



**This is a preliminary working document prepared by the Secretariat for examination by the Drafting Group members.**

**STEERING COMMITTEE FOR HUMAN RIGHTS  
(CDDH)**

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**DRAFTING GROUP ON FREEDOM OF EXPRESSION  
AND LINKS TO OTHER HUMAN RIGHTS**

**(CDDH-EXP)**

**Preliminary draft guide to good practices  
on the way of reconciling freedom of expression  
with other rights and freedoms, in particular in culturally diverse societies**

Introduction

1. This document prepared by the Secretariat contains a preliminary draft guide to good practices on the way of reconciling freedom of expression with other rights and freedoms, in particular in culturally diverse societies.
2. This text was elaborated in the light of the replies received from 24 member States<sup>1</sup> and representatives of the civil society<sup>2</sup> (the compilation of the replies appears in document CDDH-EXP(2018)02). Its structure is the one already adopted by the CDDH (see table of contents below).
3. The CDDH-EXP is called to make progress in the elaboration of this text at its third (25–27 April 2018) and fourth (3–5 October 2018) meeting, with a view of its submission to the CDDH for examination and possible adoption at the 90th meeting of the latter (27–29 November 2018).

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<sup>1</sup> Austria, Belgium, Croatia, Czech Republic, Estonia, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Republic of Moldova, Montenegro, Netherlands, Norway, Poland, Serbia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey and United Kingdom.

<sup>2</sup> European Network of National Human Rights Institutions.

## **Table of contents**

### **Background to the Guide**

- I. SCOPE AND CONTENT OF THE RIGHT TO FREEDOM OF EXPRESSION**
  - A. Protection of freedom of expression
  - B. Specific actors and their relation to freedom of expression
    - i. Specific focus area: Freedom of expression and political discourse
    - ii. Specific focus area: Fake news (disinformation)
  
- II. HATE SPEECH**
  
- III. RECONCILING FREEDOM OF EXPRESSION AND OTHER HUMAN RIGHTS**
  - A. Freedom of expression and right to private life
  - B. Freedom of expression and freedom of thought, conscience and religion
    - i. Specific focus area: Blasphemy
  - C. Freedom of expression and freedom of peaceful assembly and association
  - D. Freedom of expression and prohibition of discrimination

## BACKGROUND TO THE GUIDE

1. Freedom of expression is the foundation of open and inclusive societies as it promotes knowledge and understanding in culturally diverse societies such as those in Europe today. However the abuse or misuse of freedom of expression may place these societies in danger. This may also occur when this freedom is censored or silenced.
2. How, then, conciliate freedom of expression with other rights and freedoms, in particular in culturally diverse societies? The Council of Europe's member States brought some replies reflected in this Guide.
3. The aim of the Guide is not to propose unique ways of doing, but to show national practices which, in specific circumstances, were useful in reconciling the various rights and freedoms.
4. As an example, the murder of Charlie Hebdo journalists committed in Paris on 7 January 2015 raises questions with regard to the implementation of freedom of expression in democratic societies. These issues address not only the safety of journalists which is necessary to ensure democracy, but also the non-permissible hate speech on which various bodies of the Council of Europe have already firmly expressed their condemnation. Such a tragic event also raises questions regarding the limits to freedom of expression in contemporary European societies in which the enjoyment of one's freedoms seems more than ever, due to the diversity of cultures which coexist, to affect the freedom of others.
5. The background directing the drafting of this Guide is the wish of the Committee of Ministers of the Council of Europe to provide member States with a tool on the practical way of reconciling freedom of expression with other human rights such as, in particular, the right to respect for private life, freedom of thought, conscience and religion, freedom of assembly and association and the prohibition of discrimination.
6. While referring to good national practices for achieving such conciliation, the Guide first stresses the utmost importance of freedom of expression as of a fundamental right on which a large number of other freedoms are based. It holds a prominent place in democratic societies as according to the European Court of Human Rights ("the Court") :

« Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society. »<sup>3</sup>

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<sup>3</sup> See, e.g., the following judgments of the European Court of Human Rights: *Handyside v. the United Kingdom* (application no. 5493/72), judgment of 7 December 1972, § 49; *Palomo Sánchez and Others v. Spain* (applications nos. 28955/06, 28957/06, 28959/06 and 28964/06), Grand Chamber judgment of 12 September 2011, § 53; *Perinçek v. Switzerland* (application no. 27510/08), Grand Chamber judgment of 15 October 2015, § 196.

## I. SCOPE AND CONTENT OF THE RIGHT TO FREEDOM OF EXPRESSION

### A. Protection of freedom of expression

7. As such, freedom of expression is protected by number of international instruments (e.g. Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights (ICCPR), Article 5.d.viii of the International Convention on the elimination of all forms of racial discrimination (ICERD)).
  8. Some of these instruments recognise that the right to freedom of expression is not absolute in all its forms (e.g. Articles 20(1) and (2) of the ICCPR prohibit any propaganda for war and expression that would amount to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; Article 4 of the ICERD similarly prohibits propaganda, the dissemination of ideas based on racial superiority or hatred, and the incitement to racial discrimination).
  9. At the Council of Europe level, freedom of expression is specifically protected by Article 10 of the European Convention on Human Rights (“the Convention”). The European Social Charter also mentions specific aspects of this freedom (e.g. right to be informed of health risks, workers’ right to information, right of migrant workers to receive training in their own language), while Articles 7 and 9 of the Framework Convention for the Protection of National Minorities guarantee the right of freedom of expression and the enjoyment of this freedom in the minority language to those belonging to national minorities.
  10. Additional legal instruments include declarations, recommendations and guidelines adopted by other bodies of the Council of Europe which, although not legally binding, are an integral part of the Council of Europe standards. Of particular importance are the Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies. Also of relevance is the Declaration on freedom of communication on the Internet of 28 May 2003.
  11. Furthermore, the Human Rights Guidelines on Freedom of Expression Online and Offline of the European Union (EU) explain the international human rights standards on freedom of opinion and expression and provide political and operational guidance to officials and staff of the EU institutions and EU member States for their work in third countries and in multilateral fora as well as in contacts with international organisations, civil society and other stakeholders.
  12. At national level, freedom of expression is considered as having a “constitutional” importance<sup>4</sup> since it is not only a right in itself but it is also underpinning other rights and freedoms under the Convention, for example, the freedom of thought, conscience and religion.
13. In the legal orders of most Council of Europe member States freedom of expression is protected at the constitutional level, i.e. it is guaranteed by the constitution, fundamental law or by a charter of fundamental rights and freedoms enjoying constitutional rank. The wording of the relevant provisions is frequently similar to Article 10 of the Convention. As such, freedom of expression can be invoked in particular before the constitutional courts which interpret its scope and limits in the light

<sup>4</sup> Harris, O’Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p. 613.

of the fact that it is a basic element of a democratic society. The constitutional principles are often further developed in legislative instruments on freedom of speech, media, audio-visual communication, information society services, etc.

14. As one of the means to ensure observance of the relevant principles formulated by the Court, thematic trainings of (future) judges, prosecutors and other civil servants, aimed at enhancing their professional qualifications and raising awareness, are organised in several member States.

15. Concerning the scope of the rights protected under the freedom of expression, Article 10 § 1 of the Convention explicitly refers to three elements.

- First, it is the freedom to hold opinions, which is a prior condition to the other freedoms guaranteed by Article 10. This element of the freedom of expression in substance means that the State must not try to indoctrinate its citizens and that the State may not make distinction between those holding specific opinions and others.
- The second element in the freedom of expression is the freedom to receive information and ideas. Even if Article 10 cannot be read as guaranteeing a general right of access to information, the Court has consistently recognised that the public has a right to receive information of general interest and that particularly strong reasons must be provided for any measure limiting access to information which the public may receive.
- Thirdly, freedom of expression includes the freedom to impart information and ideas, which is of the greatest importance for the political life and the democratic structure of a country.

16. In *Georgia*, Article 17 of the new Constitution entering into force in 2018 deals with “freedom of thought, information, mass media and internet”<sup>5</sup>. The independence of the Public Broadcaster from state agencies, and its freedom from political and substantial commercial influence, shall be ensured by law.

17. In *Spain*, Article 20 of the Constitution (1978) recognizes and protects (i) the the right to freely express and disseminate thoughts, ideas and opinions through words, in writing or by any other means of communication; (ii) the right to literary, artistic, scientific and technical production and creation; (iii) the right to academic freedom; and (iv) the right to freely communicate or receive accurate information by any means of dissemination whatsoever. Furthermore, Article 5 of the Act 7/2010 on General Audio-visual communication regulates the right to cultural and linguistic diversity in the audio-visual field.

### *Permissible limitations*

18. It is undisputable that any restrictions to the freedom of expression have to be construed strictly since they could undermine the fundamentals of a democracy. Article 10 § 2 of the Convention explicitly recognises that the exercise of the freedom of expression

<sup>5</sup> This Article of the Georgian Constitution provides, *inter alia*, that (1) freedom of thought and the expression of thought shall be protected. No one shall be persecuted because of his/her thoughts or the expression of thought; (2) everyone has the freedom to obtain and disseminate information; (3) mass media shall be free. Censorship shall be impermissible. Neither the State nor particular individuals shall have the right to monopolise mass media or the means of dissemination of information; and (4) everyone shall have the freedom to access and use the internet.

“carries with it duties and responsibilities” and subjects permissible limitations to several conditions. According to this provision, “[t]he exercise of these freedoms (...) may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

19. Several member States observed that exceptions to the principle of freedom of expression provided by their domestic law are aimed at protecting public order, fundamental rights and human dignity of others; unjustified interferences are sanctioned by means of civil or criminal law that regulate rights and responsibilities of those exercising the right to freedom of expression. Namely, the Constitutional Court in *Hungary* stated in several decisions that human dignity or dignity of communities may serve as a constitutional limit to the freedom of expression.
20. *France* noted that, for historical and legal reasons, the domestic law enshrines the principle of strict neutrality of civil servants or agents charged with a public-service mission, which implies restrictions on their liberty to manifest their religious belonging in the exercise of their professional duties.
21. In *Germany* the Basic Law provides that free debate, civil commitment and education are the most effective weapons against the dissemination of totalitarian, inhuman ideologies. In principle, freedom of expression can only be limited on the basis of general laws, not special legislation.
22. In *Spain* Act 7/10 on General Audio-visual Communication guarantees the right to a pluralistic audio-visual communication and provides for its limitations since such communication can never incite hatred or discrimination based on gender or any other personal or social circumstance and should be respectful of human dignity and constitutional values, with a special attention paid to the eradication of behaviours fostering situations of inequality of women. There is a non-profit association AUTOCONTROL which manages the advertising self-regulation system, in accordance with a self-regulatory code on commercial publicity.

#### *Authority and impartiality of the judiciary*

23. It follows that the need to maintain the authority and impartiality of the judiciary could be, among others, the reason for restricting the freedom of expression. Indeed, “as the guarantor of justice, a fundamental value in a law-governed State, judiciary must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against gravely damaging attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying”.<sup>6</sup>
24. Another situation where the freedom of expression becomes relevant in the administration of justice concerns publishing information regarding on-going criminal cases, that do not comply with the presumption of innocence guaranteed by Article 6 § 2 of the Convention.<sup>7</sup> As regards the freedom of expression of lawyers, intermediaries between the public and the courts, a distinction must be drawn depending on whether the lawyer expresses himself in the courtroom or elsewhere.

<sup>6</sup> *Morice v. France* (application no. 29369/10), Grand Chamber judgment of 23 April 2015, § 128.

<sup>7</sup> *Bédat v. Switzerland* (application no. 56925/08), Grand Chamber judgment of 29 March 2016, §§ 68-69.

25. As regards the issue of “conduct in the courtroom”, the principle of fairness militates in favour of a free and even forceful exchange of arguments between the parties. Lawyers have the duty to “defend their clients’ interests zealously”, which means that they sometimes have to decide whether or not they should object to or complain about the conduct of the court. Concerning remarks made outside the courtroom, the Court recognised that the defence of a client may be pursued through media channels which allow the lawyer to inform the public about shortcomings that are likely to undermine pre-trial proceedings.
26. Whereas lawyers cannot justifiably be held responsible for the actions of the media, they are not, when making public statements, exempted from their duty of prudence in relation to the secrecy of a pending judicial investigation. Lawyers cannot, moreover, make remarks that are so serious that they overstep the permissible expression of comments without a sound factual basis, nor can they proffer insults or make remarks which could be regarded a gratuitous personal attack.<sup>8</sup>
27. Several member States stated that illicit influence on criminal proceedings, violation of order in a court session or violation of secrecy, insulting or defamation of court are punishable offences.
28. In *Croatia* specific rules applicable to persons involved in court proceedings are set in the Courts Act, in the State Attorneys Act and in the Legal Profession Act as well as in the respective codes of ethics. A new Code of Ethics and professional behavior of the judge has been in 2015 adopted in the *Republic of Moldova*, which also contains rules on communicating with mass media. In *Serbia* the Journalists Code of Ethics provides that journalists are obliged to protect privacy, identity and presumption of innocence.
29. *Norwegian* judges have established a media group that consists of judges who have undertaken to make themselves available to journalists. The objective is to contribute to openness and greater awareness of the courts amongst the general public. The members do not express the opinions of the Norwegian courts, individual courts or other judges, only their own personal opinions. The Judges Association has released a manual on regulations and good practices for the judges’ relationship to the media, called *The judges and the media*. The manual only gives recommendations and non-binding principles.
30. In *Spain* the Audio-visual Council, *Tribunal Superior de Justicia* and the Association of Journalists, all from Andalusia, published in 2013 “The right to the information and justice: guide for the informative treatment of judicial proceedings”, which summarizes all the existing case-law on the accessibility of judicial information to the media and collects codes and protocols in force both in Spain and within Europe regulating the relationship among professionals of the information and the judicial sphere.
31. In *Switzerland* journalists who want to keep the chronicle of the judicial activity need a special accreditation. Accredited journalists receive more detailed information than the general public and can be authorized to assist at hearings closed to public; in return, they must comply with specific duties.
32. In the *United Kingdom*, the institution of a Judicial Appointments and Conduct Ombudsman was created by the Constitutional Reform Act 2005. In 2016 the Judicial College published updated guidance on reporting restrictions in on-going criminal cases, setting out the exceptions to the general principle of open justice.

<sup>8</sup> *Morice v. France*, cited above, §§ 136-139.

*States' obligations*

33. Corollary to the above individual rights contained in the freedom of expression are the States' obligations. Indeed, genuine, effective exercise of the freedom of expression does not depend merely on the State's negative undertaking to refrain from any action that disproportionately interferes with the Convention rights, but may require also positive measures of protection, even in the sphere of relations between individuals.<sup>9</sup>

34. In *Spain* the Audio-visual Council of Andalusia takes different initiatives (complaints, reports, recommendations) to enforce positive and negative obligations set in the law regarding communication broadcasted through media (in the field of child protection, minors, discriminatory contents, gender-based violence, etc.)

35. To assess the State's compliance with both obligations, negative and positive, deriving from the Convention, the doctrine of the margin of appreciation is used.<sup>10</sup> In respect of the freedom of expression, the margin of appreciation granted to the States differs according to the context, in particular the historic, demographic and cultural context.<sup>11</sup> It also differs depending on the aims pursued.

*Access to information online and offline*

36. Technological innovations in information and communication technologies have created new opportunities for individuals to disseminate information to a mass audience and have had an important impact on the participation and contribution of citizens in decision-making processes. These innovations have also brought new challenges. All human rights that exist offline must also be protected online, in particular the right to freedom of opinion and expression and the right to privacy, which also includes the protection of personal data.<sup>12</sup> In this context, the Court recognized that "[i]n the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general".<sup>13</sup> Access to information in general, including public information and official documents, offline and also online should thus be available and affordable to everyone without discrimination.

37. Most of the member States have adopted laws on access to public information which allow individuals to request information held by public authorities. In *Latvia, Norway and Serbia*, the right to access information held by state and local public institutions is guaranteed by the Constitution. In *Serbia, Spain and Switzerland*, a special authority is competent to handle situations of public authorities' failure to provide information. In many member States public authorities are legally obliged to publish certain information or documents proactively, by means of a regular publication, as open data on specific website(s) or data portals. A few of them ratified the Council of Europe Convention on Access to Official Documents (CETS No. 205).

38. Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25

<sup>9</sup> *Palomo Sánchez and Others v. Spain* (applications nos. 28955/06, 28957/06, 28959/06 and 28964/06), Grand Chamber judgment of 12 September 2011, §§ 58-59.

<sup>10</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (applications nos. 9214/80, 9473/81 and 9474/81), judgment of 28 May 1985, § 67.

<sup>11</sup> *Soulas and Others v. France* (application no. 15948/03), judgment of 10 July 2008, § 38.

<sup>12</sup> Paragraph 6 of the EU Human Rights Guidelines on Freedom of Expression Online and Offline, and paragraph 2 of the UN Human Rights Council Resolution on the promotion, protection and enjoyment of human rights on the Internet (A/HRC/RES/32/13) of 1 July 2016.

<sup>13</sup> *Times Newspapers Ltd v. the United Kingdom (nos.1 and 2)* (applications nos.3002/03 and 23676/03), judgment of 10 March 2009, § 27.



November 2015 lays down measures concerning open internet access. In accordance with the obligations foreseen by this regulation, the competent regulatory authority in *Austria* published in 2017 its first net neutrality report on the state of openness of the Internet.

39. In *Estonia* e-governance website provides everyone with easy access to various public services and to certain data collected about her or him. Moreover, § 33 of the Public Information Act gives every person free access to public information through the Internet in public libraries, pursuant to the procedure provided for in the Public Libraries Act.
40. The *Conseil Constitutionnel* in *France* considered that the right to connect to the Internet comes within the exercise of the freedoms of communication and expression and, as such, enjoys constitutional protection attached to those freedoms (decision 2009-580 of 10 June 2009).
41. The new *Georgian* Constitution guarantees in its Article 17 § 4 freedom to access and use the internet (see also paragraph 16 above).
42. According to *Norwegian* law, administrative agencies must keep a record of case documents that have been received by or submitted by the agency. Einnsyn is a tool used by central government agencies to publish these records online. Public record data is stored in a searchable database, available at [www.einnsyn.no](http://www.einnsyn.no). The public can search this database to locate case documents relevant to their field of interest. Having located relevant case documents, users may submit requests to view these documents. The request is sent to the agency responsible for the case documents and public record entries. The agency then processes the request and replies to the user directly. The tool facilitates the Freedom of Information Act.
43. In *Turkey* a project designed and pioneered by the Ministry of Transport, Maritime Affairs and Communications aims at providing broadband Internet access to 2 million households. Another campaign is expected to increase broadband Internet access in low penetration districts.

## B. Specific actors and their relation to freedom of expression

### *Media*

44. Particular attention should be given to the role of the media and their special responsibility within the society to promote a climate of tolerance and intercultural respect, which is of vital importance for a culturally diverse society. Even though press is not explicitly mentioned in the text of Article 10, the case-law of the Court clearly grants the press a special status in the enjoyment of the freedom of expression and highlights its vital role as public watchdog<sup>14</sup>. The Court has developed extensive case-law in relation to freedom of the press, the purpose of which is to impart accurate and reliable information and ideas on matters of public interest. One of the basic conditions of press freedom is the protection of the journalistic sources.<sup>15</sup>

45. In many member States the independence of media and broadcasting is warranted on the constitutional level. Several member States adopted legislation providing that broadcasting shall include programmes for, and in the languages of, different minorities or groups and satisfy their media-related needs. In *Georgia*, the Law on Broadcasting enjoins the Georgian Public Broadcaster to reflect ethnic, cultural,

<sup>14</sup> *Lingens v. Austria* (application no. 9815/82), judgment of 8 July 1986, § 42.

<sup>15</sup> *Goodwin v. the United Kingdom* (application no. 17488/90), Grand Chamber judgment of 27 March 1996, § 39.

linguistic, religious, age and gender diversity of the society in programmes, and to broadcast a number of programmes in certain proportions prepared in the languages of minorities, about minority groups and prepared by minorities.

46. In several member States the media system is based on self-regulation, providing for a possibility to file complaints before a specific body or board. Public liability of media can be increased through Codes or charters of journalistic ethics, often promoted by voluntary unions of journalists (the Georgian Charter of Journalistic Ethics, the Press Council of Ireland, Latvian Union of Journalists, Latvian Association of Journalists, the Press Council in the Republic of Moldova, the Norwegian Press Association).
47. Legislation on broadcasting may forbid language or content inciting hate or discrimination. In several member States campaigns against racism, hate speech and hate crimes are run not only in the traditional media but also in the Internet and social media.
48. In *Belgium* the government of Flanders organised in 2016-2017 the competition « De Clichékillers », in which journalism students were challenge to report, in a nuanced ways and without falling into clichés, on poverty, gender, disability, origin or sexual identity (<http://declichekillers.be>). It also created an online database, to be used by journalists, of more than 1 000 experts from groups which are less visible in the media (women, immigrants, persons with disabilities, transgender persons, persons living in poverty).
49. In 2015 the *Norwegian* State broadcaster, NRK, introduced a five-year “diversity plan”, which aims to promote recruitment of employees with multicultural knowledge and skills. One goal is to advance the staff’s understanding of different cultures and minority groups, and thereby hel improve the reporting on minority issues.
50. In the *United Kingdom* publishers and independent press self-regulators have issued editorial codes which include guidelines on discrimination, making clear that publishers must avoid prejudicial or prerogative reference to, and must not incite hatred against any group on the basis of a characteristic that makes that group vulnerable to discrimination. Independent press regulators have undertaken their own initiatives to improve the quality of their work relating to groups vulnerable to discrimination. The Independent Press Standards Organisation (IPSO), which regulates 95% of national newspapers by circulation, regularly meets with representatives of different communities to talk about the standards of reporting of that community and how best to support journalists to report in a way which is consistent with the highest editorial standards.

51. The Court has further found that the function of creating forums for public debate is not limited to the press. That function may also be exercised by NGOs, the activities of which are an essential element of informed public debate ; in such a situation the NGO is exercising a role as a public watchdog of similar importance to that of the press.<sup>16</sup> Considering the general principles developed by the Court with respect to Article 10, in particular the strong protection of the freedom to receive and impart information on issues of general importance and the narrow margin of appreciation the States have in limiting political speech, activities of NGOs, NHRIs,<sup>17</sup> and individuals related to matters of public interest therefore warrant similar protection to that afforded to the press.<sup>18</sup>

<sup>16</sup> *Guseva v. Bulgaria* (application no. 6987/07), judgment of 17 February 2015, § 38 with further references.

