employers have not yet done so.

97. ECRI recommends that the German authorities increase the budget of the Federal Anti-Discrimination Agency so that it can broaden its action in order to promote diversity at the workplace. It also recommends that they motivate those who apply for contracts, loans, grants or other benefits to use anonymous recruitment procedures and to sign and comply with the Diversity Charter (General Policy Recommendations Nos. 7 and 14).

2. Policies to combat discrimination and intolerance against LGBT persons¹¹²

98. During the last micro-census in 2011, 67 000 households made up of homosexual couples were declared in Germany.¹¹³ 27 000 homosexual couples had been registered in accordance with the Law on registered partnerships. According to official statistics, 7 000 children were living with parents of the same sex.¹¹⁴ The number of transgender persons is difficult to pinpoint. Between 1995 and 2010, the courts dealt with 11 514 applications from individuals wishing to change their forenames or gender registered.¹¹⁵

- Legislative issues

99. Article 3 GG, which guarantees the equality of all persons and expressly prohibits discrimination on ten different grounds, mentions neither sexual orientation nor gender identity. In 1994 the two-thirds majority required to include these grounds was not achieved, whereas it was for the ground of disability. Another initiative geared to raising the level of protection for LGBT persons was rejected by the Bundesrat in 2009. The constitutions of several Länder comprise a prohibition of discrimination on the ground of sexual identity.¹¹⁶ The Law on registered

¹⁰⁹ ADS, Pilot project "Depersonalised application procedures - Summary of outcomes", pp. 3 et seq. The ADS noted a trend towards equal opportunities for all groups of applicants.

¹¹⁰ § 4 of GPR No. 14.

¹¹¹ Over 1 200 employers, covering 6 million employees, had signed the Charter at December 2012.

¹¹² For terminology, see the definitions set out in: Council of Europe, discrimination on grounds of sexual orientation or gender identity in Europe, pp. 139 et seq.

¹¹³ In the questionnaire, answering this question was optional. According to conservative estimates, the number of lesbian and gay persons in Germany is well over half a million, with over two million bisexual persons: according to several surveys, 1.1 % to 2.7 % of men and 0.4 % to 1.3 % of women are exclusively homosexual (<http://lsvd.de/233.0.html>, site accessed on 20.6.2013), and 2.8 % of men and 2.5 % of women are bisexual. According to another estimate, which the German authorities have communicated to ECRI, 5 to 7 % of the population are homosexual, which means between 4 and 5.5 million persons in Germany. In connection with data collection, see § 19 of Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

¹¹⁴ For 2003, this figure was 12 800. It has not been established whether this decrease was due to methodological reasons, Eggen, Gleichgeschlechtliche Lebensgemeinschaften mit und ohne Kinder, 2009, pp. 7 and 32.

¹¹⁵ The actual number of transgender persons could be much higher: cf. Lynn Conway, "How Frequently Does Transsexualism Occur?", 2002.

¹¹⁶ Bundesrat, minutes of the session of 27.11. 2009, p. 426; Bundesrat, printed document no. 741/09, p. 3.

partnerships came into force in 2001. It applies solely to same-sex couples and allows them to establish legal cohabitation. Most of the legal consequences are similar to those of marriage.¹¹⁷ Most Länder have granted registered partners the same rights as married couples in all fields coming under their jurisdiction.¹¹⁸

100. The Constitutional Court has issued several rulings to the effect that discrimination between married persons and persons living in a registered partnership is a breach of Article 3 (1) GG. It has generally ruled that the special protection for marriage granted under Article 6 GG cannot be construed to mean that registered partnerships must necessarily enjoy fewer rights. On the contrary, there must invariably be a sufficiently serious reason to justify any differential treatment.¹¹⁹
101. Despite this case law, there are still major differences between the rights of registered partners and married couples.¹²⁰ A list drawn up by the Government sets out laws which are less favourable to registered partners concerning certain family allowances and other financial advantages, residence rights¹²¹ and nationality, certain rights in the social security field, inheritance of farms and the rules on inheritance in a number of occupations.¹²²
102. ECRI welcomes the major progress vis-à-vis the legal situation of homosexual and bisexual persons and the major role played by the Constitutional Court in this context. It is also satisfied with the results of a survey conducted following the last judgment of the Constitutional Court: 74 % of the German population are in favour of complete equivalence between partnership and marital status.¹²³ ECRI considers, however, that the authorities should re-examine whether there is any objective and reasonable justification for all these legislative texts and revoke any unjustified differences.¹²⁴
103. The Law on transsexuals came into force in 1980. In 2008 and 2011 the Constitutional Court decided that several of the conditions laid down in the law for legal recognition of gender changes were contrary to the Basic Law¹²⁵: the applicant could not be married, had to have had a surgical operation and be sterile.¹²⁶ Given that Articles 5 and 10(2) of the Law on transsexuals prohibit disclosure of the former sexual identity following the change of forename and legal recognition of the change of gender, the courts have also recognised the right of transgender persons to change their gender marker in such important

¹¹⁷ Reply by the German Government to the questionnaire on the implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers, CDDH(2012) R 76 Addendum VIII, reply to question no. 24.

