



25 May 2020

BACKGROUND DOCUMENT

Mandate: To prepare a draft recommendation by the Committee of Ministers to member States on a comprehensive approach to addressing hate speech, including in the context of an online environment, within a human rights framework building on the case law of the European Court of Human Rights and drawing upon existing Council of Europe texts and the legacy of the No Hate Speech Movement Youth Campaign, as well as possible practical tools to give guidance to member States and other stakeholders in this area

A. Background

All standard-setting work of the Council of Europe Committee of Ministers is prepared in inter-governmental committees, composed of representatives of the 47 member States with the highest possible rank in the respective thematic field. Due to the complex nature of hate speech and the need for a comprehensive approach to this growing challenge, the Committee of Experts on Combating Hate Speech (ADI/MSI-DIS) is sub-ordinated to two Steering Committees: the Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI) and the Steering Committee on Media and Information Society (CDMSI). The preparation of the 'draft recommendation on a comprehensive approach to addressing hate speech', therefore, will need to be reviewed, discussed and ultimately approved by the two Steering Committees in November/December 2021. It will then be forwarded to the Committee of Ministers for its consideration, discussion and adoption in spring 2022.

When preparing recommendations, Steering Committees base themselves on existing Council of Europe standard-setting instruments (conventions, recommendations, resolutions, guidelines), the case-law of the European Court of Human Rights, the findings of monitoring bodies and relevant expert studies. Based on the analysis of new and emerging issues that is supported by experts, and through close cooperation with a wide circle of stakeholders, including importantly civil society organisations, recommendations provide concrete guidance for member States in a non-binding, soft law manner.

Recommendations of the Committee of Ministers are considered important sources for the European Court of Human Rights in further developing and refining its case-law. This

mutual consideration of the Court's case-law, the Committee of Minister's standard-setting instruments and the findings of monitoring bodies, supported by co-operation projects that promote their implementation, is intended to help member States create an environment where the rights enshrined in the Convention and other Council of Europe instruments are best protected and promoted.

As constant technological evolution is profoundly affecting the way that information and opinions are created, expressed and shared in today's world, the close cooperation between standard-setting, jurisprudence and monitoring is particularly vital in the area of freedom of expression and the prevention of hate speech and online abuse which fundamentally undermine the enjoyment of equality and human dignity.

B. The draft recommendation on a comprehensive approach to addressing hate speech

The draft recommendation should build on existing Council of Europe standards and practices related to addressing hate speech, promoting a comprehensive and effective approach towards combating a phenomenon that constitutes an urgent challenge in all Council of Europe member States. The work of the ADI/MSI-DIS should thus consider constitutional, legislative and institutional frameworks for combatting hate speech, through criminal, civil and administrative law provisions, self and co-regulatory models, as well as different forms of policy responses that member States may adopt to address its causes, manifestations and impacts on victims and societies. It should also take account of relevant international and regional cooperation initiatives launched in this context.

Definition(s)

The term 'hate speech' has been defined and understood in differing ways at the national and international levels. It is important to distinguish between the ordinary phrase "hate speech", which has become an umbrella concept with multiple meanings and the legal term "hate speech", referring to expressions that are punishable under criminal law or subject to sanctions under civil or administrative law.

According to the 1997 Committee of Ministers Recommendation (97)20 'On Hate Speech',¹ the term shall be "understood 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".

¹ Recommendation (97) 20 of the Committee of Ministers to Member States On "Hate Speech", adopted on 30 October 1997.

For the purposes of ECRI's General Policy Recommendation (GPR) No. 15 'On Combating Hate Speech',² hate speech is to 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, stigmatisation 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". GPR No. 15 further states that hate speech "may take the form of the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes".

Freedom of expression and its restrictions

Freedom of opinion and expression (freedom of expression) is a fundamental human right, essential to the functioning of democratic societies and the human rights system. It is listed amongst the fundamental rights in the Universal Declaration of Human Rights (UDHR) and given legal force through all major international and regional human rights treaties. Article 10 of the European Convention on Human Rights protects the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers.³ However, it is not an absolute right. It may be restricted, as long as this is prescribed by law, necessary in a democratic society and proportionate to a legitimate aim, including national security, public health or the protection of the rights of others.