<sup>17</sup> Report of the UN Special Rapporteur on Human rights Defenders of 13 January 2013, A/HRC/22/47 and OSCE Guidelines on the Protection of Human Rights Defenders 2014, p 25, § 7.

<sup>18</sup> *Youth Initiative for Human Rights v. Serbia* (application no. 48135/06), judgment of 25 June 2013, § 20.

52. Numerous National Human Rights Institutions closely cooperate with journalists, such cooperation including trainings, regular meetings, exchange of information, etc.

### *Internet intermediaries*

53. Even though, for the time being, the Court considered that the impact of traditional broadcast media was stronger than the influence of the Internet<sup>19</sup>, attention has to be paid to the role, and ensuing responsibilities, that Internet intermediaries play in the distribution of content online. Indeed, the Court considered that “because of the particular nature of the Internet, the “duties and responsibilities” that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher”.<sup>20</sup> It held, in particular, that the commercial operator of an Internet news portal may be held accountable for offensive comments posted on the portal by users, which constituted clearly unlawful speech; such conclusion could not be automatically applied to other types of Internet fora where third-party comments could be posted, for example, Internet discussion groups, bulletin boards or certain social media platforms. However, when examining the Internet portals’ liability for third-party comments which did not constitute clearly unlawful speech and did not amount to hate speech or incitement to violence<sup>21</sup>, the Court considered that such liability may have foreseeable negative consequences on the comment environment of an Internet portal. These consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet which could be particularly detrimental for a non-commercial website. The Court thus attaches importance to the fact whether a comment, although offensive, amounts to hate speech or incitement to violence, whether it is posted on a small blog run by a non-profit association or on a commercial website, and whether it was rapidly taken down.<sup>22</sup>

54. Several member States draw in their legislation a distinction between Internet “publishers” or providers of content services, which have to prevent clearly unlawful comments from being published (duty of pre-monitoring), and the Internet service providers transmitting and storing (hosting) third-party content, which enjoy limited liability since they are usually not responsible for the content as such but are obliged to remove or to disable access expeditiously after obtaining actual knowledge of illegal content.

55. The Code of Conduct on Countering Illegal Hate Speech Online was concluded by the European Commission, Facebook, YouTube, Twitter and Microsoft in May 2016, according to which the companies concerned have to establish a simple mechanism to report contents hosted at their webs and considered by users as hate speech, to examine them within 24 hours and to remove them in case those contents are indeed considered as hate speech. In *Germany* the Network Enforcement Act (NetzDG) explicitly refers to unlawful content (incitement to hatred, insult or defamation) which is not protected by freedom of expression.

56. In *Estonia*, the Police and Border Guard Board established in 2011 the “web-constables”, i.e. police officers tasked with responding to notifications and letters submitted by people via the Internet and with training children as adults on issues of Internet security.

57. In the *Republic of Moldova* several legislative acts and action plans have recently been adopted in order to promote safety of children and teenagers on the Internet, and to set

<sup>19</sup> *Animal Defenders International v. United Kingdom* (application no. 48876/08, Grand Chamber judgment of 22 April 2013, § 119.

<sup>20</sup> *Delfi v. Estonia* (application no. 64569/09), Grand Chamber judgment of 16 June 2015, § 113.

<sup>21</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (application no. 22947/13), judgment of 2 February 2016.

<sup>22</sup> *Pihl v. Sweden* (application no. 74742/14), decision on admissibility of 9 March 2017.

up a self-regulation service that filtrates the content likely to have negative impact on children. In the *Netherlands* the Ministry of Education, Culture and Science supports Mediawijzer.net, an expertise unit for media literacy that helps children, parents, caretakers and educators to use media safely and responsibly.

58. In 2017, the Association of *Norwegian* Editors published guidelines for managing user-generated content in comments sections and discussion fora online. The guide outlines applicable legal framework as well as ethical standards and practice from the Press Complaint's Commission (PFU) in this field, and offers editors recommendations and tips on issues such as registration, moderation of content, and the use of filtering and flagging systems. Article 4.17 of the Ethical Code of Practice for the Press states that "Should the editorial staff choose not to pre-edit digital chatting, this has to be announced in a clear manner for those accessing the pages. The editorial staff has a particular responsibility, instantly to remove inserts that are not in compliance with the Ethical Code".
59. In *Switzerland* some social networks give a special status to "trusted flaggers" (such as the Federal Police Office) and remove very rapidly contents flagged by the latter when they clearly infringe the conditions of use of the platform. The Federal Police Office has also established a black list of illegal websites dedicated to infantile pornography; their illegal content is being blocked on a voluntary basis, without any legal obligation, by the Swiss Internet access providers.

#### **i. Specific focus area: Freedom of expression and political discourse**

60. Protecting the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential in a democratic society. Articles 10 and 11 of the European Convention on Human Rights, concerning the freedoms of expression and of assembly and association are closely related, without which pluralist democratic political activity would be impossible. In particular Article 10 ECHR underlines that the exercise of freedom of expression carries with it special duties and responsibilities. For this reason certain limitative areas of restrictions on this right are permitted, when necessary in a democratic society for the protection of various objectives, including the rights and freedoms of others.<sup>23</sup>

61. In *Norway*, political expressions have been given a particularly strong protection in the constitutional article establishing the right to freedom of expression. According to art. 100 third paragraph, limitations on political expressions must be clearly defined and may only be imposed when particularly weighty considerations justify it in relation to the grounds for freedom of expression.

62. Opinion leaders, including political leaders, have a particular responsibility which is inherent to free speech in culturally diverse societies.<sup>24</sup> They should speak and act resolutely in such a way as to foster a climate of mutual understanding, respect and diversity, based on universally recognised human rights.<sup>25</sup>
63. The arrival of asylum seekers and migrants in large numbers in Europe since 2015 combined with reactions to (foiled) terrorist attacks in a number of member States has

<sup>23</sup> Council of Europe, *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers' Deputies, §21.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, §70. See also *Declaration of the Committee of Ministers on human rights in culturally diverse societies*, adopted by the Committee of Ministers on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies and *OSCE Ljubljana Guidelines on Integration of Diverse Societies*, Guideline 27.

contributed to the more open manifestation of racism, xenophobia and intolerance in political discourse.<sup>26</sup> In many instances, the entities concerned have been political parties, including those represented in the legislature, and other campaigning organisations.<sup>27</sup> On the other hand, members of minority groups perceive the prevailing social climate as condoning racism, xenophobia and intolerance which underlines the need for States to address the effects that incitement to violence or hatred have on the population groups it targets.<sup>28</sup>

64. Manifestations of racism, xenophobia and intolerance in political discourse may take a variety of forms and be of varying gravity. Accordingly, there needs to be a progressive range of measures in place so as to accommodate and address fully the complexity of each situation.

65. In several States political parties spreading, allowing or condoning in their programmes racist, anti-Semitic and xenophobic elements, are firmly framed, in order to draw a line between the requirement and protection accorded by both Article 10 ECHR and Article 11 ECHR.

66. Articles 10 and 11 ECHR are reflected in several dispositions of the Constitution of the *Republic of Croatia* which includes clear conditions of exercising these rights. In addition, to combat racism, hate speech are prohibited under national legislation, on the grounds that rights of others are a necessity in a democratic society. On that basis, the “Act on the Responsibility of Legal Persons for the Criminal Offences” 2003 prescribes criminal liability for political parties that use hate speech, which may consequently be subject to a fine. As to Article 11 ECHR, under the “Public Assembly Act” 1999, prohibitions of peaceful assembly and public protest can be ordered whether the goals of the assembly are focused on calling for and incitement to, among others, national, racial or religious hatred or any form of intolerance.

***Prohibition and dissolution of political parties and organisations in exceptional cases of racist, xenophobic or intolerant discourse***

67. In increasingly culturally diverse societies in Europe today, appropriate responses against organisations that promote hatred, intolerance and xenophobia will need to be taken. In the event of racist, xenophobic or intolerant discourse of exceptional gravity such measures should, as a last resort, lead to the dissolution of organisations that incite racial hatred.<sup>29</sup>

68. At the global level, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) obliges the States Parties, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights

<sup>26</sup> European Union Agency for Fundamental Rights (FRA), *Incitement in media content and political discourse in EU Member States*, Contribution to the second Annual Colloquium on Fundamental Rights, November 2016, available at <http://fra.europa.eu/en/publication/2016/incitement-media-content-and-political-discourse-member-states-european-union>

<sup>27</sup> ECRI, General Policy Recommendation 15 on combating Hate Speech, Explanatory Report, §158. See also ECRI Declaration on the use of racist, anti-Semitic and xenophobic elements in political discourse, adopted on 17 March 2000, available at [https://www.coe.int/t/dghl/monitoring/ecri/activities/14-Public\\_Presentation\\_Paris\\_2005/Presentation2005\\_Paris\\_Declaration\\_en.asp#TopOfPage](https://www.coe.int/t/dghl/monitoring/ecri/activities/14-Public_Presentation_Paris_2005/Presentation2005_Paris_Declaration_en.asp#TopOfPage)

<sup>28</sup> European Union Agency for Fundamental Rights (FRA), *Incitement in media content and political discourse in EU Member States*, Contribution to the second Annual Colloquium on Fundamental Rights, November 2016, Conclusions.

<sup>29</sup> Council of Europe, *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers’ Deputies, §38. See also *Association nouvelle des Boulogne Boys v. France* (dec.), no. 6468/09, 22 February 2011.

expressly set forth in article 5 of CERD, under Article 4(b) to declare illegal and prohibit organisations that promote or incite racial discrimination. The United Nations Committee on the Elimination of Racial discrimination has underlined the positive obligation for States to declare illegal and prohibit organisations that promote or incite racial discrimination.<sup>30</sup> In addition, in its concluding observations on periodic reports submitted by States Parties to the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee has called for specific legislation criminalising racist organisations.<sup>31</sup>

69. Similarly, ECRI has stressed that there should be provision for prohibiting or dissolving political parties and other organisations where the use of hate speech by them is of a more serious character, namely, where it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination.<sup>32</sup>
70. It is important that any measure to prohibit or dissolve political parties and organisations is applied in a manner consistent with the requirements of the right to freedom of association under Article 11 of the European Convention on Human Rights. In determining whether a necessity within the meaning of Article 11 (2) exists, the Contracting States have only a limited margin of appreciation.<sup>33</sup> This approach should be translated into an obligation on States to also adopt a strict approach to the use of such sanctions by substantiating the need for their application<sup>34</sup> and then only doing so as a measure of last resort.<sup>35</sup> Prohibition or dissolution of political parties may only be justified in the case of parties which advocate violence including specific demonstrations of it such as racism, xenophobia and intolerance, or is clearly involved in terrorist or other subversive activities.<sup>36</sup> Moreover, Article 17 of the European Convention on Human Rights allows a state to impose a restraint upon a programme a political party might pursue.<sup>37</sup>
71. Several States have provision to prohibit or dissolve political party organisations, notably the ones that support racial or national hatred, incite violence and are a threat to democracy. A number of States have bans on extremist parties.
72. The *Estonian* Civil Code Act foresees compulsory dissolution of a legal person, if the objective or activities of the legal person are contrary to law, public order or good morals (§ 40). Relevant activities punished by the Penal Code are for example “incitement of hatred” (§ 151) and “violation of equality” (§ 152).
73. The national legal framework of *Hungary* ensures the lawful operation of political parties under article 11 ECHR, and “mutatis mutandis” Article 10 ECHR, through the intervention, if needed, of the independent public prosecution and judiciary. This

<sup>30</sup> Committee on the Elimination of Racial Discrimination [2013], Recommendation No.35, Combating hate speech, CERD/C/GC/35

<sup>31</sup> ECRI, *General Policy Recommendation No. 15 on combating hate speech, Explanatory Report*, §166.

<sup>32</sup> Council of Europe, ECRI GPR 15, Recommendation 6, See also *General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination*, Part III, §§ 16-17.

<sup>33</sup> ECtHR, *United Communist Party of Turkey v. Turkey* [GC] (Application no. 19392/92, judgment of 30 January 1998), §46.

<sup>34</sup> ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* (Application no. 37083/03, judgement of 8 October 2009).

<sup>35</sup> European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Association* (2014), §248.

<sup>36</sup> European Commission for Democracy through Law (Venice Commission), *Guidelines on prohibition and dissolution of political parties and analogous measures*, adopted by the Venice Commission at its 41<sup>st</sup> plenary session (Venice, 10-11 December 1999), §3, Explanatory report, § 15, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2000\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)001-e)

<sup>37</sup> *Ibid.*, § 5

intervention might conclude to the dissolution of the organisation, if among others, it violated the right and freedom of others by using hate speech.

74. Article 13 of the *Polish* Constitution provides that political parties and other organisations whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, shall be prohibited.
75. According to Art. 6 of the *Croatian* Constitution political parties which, in their platforms or by violent action, intend to undermine the free democratic order or threaten the existence of the country shall be deemed unconstitutional.
76. Similarly, Article 5 of the *Serbian* Constitution prescribes that political parties shall be prohibited if its activities are aimed at forced overthrow of constitutional system, violation of guaranteed human or minority rights, inciting racial, national or religious hatred.
77. Under the law on “Associations and Foundations” 2004 of *Latvia*, a refusal to make record in the registry of associations and foundations might be held, in the case the aim of these entities amount to an infringement of any legislative acts binding upon the State. Since amendments of June 2007, the Latvian criminal law includes the prohibition of discrimination, with racial and ethnic identity as specified grounds. Moreover, a Court can terminate the operation of an association or a foundation whether the activity of the organisation or foundation is contrary to law.
78. In *Spain* a political party may be dissolved for being a criminal association under the code of criminal law, particularly when it fosters, promotes or incites hatred, hostility, discrimination or violence against a group, or part thereof, or against a certain person for belonging to such a group, for reasons of racism, anti-Semitism or for other reasons related to ideology, religion or beliefs, family circumstances, the fact that the members belong to an ethnicity, race or nation, national origin, gender, sexual orientation or identity, or due to gender, illness or disability.
79. In *Germany*, pursuant to Art. 21 (2) of the Basic Law<sup>38</sup> a political party can be declared unconstitutional, if this party seeks to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic. However, the instrument of prohibiting political parties is used very reluctantly because of the important role parties play in the political process, especially with regard to freedom of expression and political discourse
80. In *France*, an association whose purpose is lawful but tends to spread or provoke discrimination, hatred or racist violence or racist ideas may be subject to administrative dissolution in accordance with Article L. 212-1 of the Internal Security Code. However, in order to strike a balance between freedom of association and freedom of expression, on the one hand, and the public order and rights of others on the other hand; the dissolution procedure is used exceptionally, where it is demonstrated that these associations use hate speech.

<sup>38</sup> Available at [https://www.gesetze-im-internet.de/gg/art\\_21.html](https://www.gesetze-im-internet.de/gg/art_21.html) – latest version only available in German.



81. The prohibition or dissolution of political parties being a particularly far-reaching measure it should be used with utmost restraint.<sup>39</sup> Before asking the competent judicial body to prohibit or dissolve a party, governments or other State organs should assess, having regard to the situation of the country concerned, whether the party really represents a danger to the free and democratic political order or to the rights of individuals and whether other, less radical measures could prevent the said danger.<sup>40</sup>
82. Moreover, legal measures directed to the prohibition or dissolution of a political party or other organisation should only be ordered by a court and such an order should be subject to prompt appeal.<sup>41</sup>

83. In some member States the exceptional circumstances have been of such gravity that it has justified the prohibition or the dissolution of a political party or an organisation.
84. In *Latvia*, the Supreme Court adopted a judgment on 30 April 2013 whereby it refused the registration of a movement supporting communism.<sup>42</sup> The court stated that if it were registered, such activity of a non-governmental organisation would be directly related to expression of the ideology of communism and to uniting in an association of persons who support the ideology of communism.
85. In *Germany*, the Federal Constitutional Court has twice prohibited a political party: In 1952, the Socialist Reich Party (SRP) was banned, and in 1956, the Communist Party of Germany (KPD). However in a judgement of 17 January 2017 the Federal Constitutional Court rejected to declare the unconstitutionality of the far-right National Democratic Party (NPD). Although the Court concluded that the NPD does indeed pursue anti-constitutional aims, it appeared entirely impossible in the view of the Court that the NPD would succeed in achieving these aims, especially due to its structural deficiencies and lack of political relevance.<sup>43</sup>
86. In *Serbia*, the Constitutional Court issued a decision on 12 June 2012 by which it banned the Association “Otočastveni pokret Obraz” having concluded that the said association’s activities were oriented in the direction of violation of guaranteed human and minority rights and inciting of racial, national and religious hatred. In the reasons of decision, the Constitutional Court exposed very detailed analysis of both the subject association and the Serbian society: In the reasons of decision, the Constitutional Court exposed very detailed analysis of both the subject association and the Serbian society: “the country has relatively recently gone through a very difficult historical period burdened by wars incited by racial and religious contradistinction of nations in the region and that the democratic society which is still developing is still burdened by numerous prejudice. It was of utmost social importance to protect the most important social values by all means and to prevent all occurrences that could, by generation of surroundings of insecurity and fear for minority members, annul efforts in the direction of the democratic tradition of the people.”<sup>44</sup>

<sup>39</sup> European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Association* (2014), §249.

<sup>40</sup> Council of Europe, *Guidelines on prohibition and dissolution of political parties and analogous measures*, adopted by the Venice Commission at its 41<sup>st</sup> plenary session (Venice, 10-11 December 1999), §5.

<sup>41</sup> *Ibid.*, §§6-7.

<sup>42</sup> Judgement of the Department of Administrative Cases of the Senate of the Supreme Court of the Republic of Latvia of 30 April 2013 in the case No.A42945009, SKA-172/2013, available in Latvian at [www.at.gov.lv](http://www.at.gov.lv).

<sup>43</sup> An unofficial English translation of this judgement can be found at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117\\_2bvb000113en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html).

<sup>44</sup>, Constitutional Court’s decision no. VIIIU - 249/2009 from 12 June 2012



87. In the *Czech Republic*, the political party "Dělnická strana" was dissolved by the Supreme Administrative Court,<sup>45</sup> which concluded that the political programme of the party was xenophobic, homophobic and included racist features.<sup>46</sup> In its extensive reasoning, the Supreme Court weighed all the incumbent interests at stake, especially the freedom of assembly and freedom of expression of the party and its representatives. On 27 May 2010 the Constitutional Court dismissed the constitutional appeal upholding the conclusions of the Supreme Administrative Court.
88. In *France*, associations or *de facto* groups such as "Radical Unity", "Elsass Korps", "Tribu Ka" and "Jeunesse Kémi Séba" were ordered dissolved in 2002, 2005 and 2009 respectively due to their call for discrimination and their racist remarks and actions. In 2013, following the aggression of a student by the members of a far-right association, five procedures for dissolutions of *de facto* groups and associations were implemented at the request of the Prime Minister.

***Withdrawal of financial and other forms of support by public bodies to political parties and other organisations that use hate speech***

89. In the context of cultural diversity in European societies, there should be measures in place to suppress public financing of organisations that promote hatred, intolerance and xenophobia. It is of particular importance to ensure that such provisions are effectively enforced.<sup>47</sup> ECRI recommends that there should be a withdrawal of financial and other forms of support by public bodies where any form of hate speech is used by them or, in the case of their members, such use is not sanctioned.<sup>48</sup>
90. The withdrawal of support by public bodies should cover not only grants, loans and other forms of financing for the activities of the political parties and other organisations concerned but also the making available to them of facilities or premises, the possibility to use staff and any other kind of practical assistance. These measures should involve both to political parties and organisations that have a formal legal status as well as those having a more informal or *de facto* character.<sup>49</sup>
91. However, the said measures must always be applied in a manner consistent with the requirements of the right to freedom of association under Article 11 of the European Convention on Human Rights. The withdrawal of various forms of support for political parties and organisations using hate speech or failing to sanction their members for having done so is, in principle a restriction compatible with the right to freedom of association. However, such a withdrawal is unlikely to be regarded as a proportionate measure unless there is a clear institutional commitment to the use of hate speech. This will undoubtedly exist where it figures in policy documents and pronouncements and by leading personalities in the political party or organisation concerned but also where it is used repeatedly by individual members without any objection being made to

<sup>45</sup> Judgment ref. no. Pst 1/2009 – 349 of 17 February 2010.

<sup>46</sup> The political party programme aimed at limiting human rights by calling for registering the ethnicity of the whole population in ID cards, preferential access to health care and social security for ethnic Czechs and for making homosexuality illegal.

<sup>47</sup> Council of Europe, *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers' Deputies, §38; Moreover Article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) obliges States Parties, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of CERD, to criminalize hate speech, hate crimes and the financing of racist activities.

<sup>48</sup> ECRI GPR No. 15, Recommendation 9. See also *General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination*, Part III, §§ 16-17.

<sup>49</sup> Council of Europe, ECRI GPR 15, Explanatory report, §157.

this. On the other hand, it will be less evident where such use entailed no more than an isolated incident of remarks by an individual member.<sup>50</sup>

92. The withdrawal of any form of support to a political party or other organisation should always be open to challenge in an independent and impartial court.<sup>51</sup>

93. In several States, the financing of political parties is regulated in national legislation. In some member States there is provision of discontinuing public funding to political parties found to be hostile towards the rights and freedoms guaranteed under the European Convention on Human Rights.
94. In *Greece*, in the event of prosecution and pre-trial detention of either the leader or a number of a party's members involved in a criminal organisation or a terrorist activity (articles 187 and 187A of the Penal Code), State funding is suspended, following a decision by Parliament (article 23, Law 4203/2013).
95. In *Germany*, in 2017, Article 20 (3) of the German Basic Law was amended so as to cancel such public funding for political parties which have not been prohibited by the Federal Constitutional Court but are nonetheless hostile towards democracy. This applies irrespective of whether it appears possible for the party to achieve its goal of abolishing the existing free democratic basic order.<sup>52</sup> The exclusion from public funding is limited to a period of six years but can be extended.
96. In the *Netherlands*, if a political party is guilty of discrimination the party loses the right to subsidies in accordance with the law on the financing of political parties (*Wet financiering politieke partijen*). This is only possible if a political party is convicted as a legal entity and not on the basis of the behaviour of persons from the party. In 2005, for example, the subsidies to the "Reformed Political Party" (*Staatkundig Gereformeerde Partij – SGP*) were discontinued, following the refusal to include women as full members in the party. That was reversed in 2007 when the party decided to admit women.