¹¹⁸ This applies, for example, to rights to retirement pensions and payment of supplementary remuneration to civil servants living in a registered partnership.

¹¹⁹ Constitutional Court, decision of 7.7.2009, 1 BvR 1164/07, § 105; 21.7.2010, 1 BvR 611/07, §§ 86 and 95 concerning the field of retirement pensions and rights of inheritance and donation; 1 BvL 1/11 and 1 BvR 3247/09, 19.2.2013, concerning the right to adoption by one partner of a child previously adopted by the other partner (successive adoption); 2 BvR 909/06 et al., 7.5.2013 concerning income tax.

¹²⁰ See Appendix 9 to the letter sent to ECRI by the authorities on 14.12.12 and ILGA-Europe Rainbow Map and Index, 2013.

¹²¹ For a Government draft law in this field, see Bundestag printed paper no. 17/10746.

¹²² Bundestag printed paper no. 17/8248, pp. 2 et seq. and 14 et seq.

¹²³ On 22.3.13 the Bundesrat decided to introduce a draft law on opening up marriage to all couples, Bundesrat, printed paper no. 196/13.

¹²⁴ § 1 of Recommendation CM/Rec(2010)5 of the Committee of Ministers.

¹²⁵ Regarding the ECHR's more restrictive case-law, see *H. v. Finland*, no. 37359/09, 13 November 2012; case referred to the Grand Chamber.

¹²⁶ Constitutional Court, judgments of 27.5.2008, 1 BvL 10/05 and 11.1.2011, 1 BvR 3295/07.

documents as diplomas and employment certificates.¹²⁷ However, this right is not widely known among employers, schools and even the organisations specialising in combating discrimination.¹²⁸

104. ECRI recommends that the German authorities insert into the law the right of transsexuals to change their gender marker in documents such as educational diplomas and employment certificates.

- **Promoting tolerance and combating discrimination**

105. A recent FRA survey shows that there is still heavy discrimination against LGBT persons in Germany and that policies to combat such discrimination could be improved. 49 % of LGBT persons consider that measures to promote respect for LGB human rights are few and far between. 79 % voice the same opinion in connection with transgender persons. Despite a strong tendency for LGBT persons to conceal their sexual orientation¹²⁹, 15 % of the persons interviewed in Germany considered that they had suffered discrimination in job-seeking, 21 % in the workplace and 17 % when seeking housing.¹³⁰ Knowledge of the different forms and extent of discrimination against LGBT people on the housing market is still scanty.

106. Homo/transphobia is one of the main problems in German schools. 73 % of LGBT students have never spoken openly about their sexual orientation at school. 64 % have heard negative comments about a classmate who has been perceived as LGBT. The word “gay” is one of the commonest insults at school. 17 % of LGBT students have suffered discrimination from school or university staff. ECRI considers that the ministries responsible for education should make sexual diversity a cross-cutting issue in the curriculum in order to promote tolerance vis-à-vis young LGBT persons and enable them to talk openly about their sexual orientation. ECRI also encourages them to devise measures to combat the discrimination and violence¹³¹ suffered by young LGBT persons at school.

107. The situation of transgender persons is particularly difficult in the employment field. They are disadvantaged in terms of access to employment and career prospects, and they suffer rejection, harassment and even violence. They are more often affected by job loss, unemployment and poverty and are frequently overqualified for their jobs. They are subjected to transphobic conducts on the part of colleagues and superiors.¹³²

108. Where health is concerned, transsexualism is still classified as a “disorder of personality and behaviour”.¹³³ There is also a lack of awareness on the part of

¹²⁷ Hamm High Labour Court, judgment of 17.12.1998, 4 Sa 1337/98; regarding educational diplomas, see Munich Administrative Court, judgment of 20.9.2012, M 17 K 11.5453.

¹²⁸ Cf. in this context ECHR, *B. v. France*, no. 13343/87, 25.3.1992.

¹²⁹ 68 % conceal their sexual orientation at school; in the workplace, 24 % conceal such orientation completely and 49 % conceal it selectively. Only half disclosed their sexual orientation to most or all of their classmates, work colleagues or healthcare providers, FRA, LGBT Survey data explorer, 2013; EU LGBT survey, Results at a glance, 2013; see also ILGA-Europe, Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2013, pp. 107 et seq.