The European Court of Human Rights has developed a rich case-law on hate speech and incitement to violence.⁴ In doing so, it often had to balance competing considerations. On the one hand, the need to preserve free speech, a cornerstone of democratic societies, and on the other hand, the need to protect individuals' personality rights, the prohibition of discrimination, mutual respect and understanding within society or public order. In this respect, the Court has noted that a failure to provide redress for insulting expression could entail a violation of the positive obligation under Article 8 to secure effective respect for the right to private life. When deciding the boundaries between permissible and

² ECRI General Policy Recommendation No. 15 on Combating Hate Speech, adopted 8 December 2015.

³ Article 10 of the European Convention on Human Rights reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, 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.

⁴ See, for instance, the Factsheet on Hate Speech, prepared by the European Court of Human Rights, (updated March 2020).

impermissible speech, the Court examines a) the political and social context at the time the speech was made, b) the purpose of the speaker, c) his or her role and status in society, d) the content of the speech, e) the form of its dissemination and f) the nature of the audience.

In its case-law,⁵ the Court has often emphasised the need for strong policies to combat racial discrimination as a basis for restricting hate speech. The Court has stated that “racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment”.⁶

Legislative and other approaches to hate speech

Hate speech legislation in Council of Europe member States, imposing criminal, civil and administrative liability, can broadly be divided in two types: those intended to preserve public order and those intended to protect the rights of others. The application of hate speech legislation, policies and practices in the member States is monitored mainly by ECRI, the European Commission against Racial Discrimination. ECRI’s findings, along with recommendations as to how each country might deal with the problems identified, are published in country reports. These reports are drawn up after a visit to the country in question and following a confidential dialogue with the national authorities.

Based on its experience, ECRI also elaborates General Policy Recommendations addressed to the governments of all member States. According to its GPR No. 15, legislative frameworks are insufficient to comprehensively address hate speech. Additional measures against the use of hate speech should comprise efforts that involve:

- a) ensuring that hate speech laws are implemented scrupulously and at all levels;
- b) identifying and removing the conditions in society that are conducive to hate speech, including through raising public awareness, education and counter speech;
- c) protecting and providing support to those who are targeted by hate speech, including through legal advice, counselling and the provision of effective redress mechanisms
- d) promoting self-regulation and taking regulatory action;

⁵ See for a recent series of judgments, *R.B. v. Hungary*, no. 64602/12, § 78 and §§ 81-84, 12 April 2016; *Király et al. v. Hungary*, no. 10851/13, §§ 61-82, 17 January 2017; *Alković v. Montenegro*, no. 66895/10, §§ 63-73, 5 December 2017.

⁶ See *Aksu v. Turkey*, Applications nos. 4149/04 and 41029/04, of Grand Chamber Judgement 15 March 2012, § 44.

e) withdrawing support from particular organisations and prohibiting others.

All anti-hate speech measures must be well-founded, proportionate, non-discriminatory, and they may not be misused to curb freedom of expression or assembly nor to suppress criticism of official policies, political opposition and/or religious beliefs. To that end, a wide range of actors, including national human rights institutions and ombudspersons, as well as private and non-governmental stakeholders must be involved and committed. The experience gained by the Council of Europe, members States and (youth) civil society partners through the No Hate Speech Movement illustrates the potential of such an approach.⁷

Online hate speech

Due to the proliferation of hate speech online, specific efforts have been made to understand its peculiar nature and to meet its many challenges. While hate speech online is not intrinsically different, the nature of the online environment makes it difficult to assign liability and develop adequate legal measures. There are questions around territorial jurisdiction, particularly in the case of search engines registered abroad or that of global social networks. Hateful contents may either go ignored or go viral, making it difficult to assess their actual harm. Hate speech can stay online for a long time in various locations and can be revived at will through linking and sharing. Harmful speech may travel, with content banned in one location finding free expression elsewhere, whether in a different country or a different virtual space. Users, whether natural or legal entities, often hide behind pseudonymous accounts to propagate harmful contents.

The Additional Protocol to the Council of Europe Convention on Cybercrime, on the criminalisation of acts of a racist and xenophobic nature committed through computer systems, requires States Parties to enact appropriate legislation and ensure that it is effectively enforced. In addition, States should adopt legislation and other measures that criminalise “distributing, or otherwise making available, racist and xenophobic material to the public through a computer system.” This requirement is based on the presence of intent or *mens rea*, while at the same time it is understood that Internet Service Providers (ISPs) should not attract criminal liability for the dissemination of impugned material where they have merely acted as conduit, cache or host for such material.

Relevant actors

While recommendations of the Committee of Ministers are primarily addressed to the governments of member States as main duty-bearers regarding human rights and the negative and positive obligations flowing from the European Convention on Human Rights and other binding Council of Europe instruments, they may also list principles and

⁷ See CM Declaration on the legacy of the No Hate Speech Movement Youth Campaign; and the Campaign website.

standards applicable to other relevant actors, including internet platforms, civil society, media organisations, education institutions and academia.