### ***Self-regulation as a means of combating the use of hate speech***

97. Self-regulation by public institutions (including elected bodies, political parties, etc.) is in many instances the most effective means of preventing and condemning the use of hate speech.<sup>53</sup> Such institutions are often best-placed to identify certain uses of hate speech and to prevent their continuation. The nature of these institutions can vary significantly which may have a bearing on the exact way how their regulations are set up and function. Thus there is not a single model of self-regulation to tackle hate speech.<sup>54</sup>
98. Certain features are however useful to include in all self-regulatory schemes such as codes of conduct (or ethics) and similar sets of standards – including rules of

<sup>50</sup> *Ibid.*, §168.

<sup>51</sup> Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, §10.

<sup>52</sup> The new Article 20 (3) of the Basic Law available is at [https://www.gesetze-im-internet.de/gg/art\\_21.html](https://www.gesetze-im-internet.de/gg/art_21.html) (however not yet in English). The amended version has its origin in the judgement of the Federal Constitutional Court of 17 January 2017 regarding the far right-wing National Democratic Party (NPD) (see above paragraph ...). While the Court rejected the application to ban the NPD due to the fact that it did not consider the NPD to be a genuine threat to the democratic basic order, the Court indicated that there were less restrictive means than a prohibition to react to parties which are hostile towards democracy. As a consequence of this, the German constitutional legislator amended the constitution shortly after the judgement was handed down.

<sup>53</sup> ECRI GPR 15, preamble.

<sup>54</sup> ECRI GPR 15, explanatory report §116.

procedure - accompanied by certain sanctions for non-compliance with their provisions.<sup>55</sup> In addition, there are a number of international or regional codes or charters that are applicable to bodies, institutions and organisations operating within member States such as the Charter of European Political Parties for a non-racist society<sup>56</sup>.

99. Moreover, the existence of such codes is particularly relevant where the position of the speaker may entail immunity, such as in the case of judges and parliamentarians, since it may preclude any other forms of action being taken against the use of hate speech by the person concerned.<sup>57</sup>
100. The use of codes to tackle hate speech is likely to be more effective if they contain an explicit reference to hate speech e.g. such as defined in ECRI General Policy Recommendation No. 15. This will ensure that they cover all forms of hate speech including negative stereotyping and misleading information and not just those which might attract criminal sanctions.<sup>58</sup>
101. Moreover, the codes need not only to be disseminated to and drawn to the attention of those to whom they apply but should also be made publicly available so that anyone with an interest in ensuring the observance of their requirements is in a position to act accordingly.<sup>59</sup>

102. The *Czech* Ministry of Justice has joined the Hate Free Zone Network.
103. In *Estonia*, the Network of Estonian Nonprofit Organisations 'Valimiste valurid' (Election Guardians), with representatives from several NGOs and different media, policy and other experts, keeps an eye on whether politicians' campaigns (actions, messages etc.) are in line with the 'Hea valimistava' (good practice document for elections). The text consists of principles for politicians to follow, including not spreading hate speech and other topics related to moral and ethical questions. The experts are usually rather active and bring out any shortcomings publicly.
104. In *Greece* the Code of Ethics for Members of the Greek Parliaments (Articles 2 and 8 par.1) provides for the prevention of hate speech against persons on the grounds of their racial or ethnic origin, religious or political beliefs, sex, age, disability or sexual orientation (Official Gazette, A67/18.4.2016). Furthermore, Presidential Decree 77/2003 ratified the Code of Conduct on News and Other Journalistic and Political Broadcasts, as it was drafted by the National Council for Radio and Television, which is an independent authority, as specified by law (article 15 par.2 of the Constitution).
105. In *Hungary*, Act XXXVI "Maintaining the order of the discussion, the disciplinary power" 2012 on the National Assembly deals with the limits of freedom of expression. According to the dispositions of the act, the chair of the sitting shall reprimand a

<sup>55</sup> In its concluding observations on periodic reports submitted by States Parties to the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee has also expressed the need to impose on all actors and political forces rules of conduct and behaviour that are compatible with human rights, democracy and the rule of law.

<sup>56</sup> The Charter of European Political Parties for a Non-Racist Society was drawn up under the auspices of the European Union Consultative Commission on Racism and Xenophobia opened for signature on 28 February in Utrecht 1998. Taking inspiration from the United Nations Convention on the Elimination of All Forms of Racial Discrimination and referring to the European Convention on Human Rights and the European Social Charter, it rejects all forms of racist violence, incitement to racial hatred and harassment and any form of racial discrimination.

<sup>57</sup> ECRI GPR 15, Recommendation 6.a, Explanatory report §§118-119.

<sup>58</sup> ECRI GPR 15, Explanatory report §§119-120.

<sup>59</sup> *Ibid.*

speaker who in the course of his or her speech uses a term ostentatiously offending or a term offending the reputation of any person or group. In a situation in which the speaker uses such term after being warned, the chair of the sitting shall withdraw the right to speak from him. In addition, measures to exclude the Member concerned from the remaining part of the sitting day may be taken and the remuneration payable to him or her may be decreased. In case of exclusion, the Member shall not have the floor again on the same sitting day and shall not be entitled to remuneration for the day of exclusion. This way, the rules adopted by the National Assembly on its own functioning regulate the order of discussion while creating a balance between the fact that the political discourse in the National Assembly is an indispensable precondition of the democratic operation and that all Members of the National Assembly bear responsibility for serving the Hungarian nation as well as the rights and dignity of individuals and groups of the society.

106. The Parliament of the Republic of *Latvia* has a standing Mandate, Ethics and Submissions Committee tasked with the supervision of the observance of the Code of Ethics for Members of the Parliament<sup>60</sup> which is an integral part of the Parliament's Rules of Procedure. The decisions of the Committee are publicly available.<sup>61</sup> The Code states that “a Member of Parliament avoids using words, gestures and other actions that can be insulting and does not use offensive or otherwise inappropriate statements that may dishonour the [Parliament]. A Member of Parliament bases his/her decisions on facts and their fair interpretation, as well as on logical argumentation”. The Code further states that “a Member of Parliament does not use statements and does not support actions that may be regarded as incitement to illegal activity. A Member of Parliament observes the principles of human rights and does not appeal to race, gender, skin colour, nationality, language, religious beliefs, social origin or state of health to justify his/her argumentation.”
107. Although the adoption of codes in itself reflects a commitment to the values embodied in them, their effective implementation is often best achieved through a combination of monitoring and complaints mechanisms.<sup>62</sup>
108. The effective implementation of codes is much dependent upon the provision of appropriate training for those with responsibilities in this regard, as well as the availability of sufficient funding for the operation of the various monitoring and complaints mechanisms involved.<sup>63</sup>
109. In case internal complaints mechanisms are not sufficient enough to deal effectively with of the use of hate speech, including the provision of appropriate satisfaction for those targeted by it, it should be possible to use other forms of redress under the law e.g. criminal sanctions.<sup>64</sup>
110. The existence of codes of conduct in public institutions have in some cases led to action being taken against the use of hate speech For example, in 2016 a member of a parliamentary party in *Estonia* was evicted from the party for giving speeches that contained racist elements. The party in question issued a public statement explaining that racist statements are against the values the party supports and that the party does not tolerate racism in any forms.

<sup>60</sup> <http://www.saeima.lv/en/legislation/rules-of-procedure/8>

<sup>61</sup> <http://mandati.saeima.lv/lemuma-projekti/par-saeimas-deputtu-tikas-kodeksa-prkpumiem>

<sup>62</sup> ECRI GPR 15, Recommendation 6.c, Explanatory report §§122-123.

<sup>63</sup> ECRI GPR 15, Explanatory report §§ 126-127.

<sup>64</sup> ECRI GPR 15, Explanatory report §129.

### **Higher tolerance of political figures towards criticism**

111. Freedom of expression is particularly important for political parties and their active members. Statements which are part of a public or political debate leave hardly any room for restrictions on freedom of expression. Thus politicians and governments may be subject to greater criticism and insult than ordinary private individuals.<sup>65</sup> Consequently, the limits of acceptable or permissible criticism are accordingly wider as regards a politician as such than as regards a private individual.<sup>66</sup>
112. Indeed, unlike private individuals, politicians bear great responsibility for leadership and representation of their constituents and their country. They knowingly lay themselves open to close scrutiny not only of legislative and judicial authorities but also of the press and public opinion. Politicians must consequently display a greater degree of tolerance towards criticism notably in a situation in which they themselves make public statement that are susceptible of criticism, otherwise public debate may be stifled altogether.<sup>67</sup> Moreover, all political figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.<sup>68</sup>
113. A distinction shall, however, be established between (falsification of) facts and value judgments. The formers can be demonstrated, whereas the truth of value judgments *i.e.* somebody's personal opinion, is not susceptible of proof.

114. The Constitutional Court of *Hungary* has established an approach concerning criticism against political figures in line with international standards. The Court firstly examined the relationship between the freedom of speech and the freedom of the press with the protection of the personality rights of public figures in criminal law context.<sup>69</sup> Following a decision of 1994, the Constitutional Court established the legal standard related to criticism of political figures and freedom of expression stating that the level of criticism political figures must bear is higher than that of other individuals.<sup>70</sup> This applies to both the falsification of facts and value judgements. However, the human dignity of others has been interpreted in the Court's practice as a clear limitation over the freedom of speech, as refer Section 2:44 of Act V of 2013 on the Civil Code.
115. In *Austria* when examining claims for compensation in respect of alleged insults relating to politicians under Sec. 6 of the Media Act (see paragraph.. below), Austrian civil courts take into account, inter alia, whether and in how far the statement at issue contributed to a debate of public concern, and the position and conduct of the politician concerned.<sup>71</sup>

<sup>65</sup> See e.g. ECtHR decisions *Lingens v. Austria*, Judgment of 8 July 1986, Series A no. 103; *Castells v. Spain*, Judgment of 23 April 1992, Series A no. 236; *Oberschlick v. Austria*, Judgment of 01 July 1997, Series A no. 103; ECtHR, *Vona v. Hungary*, no. 35943/10, 9 July 2013.

<sup>66</sup> Council of Europe [2007], Freedom of expression in Europe, Case-Law concerning Article 10 of the European Convention on Human Rights, Human Rights files, No.18

<sup>67</sup> *Ibid.*

<sup>68</sup> Several judgment of the ECtHR are of relevance: *Association nouvelle des Boulogne Boys v. France* (dec.), no. 6468/09, 22 February 2011; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98, 13 February 2003 at §§101 and 111-115; *Kalifatstaat v. Germany* (dec.), no. 13828/04, 11 December 2006; *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998, *The United Macedonian Organisation Ilinden and Others v. Bulgaria*, no. 59491/00, 19 January 2006, *Tourkiki Enosi Xanthis and Others v. Greece*, no. 26698/05, 27 March 2008; *Association of Citizens Radko & Paunkovski v. the former Yugoslav Republic of Macedonia*, no. 74651/01, 15 January 2009; *Socialist Party and Others v Turkey* [GC], no. 21237/93, 25 May 1998, conclusion

<sup>69</sup> Decision 36/1994. (VI. 24.) AB.

<sup>70</sup> Decision 7/2014. (III. 7.) AB available at [http://hunconcourt.hu/uploads/sites/3/2017/10/en\\_0007\\_2014.pdf](http://hunconcourt.hu/uploads/sites/3/2017/10/en_0007_2014.pdf)

<sup>71</sup> See, for example, the recent ECtHR decision of 2 May 2017 in the case of *Haupt v. Austria*. no. 55537/10.

116. The Constitutional Court of *Poland*, in its judgment of 21 September 2015,<sup>72</sup> held that the rights provided for in Article 54, para. 1 of the Constitution consist in the right to political debate constituting a material element of the democratic legal system. The free public debate in a democratic State is one of the most important guarantees of freedom and civil liberties and the establishment of the guarantees for the exercise of freedom of expression in a debate “is necessary due to both the personal and political aspects of the individual”. However, the establishment of conditions for free exchange of views does not include, in principle, clearly insulting statements. The Court also stressed that public debate is characterised by a high tension of emotions and often presents subjective views and beliefs of the speakers. This relates to the use of concepts and deliberately exaggerated, extreme terms, but there is no free democratic debate in a situation where the level of emotions and “emotive” (*soczystość*) of the used language would be an imposed standard, formally defined and bureaucratised by public authorities.
117. In *Serbia*, according to Article 8 of the “Law on Public Information and Media” 2014, the elected, appointed person shall be obliged to be subjected to the expression of critical opinion that pertain to the results of their performance namely, the policy they implement, and the opinions that are in relation to performing their function regardless of whether they feel personally affected by the expression of these opinions. On that basis, a decision of 2016 of the Supreme Court of Cassation indicated that public figures in practice are expected to be more tolerant to public criticism. Nonetheless, the government also encloses a 2017 judgement of the Supreme Court of Cassation showing that public figures are not expected to endure insults in any case, notably when the statement is aimed to harm the plaintiff’s personality and that he or she suffered as a consequence.<sup>73</sup>
118. In 2016, on the occasion of the presidential elections in the *Republic of Moldova*, the Central Electoral Commission adopted a regulation which expressly forbade attempts on a person’s safety and goods, incitement to hatred or discrimination, incitement to war, interethnic hatred or territorial separatism, harming the person’s dignity or reputation, public offense, verbal, written or non-verbal expressions that do not comply with the general acceptable behaviour norms in political debates.
119. In the *Czech Republic*, the Constitutional Court concluded in its decision<sup>74</sup> concerning anti-Roma statements posted on Facebook that a deputy of the national Parliament may not invoke his or her parliamentary immunity with regard to posts on social media despite these being written at parliamentary premises because such statements are not part of the parliamentary debate and are directed towards the public at large.
120. However political figures are not expected to tolerate discrimination based on gender, race, etc. which is prohibited by Article 14 ECHR. Indeed, the right to freedom of expression does not include racist or hate speech, which have no place in a democratic society where everyone, irrespective of their sex, religion or ethnic or social origin has the right to take part in democratic life.<sup>75</sup>

<sup>72</sup> Case no. K 28/13.

<sup>73</sup> Judgment of the Supreme Court of Cassation Rev 605/2017 of 6 April 2017.

<sup>74</sup> Ref. no. I. ÚS 3018/14 of 16 June 2015. The English translation of the Constitutional Court’s decision is available at [https://www.usoud.cz/fileadmin/user\\_upload/ustavni\\_soud\\_www/Decisions/pdf/1-3018-14.pdf](https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/1-3018-14.pdf).

<sup>75</sup> Statement by the previous Council of Europe Commissioner for Human Rights, Thomas Hammarberg (Sweden) on 14 November 2013, *Commissioner’s reaction to racist attacks on French Minister of Justice Taubira*



121. In October 2014, the *Estonian* Minister of Finance made insulting comments about the Minister of Education on account of his ethnic origin. The comments were condemned and criticised at various levels in the Estonian institutions, including by the President of Estonia. As a result, the Minister of Finance resigned.
122. In the *Netherlands*, in a criminal case from 2017 against politician Geert Wilders about his remark regarding “fewer Moroccans” expressed on 19 March 2014, the Court found him guilty of group insult and incitement to discrimination. Moreover, in 2018 in the criminal case against coloured and female politician Sylvana Simons the court found 21 persons guilty of group insult and incitement to discrimination.

## II. SPECIFIC FOCUS AREA: “FAKE NEWS” (DISINFORMATION)

123. The recent growth in ‘fake news’ (disinformation) creates new global challenges in the field of freedom of expression and the freedom to receive and impart information. There is no agreement yet on the definition of the phenomenon<sup>76</sup> and not even on the use of the term ‘fake news’<sup>77</sup>. Some forms of ‘fake news’ (disinformation) may harm individual reputations and privacy, or incite to violence, discrimination or hostility against identifiable groups in society.<sup>78</sup> There is ongoing discussion on how the phenomenon is influencing democratic political processes and values. Concern has in particular been expressed regarding the long-term implications of disinformation campaigns designed specifically to sow mistrust and confusion and to sharpen existing sociocultural divisions in society using nationalistic, ethnic, racial and religious tensions.<sup>79</sup>
124. Although false information, rumours and propaganda have always existed and have always been particularly prevalent in politically charged times, such as before elections<sup>80</sup> such information can today be rapidly produced and disseminated on the internet, in

<sup>76</sup> Wardle, C. & Derakhshan, H. (2017) *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, report to the Council of Europe: ‘Information disorder’ includes the following three different types of content: ‘misinformation’ (false, but with no intent to harm); ‘disinformation’ (false, imposter or manipulated content designed to harm); ‘mal-information’ (not necessarily false, but leaks, harassment, hate speech), <https://shorensteincenter.org/information-disorder-framework-for-research-and-policy-making/>; Final report from the EU Commission High Level Expert Group on Fake News, *A Multi-Dimensional Approach to Disinformation*, released on 13 March 2018: “Disinformation” covers all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit. It does not cover issues arising from the creation and dissemination online of illegal content (notably defamation, hate speech, incitement to violence), which are subject to regulatory remedies under EU or national laws. Nor does it cover other forms of deliberate but not misleading distortions of facts such as a satire and parody.

<sup>77</sup> The EU Commission has moved away from using the term ‘fake news’ as it is inadequate in explaining the complexity of the situation, and leads to confusion in the way researchers discuss the issue, it is reported on in the media, and discussed by policy-makers, Final report from the EU Commission High Level Expert Group on Fake News, *A Multi-Dimensional Approach to Disinformation*, released on 13 March 2018, <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>; The term ‘fake news’ opens up to misuse by politicians around the world as a weapon against the fourth estate and an excuse to censor free speech, *How did the news go ‘fake’? When the media went social*, Claire Wardle and Hossein Derakhshan, *The Guardian*, 10 Nov. 2017 <https://www.theguardian.com/commentisfree/2017/nov/10/fake-news-social-media-current-affairs-approval>

<sup>78</sup> The UN Special Rapporteur on Freedom of Expression and Opinion, the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe (OSCE), the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS) and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples’ Rights (ACHPR), *Joint Declaration on the freedom of expression and “Fake news”, Disinformation and Propaganda*, 3 March 2017, preamble <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E>

<sup>79</sup> Wardle, C. & Derakhshan, H, Report to the Council of Europe (2017) *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, p. 4 <https://shorensteincenter.org/information-disorder-framework-for-research-and-policy-making/>

<sup>80</sup> During the second half of 2016, in particular surrounding the United Kingdom’s referendum on European Union membership and the presidential elections in the United States and the decision in Kenya to nullify the national

particular via social media platforms, often without prior verification of accuracy or correctness and without editorial control.<sup>81</sup>

### *Multi-dimensional approach*

125. Given the complexity of the problem it requires a multi-dimensional approach to tackle “fake news” (disinformation) which includes all parties involved with a view to identifying the roles and responsibilities of relevant stakeholders, such as internet intermediaries,<sup>82</sup> citizens, media outlets, civil society and the academia as well as States and international organisations.<sup>83</sup> This will ensure that all stakeholders collaborate in a manner that protects and promotes freedom of expression, media freedom, and media pluralism. All stakeholders should be supported in developing participatory and transparent initiatives for creating a better understanding of the impact of disinformation and propaganda on democracy, freedom of expression, journalism and civic space, as well as appropriate responses to these phenomena.<sup>84</sup> Regular consultation with all relevant stakeholders will ensure that an appropriate balance is struck between the public interest, the interest of the internet users and affected parties and the interest of the intermediaries.<sup>85</sup>

### *Fact-checking and trust-enhancing initiatives*

126. Both traditional media and social media have reacted to the concerns expressed about the distribution of false information. Several media organisations have strengthened their fact-checking capabilities<sup>86</sup> and provided advice on how to debunk “fake news.”<sup>87</sup> Some social media have stepped up their engagement in designing and deploying tools that enable users to flag possible false stories which are then examined for their accuracy by third-party fact-checking organisations.<sup>88</sup> The social media have also

election results, public and political concern about mass dissemination of deliberately misleading and false information online has grown.

<sup>81</sup> Report of the Secretary General Thorbjørn Jagland: *Populism – How strong are Europe’s check and balances?*, presented at the 127<sup>th</sup> Session of the Committee of Ministers, Nicosia, 19 May 2017, p. 37

<sup>82</sup> See Council of Europe, *Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries* which provides a human rights and rule of law framework to the relationship between state authorities and intermediaries.

[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680790e13](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13)

<sup>83</sup> The UN Special Rapporteur on Freedom of Expression and Opinion, the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe (OSCE), the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS) and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples’ Rights (ACHPR), *Joint Declaration on the freedom of expression and “Fake news”, Disinformation and Propaganda*, 3 March 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E>; Final report from the EU Commission High Level Expert Group on Fake News, *A Multi-Dimensional Approach to Disinformation*, released on 13 March 2018 <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>

<sup>84</sup> *Ibid.*, §6.a.

<sup>85</sup> See Council of Europe, *Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries*, Appendix 1.1.4

[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680790e13](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13)

<sup>86</sup> In 2016, the International Fact-Checking Network (IFCN) which is a unit of the Poynter Institute, launched a code of principles for journalists to check facts, <https://www.poynter.org/channels/fact-checking>; See also the European Fact-checking and Debunking Initiatives in 20 European countries, Council of Europe report, DGI(2017)09, *Information disorder : Toward an interdisciplinary framework for research and policy making*, Appendix: *European Fact-checking and Debunking Initiatives*, p.87.

<sup>87</sup> Poynter Institute, *Tips on debunking fake news stories*, <https://www.poynter.org/news/6-tips-debunk-fake-news-stories-yourself>

<sup>88</sup> However such initiatives are at present only taken in a limited number of European countries, , Final report entitled “*A Multi-Dimensional Approach to Disinformation*” from the EU Commission High Level Expert Group on Fake News, released on 13 March 2018, p. 14 <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>; See also 2016 Reuters Institute study on European fact-checking



started using “trust indicators” to provide users with more context concerning the reliability of the publications and journalists behind so that the users are better equipped to assess whether news derive from a credible source.<sup>89</sup>

127. Individual news media, international organisations such as the International Federation of Journalists, as well as national bodies have issued journalism guidelines. Guidelines include deontological codes, ethics and standards to guarantee quality in the methods in which news is produced.<sup>90</sup>

128. In *Norway*, “Faktisk.no AS” is a non-profit organisation and independent editorial organisation for fact checking of the public debate. “Faktisk.no” is part of the International Fact-Checking Network (IFCN) and a verified signatory of the “Fact checkers code of principles”. Faktisk.no is owned by the media companies VG, Dagbladet, NRK and TV 2.