¹³⁰ 49 % conceal it selectively; FRA, LGBT Survey data explorer, 2013.

¹³¹ See § 49 above.

¹³² See the references in note 137.

¹³³ Section F64.0 of the ICD-10-GM (International Statistical Classification of Diseases and Related Health Problems - German Modification), 2013 version. Cf. also Council of Europe, footnote 112, p. 25 and the initiative to amend this classification in the North Rhine-Westphalia Action Plan, p. 47. Civil society feels it

physicians, psychotherapists and medical professional associations of the different problems for each of the component groups of the LGBT community. 12 % of LGBT persons say that they have suffered discrimination from a physician or another health professional in the past 12 months. One group which is particularly exposed to this type of discrimination is elderly LGBT persons. Many of them are afraid of being subject to exclusion after their move to a retirement home or sanatorium.¹³⁴

109. ECRI welcomes the fact that several Länder have adopted measures and action plans to increase tolerance vis-à-vis LGBT persons and combat homophobia and transphobia.¹³⁵ The Land of Berlin recently assessed the implementation of its 2010 Action Plan. The Action Plan implemented by the Land of North Rhine-Westphalia might also be mentioned as a good example. It addresses almost all the fields covered by Recommendation CM/Rec(2010)5 of the Committee of Ministers. A further strong point in these processes is the intensive participation of civil society in their development. ECRI considers that the Federation and the other Länder should follow these examples.

110. ECRI recommends that the Federal Government and the Länder which have not yet adopted an action plan or a comprehensive programme to promote tolerance vis-à-vis LGBT persons and combat homophobia and transphobia take inspiration from the existing plans to draw up their own measures or action plan.

111. ECRI notes that the problems transgender persons face have not yet become sufficiently rooted in the collective consciousness. For instance, in evaluating its action plan, the City of Berlin noted that transgender issues had only played a minor role.¹³⁶ As the transgender community set up its structures for defending its members fairly late on, they are still short of political and financial support. The ADS and the German Association of Lesbians and Gays (LSVD) in North Rhine-Westphalia only began publishing the first two major surveys on the situation of transgender persons in 2010.¹³⁷

112. ECRI recommends that the German authorities systematically include specific transgender issues in their action plans on promoting equality and increase financial support for organisations fighting for their rights.

113. As regards the low rate of declaration of discrimination by LGBT persons, ECRI once again refers to its recommendations on increasing the financial and human resources of the ADSs and setting up contact points for vulnerable groups within the police agencies and the prosecuting authorities.

was unable to participate in the work on revising the medical guidelines “Gender identity disorders in childhood and adolescence”.

¹³⁴ See the FRA survey, footnote 130, and the North Rhine-Westphalia Action Plan, p. 24.

¹³⁵ Other Länder are currently drawing up similar plans, eg Berlin, North Rhine-Westphalia, Rheinland-Pfalz, Baden-Württemberg and Hamburg.

¹³⁶ Report on the results of the overall evaluation of the initiative “Berlin promoting self-determination and acceptance of sexual diversity”, 2012, p. 6; the German authorities’ answers to the questions on transgender people in the questionnaire on the implementation of Recommendation CM/Rec(2010)5 are also fairly brief; cf. the criticism from transgender associations of the procedure for devising an action plan in Baden-Württemberg.

¹³⁷ Franzen, Sauer, Benachteiligung von Trans*Personen, insbesondere im Arbeitsleben, 2010, pp. 83 et seq.; Fuchs, Ghattas, Reinert, Widmann, Studie zur Lebenssituation von Transsexuellen in Nordrhein-Westfalen, 2012, pp. 17 et seq.

PRIORITY RECOMMENDATIONS SUBJECT TO INTERIM FOLLOW-UP

The two specific recommendations for which ECRI requests priority implementation from the authorities of Germany are the following:

- ECRI reiterates its recommendation to the authorities to ratify Protocol No. 12 to the European Convention on Human Rights as soon as possible.
- ECRI recommends that the German authorities reform their system for recording and following up "racist, xenophobic, homophobic and transphobic" incidents in order to ensure that all cases involving such a motive are recorded (§ 12 of General Policy Recommendation No. 11).

A process of interim follow-up for these two recommendations will be conducted by ECRI no later than two years following the publication of this report.

LIST OF RECOMMENDATIONS

The position of the recommendations in the text of the report is shown in parentheses.