Any legal or policy response to hate speech online must consider the crucial role that intermediaries, including Internet access providers, social networks and search engines, play in facilitating communication. The prominence of many intermediaries and the anonymity of many users have rendered platforms vulnerable to pressures aimed at restricting the flow of information online. Major social media platforms have increasingly committed to police the online environment and remove illegal content – relying heavily on automation and algorithmic detection and moderation tools. This in turn raises concerns regarding their possible overreach and the absence of judicial supervision. The Council of Europe Recommendation CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries provides guidelines both for states and internet intermediaries.⁸ It is primarily for states to ensure that laws, regulations and policies applicable to internet intermediaries effectively safeguard the human rights of their users; however, internet intermediaries also have the responsibility to respect the internationally recognised human rights of their users and of third parties affected by their activities.

C. Relevant reference documents

Council of Europe Conventions:

Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, **2003**
<https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008160f>

European Convention on Human Rights, **1950**
https://www.echr.coe.int/Documents/Convention_ENG.pdf

European Court of Human Rights caselaw on “hate speech”:

Factsheet on Hate Speech, March **2020**
https://www.echr.coe.int/documents/fs_hate_speech_eng.pdf

Recommendations/Declarations of the Committee of Ministers:

Recommendation CM/Rec(**2019**)1 of the Committee of Ministers to member States on preventing and combating sexism
https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168093b26a

Declaration (Decl/29/05/**2019**) by the Committee of Ministers on the legacy of the No Hate Speech Movement youth campaign

⁸ See Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries.

https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168094b576

Recommendation CM/Rec(**2018**)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries

https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14

Recommendation CM/Rec(**2014**)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804d5b31>

Recommendation Rec(**97**)20 of the Committee of Ministers to member states on "hate Speech"

<https://rm.coe.int/1680505d5b>

Parliamentary Assembly of the Council of Europe:

Resolution 2275 (**2019**) The role and responsibilities of political leaders in combating hate speech and intolerance

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=27636&lang=en>

Resolution 2276 (**2019**) Stop hate speech and acts of hatred in sport

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=27637&lang=en>

Resolution 2144 (**2017**) Ending cyberdiscrimination and online hate

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23456>

Resolution 1967 (**2014**) A strategy to prevent racism and intolerance in Europe

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20337>

The European Commission against Racism and Intolerance (ECRI):

ECRI revised General Policy Recommendation No.7 National legislation to combat racism and racial discrimination - adopted on 13 December 2002, revised on 7 December **2017**

<https://www.coe.int/fr/web/european-commission-against-racism-and-intolerance/recommendation-no.7>

ECRI General Policy Recommendation No 15, on combating hate speech, adopted on 8 December **2015**

<https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>

ECRI General Policy Recommendation No. 6, on combating the dissemination of racist, xenophobic and antisemitic material via the internet, adopted on 15 December **2000**
<https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.6>

Recent European Union and United Nations Standards and Policies on the Prohibition and Prevention of “Hate Speech”

United Nations Guidance Note on Addressing and Countering COVID-19 related Hate Speech, 11 May **2020**
<https://www.un.org/en/genocideprevention/documents/Guidance%20on%20COVID-19%20related%20Hate%20Speech.pdf>

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 9 October **2019**
https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf

UN Strategy and Plan of Action on Hate Speech, May **2019**
<https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf>

European Commission Recommendation of 1.3.**2018** on measures to effectively tackle illegal content online
<https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online>

European Code of Conduct on Countering Illegal Hate Speech Online **2016**
https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-racism-and-xenophobia_en

Council of Europe Studies

The Council of Europe Against Online Hate Speech, Dr. Tarlach McGonagle, Background paper for the 2013 Ministerial Conference of Ministers responsible for Media and Information Society on Freedom of Expression and Democracy in the Digital Age
<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168059bfce>

The Hate Factor in political speech: where do responsibilities lie? Françoise Tulkens, Report of the Council of Europe Conference in Warsaw, September 2013

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168059bfcf>

Models of Governance of online Hate Speech: On the emergence of collaborative governance and the challenges of giving redress to targets of online hate speech within a human rights framework in Europe, Dr. Alex Brown, study commissioned by Anti-discrimination Department <https://rm.coe.int/models-of-governance-of-online-hate-speech/16809e671d>