129. In *Estonia* during the local government elections, in September/October 2017, the NGO “Estonian Debating Society” in collaboration with online-news service “Delfi” and the daily newspaper “Eesti Päevaleht” conducted a fact-checking initiative “Faktikontroll” (Fact Control), where the members of the NGO controlled several statements made by politicians during the elections period. The aim of the project was to fight against wrong claims and fake ‘facts’. Articles publishing the results of this initiative were highly popular among readers.

130. In the *Czech Republic*, there are a number of non-governmental initiatives focusing on fact-checking such as [www.demagog.cz](http://www.demagog.cz), [www.factczech.cz](http://www.factczech.cz), [www.manipulatori.cz](http://www.manipulatori.cz) and [www.hatefree.cz](http://www.hatefree.cz).

131. In the *Netherlands* a cooperation agreement has been established between Facebook, NU.nl (a news website) and Leiden University. Editors from both NU.nl and Leiden University have access to a special Facebook-dashboard in which articles can be labeled as ‘fake news’ by Facebook-users. Whenever these articles appear to be factual incorrect, the articles will be flagged.

132. The UK government has announced it will undertake a review of press sustainability to encourage and protect high quality journalism which, among other things, will investigate whether advertising revenues are being unfairly diverted away from content producers and if the digital advertising market has encouraged the growth of ‘click-bait’. The review will report its findings and make recommendations on what industry and Government action might be taken to ensure a financially sustainable future for high quality journalism.

133. To counteract “fake news” (disinformation) *Spain* has encouraged the development of data journalism through, for example:

- the “Civio Foundation” which works on achieving free access to information on public policies based on evidence through journalism and innovation,<sup>91</sup>
- the programme “Medialab Prado” which since 2011 has worked on promoting data journalism.<sup>92</sup> In cooperation with the Madrid City Council it has organised two

<sup>89</sup> In November 2017, Facebook, Twitter and Google announced their compromise to use “trust indicators” to boost transparency and credibility of information, <http://money.cnn.com/2017/11/16/technology/tech-trust-indicators/index.html>

<sup>90</sup> Final report from the EU Commission High Level Expert Group on Fake News, *A Multi-Dimensional Approach to Disinformation*, released on 13 March 2018, p. 16 <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>

<sup>91</sup> <https://civio.es/nosotros/>

competitions on journalism data,<sup>93</sup>

- the “Datadista” initiative which was selected by Google, Digital News Initiative Innovation Fund to produce a prototype (EUR 50,000).<sup>94</sup>
- the “Maldita.es” project aimed at providing the readers with “tools for not being tricked”.<sup>95</sup> Through its different branches it monitors political discourse and the information circulating in social networks and analyze the message by applying data journalism techniques for verification. The “Maldita Hemeroteca” initiative was awarded the José Manuel Porquet Prize in journalism in 2015 and was a finalist for the European Press Prize in 2016.

134. Furthermore in 2017, the Association of Journalists in Madrid approved a code of conduct to fight “fake news” or false information.<sup>96</sup>
135. In *Serbia*, according to the Journalists’ Code of Ethics, heading IV paragraph 6, the media are obliged, without delay to publish correct and complete information, even though they unintentionally published information which later proved to be false accusation, rumor, insult or defamation. The provisions under the heading V paragraph 2 stipulate that a journalist must not blindly trust sources of information, but must keep in mind that information sources often have their own interests or interests of the social groups to whom they belong, and that they adjust their statements to such interests. Also, readers/viewers/listeners must be notified regarding direct benefits that the source can achieve from publishing said information (paragraph 2). Keeping secret of the facts that might significantly affect the public perception of an event is equal to their deliberate distortion or lying (paragraph 3). In addition, if the sources of information are spokespersons of political parties, individuals and companies, this information must be indicated because of the possibility of their direct or indirect impact on objectivity of reporting (also paragraph 3).

#### *Regulations at the national level*

136. There is an ongoing discussion in many member States on the necessity of regulating the “fake news” (disinformation) in order to safeguard a pluralistic discourse based on objective information and professional journalism as a condition for a democratic decision-making. Any efforts to tackle “fake news” (disinformation) should be based on a human rights approach guaranteeing the right to freedom of expression and the freedom to receive and impart information. At the same time is it necessary to find an appropriate balance. The right balance must be found between freedom of expression and the protection of public order and the rights of others - including the right to reputation, which is particularly at stake here.
137. There is increasing concern of the close link between propaganda and misinformation online and hate speech, incitement to violence or perpetration of terrorist attacks. “Fake news” (disinformation) may in some cases constitute the first stage of a process of radicalization by a loss of the usual benchmarks. It is therefore also a security concern for most States.<sup>97</sup>

<sup>92</sup> [http://medialab-prado.es/article/periodismo de datos - grupo de trabajo](http://medialab-prado.es/article/periodismo-de-datos-grupo-de-trabajo) also available in English.

<http://medialab-prado.es/article/v-taller-de-produccion-de-periodismo-de-datos-la-espana-vacia>

<http://medialab-prado.es/article/jornadas-de-periodismo-de-datos-2017-jpd17-cada-dato-cuenta>

<sup>93</sup> <http://medialab-prado.es/article/premio-periodismo-de-datos-ciudad-de-madrid-2017>

<sup>94</sup> <https://datadista.com/>

<sup>95</sup> <https://maldita.es/>

<sup>96</sup> <http://www.apmadrid.es/decalogo-para-combatir-las-fake-news-o-noticias-falsas-en-la-era-de-la-posverdad/>

<sup>97</sup> The Committee of the Parties to the Convention on Cybercrime (ETS No. 185, Budapest Convention) is working to facilitate co-operation between multinational service providers and national law-enforcement authorities to obtain subscriber information for accounts and websites involved in criminal activities.

138. In *Austria* the distribution of false or manipulating information is regarded as illegal only in exceptional cases, for example in case the distribution of “fake news” (disinformation) is connected to general elections. According to Sec. 264 of the Penal Act, the public dissemination of false information which is liable to keep persons entitled to vote from casting their vote or to influence the voting behaviour is regarded as a criminal offence, if the dissemination takes place at a point in time when a counter statement cannot be published in due course.
139. In *France*, Article 27 paragraph 1 of the Law of 29 July 1881 on the Freedom of the Press provides that the publication, distribution or reproduction, by any means whatsoever, false news, manufactured parts or deceptively attributed to third parties when, made in bad faith, it has disturbed the public peace or has been likely to disturb it will be punished by a fine of €45,000. However, the conviction on this basis is conditioned by proof of the disturbance to public order, proven or likely to be caused, and is applied only in the most serious and most obvious cases.
140. In *Germany*, to combat the rising tide of harmful content online, a law was passed in June 2017 to ensure that the rules already applicable offline will be equally enforceable in the digital sphere. The Network Enforcement Act requires social media companies to remove any content that is illegal in Germany — such as Nazi symbols or Holocaust denial — within 24 hours of it being brought to their attention. The law allows for up to seven days for the companies to decide on content that has been flagged as offensive, but that may not be clearly defamatory or inciting violence. Companies that persistently fail to address complaints by taking too long to delete illegal content face fines that start at €5 million and could rise to as much as €50 million. Every six months, companies will have to publicly report the number of complaints they have received and how they have handled them.<sup>98</sup>
141. In *Serbia*, according to Article 9 of the Law on Public Information and Media, prior to publishing information about an occurrence, an event or a person, both the editor and the journalist shall check its origin, authenticity and completeness with due diligence appropriate for the circumstances. Also, both the editor and the journalist shall convey the accepted information, ideas and opinions authentically and fully, and if the information is taken from another medium, they shall credit that medium.
142. In *Spain* the National Security Act 36/2015, of 28 September, although not specifically focusing on the threat of “fake new” (disinformation), nevertheless includes in its Article 4 that the National Security Strategy is “the referential strategic political framework of National Security Policy and includes the analysis of the strategic environment, states the risks and threats affecting security in Spain, defines the strategic lines of action on each field of action and promotes optimization of available resources.” The National Security Strategy approved by the Government on 1 December 2017 mentions as a threat online misinformation aimed at influencing the electoral processes.<sup>99</sup> The Strategy shall undertake new second level strategies in certain spheres such as cybersecurity useful for transferring the purposes and lines of action to specific objectives on those spheres.

<sup>98</sup> Bundesministeriums der Justiz und für Verbraucherschutz, *2. und 3. Beratung des Entwurfs eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken im Deutschen Bundestag*, 30 June 2017, [http://www.bmji.de/SharedDocs/Reden/DE/2017/06302017\\_BT\\_NetzDG.html?nn=6704226](http://www.bmji.de/SharedDocs/Reden/DE/2017/06302017_BT_NetzDG.html?nn=6704226); The New York Times, *Delete Hate Speech or Pay Up, Germany Tells Social Media Companies*, 30 June 2017, <https://www.nytimes.com/2017/06/30/business/germany-facebook-google-twitter.html>

<sup>99</sup> [http://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/presidenciadelgobierno/Documents/2017-1824\\_Estrategia\\_de\\_Seguridad\\_Nacional\\_ESN\\_doble\\_pag.pdf](http://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/presidenciadelgobierno/Documents/2017-1824_Estrategia_de_Seguridad_Nacional_ESN_doble_pag.pdf)

143. Furthermore, as a means of tackling “fake news” (disinformation) the *Spanish* Government has presented to the Congress of Deputies a “nonbinding proposal to protect the digital identity of users and prevent that anonymity becomes unpunished on internet” with a view to adopting appropriate measures and setting up a strategy to fight against the illegal use of data of users on internet and, secondly, to put an end to the anonymity on internet which will prevent internet users using anonymity to carry out crimes. Such a strategy will involve providers of facilities and services on internet, the Administration of Justice and the State Security Forces.

*Need for further data and research*

144. It is only in the last few years that “fake news” (disinformation) has grown at such a scale globally and a clearer understanding of its direct and indirect implications is slowly emerging. Any effective action will require continuous research on the impact of “fake news” (disinformation), increased transparency, and access to relevant data, combined with evaluation of responses on a regular, ongoing basis. This is particularly important as disinformation is a multi-faceted and evolving problem that does not have one single root cause. It does not have, therefore, one single solution.<sup>100</sup>

145. The *Czech* Government has set up two specialised bodies aimed at identifying and analyzing current national security threats:

- the National Security Audit (NSA) set up in 2016 deals extensively with extremist threats and assesses the suitability of existing legislation and the capacities of the security infrastructure to respond to these. According to the NSA, high risks are attributed especially to the ability of extremists to split society and weaken the State through generating antagonisms based on ethnic, religious, class or other identities as the majority population is getting polarized based on animosities resulting from different opinion positions. In this regard, the NSA mentions disinformation campaigns launched by foreign powers, using among others social media platforms as an instrument, with the aim of radicalizing society.<sup>101</sup>
- the Centre Against Terrorism and Hybrid Threats under the Czech Ministry of Interior, which began operating on 1 January 2017, aimed, inter alia, at tackling new asymmetric or hybrid threats, as mentioned in the National Security Strategy. The Centre monitors threats directly related to internal security, which implies a broad array of threats and potential incidents including disinformation campaigns. Based on its monitoring work, the Centre evaluates detected challenges and comes up with proposals for substantive and legislative solutions that it will also implement where possible. It also disseminates information and spreads awareness about the given issues among the general and professional public.<sup>102</sup>

146. In *Spain*, to gain better knowledge of the ‘fake news’ phenomenon the Joint Commission on National Security held a series of meetings at the end of 2017 with external experts,<sup>103</sup> including with the Director of the NATO STRATCOM Center of Excellence who mainly focused on cybersecurity issues.<sup>104</sup>

<sup>100</sup> Final report entitled “A Multi-Dimensional Approach to Disinformation” from the EU Commission High Level Expert Group on Fake News, released on 13 March 2018, p.3 <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>

<sup>101</sup> For more information (including a link to the English translation of NSA) see <http://www.mvcr.cz/cthh/clanek/audit-narodni-bezpecnosti>.

<sup>102</sup> For more information in English see <http://www.mvcr.cz/cthh/clanek/centre-against-terrorism-and-hybrid-threats.aspx>.

<sup>103</sup> [http://www.congreso.es/portal/page/portal/Congreso/GenericPopUpAudiovisual?next\\_page=wc/audiovisualdetallegid=12&codSesion=10&codOrgano=319&fechaSesion=23/11/2017&mp4=mp4&idLegislaturaElegida=12](http://www.congreso.es/portal/page/portal/Congreso/GenericPopUpAudiovisual?next_page=wc/audiovisualdetallegid=12&codSesion=10&codOrgano=319&fechaSesion=23/11/2017&mp4=mp4&idLegislaturaElegida=12) and

### Awareness-raising and education

147. A key means of responding to "fake news" (disinformation) is the development of media and digital literacy for the public at large, including by covering these topics as part of the regular school curriculum and by engaging with civil society and other stakeholders to raise awareness about these issues.<sup>105</sup> It is important that internet users have the tools they need to be able to independently analyze published information and develop a critical spirit. Such efforts should be implemented through various means, including formal and non-formal education, without discrimination of any kind. Given the particularly high number of young and child users of the internet digital citizenship education programmes that emphasise media and information literacy and human rights education is essential to help young people develop the necessary critical thinking skills to navigate the digital space.<sup>106</sup> Training modules should also be available for teachers, journalists and other media professionals. Developing knowledge of the media and increasing digital skills may engage libraries as well.<sup>107</sup>

148. In connection with the parliamentary election in *Norway* in September 2017, the Norwegian Media Authority, in cooperation with Faktisk.no and Facebook, published ads in many national and local newspapers. The ad consisted of ten concrete tips on how to expose a fake news item, and the purpose was to enable the public to discover fake news online. The Norwegian Media Authority also published a quiz about how to differentiate between satire, fake and real news. The quiz was published i.a. on Facebook.

149. In *Sweden*, the national agency the Media Council is tasked with providing education and training in media and information literacy for children and young people. Since 2017, media and information literacy is also part of the Swedish school curricula so as to provide pupils with the necessary skills to analyze the sources and to distinguish between true and false information and to develop critical minds from an early age<sup>108</sup>.

[http://www.realinstitutoelcano.org/wps/portal/rielcano\\_en/contenido?WCM\\_GLOBAL\\_CONTEXT=/elcano/elcano\\_in/zonas\\_in/defense+security/ari92-2017-milosevichjuaristi-combination-instrument-russia-information-war-catalonia](http://www.realinstitutoelcano.org/wps/portal/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/defense+security/ari92-2017-milosevichjuaristi-combination-instrument-russia-information-war-catalonia)

<sup>104</sup> [http://www.congreso.es/portal/page/portal/Congreso/GenericPopUpAudiovisual?next\\_page=/wc/audiovisualdetalledisponible?codSesion=12&codOrgano=319&fechaSesion=14/12/2017&mp4=mp4&idLegislaturaElegida=12](http://www.congreso.es/portal/page/portal/Congreso/GenericPopUpAudiovisual?next_page=/wc/audiovisualdetalledisponible?codSesion=12&codOrgano=319&fechaSesion=14/12/2017&mp4=mp4&idLegislaturaElegida=12)

<sup>105</sup> The UN Special Rapporteur on Freedom of Expression and Opinion, the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe (OSCE), the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS) and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights (ACHPR), *Joint Declaration on the freedom of expression and "Fake news", Disinformation and Propaganda*, 3 March 2017, §3.e. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E> See also *Mapping of media literacy practices and actions in EU-28* Audiovisual Observatory report published in March 2017

<https://www.obs.coe.int/en/web/observatoire/reports>

<sup>106</sup> See Council of Europe, *Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries*, §8

[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680790e13](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13)

See also Council of Europe *Internet Literacy Handbook* which is a guide for teachers, parents and students available in several language at [https://www.coe.int/t/dghl/StandardSetting/InternetLiteracy/hbk\\_en.asp](https://www.coe.int/t/dghl/StandardSetting/InternetLiteracy/hbk_en.asp)

<sup>107</sup> Final report from the EU Commission High Level Expert Group on Fake News, *A Multi-Dimensional Approach to Disinformation*, released on 13 March 2018, p. 27 <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>

<sup>108</sup> *Swedish kids to learn computer coding and how to spot fake news in primary school*, TheLocal.se, 13 March 2017.

<https://www.thelocal.se/20170313/swedish-kids-to-learn-computer-coding-and-how-to-spot-fake-news-in-primary-school>

150. In May 2017 the *Italian* Parliament approved a Government project, in cooperation with leading digital companies including Google and Facebook, on digital civic education aimed at high school students so as to train them in recognizing fake news and conspiracy theories online.<sup>109</sup>
151. In the *Czech Republic* progressive media education for students is implemented by the Czech NGO “People in Need” at [www.jsns.cz](http://www.jsns.cz). A popular student project has also been developed which focuses on fact checking and media education at [www.zvolisi.cz](http://www.zvolisi.cz).
152. In *France*, DILCRAH (Délégation Interministérielle à la Lutte Contre le Racisme, l'Antisémitisme et la Haine anti-LGBT) supports several associations, such as “Génération Numérique”, “Conspi Hunter”, “France Fraternities”, and soon “E-enfance” whose goal it is to raise awareness of the danger of “Fake News”. DILCRAH also supports associations such as the “Observatory of Conspiracy”, and “What’s the fake”, which produces films broadcast on the internet, and which are intended to analyze and deconstruct conspiracy speech, and false news or “fake news”. For example, the latter association posted in November 2015 a video clip to draw awareness of the sources of “fake news” published on Twitter and Facebook. The clip was based on a study conducted by researchers from several universities, which shows that conspiracy theories and “fake news” mostly originates from the same sources.<sup>110</sup>
153. In the *Republic of Moldova*, the Independent Press Association (IPA) in partnership with the Independent Journalism Centre and the Association of Independent Tele-journalists has since November 2015 conducted the media campaign against false and biased information “*Stop Fals!*”. The goal of the campaign is to diminish the effects and the impact resulted from propagandistic and manipulative information that distorts the reality, being spread out through various communication means by mass-media institutions and other politically-controlled structures, and to build Moldovan citizens’ capacities to critically analyse the received information. In addition, the IPA launched the application *StopFals* for mobile phones, through which the users may report information they find as being false or distorted and IPA shall check their veracity.
154. The *Swedish* Library Act establishes the overarching aim of the public library system which shall promote the development of a democratic society by contributing to the transfer of knowledge and the free formation of opinions. In accordance with this Act, public libraries shall attempt to increase knowledge about how information technology can be used for the attainment of knowledge, learning, and participation in cultural life. This provision is directed at the ability to use digital technology in order to obtain and evaluate information. The Swedish Government bill stresses the fact that although many people today have great knowledge of how to use information technology, this is not true for all groups. It is also noted that even technologically proficient people may lack crucial insight regarding how to relate to digital information sources and how information can be problematized, evaluated, and critically examined. In the budget bill for 2018, the Government proposes that the National Library be commissioned to increase digital skills in Sweden. The National Library, together with the regional library activities, will coordinate an education of the country’s public libraries to increased digital competence.

<sup>109</sup> The New York Times, *In Italian Schools, Reading, Writing and Recognizing Fake News*, 18 October 2017, <https://www.nytimes.com/2017/10/18/world/europe/italy-fake-news.html>

<sup>110</sup> See further <http://what-the-fake.com/2017/11/15/reddit-4chan-forum-fake-news/>



## II. Hate speech

155. Hate speech is a serious and complex issue that has significant impacts on the values and functioning of democratic societies, and presents a complicated challenge as regards its elimination while still securing freedom of expression.

156. Hate speech requires serious and sustained efforts to counter. Hate speech must be addressed as it can pave the way for hate crimes, interfere with peoples enjoyment of other human rights, weakens democracy, and inflict considerable harm on the well-being and success of both individuals and communities as in the long run hate speech and incitement can endanger social cohesion and create or deepen inter-communal divides and tensions.<sup>111</sup>

157. The exact content and form of hate speech can be a complicated issue to determine, as hate speech can cover a variety of forms of expression and discourse. This may lead to it being thought of as broad in scope. Hate speech can range from types of expression that are not entitled to protection under international human rights law, to types that may or may not be entitled to protection, to types of expression that have a presumption of protection, despite their morally objectionable character.<sup>112</sup> Hate speech as a cultural phenomenon should be addressed throughout this spectrum, however from a legal perspective for measures that may interfere with freedom of expression there is a clear necessity to ensure that the classification of hate speech requires surpassing a certain level of intensity<sup>113</sup> and covers only the most damaging forms,<sup>114</sup> and that it must be read fully in context.

- *The challenge of defining “hate speech”*

158. At present there is no agreement internationally on the use of the term “hate speech” or on its meaning.

159. At the European level, the Committee of Ministers’ Recommendation (97) 20 on “Hate Speech” refers to the term as “covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”.<sup>115</sup>

160. Since the adoption of the said Recommendation in 1997 significant technological development have taken place which needs to be taken into account in order to ensure that it continues to provide an effective basis for combating all forms of this phenomenon, including online hate, and that it covers all the grounds on which victims may be targets of hate speech.<sup>116</sup>

161. More recently, on the basis of its country monitoring, the European Commission against Racism and Intolerance (ECRI) has in its General Policy Recommendation No. 15 (GPR No. 15) on combating hate speech clarified that for the purposes of this

<sup>111</sup> Council of Europe, *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers’ Deputies, preamble recital 13; Report of the UN Special Rapporteur on minority issues, para. 102

<sup>112</sup> Report of the UN Special Rapporteur on minority issues, para. 59 ; Council of Europe, Expert Paper, Tarlach McGonagle, “[The Council of Europe against online hate speech: Conundrums and challenges](#)” (2013), p5

<sup>113</sup> Robert Post, “Hate Speech”, in Ivan Hare and James Weinstein, Eds., *Extreme Speech and Democracy* (New York, Oxford University Press, 2009), p. 123-138, at 123

<sup>114</sup> [European Union Human Rights Guidelines on Freedom of Expression Online and Offline](#), Council of the European Union, adopted 12 May 2014, p19

<sup>115</sup> [Recommendation No. R \(97\) 20](#) of the Committee of Ministers to member states on “hate speech”, adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers’ Deputies.

