

LINKS BETWEEN FREEDOM OF EXPRESSION AND OTHER HUMAN RIGHTS



Specific focus areas:

- ▶ **Freedom of expression in political discourse**
- ▶ **Information disorder (“fake news”)**
- ▶ **Hate speech**
- ▶ Guide to good and promising practices on the way of reconciling freedom of expression with other rights and freedoms, in particular in culturally diverse societies
- ▶ Analysis of the relevant jurisprudence of the European Court of Human Rights and other Council of Europe instruments

**GUIDE TO GOOD AND PROMISING PRACTICES
ON THE WAY OF RECONCILING FREEDOM OF EXPRESSION
WITH OTHER RIGHTS AND FREEDOMS,
IN PARTICULAR IN CULTURALLY DIVERSE SOCIETIES**

**Adopted by the Steering Committee on Human Rights (CDDH)
at its 91st meeting (18–21 June 2019)**

French edition:

Guide de bonnes et prometteuses pratiques sur la manière de concilier la liberté d'expression avec d'autres droits et libertés, notamment dans les sociétés culturellement diverses

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Guide to good and promising practices on the way of reconciling freedom of expression with other rights and freedoms, in particular in culturally diverse societies

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Abbreviations and acronyms used in this guide

CDDH	Steering Committee for Human Rights
CDMSI	Steering Committee on Media and Information Society
CERD	Committee on the Elimination of Racial Discrimination
ECHR or Convention	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR or Court	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
NGOs	Non-governmental organisations
OSCE	Organization for Security and Co-operation in Europe
OSCE/ODIHR	Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE)
PACE	Parliamentary Assembly of the Council of Europe
UN	United Nations
Venice Commission	European Commission for Democracy through Law

I. BACKGROUND

1. Freedom of expression is the foundation of open and inclusive societies as it promotes knowledge, exchange and mutual understanding in culturally diverse societies such as those in Europe today. On the other hand, the abuse or misuse of freedom of expression may pose a threat to democracy. Such a threat may also exist when this freedom is censored or silenced.

2. Examples include the international controversy after a Danish newspaper published Muhammad cartoons on 30 September 2005 and the murder of *Charlie Hebdo* journalists committed in Paris on 7 January 2015 have highlighted challenges related to the implementation of freedom of expression in democratic societies. These events highlight the risk for the safety of journalists, at the same time showing the risk to democracy itself. They also highlight the questions regarding limits to freedom of expression in contemporary European societies. Due to the diversity of multicultural societies, the enjoyment of one's freedoms seems more than ever to affect the freedom of others.

3. The background for preparing the present Guide is the wish of the Committee of Ministers of the Council of Europe to provide member States with a practical tool on ways of reconciling freedom of expression with other human rights, 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. This practical tool is guided by the principle that coordinated and focused action taken to promote the rights to freedom of expression and equality is essential for fostering a tolerant, pluralistic and diverse democratic society in which all human rights can be realised for all people. At the same time it is necessary to draw attention to the non-permissible hate speech which various bodies of the Council of Europe have also firmly condemned.

4. While referring to national practices for achieving such conciliation, the Guide first and foremost stresses the utmost importance of freedom of expression as a fundamental right on which a large number of other freedoms are based. It holds a prominent place in democratic societies according to the European Court of Human Rights (hereafter "the Court"):

Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, 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".¹

5. Reconciling freedom of expression with other human rights is crucial in culturally diverse societies which strive to promote pluralism, one of the foundations of a democratic society, as underlined by the Court:

For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.²

¹ *Thoma v. Luxemburg* (application no. 38432/97), judgment of 29 June 2001; *Perna v. Italy* (application no. 48898/99), judgment of 6 May 2003, § 39.

² *Gorzelik and Others v. Poland* (application no. 44158/98), Grand Chamber judgment of 17 February 2004, § 92.