1. (§ 4) ECRI reiterates its recommendation to the authorities to ratify Protocol No. 12 to the European Convention on Human Rights as soon as possible.
2. (§ 10) ECRI again reiterates its recommendation that the German authorities provide expressly in the Criminal Code that racist motivation for an ordinary offence constitutes an aggravating circumstance. It further recommends that they remove from Article 130 (1) of the Criminal Code the proviso that the acts in question must be liable to disturb public order, include the grounds of colour and language and provide that any public incitement to racial discrimination is punishable (§§ 18 and 21 of General Policy Recommendation No. 7). It also encourages them to consider the possibility of remedying the gaps identified in § 9 of this report.
3. (§ 16) ECRI recommends that the authorities extend the scope of the Law on Equal Treatment (AGG) to the public sector (§§ 4-15 and 24 of General Policy Recommendation No. 7). It further recommends that they include, in the AGG and in laws relating to the police at federal level and at the level of the Länder, provisions defining and expressly prohibiting racial profiling and establishing a reasonable suspicion standard for the carrying out of control, surveillance and investigation activities (§§ 1-4 of General Policy Recommendation No. 11 on combating racism and racial discrimination in policing).
4. (§ 19) ECRI recommends that the German authorities introduce into the law an obligation to discontinue public financing of organisations, including political parties, which promote racism (§ 16 of General Policy Recommendation No. 7).
5. (§ 22) ECRI recommends that the German authorities set up in all the Länder an independent authority to combat racism and racial discrimination or that they ensure that the Federal Anti-Discrimination Agency performs throughout German territory all the functions and responsibilities provided for in principle 3 of General Policy Recommendation No. 2 on specialised bodies.
6. (§ 56) ECRI recommends that the German authorities reform their system for recording and following up "racist, xenophobic, homophobic and transphobic" incidents in order to ensure that all cases involving such a motive are recorded (§ 12 of General Policy Recommendation No. 11).
7. (§ 63) ECRI recommends that the authorities set up contact points or persons in police stations and prosecution authorities in all the Länder to record complaints from persons belonging to a vulnerable group and to conduct effective investigations following such complaints.
8. (§ 67) ECRI encourages the German authorities to continue developing strategies and to include measures in favour of ethnic, religious and linguistic minorities historically present in Germany, especially Roma and Sinti, in the National Action Plan on Integration.
9. (§ 70) ECRI recommends that the German authorities update their National Action Plan against Racism, Xenophobia, Anti-Semitism and the related Intolerance and to incorporate it in the National Action Plan on Integration to ensure that it receives the same level of support as the latter.

10. (§ 75) ECRI recommends that Germany accompany any obligation to participate in language and orientation courses or language and orientation tests first and foremost with incentives and rewards and confine sanctions to cases where such motivating measures have failed and integration is unlikely without participation in these measures.
11. (§ 81) ECRI recommends that the Federal authorities and the Länder accompany all the strategic and operational objectives of the National Action Plan on Integration with target values and that the Länder and local authorities document with target values the measures which they are intending to adopt in order to achieve these objectives in all matters falling with the legislative and administrative competence of the Länder.
12. (§ 86) ECRI recommends that the German authorities clarify and quantify, in the National Action Plan on Integration, the two aims of considerably increasing the rate of enrolment of children from migrant backgrounds in pre-school facilities and raising the standard of training and the educational and intercultural competences of child care workers and pre-school teachers; the Plan should also describe the measures which all Länder should undertake in order to achieve these two aims.
13. (§ 89) ECRI recommends that the authorities clarify and quantify, in the National Action Plan on Integration the objective of providing children from migrant backgrounds, throughout their school and university careers, the necessary individual support to realise their potential. Specification is required of the actions to be undertaken by the Länder to achieve this aim.
14. (§ 93) ECRI recommends that the German authorities insert into the National Action Plan on Integration the objective, with measures to be taken, to combat the practice whereby children from higher socio-economic status are three times more likely than others to obtain favourable opinions on the continuation of their schooling at Gymnasium.
15. (§ 97) ECRI recommends that the German authorities increase the budget of the Federal Anti-Discrimination Agency so that it can broaden its action in order to promote diversity at the workplace. It also recommends that they motivate those who apply for contracts, loans, grants or other benefits to use anonymous recruitment procedures and to sign and comply with the Diversity Charter (General Policy Recommendations Nos. 7 and 14).
16. (§ 104) ECRI recommends that the German authorities insert into the law the right of transsexuals to change their gender marker in documents such as educational diplomas and employment certificates.
17. (§ 110) ECRI recommends that the Federal Government and the Länder which have not yet adopted an action plan or a comprehensive programme to promote tolerance vis-à-vis LGBT persons and combat homophobia and transphobia take inspiration from the existing plans to draw up their own measures or action plan.
18. (§ 112) ECRI recommends that the German authorities systematically include specific transgender issues in their action plans on promoting equality and increase financial support for organisations fighting for their rights.

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