<sup>116</sup> PACE Recommendation 2098 (2017) on Ending cyberdiscrimination and online hate, §3.1.

recommendation the term “hate speech” shall be understood “as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status”.<sup>117</sup>

162. Hate speech, within the meaning of ECRI GPR No. 15 concerns various forms of expression and it not only limited to those amounting to a criminal offenses, also referred to as hate crime. Moreover, hate speech may be directed to different groups within the society. When directed towards women it can take an aggravated form on account of multiple grounds.<sup>118</sup>

163. The Council of Europe Convention on preventing and combating violence against women and domestic violence refers to forms of violence against women that can also be manifestations of online/offline sexist hate speech: sexual harassment (Article 40) and stalking (Article 34) and requires that Parties take the necessary legislative or other measures.

164. In *Latvia*, Article 78 of the Criminal Law provides for criminal liability for incitement to national, ethnic, racial or religious hatred or enmity. The domestic courts have recognised that the objective side of the criminal offence provided in Article 78 of the *Criminal Law* can also be in the form of acts that include the use of symbols and rituals that have acquired a certain meaning in order to trigger race, national or ethnic hatred. Moreover, Article 150 of the *Criminal Law* establishes liability for an act aimed at inciting hatred or enmity depending on the gender, age, disability of a person or any other characteristics (including sexual orientation of the person), if substantial harm has been caused thereby. Hatred in the context of Article 150 can be described as feelings that have characteristics of evil, disfavour (towards someone); enmity can be described as unjustified negative attitude towards people, their lifestyle, beliefs, feelings, habits. In current formulation, the scope of the provision is very broad and is not limited only to gender, age or disability of the person, but also to any other characteristics.

165. In *Spain*, hate as underlying element to the criminal offence has a different approach by being considered a multi offensive element, aggravating another offence (art. 22.4 Criminal Code - CC), intimidating other people (art. 170.1 CC), seriously damaging themoral integrity of a person (art. 173 CC), discriminating someone in the work sphere (art. 314 CC), the punishable hate speech with its own autonomy and significantly defined around the promotion or incitement to hatred, hostility, discrimination or violence against a group, or part thereof, or against a certain person for belonging to such a group, for reasons of racism, anti-Semitism or for other reasons related to ideology, religion or beliefs, family circumstances, the fact that the members belong to an ethnicity, race or nation, national

<sup>117</sup> European Commission against Racism and Intolerance, [General Policy Recommendation No. 15](#) (GPR No. 15) on combating hate speech, adopted on 8 December 2015. The significant elements in the Recommendation's understanding as to what constitutes hate speech that differ from those found in many other documents are its application to: - advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification as well as; harassment, insult, negative stereotyping stigmatisation or threat; - use that is not just intended to incite the commission of acts of violence, intimidation, hostility or discrimination but also such use that can reasonably be expected to have that effect; and - grounds that go beyond “race”, colour, language, religion or belief, nationality national or ethnic origin and descent, Explanatory Memorandum , §10.

<sup>118</sup> Council of Europe, *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers' Deputies, §31.



origin, gender, sexual orientation or identity, or due to gender, illness or disability (art. 510 CC in conjunction with the punishment of provocation, conspiracy and proposition under Articles 17, 18 and 615 CC), including the responsibility of legal persons (art. 510 bis CC); the discriminatory refusal of services (art. 511 et seq. CC); unlawful association to commit a discriminatory offence (art. 515.4 CC); offences affecting religious confessions (art. 522 et seq. CC); crimes against humanity and of genocide (arts. 607 and 607 bis CC). The underlined provisions were updated by the Organic Law 1/2015, of 30 March, to conform the Council Framework Decision 2008/913/JHA, on combating certain forms and expressions of racism and xenophobia by means of criminal law. The amendment exceeds the Council Framework Decision 2008/913/JHA and reflects the radical rejection of all acts inciting discrimination, hate or violence towards some groups or minorities (defined by race or nation, gender, sexual preference or political grounds, including acts inciting hatred or violence on ideological grounds). This new legal framework is an efficient legal instrument to improve the Court's response against conducts of hate speech regarding groups or minorities on political or ideological grounds among others.

- The implementation of international and regional standards of international and regional standards by way of:

- Ratification of treaties/withdrawal of reservations

166. As parts of their efforts to combat hate speech ECRI recommends States to ratify the following three treaties:

- the Additional Protocol to the Convention on Cybercrime are concerned with the criminalisation of acts of a racist and xenophobic nature committed through computer systems, which is important because of their specific focus on hate speech.
- the Framework Convention for the Protection of National Minorities (the Framework Convention) and
- Protocol No. 12 to the European Convention on Human Rights (Protocol No. 12).<sup>119</sup>

167. In particular the latter two legal instruments are reflected in the *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*.<sup>120</sup>

168. Furthermore, ECRI recommends States that have made reservations in favour of the rights to freedom of assembly, association and expression to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and to Article 20 of the International Covenant on Civil and Political Rights to consider withdrawing them since their maintenance could impede effective action to prohibit organisations which promote or incite racism and racial discrimination, propaganda for war and the advocacy of national, racial or religious hatred.

169. It is however clear that a formal adherence to the mentioned international treaties must be supported also by relevant domestic practice. Thus a clear understanding of the State obligations connected to these treaties should be included in any training provided at national level on hate speech.

- The development of integrated policy on hate speech

<sup>119</sup> ECRI GPR No. 15, Recommendation 1 and Explanatory memorandum ,§67.

<sup>120</sup> Council of Europe, *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, Guidelines 21 and 54.

- The use of national action plans, whether on hate speech in particular, or in a broader focus/context

170. Combating hate speech in all its forms requires a multitude of measures involving various sectors of the society as well as national authorities at different levels. For these measures to be fully effective it will be necessary to ensure cooperation and coordination between the different stakeholders involved. There will also be a need to view the problem in a broader context so as to address the underlying root causes that give rise and enable hate speech to spread. For this purpose it is useful to develop a series of integrated policies on hate speech which might either be part of a focused action plan on combating hate speech or of a broader national strategy to fight extremism, racism and intolerance. Such plans and strategies should include concrete tasks for ministries, municipalities and police and be drawn up and evaluated annually. It is crucial that all these efforts involved are continuing and not an *ad hoc* process.<sup>121</sup>

171. In the *Republic of Moldova* the General Prosecution Office issued an Action Plan on preventing and combating cybercrimes. This document has been approved by the 12 public institutions responsible for its enforcement. Its purpose is to put in place the necessary measures enabling the country to accede to the Additional Protocol to the Cybercrime Convention,

172. The Ministry of Interior of the *Czech Republic* publishes an annual report on extremism, and in 2016 it elaborated the National Security Audit (NSA; see above) focusing inter alia on radicalisation of population via incitement to hatred directed towards specific ethnic and religious communities.

173. In *Croatia*, the National Antidiscrimination Plan 2017-22 contains several measures aiming at combating hate speech such are:

- campaigns aiming to tackle hate speech in sports
- expert seminars for law enforcements, lawyers, prosecutors, judges and NGO's on the *Criminal Code* provisions related to hate crime and hate speech
- round tables dedicated to discrimination, hate crime and hate speech
- hate crime and hate speech data collection improvement
- monitoring the EU Code of Conduct on countering illegal hate speech online
- Campaigns aiming to tackle discrimination and hate crime.

174. On 24 of November 2016 the *Swedish* Government adopted a national plan to combat racism, similar forms of hostility and hate crime with the following strategic areas: improved coordination and monitoring; more knowledge, education and research; civil society: greater support and more in-depth dialogue; strengthening preventive measures online; a more active legal system.<sup>122</sup> Furthermore in July 2017 the *Swedish* Government presented an Action Plan to safeguard freedom of expression, by protecting journalists, artists and politicians against threats and hatred.

175. *Spain* has adopted a Comprehensive Strategy against racism, racial discrimination, xenophobia and other forms of intolerance, with the participation of the Judiciary, the Prosecutor, the Ministries of Justice, of Internal Affairs, of Health, Social Services and Equality, of Work and Social Security, and the Legal Studies Centre. On 8 June 2016 the Monitoring Committee for the Framework Convention for inter-institutional cooperation was

<sup>121</sup> *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, guidelines 77 and 78; ECRI GPR No. 15, Recommendation 4 and Explanatory memorandum, §103.

<sup>122</sup> Available at [....get link](#)

launched in order to comply with the objectives of the Strategy.

176. In *Ireland*, the Migrant Integration Strategy<sup>123</sup> is the main vehicle for conveying and implementing the Government's policies with regard to anti-racism measures at a national level for the period 2017 - 2020. The Strategy envisages a whole-of-Government approach involving actions in collaboration with local authorities, public bodies, local communities, the business sector, sporting and arts organisations and NGOs. The Strategy will address issues such as under-reporting of racially-motivated crime, including through greater contact with marginalised communities and will consist of actions such as early removal of racist graffiti by local authorities.

177. Identification and combating of hate crimes and instances of hate speech in the virtual environment is closely related to cybercrimes. In *Latvia*, this issue is examined in the guidelines "Latvian Cybersecurity Strategy 2014-2018", because automated data processing system may be used as a medium for circulation of illegal information and information damaging reputation.

178. In 2016, the *German* Federal Government, for the first time, adopted a harmonised Strategy to Prevent Extremism and Promote Democracy. The strategy targets areas that are crucial in this respect e.g. the social sectors, local authorities and administrative districts, institutions, federations and associations, schools and prisons. It is based on a systematic, strong networking of the various players at federal, regional and local authority level and in civil society and their coordinated cooperation across the board. Approaches that have proved successful will be expanded across Germany. Efforts will also be made to intensify cooperation with the business world. The strategy also tackles the phenomenon of hate speech on the internet and in this respect an interdepartmental concept will be developed to systematically support those who join the "No Hate Speech" movement online and consistently bring those who disseminate hate speech to justice.<sup>124</sup>

179. In 2017 the *German* Federal Government also adopted a new National Action Plan on Combating Racism which includes human rights policies; protection against discrimination and the prosecution of respective criminal offences; social and political education; civic and political commitment for democracy and equality; diversity in the working life; education and training as well as the strengthening of intercultural and social competence on the job; racism and hatred on the internet and research. The Chapter on racism and hate on the internet provides an overview of initiatives in this field.<sup>125</sup>

180. The federal programme "Live Democracy!" launched by the *German* Ministry for Family Affairs, Senior Citizens, Women and Youth, provides financial support to projects that aim at preventing radicalisation and promoting democracy. It includes projects for strengthening democracy and civic engagement on the web. Innovative educational formats are to be used to teach skills to children, young people, parents, multipliers and educators to deal appropriately with hate speech on the internet. People and groups who are affected by racism and discrimination are to be empowered through the development of new formats.

<sup>123</sup> The Migrant Integration Strategy s available at

[http://www.justice.ie/en/JELR/Migrant\\_Integration\\_Strategy\\_English.pdf/Files/Migrant\\_Integration\\_Strategy\\_English.pdf](http://www.justice.ie/en/JELR/Migrant_Integration_Strategy_English.pdf/Files/Migrant_Integration_Strategy_English.pdf)

<sup>124</sup> [English version of The Federal Government Strategy](https://www.bmfsfj.de/blob/115448/cc142d640b37b7dd76e48b8fd9178cc5/strategie-der-bundesregierung-zur-extremismuspraevention-und-demokratieforderung-englisch-data.pdf) available at <https://www.bmfsfj.de/blob/115448/cc142d640b37b7dd76e48b8fd9178cc5/strategie-der-bundesregierung-zur-extremismuspraevention-und-demokratieforderung-englisch-data.pdf>

<sup>125</sup> [National Action Plan on Combating Racism](#) available at.... (an English translation will be available by the end of 2018).

Projects for working with young people who are prone to radicalisation, or are already radicalised, are also supported by this programme.<sup>126</sup>

181. The National Action Plan on Human Rights (2018-2022) adopted by the Government of the *Republic of Moldova* on 8 November 2017 includes a special chapter related to non-discrimination and equality as well. The activities set in the Action Plan refer to raising the society's and the public institutions' awareness on the stereotypes related to persons that belong to vulnerable and marginalized groups, consolidating media's capacity on presenting materials concerning vulnerable and marginalised groups, incrimination of illegal acts motivated by prejudice, hate or contempt, raising the awareness within the marginalized and vulnerable groups in what concerns their rights, in order to ease the access to the support services rendered by the authorities and the national mechanism of protection against discrimination. Moreover, according to the Action Plan, a mechanism of data collection and monitoring shall be created, that would divide the data on sex, ethnicity, disability, religious affiliation and so forth. The results of such monitoring will influence the adoption and revision of national and local public policies. The Action Plan especially focuses on the rights of the persons with disabilities and the rights of the persons who belong to national, ethnic, religious and linguistic minorities.

- The enacting of legislation (note the importance of such features such as: clear and precise definitions; regular periods for review and update; specification of bias categories e.g. discrimination by ethnicity, religion, sexual orientation; relevant or specialised to various sectors; e.g. employment, media, education, welfare, sports; criminal law provisions)

182. To effective combat hate speech national legislation should reflect international and regional standards to protect freedom of expression. Article 10, paragraph 2 of the European Convention on Human Rights allows for certain limitation or Article 17 is applicable where hate speech is of a nature which negates the fundamental value of the Convention.

183. The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189) instructs Parties to establish a certain number of criminal offences under their domestic law, when committed through computer systems intentionally and without right. Parties to the Protocol must criminalise racist or xenophobic threats committed through computer systems, and aiding and abetting, in accordance with the terms set out in Articles 4 and 7 of the Protocol. Public dissemination of racist and xenophobic material, public racist and xenophobic insults, and the trivialisation or denial of genocide or crimes against humanity, when committed through computer systems, are also to be criminalised (Articles 3, 5 and 6 respectively).

184. Apart from the Council of Europe, there are other international or regional instruments concerning human rights that are directly relevant to the issue of hate speech. Article 19, paragraph 3 of the Convent of the International Covenant on Civil and Political Rights specifies that freedom of expression may be subject to certain restrictions, "but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals."

185. Among the international and regional instruments relevant to human rights, only the International Covenant on Civil and Political Rights (Article 20, paragraph 3), at universal level explicitly prohibit advocacy of national, racial or religious hatred. Thus, Article 20 of the

<sup>126</sup> [more information on the federal programme](https://www.demokratie-leben.de/en/federal-programme/about-live-democracy.html) "Live Democracy!" available at <https://www.demokratie-leben.de/en/federal-programme/about-live-democracy.html>.

Covenant states that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. As for Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination it declares illegal all propaganda activities which promote and incite racial discrimination.<sup>127</sup>

186. As regards the criminal law, ECRI GPR No. 15 emphasises that criminal offences should be defined clearly, but also in a way that allowed their application to keep pace with technological developments.<sup>128</sup>

187. It is important that those targeted by hate speech must be able to participate effectively in criminal proceedings. The law must lay down effective but proportionate penalties. 43. In this respect it will be essential to clarify the scope and applicability of responsibility under civil and administrative law where hate speech was intended or could reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against its targets. States should determine the particular responsibilities of authors of hate speech, internet service providers, web forums and hosts, online intermediaries, social media platforms, moderators of blogs and others performing similar roles. States should ensure the availability of powers, subject to judicial authorisation or approval, to: require hate speech to be deleted from web sites, or block sites using hate speech; require media publishers (including internet providers, online intermediaries and social media platforms) to publish an acknowledgement that something they published constituted hate speech; prohibit the dissemination of hate speech and compel the disclosure of the identity of those engaging in it. It is important that relevant non-governmental organisations (NGOs) and other bodies be allowed to bring proceedings even without an individual complainant.

188. In many States the types of speech that can be prohibited under the criminal law under the umbrella of incitement to hatred are usually defined narrowly. The term “incitement to hatred” usually refers to remarks that target whole groups, which may be identified based on characteristics such as sex, colour, sexual orientation, religion, political or other opinion, gender identity, ethnicity, disability or other status.

- Law enforcement

189. In its GPR No. 15 ECRI proposed States to ensure that prosecutions for these offences are brought on a non-discriminatory basis and are not used in order to suppress criticism of official policies, political opposition or religious beliefs. States should ensure the effective participation of those targeted by hate speech in the relevant proceedings. It will also be necessary to States to monitor the effectiveness of the investigation of complaints and the prosecution of offenders with a view to enhancing both of these. Finally States should ensure effective co-operation and co-ordination between police and prosecution authorities. This would include cooperation with other States in tackling the transfrontier dissemination of hate speech, whether in a physical or electronic format.<sup>129</sup>

190. Law-enforcement officials need comprehensive training in this field.<sup>130</sup> Police, prosecutors and judges need to be trained to recognise the seriousness of online hate and to apply the law effectively. Police often lack the technical capacity to investigate and do not know where to turn for assistance. They need to know what mechanisms can be used to identify anonymous internet users, how to contact social media and other relevant platforms

<sup>127</sup>For the EU member State all States have ensured that their national legislation is in conformity with the Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.

<sup>128</sup> ECRI GPR No. 15, Recommendation 10.

<sup>129</sup> ECRI GPR No. 15, Recommendation 10.

<sup>130</sup> ECRI GPR No. 15, Recommendation 10.h.

in online hate cases, and how to work with victims of online hate crimes. Prosecutors may qualify offences as misdemeanours where they could apply more severe provisions. Judges are also not immune from society's perceptions of online hate as simply part of the internet scenery, and something to be put up with rather than punished.

191. In *Poland*, the Law Enforcement Officer Programme (LEOP) was launched in 2005. It was coordinated by Ministry of Internal Affairs in cooperation with the Organization for Security and Cooperation in Europe (OSCE). The objective of the programme was to improve police skills in recognizing, understanding and investigating hate crimes. The agenda on combating hate crimes for public order officials (in operation since 2006) has had a particularly strong impact in terms of preventing large scale human rights violations. The objective was to ensure the safety and security of persons who could potentially fall victim to hate crimes. Approximately 70 000 persons took part in various forms of training.

192. Since the end of 2011, within the *Spanish* Attorney's Office a specific office has established specializing in hate crime and discrimination, which coordinates the prosecutors included in the Network of Prosecutors for the Protection of Equality and against Discrimination, responsible for the identification of hate crimes, the statistical control, the follow-up of the causes for hatred crimes and the fulfillment of the duties undertaken by Spain in the framework of international treaties.<sup>131</sup>

193. In *Greece* in the context of the fight against racism, two Divisions and sixty eight Offices against Racist Violence have been established within the Police and are currently operating throughout the country. Their basic responsibility is to investigate crimes that may cause discrimination, hatred or violence against persons or groups of persons defined by reference to race, colour, religion, descent, national or ethnic origin, sexual orientation, gender identity, or disability. In addition, they notify without delay the competent Prosecutor, whenever they conduct a preliminary investigation in cases of racist violence.

194. In *Turkey*, the preparation of guide documents for investigations has been started; in this context, a project for "Developing Investigation Techniques of Public Prosecutors and Enhancing Activities In Accordance With European Standards of Human Rights" has been prepared. Furthermore, within the "Hate Crime" project conducted by the Police Academy, it is planned for hate crimes to be recorded by the judicial police officers and for the collection of the statistics.

195. In *Belgium*, within the framework of the circular COL 13/2013 jointly to the Minister of Justice, Minister of the Interior and College of Public Prosecutors, training courses are offered to magistrates, judicial trainees and judges on cyberhate. The training of judges of reference includes the subject of discrimination in 2017. Moreover, specific training is also organized for the police where the issue of hate speech is discussed as well as the balance to be found between humour in the workplace - harassing behaviour and freedom of expression.

196. In the *Republic of Croatia*, continuous trainings and educations of law enforcements, prosecution and judges are standards in the context of hate crime and hate speech prevention.

<sup>131</sup> More details are available at [https://www.fiscal.es/fiscal/publico/ciudadano/fiscal\\_especialista/crimenes\\_odio!/ut/p/a1/04\\_Sj9CPykyssy0xPLMnMz0vMAfGjzOL9DQydPUxMDLz9XUINDRwdA70s3Dz8DQ0MziAKIoEKPBO9HA09gw283H0s3Awc3T2DnUw9PIwtgkyl02-AAzgaENlfrh8FVoLDBf5-ZvgVgJ0IVoDHDQW5oREGmZ6KAL2bLdE!/dl5/d5/L2dBISEvZ0FBIS9nQSEh/](https://www.fiscal.es/fiscal/publico/ciudadano/fiscal_especialista/crimenes_odio!/ut/p/a1/04_Sj9CPykyssy0xPLMnMz0vMAfGjzOL9DQydPUxMDLz9XUINDRwdA70s3Dz8DQ0MziAKIoEKPBO9HA09gw283H0s3Awc3T2DnUw9PIwtgkyl02-AAzgaENlfrh8FVoLDBf5-ZvgVgJ0IVoDHDQW5oREGmZ6KAL2bLdE!/dl5/d5/L2dBISEvZ0FBIS9nQSEh/)

197. In *Poland*, the specific institutional and organisational framework for the offences committed against people because of their racial, national, ethnic or religious background was created. At the beginning, in the jurisdiction of each regional prosecutor's offices, one (or more if necessary) prosecutor was appointed to deal with hate crimes. Then the number was increased to two prosecutors. Consequently, the special group of prosecutors was distinguished at the level of the regional prosecutor's offices (there are 100-105 prosecutors in this group, whereas there are in total 4400 prosecutors at this level). The assessment of the hate crime data, during the period of the application of this framework, showed the positive trends like an increase of detectability of hate crimes and the lower number of the cases which had been closed due to the failure to find the perpetrators.

198. Furthermore, in order to unify the practice and implementation of the guidelines by the police officers and prosecutors, the prosecutor-coordinator on behalf of the Preparatory Proceedings Office of the General Prosecutor's Office attends as a speaker the trainings for the police officers few times a year.

199. It should be highlighted that in the district prosecutors' offices there are the advisors who deal with hate crimes and in the regional prosecutors' offices the coordinators. This solution allows to unify the practice and eliminate the errors. The advisors are also responsible for the periodical assessment of the cases in the subordinated prosecutors' offices.

200. In the *Republic of Croatia* the CEPOL Course 78/2016 on Hate Crimes was held from 4 to 7 July 2016 at the Police Academy in Zagreb, where 32 police officers from the EU Member States, Iceland and Turkey had the opportunity to get introduced to the up-to-date information on identifying hate crimes, including hate speech, and on taking appropriate actions to investigate these crimes. Experienced trainers coming from the police, NGO, government sector from Croatia, UK, Poland, as well as the representatives from FRA and ODIHR/OSCE talked about understanding and defining hate crimes, the possible motives and indicators, ways to improve capacity building, policing and procedures on hate crimes and ways to improve police – NGO cooperation. The course gave an opportunity to exchange good examples.