II. INTRODUCTION

6. This Guide was prepared by the Steering Committee for Human Rights (CDDH) which set up a drafting group for this purpose composed of a selective number of experts and intergovernmental representatives from member States who met four times during 2017-2019. The Guide has been produced by drawing on the established standards, principles and approaches, and recommendations from international, regional and national legal bodies. These include namely the European Convention on Human Rights (“ECHR” or “the Convention”) and the principles that can be derived from the case-law of the European Court relating to freedom of expression, in particular in the context of culturally diverse societies. An analysis of the relevant case law is contained in the appendix to this Guide.

7. Various Council of Europe bodies, international, regional, and intergovernmental organisations, non-governmental organisations (NGOs), national human rights institutions and national public authorities have published analyses and reports relating to freedom of expression. In particular the legal framework of the Council of Europe, namely the European Commission against Racism and Intolerance (ECRI), the Steering Committee on Media and Information Society (CDMSI), the European Commission for Democracy through Law (Venice Commission), the Council of Europe Commissioner for Human Rights and the recommendations and resolutions of the Parliamentary Assembly alongside recommendations from Special Rapporteurs of the UN Human Rights Council on the promotion and protection of the right to freedom of opinion and expression, on freedom of religion or belief, on the rights to freedom of peaceful assembly and of association, on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and on minority issues have provided the foundation for the State practices on freedom of expression which this Guide features.

8. The specific good and promising practices indicated in this document detail the approaches and methods States use and serve as an example for the development and incorporation of further measures and improved co-operation. State submissions to a Questionnaire sent out by the CDDH in 2017 provided the primary source of these practices,³ though there are some aspects identified from other studies and reports on State practices.

9. The practices and selected responses are included to provide examples of specific measures and initiatives that could inspire other States or actors to develop and advance their own measures to protect and promote freedom of expression in culturally diverse societies, enhance co-operation between States and across borders, and to demonstrate various concrete means by which a number of challenges and concerns in the implementation can be tackled.

10. This Guide is not intended as a monitoring exercise. Such monitoring is the role of other Council of Europe and UN bodies. Thus the selection of national practices is intended to be informative and does not imply an evaluation of the specific practices or of State responses. The references to concrete examples are by no means meant to be exhaustive.

11. The practices were selected for illustrative purposes only. The Guide shows how States implement the relevant standards and address the complex aspects of the protection of freedom of expression and the role it plays for other human rights, alongside show-casing some creative, enterprising, or transferable ideas to highlight particular options.

12. This Guide is mainly addressed to policy makers and public authorities in the Council of Europe member States as an aid to their process in developing national strategies and strengthening their existing ones, as well as collaborating at a regional or international level. It may also be useful for NGOs involved in advocacy and lobbying, and for their work implementing policies in this field. As protection and promotion of freedom of expression is a matter of global concern, in particular due to its exercise on the internet, the good and promising practices put in place in Europe may also serve as inspiration for other regions beyond Europe who are confronted with similar concerns.

³ The replies from member States and representatives of the civil society are contained in the *Compilation to good and promising practices on the way of reconciling freedom of expression with other rights and freedoms, in particular in culturally diverse societies* (document CDDH-EXP(2018)02).

13. The CDDH has focused on the protection and promotion of human rights in culturally diverse societies since 2003. It has co-organised several conferences and seminars⁴ and has produced manuals on hate speech and the wearing of religious symbols in public areas⁵ well as a Declaration of the Committee of Ministers on the need to intensify the effort to prevent and combat female genital mutilation and forced marriage in Europe which was accompanied by a Guide to good and promising practices aimed at preventing and combating female genital mutilation and forced marriage⁶. In 2016, it prepared Guidelines of the Committee of Ministers on the protection and promotion of human rights in culturally diverse societies.⁷ In 2018, it prepared Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe.⁸ The present Guide to good and promising practices on protecting and promoting freedom of expression is aimed in particular at the context of culturally diverse societies of Europe.

⁴ International Conference on "Fundamental Rights in a Pluralistic Society" (The Hague, 20-21 November 2003) co-organised by the Dutch chairmanship of the Committee of Ministers, Conference on "Human Rights in culturally diverse societies: challenges and perspectives" (The Hague, 12-13 November 2008) organised in cooperation with the Government of the Netherlands, High level Seminar "Protection and promotion of Human Rights in culturally diverse societies" (Strasbourg, 13-14 June 2016) organised during the Estonian chairmanship of the Committee of Ministers.