- Data, monitoring and research on hate speech

201. The actual extent to which hate speech is being used remains uncertain, even though there seems to be an increase in the phenomenon. This uncertainty is mainly due to the absence of comprehensive and comparable data regarding complaints about the use of hate speech, resulting from complaints either not being recorded or due to varying criteria by which States regard such use as having occurred. Moreover, it is evident that those targeted by hate speech do not always report it, and when reported there seems not always to be a proper investigation. In addition, there is no systematic monitoring of all fora in which such speech might be used. Nevertheless, there is no doubt that hate speech is more easily spread on the internet.<sup>132</sup>

202. In order to have a better understanding of the circumstances that can give rise to the use of hate speech and its particular forms, as well as to measure both the extent of such use and the impact which it has, there is a need for further research in the form of surveys and field studies and, where practicable, of a comparative nature. To obtain comparable research there will need to be cooperation between the various research entities in the different States. To this end, it would be necessary to operate with harmonised definitions of hate speech. This further means that data collection and analysis regarding the actual use of

<sup>132</sup> ECRI GPR No. 15, Recommendation 3 c.-h, Explanatory memorandum §23.

hate speech should be undertaken on a consistent, systematic and comprehensive basis.<sup>133</sup> It is important that the collected data may be broken down into smaller units so that issues relating to particular target groups and factor appear. This would ensure that the emergence of certain trends or the particular vulnerability of certain targets of hate speech becomes more evident. Such results could then be used for the adoption of effective responses to tackle the use of hate speech.<sup>134</sup>

203. Finally, it is important that the results of the collected data and its analysis is widely disseminated not only to those bodies and persons that have a responsibility for tackling hate speech but also to the public at large which will also send a clear message that hate speech is unacceptable.<sup>135</sup>

204. In *Austria*, the EU-project Research – Report – Remove: Countering Cyber Hate Phenomena (2016-2017), developed by the International Network Against Cyber Hate (INACH), co-funded *inter alia* by the EU, the Austrian Federal Chancellery and the Austrian Ministry for Europe, Integration and Foreign Affairs, aims at:

- gathering systematic knowledge about the phenomenon, its origins and sources, as well as forms and influences through comparative research.
- developing standards to document and analyse cyber hate and to improve takedown procedures by establishing guidelines for Internet Service Providers (ISPs) and social network sites and by providing support and advice to the political, legal and educational communities.
- establishing a central contact point will help to develop a sustainable and effective cross-border online complaint mechanism available worldwide to all users from their home or mobile device.
- monitoring activities that shall help developing an early warning system by continuously observing and analysing hateful content on the internet.

The project will particularly focus on the monitoring of antisemitism, hate against Roma and Sinti, hate against Muslims and homophobia.

205. In *Belgium*, the circular COL 13/2013 jointly to the Minister of Justice, Minister of the Interior and College of Public Prosecutors aims to standardize policies in the field of research and prosecution of discrimination and hate crime in particular cyberhate and specific collaborations are planned for this purpose. The approach is intended to be integral: in practice, the coordinating magistrate meets each year with the bench magistrates in order to evaluate the application of the circular and to make adjustments or the development of instruments with a view to its implementation.

206. In *Greece*, the recording of racist crimes is carried out through the joint update (by the Greek Police and the Ministry of Justice) of a centralized annual scoreboard illustrating the criminal course of cases with a suspected racist motive, which are recorded as such by the Police.

207. In *Spain*, regarding actions of extremism and terrorism, since 2010 the Statistical Criminal System is actually underway, allowing the State Security Forces to identify this kind of offences, in order to record, obtain, evaluate and extract statistical data regarding racism and xenophobia. One of the main adjustments of the said System was to adopt the definition for racism or xenophobia taken from the European Commission against Racism and Intolerance (ECRI), with a view to include the record of racist events from an extensive

<sup>133</sup> ECRI GPR No. 15, Explanatory memorandum §§74 and 78.

<sup>134</sup> ECRI GPR No. 15, Explanatory memorandum §85.

<sup>135</sup> ECRI GPR No. 15, Explanatory memorandum §86.



perspective and a universal vision

208. In order to reduce the phenomenon of under-reporting *France* has developed a victimization survey approach consisting of the practice of interviewing individuals, whose anonymity is guaranteed, in order to know whether or not they have been the victims of criminal offenses. Beyond the quantified data provided by the investigative or judicial services, it provides quantitative data on the victims of hate speech and their treatment, in order to better target public policies in this area. Two such victimization surveys have been conducted: one by the National Demographic Institute (INED), most recently in 2015, the second by INSEE on an annual basis since 2007.

209. In *Greece*, the Program “Building a Comprehensive Criminal Justice Response to Hate Crime” by OSCE/ODIHR and the Ministry of Justice, Transparency and Human Rights as a partner, is being currently implemented. The program started in February 2017, for a duration of two years. The project is being funded by the European Commission and provides for the improvement of the common database on hate crimes maintained by the Ministry of Justice and the Police, the identification of the main elements of a national policy against hate crimes and the drafting of a cross-government protocol for preventing and combating hate crimes as well as of a supplementary protocol on criminal justice system response to hate crimes.

210. In *Poland* hate crimes are constantly monitored by the Preparatory Proceedings Office of the General Prosecutor's Office and twice a year hate crime data is collected. This data is further analysed by the co-ordinator (one of the prosecutors from the Office), who prepares twice a year a report concerning the proceedings related to hate crime. The Office prepares an assessment of the hate crimes which includes the remarks and observations on errors which should be eliminated. This assessment is sent to the district and regional prosecutors in order to be used in the current proceedings as well as for the training purposes. Moreover, the particular cases are verified (so-called study case).

211. The *UK* Government has supported the Institute of Jewish Policy Research's work on Antisemitism in contemporary Great Britain. The research is based on the largest and most detailed survey of attitudes towards Jews and Israel ever conducted in Great Britain. It concludes that 3 per cent of the British population can be seen as hard line antisemites and a further 30 per cent believe in one or more antisemitic tropes. Furthermore, the third party reporting organisation « Tell MAMA » which carries out work around tackling anti-Muslim hatred in the United Kingdom has developed a close partnership with the police. From 1 January to 31 December 2016, 3,694 anti-Muslim hate incidents were reported to Tell MAMA by victims, witnesses, third parties or the police, compared to 2,622 in 2015 and 729 in 2014. This increase reflects a greater encouragement and confidence around reporting as well as an increasing number of data sharing agreements with individual police forces.

- The education sector

212. Education and awareness-raising about the dangers posed by the use of hate speech and in reinforcing the commitment to pluralism and democracy is an important tool in combating and preventing hate speech.

213. This will require the capacity of teachers and educators to be enhanced so that they can deliver the necessary educational programmes. Appropriate support should thus be provided for the training that this will entail, as well as for the production of the materials to be used in these programmes.

214. Parents and schools of course have a central role to play in educating children and young people about respect for others offline and online and about how to use internet interactions in a responsible way. Schools should also take on online behaviour as part of their work in the field of education for democratic citizenship. Attention should be brought to the Council of Europe's Bookmarks manual for combating online hate speech through human rights education, which is an excellent tool in this context.

215. In *Austria*, freedom of expression is taken into account in human rights education including the necessity of restrictions. To this end the following actions are taken:

- the Centre for Citizenship Education in Schools (*polis*) provides *inter alia* several educational materials relating to freedom of expression, its limitations and political participation and democracy.<sup>136</sup>
- In the course of the Political Education Action Days 2017, the aspect of freedom of expression was reflected under the head of the World Press Freedom Day (3 May).<sup>137</sup>
- In 2017/18, under the heading "Against radicalisation and marginalisation: strengthening democratic culture and digital courage", phenomena such as online hate speech will be addressed and counter-strategies will be developed. Civil courage and solidary actions as well as political and social participation shall be covered.<sup>138</sup>
- In 2016, several materials on human rights concerning prevention of violence and digital competence, addressing hate speech, were prepared (for use in school and extracurricular). Moreover, a handbook on work in schools from 2014, elaborated in the course of the Council of Europe's initiative "Movement against Hate speech", was translated into German.
- The guideline "*Aktiv gegen Hasspostings*" by the "[Safer Internet](#)" initiative was supported by the Federal Ministry of Education and actively communicated to schools.
- Milestone 2017 was the network meeting "Prevention and Intervention in cases of (cyber)mobbing" in November. The importance of a comprehensive school strategy for the physical and psychological well-being and approval of the "CHARTA – establishing a violence-free school culture". The following principles were focused on:
  - Implementation of zero tolerance for violence!
  - Appreciation of diversity!
  - Designation and rejection of discrimination!
  - Strengthening self-, social and systemic competence of teachers!
  - Living participation!

The results of the network meeting will be published on the website of school psychology and forwarded to the schools.

216. The following actions were taken by the *Spanish* Ministry of Education, Culture and Sport for example:

- i) Publishing a [Guide for the treatment of personal data in educational centers](#).
- ii) Producing a video recording "Subject on empathy"

<sup>136</sup> Available online at <http://politik-lernen.at>.

<sup>137</sup> See [http://www.politik-lernen.at/dl/IKNmJMJKomIKMJqx4KJK/pa\\_2\\_17\\_Methoden.pdf](http://www.politik-lernen.at/dl/IKNmJMJKomIKMJqx4KJK/pa_2_17_Methoden.pdf).

<sup>138</sup> See <http://www.politik-lernen.at/site/praxis/workshopreihe2017>.

- iii) The Ministry, together with the CNIEE, has produced a 3D video recording to prevent bullying, in cooperation with Samsung, as well as some 2D video recordings for teachers.

217. In *Greece*, a number of educational programmes, student competitions and information activities, encouraging mutual respect and freedom of expression in Primary and Secondary Education, is being carried out or approved by the Ministry of Education. Examples include the following:

- Since the academic year 2017-2018 the preparation of “Creative Papers” is being introduced in upper Secondary Education. The students are required to prepare a Paper, approaching creatively a subject of their interest, with the aim of promoting critical thinking, creativity, freedom of communication and expression in the school environment.
- Student competitions promoting freedom of communication and expression are being approved on a yearly basis by the Ministry of Education, such as the “Kaiti Laskaridou” Literary Competition, introducing secondary education students to liberated self-expression.
- For the Muslim minority children in Thrace a series of training and awareness-raising courses is being implemented, aiming at fighting racism, extremism and bullying while promoting tolerance and respect for diversity.

218. In *Poland*, a website<sup>139</sup> with all relevant information about hate speech was created within the framework of the Citizens for Democracy programme. Moreover, the project “Hate - I’m against » is being implemented in cooperation with the European Wergeland Centre under the Citizens for Democracy program, financed with EEA funds. Finally, a youth campaign of the Council of Europe aiming at reducing the levels of acceptance of hate speech was also carried out in Poland in years 2012-2017.

219. *Spain* is part of the Google Project: “AGAINST HATE AND RADICALISM #WEAREMORE”. It focuses on education, by means of workshops addressed to young people aged 14 - 18 years-old aimed at reinforcing the positive speech and teaching young people to make a critical and prudent judgment of what they see and produce in social networks, and by means of youtubers who try to raise awareness on the consequences of hate crime<sup>140</sup>.

220. *France* has adopted several action plans to raise awareness of hate speech among young people. Thus, the fight against racism and anti-Semitism was thus designated “Great national cause” in 2015.

- *Dialogue with internet actors, civil society and other relevant actors*

221. There appears to be increasing recognition from media companies that they have an interest in ensuring that all users of their services have a safe and inclusive experience. A particular contribution in can be made by non-governmental organisations, equality bodies and national human rights institutions, whether individually or in cooperation with one another.<sup>141</sup>

<sup>139</sup> The website is available at <http://www.mowanienawisci.info/>

<sup>140</sup> More information is available at <http://www.somos-mas.es/>

<sup>141</sup> ECRI GPR No. 15, Recommendation 4, Explanatory memorandum §101.

222. In *Germany*, in 2015 the Federal Ministry of Justice and Consumer Protection established the Task Force against illegal online hate speech which brings together internet providers and organisations of civil society.<sup>142</sup> The participants - Facebook, Google (for its video platform YouTube) and Twitter and by several civil organisations like the Association of the German Internet Industry (eco), the Voluntary Self-Regulation of Multimedia providers (FSM), as well as organisations committed to the fight against racism and right-wing-violence - agreed to implement a series of best practices and objectives in order to ensure that all hate speech is reviewed and removed from the social media platforms without delay. This self-regulatory approach, while resulting in some initial improvements, nevertheless showed that the large social media platforms were not sufficiently successful in establishing effective user complaints mechanisms and deleting illegal content on a voluntary basis. For this reason a new Act to Improve Enforcement of the law in Social Network was adopted in 2017. Nevertheless the task force has played an important role in bringing together the internet companies with relevant civil society organisations in order to intensify their collaboration, to raise awareness of the problem of hate speech on the internet and the need to strengthen counter speech and to foster a culture of communication.

223. In *France* the DILCRAH and the Delegation for security industries and cyber threats from the Ministry of the Interior has in 2017 established a dialogue between the various State services and the Internet operators (Google, Facebook, Twitter, Dailymotion, Jeuxvideo.com, Gandi, OVH), on order on the one hand to ensure better execution of judicial requisitions, and, on the other, to promote the emergence of a regulation of hatred on the Internet by an effective treatment of reports.

224. At the EU level, at the initiative within the Commission's sub-group on countering hate speech online a Code of conduct on countering illegal hate speech online has been adopted in May 2016. It is based on an agreement between the European Commission and IT companies (Facebook, Google, Twitter, Microsoft) setting a series of commitments to combat the spread of illegal hate speech online in Europe. The most important commitment by IT companies is to review the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary. Several EU member States have appointed a focal point to ensure compliance with the Code.

225. In *Latvia* the non-governmental sector provides important contribution to the prevention of hate speech. Between 1 July and 31 October 2014, the NGO Latvian Centre for Human Rights implemented the project "Strengthening of NGO Capacity to Limit Incitement to Hate on Internet". During the project NGO experts monitored the content and comments published on internet news portals, online versions of newspapers and magazines as well as social networks. The purpose was to identify hateful content, to report on that and to test how effective the different reporting methods are.

- Addressing the various challenges of reporting these abuses: e.g. under-reporting and/or barriers to reporting; insufficient or inconsistent training of relevant professionals; and challenges in identifying, investigating and prosecution in cases of hate speech, among others.

226. It is important that those having suffered the damage of hate speech are aware of the right to seek redress. They should be made aware of their rights to redress not only through criminal but also through administrative and civil proceedings. There are various measures that ensure such awareness in particular public campaigns not only making it clear that hate speech is unacceptable but also explaining how those targeted can respond or seek redress. It can in some cases be useful to focus such campaigns on persons belonging to particular groups such as visible minorities of LGBT. Information about the various possibilities of

<sup>142</sup> More information is available at <http://www.fair-im-netz.de>.

taking action might in addition to central government be disseminated through local governments.<sup>143</sup>

227. Even when there is awareness of the right to redress there may be other factors seen as obstacle to reporting hate speech, such as it not being worth the trouble and not being certain of the complaint being handled in a serious manner, concerns of the complexity and expenses of making a complaint, or even fear of repercussions from those using hate speech. Thus the importance of putting in place a complaint procedure that is as straightforward, user-friendly and inexpensive as possible. Appropriate training for those dealing with the lodged complaints, whether public authorities or private organisation is essential to ensure a process as smooth as possible.<sup>144</sup>

228. In the *Netherlands* it is possible to send notification regarding discrimination on the internet not only directly to a social media platform, but since 2013 also to the complaints office for online discrimination “MiND” (Meldpunt internetdiscriminatie) which, examines whether the online utterance in question constitutes a criminal offence. If it possible, removal of the utterance is requested. If the request is not fulfilled, the issue is escalated within the social media company concerned. In instances where the notification is still not acted upon, the case is referred to the Public Prosecution Service.

229. In *Germany*, to counter hate speech on the internet the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, since 2015, supports the activities of “jugenschutz.net” which is the joint competence centre for the protection of minors on the internet at federal and state level. Jugenschutz.net, which is not public authority, has a legal mandate laid down in the Interstate Treaty for the Protection of Minors on the Internet (JMStV). It offers a hotline for reporting on harmful content in the Internet. Hereafter, it assesses the reported case, evaluates the apparent origin and tries to find out who is responsible for the content.

230. In *Austria*, several helpdesks and reporting offices have been established in order to support persons who want to report and take action against illegal contents, including hate speech, for example:

- Reporting office “ns-Wiederbetätigung” at the Federal Ministry of the Interior concerning websites or articles of neo-Nazi, racist or anti-semitic content;
- Reporting office “Stoptline” established by ISPA (Internet Service Providers Austria) concerning national socialist contents or child pornography;
- Reporting office “Gegen Hass im Netz” established by the Federal Chancellery and the non-governmental institution ZARA (Zivilcourage und Antirassismus-Arbeit) concerning online hate speech. The work is conducted by legally and psychologically trained staff of ZARA who provide information, advice and support, including legal advice, to victims and witnesses of online hate speech, cyber-mobbing and other forms of verbal and psychological violence on the internet. Its services are free of charge and are provided via chat, messenger, e-mail, phone or in person. The reporting office also aims at raising awareness for online hate speech in society as a whole.

231. In *Latvia*, the State Police increasingly uses social media platforms – Facebook, Twitter – to inform the public and to encourage reporting. Furthermore, in addition to the traditional forms of reporting hate crimes to the State Police or the Security Police (in person, via phone or in a written form), the reporting can be done by using websites: <http://www.naidanoziegumi.lv> (in Latvian) and <http://cilvektiesibas.org.lv> (in Latvian, Russian and English). Information received by these sites is then forwarded to the competent law

<sup>143</sup> ECRI GPR No 15, explanatory memorandum, §108-109.

<sup>144</sup> ECRI GPR No 15, explanatory memorandum, §110-111.

enforcement authorities.

232. In *Estonia*, UNI-FORM “Help stop the hate” was launched which is the first-ever online platform connecting LGBTI NGOs and police forces currently in eight EU countries to work together to encourage reporting and tackle LGBTI hate crime and online hate speech. It can be used by victims, witnesses and/or any other person who wants to report a bias motivated incident i.e., on the grounds of sexual orientation, gender identity, gender expression or sexual characteristics. The reports can be anonymous or personal data can be provided for official investigation proceedings. Any submitted report will always be received by the responsible LGBTI organisation in the corresponding country and might also be received by the national police force the country concerned.<sup>145</sup>

233. *France* has established a specific online complaints system which consists of:

1) a online pre-complaint system to facilitate victim's actions and improve the handling of disputes regarding discrimination, racist or anti-LGBT insult, racist or anti-LGBT defamation, and hate provocation, This project is currently being validated for experimental purposes

2) a reporting platform of the General Inspectorate of the National Police (IGPN) and the General Inspectorate of the National Gendarmerie (IGGN) where citizens who feel victims or who have witnessed conduct likely to constitute professional misconduct, an ethical breach or even an offense, on the part of a member of the police force. However, any hate speech must be reported to the judicial authority by filing a complaint even though it is not always easy to prove the aggravating circumstance of racism or homophobia.

3) Partner associations and correspondent network on whom victims and witnesses can rely "aid to victims" of the national police present in the police stations.

Law enforcement officers receive training in the reception of victims and other users: they learn how to manage difficult relations and how to deal with different categories of users by applying the provisions of the "Charter of the reception of the public and victim assistance".

In addition , the national gendarmerie has developed a platform, "Stop-Discrimi", dedicated to its staff who consider themselves victims of discrimination or harassment. An identical platform "Signal-discrimi" intended for national police personnel was created on 22 September 2017. Likewise, a national listening unit "Allo Discrimi" was opened for all officers of the General Secretariat of the Ministry of the Interior (central administration and prefectures),

With regard to the judicial aspect, victims also have the possibility to turn to the Access to Law and Justice and Victims Assistance Service (SADJAV).

234. *France* has also created a fast and effective mechanism for reporting illegal content on the internet by an order of 16 June 2009. Indeed, the platform “Pharos” (plateforme d'harmonisation, de recoupement et d'orientation des signalements), which is part of the Central Office for Combating Information Technology Crime (OCLCTIC), is an innovative and original institution in Europe, which makes it possible to combat online crime more effectively. : terrorism, child pornography, discrimination, incitement to hatred, scams. Operational since 2009, it centralizes via the website [www.internet-signalement.gouv.fr](http://www.internet-signalement.gouv.fr) reports by Internet users of content and racist behavior broadcasts on the Internet. It received more than 17,000 reports of hate messages and discrimination in 2016. In addition, in the area of discrimination, professional reporting agreements have been signed with a number of partners to enable them to benefit from privileged reporting tools via Pharos. Thus, the reports made by the Internet users, the investigation services or the NGOs make it possible to collect a great mass of data, which are then exploited, for the purposes of

<sup>145</sup> More information available at <https://uni-form.eu/>.

investigation..

235. In *Greece*, a special hotline (“11414” with normal calling rate) has been created and a special form for complaints is available on the Police website ([www.astynomia.gr](http://www.astynomia.gr)) so that those concerned may anonymously and with full respect for the privacy of their communication, complain or notify the Police, 24h/day, about any unlawful act committed with racist characteristics or motives. On the same webpage, information has been posted on Police Services against Racist Violence in the Greek and English languages.

236. In “*the former Yugoslav Republic of Macedonia*” a Guide to Monitor Hate Speech was issued by the Agency of Audio and Audiovisual Media Services (available in [Macedonian](#), [Albanian](#), and [English](#)). It encompasses international standards and principles relating to freedom of expression and hate speech, coupled with practical examples of the case-law of the European Court of Human Rights (ECHR) in dealing with the issue, as well as how the national legislation regulates this societal matter. It is a document intended to be used as a concrete tool by both broadcasters and the Agency alike. The manner and degree to which the Guide is being applied in practice in the country received wider regional acknowledgment and recognition.

- Support to victims of hate speech, also in order to encourage them to report violations.

237. An important element of tackling hate speech is to ensure that those who are already affected by it are supported and able to recover from their experiences. The impacts of hate speech on the lives of those targeted can be severe.

238. Those having suffered by hate speech should not fear consequences from reporting it or for having provided evidence as witnesses to it. There should therefore be in place a specific criminal prohibition on any retaliation action. For example, ECRI has recommended in its country monitoring that migrants in an irregular situation should be able to complain about hate crime without risking immediate expulsion.<sup>146</sup>

239. Beyond redress through legal proceedings there can also be support measures delivered that reassure and help the victim return to their normal life – these could include removing the offensive content (particularly when it is a personal attack), support groups, psychological counseling, public declarations or condemnations of the attacking speech, among others.

240. In *Greece*, non-EU nationals who are victims or witnesses of racist acts may be granted a residence permit on humanitarian grounds until a judgment has been delivered or the case has been closed (article 19 A, law 4251/2014 as amended by law 4332/2015). Moreover, the return and consequently the detention, of a foreign national, if he or she is a victim or a substantial witness of racist criminal acts (articles 81A of the Criminal Code and 1 and 2 of Law 927/1979) and submits a complaint or report of the incident to the competent police authorities, is prohibited, until the competent prosecutor has issued an act (designating the foreigner as a victim). Moreover, according to Article 3 of Law 3811/2009, victims of crimes of violence with intent, may claim compensation by the Greek Compensation Authority under certain circumstances.

241. In the *Czech Republic*, the Act no. 45/2013 (on victims of crime) came into force in 2013. The act provides for rights of victims of crime and a financial support for them. Victims of hate crime and (some) instances of hate speech fall under the legal category of especially vulnerable persons for which enhanced protection and support is available.

<sup>146</sup> Recommendation 5 of GPR No. 15, explanatory memorandum, §113.



Provision of legal assistance to victims of crime is an important prerequisite for the correct functioning of this system in practice.<sup>147</sup>

242. In 2017, *Germany* has established a nationwide right for victims of violent or sexual offences to be offered professional care and support before, during and after trial. This entitlement to “psychosocial assistance in court proceedings” is also applicable to the victims of racist violent offences.<sup>148</sup>

243. In the *Republic of Moldova*, the Law on rehabilitating the victims of criminal acts entered into force on 9 March 2017 which also applies to victims of crimes related to incitement to national, racial or religious enmity or discord. The support services provided by the Law include informational and psychological counselling, free legal assistance and financial compensation of the damage caused by the crime.

244. In *Spain*, the Department State of Safety of the Ministry of Internal Affairs has prepared some operational guidelines for police agents with regard to the attention, protection and orientation of the victims of hate crime. To surpass that possible reluctance of the victims to report such crimes, the Ministry of Internal Affairs has made available on its website basic information is included on what is a hatred crime, why it need to be reported and advices, as well as other links of interest.<sup>149</sup> For the public is general information leaflets have been disseminated in Spanish, English, French, Romanian and Arab, to transmit the basic information aimed at making society aware of the need to identify and, where appropriate, report this type of crimes with the State Security Forces. Furthermore some local authorities e.g. the Town Council of Madrid have created a Service of Attention to the Victims of Hate Crimes ([link](#)).

245. In the *Republic of Croatia* Art. 43, para. 1 of the Criminal Procedure Act prescribes the so-called “general” catalogue of victims' rights. All victims of all criminal offenses can find information on the [website](#).

- The need for sufficient training for law-enforcement agents and training for police on how to deal with hate speech offences.

246. In *Turkey*, the Human Rights and Equality Institution established by the Law No. 6701 has the duty to provide trainings on human rights and fight against discrimination.

247. In *Belgium*, adapted and regular training courses are provided for cyber magistrates and police officers.

In the framework of the circular COL 13/2013 common to the Minister of Justice, Minister of the Interior and College of Prosecutors General on the policy of research and prosecution on discrimination and hate crimes (including discrimination based on sex), training courses are offered to judges. Particular interest has been given to the training and updating of magistrates' knowledge of cyberhate in recent years: thus, since 2016, the training of judicial trainees integrates this subject. Furthermore, in 2015 and 2017, in-depth training was offered to judges on this subject. The latter was organized in close collaboration with the department responsible for the federal police, which allows for better exchanges between the police and the prosecution on this issue. In February 2017, the judges of reference "discriminations" were also offered an afternoon of reflection on this theme. Specific training for COL 13/2013 is also organized for the police. The issue of hate

<sup>147</sup> E.g. see <http://www.in-ius.cz/dwn/praktalegdopo/zotc-web-final.pdf>.

<sup>148</sup> For more details, see Factsheet about psychosocial assistance available at [link to be provided](#) and Overview on the relevant national provisions (unofficial English translation) available at [link to be provided](#).

<sup>149</sup> See <http://www.interior.gob.es/web/servicios-al-ciudadano/delitos-de-odio>

speech is discussed as well as the balance to be found between humor in the workplace - harassing behavior and freedom of expression.

248. Training for the Belgian police officers is also provided on social media. A general training on social media is organized for the members of the police personnel. During this training, the dangers and risks of using social media as well as the principles of freedom of expression are highlighted.

249. In *Czech Republic*, within the *Governmental Campaign against Racism and Hate Crime*, various capacity building activities for police officers have been implemented. In particular, a Czech NGO In Iustitia organized trainings for 400 police officers (including, for instance, spokespersons and investigators). In on December 2016, a conference with, among others, workshops focused on hate crime data collection and case law of the European Court of Human Rights was organized in Prague.

250. In cooperation with the *Estonian Academy of Security Sciences*, police officers receive sensitivity trainings after which officers have better skills of how to communicate and motivate victims. Sensitivity training is an intensive practical training of how to communicate with victims and how to motivate victims to get service and help from victim support (including victims of hate crime). Furthermore, in 2018, in cooperation with the Estonian Academy of Security Sciences and the OSCE Office for Democratic Institutions and Human Rights (ODIHR) Estonian police implements the TAHCLE (Training Against Hate Crime for Law Enforcement) programme. The programme contains customized training materials and training of trainers, who later will be tasked to deliver this training to other police officers.

251. In *Germany*, further training for judges and prosecutors regularly focuses on the complex issue of political extremism as a challenge for society and the justice sector. The German Judicial Academy (Deutsche Richterakademie, DRA) — a cross-regional educational facility jointly funded by Federation and Länder to provide in-service training for judges and public prosecutors from throughout Germany — offers regular interdisciplinary courses focusing in detail on a wide range of issues revolving around right-wing extremism, xenophobia and anti-Semitism. In addition to these courses, the German Institute for Human Rights (DIMR) in cooperation with the German Federal Ministry of Justice and Consumer Protection is planning a more far-reaching project. 260. The idea behind the project is to develop further training modules on racism, incorporating the legal framework on human rights. These modules will then be tried and tested and made available for inclusion in the established initial and further training structures of the German Länder. This will help judges and prosecutors respond appropriately to crimes motivated by racism and hatred, and enable them to cope in criminal proceedings with the experiences of those who have been affected by racism.

252. In *Greece*, the Police personnel is trained and retrained both within the country, in particular in the Schools of the Police Academy, and abroad on issues of human rights, racism and discrimination. In addition, they participate in seminars on such topics co-organized with the Council of Europe, other national bodies (such as the Ministry of Education, Research and Religious Affairs) and NGOs.

253. In *Latvia*, in 2016 the Security Police in cooperation with the State Police College implemented the adult informal education programme “Identification and Investigation of Hate Crimes”. In order to ensure effective investigation of hate crimes, the State Police in cooperation with the Security Police and the State Police College has developed guidelines “Identification and Investigation of Hate Crimes”, which, following the approval from the Prosecutor General Office, will serve as a manual for a police officer when working with this category of crimes. Furthermore, the foundation “Latvian Judicial Training

Centre” (LJTC) provides initial and on-going training to judges and court staff. LJTC includes topics related to hate speech in annual training program or offers additional activities under projects. Training on issues related to racism is incorporated in anti-discrimination topics or training on the Court’s practice. Some of the activities use interdisciplinary approach to improve general understanding across different legal professions. For example, in April of 2017 a seminar “Honour and dignity, limitations on freedom of speech” took place, while in November a seminar “Hate crimes and freedom of speech” was organised. Finally the Office of the Prosecutor General also offers relevant training and education. Thus in 2012 a seminar “Identification and prevention of hate crimes” and seminar “Equality and elimination of discrimination” took place. In 2012 and 2013, several prosecutors attended seminars organised by the Academy of European Law, for example, on gender equality and on EU non-discrimination law. The prosecutors likewise attended 2013 conference organised by the Riga Graduate School of Law and the Ministry of Foreign Affairs “Promotion of tolerance in Latvia: legislation, practice and politics”, as well as the 2015 seminar organized by the Latvian Human Rights Centre on approaches to prevention of hate crimes and hate speech.

254. In *Georgia*, on 1-2 June 2017, with the support of the Council of Europe and within the framework between EU and UN office of the High Commissioner for Human Rights (UN OHCHR) joint Program “Human Rights for Everyone”, the training was held on “Freedom of Expression, Including Issues Related to Hate Speech” for judges of the common courts’ system. In particular, 17 judges from the Common Courts of Georgia attended the training.<sup>150</sup> Such training also took place in October 2016, in which 20 Judges participated.<sup>151</sup>

255. In *Spain*, in the area of the training courses of the General Council of the Judiciary, courses are imparted on the subject of hatred crimes. For example, the Course “Crimes of hatred and discrimination”, (06/02/17 to 08/02/17), directed for the Prosecutor Coordinator of the Service of Crimes of Hatred and Discrimination of the Provincial Attorney's Office of Barcelona. Moreover, the Spanish Bar Association organized in Seville some “Training sessions on hatred crimes and discrimination”, in order to create a specific Court Duty (Free Justice) for the defense of victims of those crimes.

256. In 2013, all police units in *Poland* received a manual entitled: Human First. Antidiscriminatory Measures in Police. Practical Guide.

257. In *France*, magistrates are trained on existing national and international instruments, particularly in the formations mentioned above on freedom of expression. On this occasion the issue of hate speech is discussed. They are also offered sessions that specifically address the issue of hate speech. Furthermore, to ensure that any racially motivated and / or homo / transphobic offense is recorded as such initial and ongoing training is provided on this topic to the staff of the National Police and pedagogical tools of a procedural nature, accessible by intranet, are made available to the investigators.

- Additional standalone measures (beyond the criminal context), for example:
  - Education and awareness-raising of the public in general

258. Civil society initiatives such as the Council of Europe’s No Hate Speech Movement are also essential to engage young people in fighting against online hate. This campaign aims to mobilise young people to stand up for human rights online, via national campaigns to counter online hate. A key factor in this effort is to build and share skills so as to have a

<sup>150</sup> Available at [http://www.hsoj.ge/eng/media\\_center/news/947-freedom-of-expression-including-issues-related](http://www.hsoj.ge/eng/media_center/news/947-freedom-of-expression-including-issues-related)

<sup>151</sup> Available at: [http://www.hsoj.ge/eng/media\\_center/news/746-gamoxatvis-tavisufleba-mat-shoris-sidzulvilis](http://www.hsoj.ge/eng/media_center/news/746-gamoxatvis-tavisufleba-mat-shoris-sidzulvilis)

multiplier effect, and to empower young people to work together with others to become much more effective actors against hate than any individual could be alone.

259. In *Serbia*, within the project "Responding to Hate Speech and Hate Crimes against Vulnerable Groups in Border Areas - Towards Adjusting Serbia's Response to EU Policy", the Committee of Lawyers for Human Rights (YUCOM) from Belgrade organised a training session with journalists and representatives of civil society organizations in Leskovac (26 September 2017).

260. In *Croatia*, the Office for Human Rights and Rights of National Minorities used the findings from FRA's publications "Making hate crime visible in the EU" and "Ensuring justice for hate crime victims" to tailor a campaign in 2016 addressing the barriers and obstacles to report hate crime and hate speech and raising trust in authorities. The campaign was initiated at the celebration of the International day of human rights. It is expected to continue with this initiative within the implementation of this Plan. The Ministry of Interior has organized campaigns in schools for raising awareness of hate speech problems implemented activities in accordance with the No Hate Speech Movement campaign of the Council of Europe.

261. In *Estonia*, the Ministry of Social Affairs has been involved in drawing up a guide to promote public familiarity with the Equal Treatment Act, published by the Tallinn University of Technology, as part of the "Diversity enriches" campaign. It contained references to the provisions stipulating that incitement to racist hatred is a criminal offence. A brochure to inform civil servants about racist crimes was also issued.

262. In *Belgium*, to support the Council of Europe campaign No Hate Speech Movement, the government of Flanders has created the "No Hate Speech Platform Vlaanderen" together with a number of partners from civil society. The aim of the platform is to raise awareness and to offer tools to children and young people to take action against hate speech themselves ([website](#)).

- Measures which send the message that barriers, prejudice, intolerance and stereotypes have no place in our societies

263. Intercultural dialogue – involving an open and respectful exchange of views between individuals and groups belonging to different cultures – should be facilitated so as remove barriers to understanding. This could be implemented through undertaking shared cultural events and research projects, the provision of language courses, the establishment of scholarship and student exchange programmes and the holding of workshops to explore particular issues of concern. It will again be important for all public authorities to play an active part in this dialogue so that their example can be an encouragement for others to follow.<sup>152</sup>

- Other measures that provide support for self-regulation by public and private institutions (including elected bodies, political parties, educational institutions and cultural and sports organisations) as a means of combating the use of hate speech

264. Although the use of hate speech is a matter of general public concern and occurs in a wide variety of different fora, those using it will in many instances have particular affiliations – including as employees and users of facilities – with one or more different bodies, institutions and organisations. These can be both public and private entities and will include parliaments and other elected bodies at the national, regional and local level, ministries and other public

<sup>152</sup> ECRI GPR No. 15, Recommendation 4, Explanatory memorandum §95.

bodies, the civil or public service, political parties, professional associations, business organisations and schools, universities and other educational institutions, as well as a very wide range of cultural and sporting organisations. Thus, these bodies, institutions and organisations should in their code of conduct make it clear that the use of hate speech by persons affiliated with them is entirely unacceptable and they should take action to prevent or sanction such use.<sup>153</sup>

265. In *Croatia*, the Code of Ethics for Civil Servants was adopted in 2011 and it sets forth the rules of conduct for civil servants as well as the ethical principles governing the dealings of civil servants. Also, civil servants are entitled to protection against harassment, i.e. any behaviour which has the purpose or effect of violating the dignity of civil servants and creates an intimidating, hostile, degrading or offensive environment. In each governmental body, its chief official appoints an ethnics commissioner among civil servants who is responsible for monitoring the application of this Code of Ethics in their respective governmental bodies.

266. The Statute of the Football Association of *Serbia* of 27 August 2017 provides in Article 4 that discrimination of any kind, including hate speech against a country, a person or a group of people on basis of ethnicity, race, sex, language, political opinion or any other basis is strictly forbidden and punishable by disciplinary measure. Moreover, the Journalists Code of Ethics from 2006 (supplemented in 2013) prescribes in heading IV paragraph 1 that all journalists must oppose to hate speech and any kind of violence. Like mentioned under the paragraph 15, the Code also prescribes that journalists' profession is incompatible with any kind of stereotypes. In addition, colloquial, abusive and imprecise referring to a group is forbidden. It is also stipulated that information about criminal offences, nationality, race, religious belief, ideology and political affiliation, sexual orientation, social and marital status could only be mentioned in reports if those characteristics are in direct relation with kind and nature of committed criminal offence.

o Counter-speech

267. A way of combating and preventing hate speech is through counter speech demonstrating the danger it poses. This will include underlining that diversity is a source of enrichment and calls for mutual understanding and respect for each other as well as off the shared commitment to securing it.<sup>154</sup> Pluralism and democracy implies that individuals and groups of individuals are ready to make concessions, thereby limiting some of their freedoms. In culturally diverse societies it will be necessary to strike an appropriate balance of between various competing rights.<sup>155</sup>

268. It is obvious that those having been targeted by hate speech also have the right to respond to it through counter-speech.<sup>156</sup>

269. In *Croatia*, during the celebration of the International Day of Human Rights 2017, the Office for Human Rights and Rights of National Minorities initiated a campaign based on a counter-speech as a reaction to the adhesive labels containing ethnic hate speech that appeared at several bus stations. Instead of the hanging tree shown at the labels, the Office designed an adhesive label with a message of humanity included in the treetop.

270. In the *Czech Republic*, the Hate Free Culture project focuses, among others, on refuting hoaxes and contributing with positive stories about negatively stereotyped

<sup>153</sup> ECRI GPR No. 15, Recommendation 6, Explanatory memorandum §§114-115.

<sup>154</sup> *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*. preamble; ECRI GPR No. 15, explanatory memorandum §§ 88 and 90.

<sup>155</sup> *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*. guideline 5.

<sup>156</sup> ECRI GPR No. 15, explanatory memorandum § 92.

communities in the public debate. Another project initiated by the Open Society Fund is “Jsme to my” (*It is us*) which aims at improving negative public opinion towards migrants in the Czech Republic.<sup>157</sup>

271. In *Serbia*, two NGOs „The Umbrella Organization of Youth of Serbia (KOMS)“ and the „Institute for Media and Diversity - Western Balkans“ organised trainings (26 – 28 July 2017 in Belgrade) which dealt with the theme of hate speech and its relationship with freedom of expression, proper reaction to hate speech, but also the creation of counter and alternative narratives to hate speech. These trainings were conceived as a training for youth educators and were part of the Council of Europe's No Hate Speech Campaign.

### III. Reconciling freedom of expression and other human rights

272. Human rights are interconnected and sometimes may conflict with each other, in particular for certain issues pertaining to culturally diverse societies. This creates the need to strike a fair balance of competing rights. On one hand, freedom of expression is necessary for the fulfilment and enjoyment of a wide range of other human rights, including the right to take part in cultural life, the right to vote and all other political rights related to participation in public affairs. But on the other hand, in contemporary European societies in which the enjoyment of one's freedoms seems more than ever, due to the diversity of cultures which coexist, to affect the freedom of others, it may be necessary to limit freedom of expression. Special attention should thus be paid in particular to the link between freedom of expression and the right to private life, freedom of thought, conscience and religion (including blasphemy), freedom of assembly and association and finally the prohibition of discrimination.

#### A. Freedom of expression and right to private life

273. One of the most obvious situations where the question of balancing the right to freedom of expression with other rights arises when the exercise of this freedom by one person affects another person's right to private life as guaranteed by Article 8 of the Convention.

274. It is well-established in the Court's case-law that the right to protection of reputation and honour is included in Article 8 of the Convention as part of the right to respect for private life.<sup>158</sup> The Court has formulated several principles that are applicable when a balance between freedom of expression and the right to private life is sought. First of all, the Court has noted that for the State to have an obligation to seek the balance, in other words for Article 8 to come into play, “an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life”.<sup>159</sup> The Court also consistently recalls the general principles regarding the freedom of expression, that is to say, that freedom of expression constitutes one of the essential foundations of a democratic society, that it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb, and that any exceptions to freedom of expression must be construed strictly and the need for any restrictions must be established convincingly.<sup>160</sup> The distinction between statements of fact and value judgements likewise remains relevant.<sup>161</sup>

<sup>157</sup> See <http://jsmetomy.cz/kdo-jsou-uprchlici-a-kdo-jsme-my-odpovedi-hledame-v-kampani-jsme-to-my/>

<sup>158</sup> *A. v. Norway* (application no.28070/06), judgment of 9 April 2009, § 64; *Delfi AS v. Estonia* (application no. 64569/09), Grand Chamber judgment of 16 June 2015, §137.

<sup>159</sup> *Delfi AS v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, § 137.

<sup>160</sup> *Axel Springer AG v. Germany* (application no.39954/08), Grand Chamber judgment of 7 February 2012, § 78.

<sup>161</sup> *Diana and Ozolins v. Latvia* (application no.16657/03), judgment of 12 July 2007, § 79.

275. In the *Czech Republic*, when seeking balance between freedom of expression and the right to respect for private and family life, the Constitutional Court follows a ten-step test as suggested by the Venice Commission in its Amicus Curiae Opinion ref. no. CDL-AD(2004)011 of 17 March 2004 (on the relationship between the freedom of expression and defamation with respect to unproven defamatory allegations of fact). In *Hungary*, the Minister of Justice has recently asked the Venice Commission for its legal opinion on question related to the protection of privacy.

276. As regards the balancing of private life and the freedom of expression of mass media, the Court uses the following criteria in evaluating the compliance with the requirements of Article 10, particularly the “necessity” and “proportionality” requirements:<sup>162</sup>
- a. the extent to which the impugned comments, remarks or publication contributed to a debate of general interest;
  - b. the degree of fame of the person whose private life interests are the reason for the balancing exercise, namely, his/her role or function, and the nature of the activities that are the subject of the report;
  - c. the prior conduct of the person concerned, including whether or not respective information has already appeared in an earlier publication;
  - d. the journalist’s method of obtaining the information and its veracity, namely whether the journalist was acting in good faith and on an accurate factual basis, providing “reliable and precise” information in accordance with the ethics of journalism;
  - e. the content and form of the publication, the manner in which the person concerned was represented, as well as the extent to which the publication was disseminated and the level of gravity of potential negative consequences the person concerned might have suffered after the publication,
  - f. the severity of the sanction imposed, if any.

277. Legislation in several member States include special provisions regarding the protection of personal rights against violations by media. They often provide that private information may be published without the consent of the person concerned only if such information is of public interest which prevails over the individual interest not to disclose it. Victims of violations are usually entitled to request publication of a reply or retraction, and to claim damages.

278. In *Germany*, as a consequence of the Court’s judgment *Von Hannover v. Germany (no. 1)*, the German Federal Court of Justice developed a concept of graduated protection, according to which the greater the information value for the public, the more the interest of a person for the protection of his or her private life has to yield.

279. In *Switzerland* the Federal Office of Communication launched an information campaign “Petites histoires d’Internet” (<http://www.thewebsters.ch/fr/>), which gives simple and accessible advice on the protection of one’s own private sphere in the Internet.

280. The need to balance two competing rights occurs not only in cases involving press and other forms of mass media, but also in cases where the disputed expression belongs to a private individual. Indeed, under Article 8 the State has also positive obligations which may involve the adoption of measures designed to secure respect for private

<sup>162</sup> *Von Hannover v. Germany (no. 2)* (applications nos.40660/08 and 60641/08), Grand Chamber judgment of 7 February 2012, §§ 109-113.



and family life, even in the sphere of the relations of individuals between themselves.<sup>163</sup> In such cases the necessity of the measure interfering with the freedom of expression is assessed to a large extent on the basis of principles applicable to media cases; the margin of appreciation the States enjoy and the quality of legal reasoning given at the domestic level are of particular importance.

281. In most member States the right to protection of reputation, honour, privacy is protected by means of civil and/or criminal law; criminal offences of insult or defamation are usually punishable by a fine. In *Austria*, victims of defamation claiming compensation in separate proceedings are entitled to legal aid. In *Georgia*, *Norway* and *Serbia*, defamation is not classified as a criminal offence. In the *Republic of Moldova*, the Law on Freedom of Expression guarantees the freedom to criticize the State, public authorities and public servants, which are thus not protected against defamatory declarations.

#### B. Freedom of expression and freedom of thought, conscience and religion

282. A new ethic of responsible intercultural relations in Europe and in the rest of the world is made necessary by the cultural diversity in modern societies, and requires that a responsible exercise of the right to freedom of expression should endeavour to respect the religious beliefs and convictions of others.<sup>164</sup>

283. According to its core public mandate, the *Austrian Broadcasting Corporation* shall ensure due regard to the importance of legally recognized churches and religious communities.

284. Following the Court judgment *Maşae v. Moldova* (application no. 6303/05), the *Moldovan Administrative Code* now punishes the restriction of the right to freedom of conscience and religion of persons participating at religious rituals of non-registered worships.

285. The interaction between the freedom of expression and the freedom of thought, conscience and religion usually appears in two situations. Firstly, such interaction appears in situations where these two freedoms come into conflict, and where the protection of the freedoms enshrined in Article 9 falls within concept of “the protection of the rights of others” as a legitimate aim in restricting the freedom of expression. Secondly, in certain situations exercise of the freedom of expression is a result of the freedom of thought, conscience and religion, for example, where a person or a group of persons wish to transmit their religious ideas and opinions which does not qualify as a “manifestation” of belief under Article 9.

#### *Competing interests of freedom of expression and freedom of thought, conscience and religion*

286. Subject to paragraph 2 of Article 10 of the Convention, freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. However, whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes also

<sup>163</sup> *Von Hannover v. Germany* (application no.59320/00), judgment of 24 June 2004, §57; *Mitkus v. Latvia* (application no.7259/03), judgment of 2 October 2012, §125; *Ion Cârstea v. Romania* (application no.20531/06), judgment of 28 October 2014, § 30.

<sup>164</sup> Report CDL-AD(2008)026 on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, adopted by the Venice Commission at its 76<sup>th</sup> Plenary Session (Venice, 17-18 October 2008), § 95.

"duties and responsibilities" within the meaning of the second paragraph. Amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.<sup>165</sup> Indeed, the Court held that, in order to ensure religious peace, States have to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.<sup>166</sup>

287. In *Spain* the Ministry of Justice carries out specific actions, such as a competition on good local practices on managing religious diversity, trainings and awareness-raising activities, focused on the fight against religious intolerance. The Observatory for Religious Pluralism, created in 2011, edited different guides for the management of religious diversity, which deal with various matters such as the use of religious symbols in the public or work sphere.

288. The Court has also been very clear in saying that hate speech against, *inter alia*, a religious group<sup>167</sup> is excluded from the protection of Article 10 of the Convention. At the same time the Court has recognised that "those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith".<sup>168</sup> It has also been argued that in the Court's case-law on balancing the freedom of expression and freedoms protected by Article 9 of the Convention the emphasis has shifted from subjective feelings of followers of specific religious faith to a more "objective" evaluation of the public sentiments, and that the current approach favours an anti-conformist choice of individual persons.<sup>169</sup>

289. Furthermore, the United Nations International Covenant on Civil and Political Rights provides, in its Article 20(2), that every kind of propaganda for national, racial or religious hatred, which constitutes incitement to discrimination, hostility, or violence must be prohibited by law.

*Exercise of the freedom of expression based on the freedom of thought, conscience and religion: wearing of religious symbols*

290. In the past, the former Commission noted that the term "manifestation of religion or belief" in Article 9 of the Convention does not cover "each act which is motivated or influenced by a religion or a belief".<sup>170</sup> On the other hand, the Court examines prohibitions on the wearing of religious symbols exclusively under Article 9 of the Convention, considering that no separate issue arises under Article 10.<sup>171</sup>

<sup>165</sup> *Otto-Preminger-Institut v. Austria* (application no. 13470/87), judgment of 20 September 1994, § 49.

<sup>166</sup> *Otto-Preminger-Institut v. Austria* (application no. 13470/87), judgment of 20 September 1994, § 56.

<sup>167</sup> *Norwood v. the United Kingdom* (application no. 23131/03), admissibility decision of 16 November 2004.

<sup>168</sup> *Otto-Preminger-Institut v. Austria* (application no. 13470/87), judgment of 20 September 1994, § 47; *Klein v. Slovakia* (application no. 72208/01), judgment of 21 October 2006.

<sup>169</sup> Harris, O'Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.670 with further references.

<sup>170</sup> *Arrowsmith v. the United Kingdom* (application no.7050/72), report of the Commission of 12 October 1978, §§71-72; *Van den Dungen v. the Netherlands* (application no.22838/93), Commission decision on admissibility of 22 February 1995.

<sup>171</sup> *Dahlab v. Switzerland* (application no. 42393/98), admissibility decision of 15 February 2001; *S.A.S. v. France* (application no. 43835/11), Grand Chamber judgment of 1 July 2014.

291. Moreover, in connection with the debate in many European countries on the prohibition of religious clothing, such as the *burqa* and the *niqab*, the Commissioner for Human Rights referred to a general ban on such attire as constituting an ill-advised invasion of individual privacy. In his view the political challenge for Europe is to promote diversity and respect for the beliefs of others whilst at the same time protecting freedom of speech and expression. “If the wearing of a full-face veil is understood as an expression of a certain opinion, we are in fact talking here about the possible conflict between similar or identical rights – though seen from two entirely different angles”.<sup>172</sup>
292. In addition, the Court of Justice of the European Union (CJEU) recently issued a joint judgment on the interpretation of EU Equal Treatment Directive<sup>173</sup> in the cases<sup>174</sup> of two women, from France and Belgium, who were dismissed for refusing to remove headscarves.

293. In *France*, the principles of secularism and neutrality are strictly applied in public services. Thus neither civil servants nor agents charged with a public-service mission can manifest their religious beliefs, e.g. by wearing religious signs, in exercising their functions; this applies also to employees in the State education services. In State primary and secondary schools and educational institutions, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is also prohibited; this does not apply to State universities. Moreover, no one may, in public places, wear clothing that is designed to conceal the face. The Court found in the judgments *Ebrahimian v. France* and *S.A.S. v. France* that such legislation was not contrary to the Convention.
294. In *Germany* wearing of religious symbols in public is covered by the religious freedom guaranteed by the German Basic Law. In 2015 the Federal Constitutional Court held that religious avowals conveyed by a public school teacher’s outward appearance may only be legally restricted if the general peace at schools or the State’s neutrality is sufficiently endangered in a specific way.
295. In *Norway* the Courts Administration Board treated a case in June 2010 in which the use of religious and political conditional garments and symbols in the courts was considered. The board concluded that there should be no prohibition on the use of political or religious conditional symbols or garments in court. According to existing law, all judges should execute their task in a manner that provides trust and respect. In addition, the ethical principle for judges’ behaviour affirm that a judge should behave in a way that no reasonable questions can be asked about his or her neutrality. Furthermore, if a party has an objection to the use of religious and political conditional garments and symbols, he or she can raise a question about the judge’s impartiality.

#### *Freedom of expression in employment situations (whistle-blowing)*

296. The protection of Article 10 of the Convention extends to the workplace in general and to public servants in particular.<sup>175</sup> At the same time civil servants owe to their employer a duty of loyalty, reserve and discretion.<sup>176</sup>

<sup>172</sup> Viewpoint on “Burqa and privacy” published on 20 July 2011, see *Human rights in Europe: no grounds for complacency. Viewpoints by Thomas Hammarberg, Council of Europe Commissioner for Human Rights*, pages 39-43

<sup>173</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

<sup>174</sup> Cases C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* and 188/15 *Bougnouli and Association de défense des droits de l’homme (ADDH) v. Micropole Univers*, CJEU of 14 March 2017.

<sup>175</sup> *Wille v. Liechtenstein* (application no. 28396/95), Grand Chamber judgment of 28 October 1999.

<sup>176</sup> *De Diego Nafría v. Spain* (application no. 46833/99), judgment of 14 March 2002.

297. In *Hungary* an integrity management system supports public servants in cases related to integrity, based on Government Decree no. 50/2013. This includes e.g. appointment of integrity advisors, anti-corruption training for civil servants, risk assessment related to corruption.
298. The *Norwegian* Ministry of Local Government and Modernisation helps fund a website called "Etikkportalen" (The Ethics Portal) run by The Norwegian Association of Local and Regional Authorities. It is a website with information such as news, guidelines and templates for code of conducts to secure and safeguard freedom of expression for both local politicians and employees. The address is [www.etikkportalen.no](http://www.etikkportalen.no)".
299. As regards whistle-blowers, the Court considers, inter alia, that the penalties imposed on employees who have criticised the operation of a service or disclosed conduct or illegal acts found at their place of work may constitute a violation of their right to freedom of expression within the meaning of Article 10 paragraph 1 of the Convention.<sup>177</sup>
300. The Recommendation CM/Rec(2014)7 on the protection of whistle-blowers, prepared by the European Committee on Legal Co-operating (CDCJ) of the Council of Europe and adopted by the Committee of Ministers at its 1198th meeting (30 April 2014), sets out a series of principles to guide member States when reviewing their national laws or when introducing legislation and regulations or making amendments as may be necessary and appropriate in the context of their legal systems.
301. Several member States recently adopted special legislation on the protection of whistle-blowers. In *Georgia* several amendments were made upon recommendations of the Council of Europe bodies and the European Commission, in order to provide additional guarantees for whistleblowers. In particular, whistle-blower protection rules have thus been extended to any person outside the public sector and are not limited to current or former civil servants. In *Georgia* as well as in *Hungary* whistle-blowing may also be made electronically; in the latter, the Commissioner for Fundamental Rights is in charge of effectively protecting whistleblowers.
302. *Germany* mentioned their upcoming legislation transposing the European Directive 2016/943/EU on the protection of undisclosed know-how and business information, which will specify that the disclosure of trade secrets is lawful if its purpose is to expose professional or other misconduct or illegal activity in order to protect the general public interest.
303. In 2017 the *Norwegian* government adopted a revised Code of ethics for the civil service. One subject that has been of great controversy is the limitation of the right to freedom of expression when civil servants express personal opinions within their own areas of work. The revised Code emphasises the fundamental nature of freedom of expression in a democracy, and that the duty of loyalty of civil servants is owed also to society as a whole. The section on whistle blower protection in the Code was revised in order to enhance the protection of employees and accentuate that the general rules on the freedom of expression and the special rules on protection of whistle blowers are complementary.

#### i. Specific Focus Area: Blasphemy

<sup>177</sup> *Guja v. Moldova* (application no. 14277/04), Grand Chamber judgment of 12 February 2008.

304. Intimate religious beliefs and convictions of persons may be offended by blasphemous expression in regard to object of veneration.<sup>178</sup> However, since it is not possible to discern throughout Europe a uniform conception of the significance of religion in society, it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.<sup>179</sup> The respect for the religious feelings of believers can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration or offensive attacks on religious principles and dogmas; these may in certain circumstances be regarded as malicious violation of the spirit of tolerance, which must also be a feature of a democratic society.<sup>180</sup>
305. In its Recommendation 1805(2007) on Blasphemy, religious insults and hate speech against persons on grounds of their religion, the Parliamentary Assembly of the Council of Europe considers that “national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence”.
306. In its Report CDL-AD(2008)026 on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, the Venice Commission found in particular that criminal sanctions are only appropriate in respect of incitement to hatred, including religious hatred; that it is neither necessary nor desirable to create an offence of religious insult, without the element of incitement to hatred as an essential component; and that the offence of blasphemy should be abolished.<sup>181</sup>

307. In several member States, there is no criminal offence of blasphemy as such. Whereas attacks on God, religion, Church or religious institutions are not criminalized, attacks on believers are often classified as criminal offences, in order to protect the right of others and to preserve religious peace and public order.
308. The *French* legislation gives priority to freedom of expression when it comes to promoting the debate of ideas and opinions around religions, nevertheless it protects believers against any incitement to hatred, discrimination or violence. Thus, in line with the Court case-law, freedom of expression is limited, in this particular domain, only when it degenerates into hate speech or incitement to discrimination. Similar regulations exist in *Norway*.
309. In *Germany*, apart from general criminal offences of racist and xenophobic crimes, which also cover offences against persons on the ground of their religion, the Criminal Code contains provisions on specific offences of defamation of religions, religious and ideological associations and of disturbing the exercise of religion. The main purpose of those provisions is to protect public safety and the population’s trust in legal security.
310. In *Poland* criminal sanctions can be imposed to whoever offends the religious feelings of other persons by outraging in public an object of religious worship or a place

<sup>178</sup> Harris, O’Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p. 669.

<sup>179</sup> *Otto-Preminger-Institut v. Austria* (application no. 13470/87), judgment of 20 September 1994, § 50.

<sup>180</sup> *Ibidem*, § 47.

<sup>181</sup> Report CDL-AD(2008)026 on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, adopted by the Venice Commission at its 76<sup>th</sup> Plenary Session (Venice, 17-18 October 2008), §§ 89-90.

dedicated to the public celebration or religious rites.
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### C. Freedom of expression and freedom of peaceful assembly and association

311. The purpose of the freedom of assembly and association protected by Article 11 of the Convention “is to allow individuals to come together for the expression and protection of their common interests, and where those interests are political in the widest sense, the function of the Article 11 freedoms is central to the effective working of the democratic system”.<sup>182</sup> The Court considered that the protection of personal opinions, as secured by Article 10, is one of the objectives of freedom of assembly and association as enshrined in Article 11.<sup>183</sup>
312. Several official documents, declarations and guidelines warn against the imposition of undue restrictions on the exercise of freedom of expression and assembly in situations of crisis, notably in the framework of measures taken by States to combat terrorism.<sup>184</sup> The Court considered it “unacceptable from the standpoint of Article 11 of the Convention that an interference with the right to freedom of assembly could be justified simply on the basis of the authorities’ own view of the merits of a particular protest”.<sup>185</sup> Instead, States have an obligation to foster a permissive environment for peaceful gatherings.

313. In most member States meetings, events and assemblies held in public places are subject to a prior notification or registration (not approval), which aims only at ensuring the necessary (police) protection; exceptions can be made in case of spontaneous assemblies. They can be prohibited only if they call, *inter alia*, for disobedience, war, violence, national, racial or religious hatred or undermine public safety or security. State interference with freedom of assembly may usually be challenged before the courts.
314. In *Georgia*, following the Constitutional Court judgment annulling the blanket prohibition to demonstrate within 20 meters around several public buildings and the provision providing for an immediate termination of a protest blocking a public thoroughfare or violating other legal requirements, a new Law on Assemblies and Demonstrations was adopted and entered into force In 2011, which was positively assessed by the Venice Commission.
315. In *Hungary*, organised events in public places, such as peaceful gatherings, rallies and demonstrations, can be prohibited only if they are likely to seriously disturb the operation of representative bodies or courts, or if traffic cannot be arranged on other routes. According to the Hungarian Constitutional Court, the protection of freedom of assembly also covers peaceful public gatherings where the nature of the event necessitates a gathering at short notice (rapid assemblies) or spontaneously, without any preceding organisation.
316. In *Serbia* the provision of the 1992 Public Assembly Act allowing local authorities to prohibit holding of an assembly if it would obstruct public transport was abolished by

<sup>182</sup> Harris, O’Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p. 710.

<sup>183</sup> *Ezelin v. France* (application no.11800/85), judgment of 26 April 1991, § 37.

<sup>184</sup> See in particular the Berlin Declaration of 2004 of the International Commission of Jurists on upholding human rights and the rule of law in combating terrorism; United Nations Global Counter-Terrorism Strategy adopted by member states on 8 September 2006; Guidelines of the Committee of Ministers of the Council of Europe on the protection of freedom of expression and information in times of crisis, 26 September 2007; OSCE Manual on Countering Terrorism, Protecting Human Rights, 2007.

<sup>185</sup> *Hyde Park and Others v. Moldova (no. 1)* (application no. 33482/06, judgment of 31 March 2009, § 26.

the new 2016 Act.

317. A strict interpretation of the criteria being at the basis of any restriction of the freedom of peaceful assembly and association has to be applied also with regard to the work of NGOs, which should be allowed proper conditions and an enabling environment to function.

318. Domestic legislation in *Latvia* provides for public participation in the state administration through participating in various working groups, councils, advisory bodies as well as by providing opinions and recommendations following the initiative of officials of an institution. To promote cooperation with NGOs and to further strengthen involvement of the civil society at all levels and stages of decision-making, the government approved in January 2014 a new memorandum of cooperation between NGOs and the Cabinet of Ministers.

319. The new *Moldovan* Law on non-commercial organisations establishes for the first time the right of non-commercial organisations to practice social entrepreneurship and to benefit from the mechanism of percentage designation

320. It is in particular in a trade-union context that the question of freedom of expression is closely related to that of freedom of association<sup>186</sup>. The Court held, in particular, that the members of a trade union must be able to express to their employer the demands by which they seek to improve the situation of workers in their company. In this respect, it noted that the Inter-American Court of Human Rights, in its Advisory Opinion OC-5/85, emphasised that freedom of expression was “a *conditio sine qua non* for the development of ... trade unions”. A trade union that does not have the possibility of expressing its ideas freely in this connection would indeed be deprived of an essential means of action. Consequently, for the purpose of guaranteeing the meaningful and effective nature of trade-union rights, the national authorities must ensure that disproportionate penalties do not dissuade trade-union representatives from seeking to express and defend their members’ interests. Trade-union expression may take the form of news sheets, pamphlets, publications and other documents of the trade union whose distribution by workers’ representatives acting on behalf of a trade union must therefore be authorised by the management, as stated by the General Conference of the International Labour Organization in its Recommendation No. 143 of 23 June 1971.<sup>187</sup>

321. In *Latvia* the new Law on Trade Unions entered into force in 2014, which provides, *inter alia*, that a person’s belonging to any trade union or a wish of a person to join or not to join it may not serve as a ground for restricting rights of that person. It also clearly stipulates the so-called negative freedom of trade-unions.

#### D. Freedom of expression and prohibition of discrimination

322. Careful balance needs to be struck between allowing societies to be plural spaces, in which all voices and viewpoints can express themselves, and prevention of hate speech which is linked to racist and xenophobic attitudes and can thus lead to violence, discrimination and stigmatization of whole cultures or groups.

<sup>186</sup> *Palomo Sánchez and Others v. Spain* (applications nos. 28955/06, 28957/06, 28959/06 and 28964/06), Grand Chamber judgment of 12 September 2011, § 52.

<sup>187</sup> *Ibidem*, § 56.



323. As underlined by the UN Committee on the Elimination of Racial Discrimination, Article 4(a) 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination requires States parties to penalise four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.<sup>188</sup>
324. The Court has likewise held that even though tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society, “as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (...), provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued”.<sup>189</sup> It also considers that denial of the Holocaust<sup>190</sup>, defamation in public of a group of persons,<sup>191</sup> incitement to racial hatred<sup>192</sup> or racist statements<sup>193</sup> do not benefit from the protection afforded by Article 10 of the Convention.
325. Furthermore, in order to help member States to build inclusive societies in which difference is respected while core liberties and rights are upheld, the Committee of Ministers adopted on 2 March 2016 at the 1249th meeting of the Ministers’ Deputies the Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies.

326. In most member States a special Act on Antidiscrimination or on Equal Treatment prohibits all forms of discrimination; it sometimes sets up a State agency or institution to combat discrimination (Germany, Republic of Moldova, Turkey). National plans or strategies to fight racism and discrimination or to promote inclusive diversity are often adopted (Croatia, Germany, Georgia, Republic of Moldova). Authority to monitor implementation of anti-discrimination legislation may also be vested with the Public Defender or Ombudsman, entitled to examine individual complaints (Georgia, Greece).
327. In the *Belgian* region of Flanders a project called « Integration pact » (2017-2019) consists of a partnership between an organisation representing ethnic-cultural organisations in Flanders and Brussels, public authorities, employers, trade unions, education actors and media, aimed at creating broad public support and initiatives to combat discrimination and to promote mutual respect.
328. In *Belgium* a new Law was passed in 20147 to combat sexism, which is now classified as a criminal offence. The *Republic of Moldova* introduced a new administrative offence related to violation of labour equality.
329. The *Estonian* Diversity Charter is a voluntary commitment, put in place by the Tallinn University of technology in 2012, that can be signed by any company, public institution or civil society organisation that values a discrimination-free work environment and works towards fostering diversity. It provides a platform for its members (currently 80) to learn from experts and from one another, to share best practices and promote diversity

<sup>188</sup> United Nations Committee on the Elimination of Racial Discrimination, General Recommendation No.15: Organized violence based on ethnic origin, 1993.

<sup>189</sup> *Erbakan v. Turkey* (application no.59405/00), judgment of 6 July 2006, § 56.

<sup>190</sup> *D.I. v. Germany* (application no. 26551/95), Commission decision on the admissibility of 26 June 1996.

<sup>191</sup> *Pavel Ivanov v. Russia* (application no. 35222/04), decision on admissibility of 20 February 2007; *Vejdeland and Others v. Sweden* (application no. 1813/07), judgment of 9 February 2012.

<sup>192</sup> *Garudy v. France* (application no. 65831/01), decision on the admissibility of 24 June 2003.

<sup>193</sup> *Glimmerveen and Hagenbeek v. the Netherlands* (applications nos. 8348/78 and 8406/78), Commission decision on the admissibility of 11 October 1979.

and inclusion; it also collaborates within other diversity charters in the EU within the EU Platform of Diversity Charters. A 5-year project “Diversity enriches”, aimed at increasing awareness about equal treatment and at fighting against intolerance, was carried out.

330. In *France*, a « citizenship internship » (*stage de citoyenneté*) on different subjects can be imposed to those who commit racist or anti-Semitic offences or contravene to the principle of secularism.
331. In *Spain* a particular attention is paid to the effective equality between women and men in the media: specific rules are contained in the 2007 Law and in the General Law on Advertisement, and the Spanish Institute for Women and Equal Opportunities deals, through the Observatory of the Image of Women, with complaints concerning advertisements or contents which are considered as sexist.