⁵ *Manual on hate speech* by Dr Anne Weber and *Manual on the wearing of religious symbols in public areas* by Prof. Malcolm D. Evans.

⁶ *Declaration of the Committee of Ministers on the need to intensify the effort to prevent and combat female genital mutilation and forced marriage in Europe*, adopted at the 1293rd meeting of the Ministers' Deputies on 13 September 2017.

⁷ The Committee of Ministers' Guidelines were based on a *Compilation of Council of Europe standards relating to the principles of freedom of thought, conscience and religion and links to other human rights*, adopted by the CDDH on 19 June 2015, which includes an appendix with a selection of relevant good practices from member States.

⁸ *Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe*, adopted by the Committee of Ministers at the 1330th meeting of the Ministers' Deputies, on 28 November 2018. In this context see also *Compilation of measures and practices in place in the Council of Europe member States*, as contained in document CM(2018)149.

III. SCOPE AND CONTENT OF THE RIGHT TO FREEDOM OF EXPRESSION

14. Individuals of all backgrounds and beliefs have the right to express themselves, even when their opinions are offensive or shocking, provided that they do not incite violence or hatred.⁹ Open debate enables our societies to evolve and meet new challenges. Free speech, supported by a diverse and independent media, allows citizens to make informed decisions and helps ensure that powerful interests are held to account.¹⁰

A. Protection of freedom of expression

International and regional levels

15. Freedom of expression is protected by a number of international instruments such as Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5.d.viii of the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).

16. 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 expressions 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 and as such, it requests States parties to prosecute such behaviour).

17. Moreover, the Universal Declaration on Cultural Diversity underlines the importance of ensuring the free flow of ideas by word and image by providing all cultures access to express themselves and make themselves known. Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity.¹¹

18. Freedom of expression and information is protected by Article 11 of the Charter on Fundamental Rights of the European Union (Charter). Furthermore, the EU Human Rights Guidelines on Freedom of Expression Online and Offline¹² 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.

19. At the Council of Europe level, freedom of expression is specifically protected by Article 10 of the European Convention on Human Rights. 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.

⁹ *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, II.B.

¹⁰ Fourth annual report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe, *Populism - How strong are Europe's checks and balances?*, presented at the 127th session of the Committee of Ministers, Nicosia, 19 May 2017, Foreword.

¹¹ *Universal Declaration on Cultural Diversity* adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at its thirty-first session on 2 November 2001, Art. 6. See also *Convention on the Protection and Promotion of the Diversity of Cultural Expression*, adopted by UNESCO on 20 October 2005.

¹² *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, adopted by Council of the European Union on 12 May 2014.

20. Additional legal instruments include 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.¹³ Of particular importance in the present context are the Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies, as well as the Committee of Ministers' Declaration on freedom of communication on the Internet¹⁴ reaffirming freedom of expression and the free circulation of information on the internet.

National level

21. Freedom of expression is considered as having a "constitutional" importance¹⁵ since it is not only a right in itself but also underpins other rights and freedoms under the Convention, for example, the freedom of thought, conscience and religion and for freedom of assembly and association.

22. 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 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.

23. At the end of 2017, the *Danish* Government set up a Commission on Freedom of Expression to assess the framework and general conditions for the freedom of expression in Denmark. The purpose of the Commission's work is to give way for broad political discussions regarding the status of freedom of expression in the present Danish society. The commission is scheduled to deliver its report before the end of 2019.

24. In *Georgia*, Article 17 of the Constitution 2018 deals with "freedom of thought, information, mass media and internet". The independence of the Public Broadcaster from state agencies, and its freedom from political and substantial commercial influence, shall be ensured by law.

25. In *Spain*, Article 20 of the Constitution (1978) recognises and protects:
(i) 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.

¹³ See document SG(2014)1 Final. Report by the Secretary General of the Council of Europe on the state of democracy, human rights and rule of law in Europe, Executive Summary, "Standard-Setting".

¹⁴ *Declaration on freedom of communication on the Internet*, adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies.

¹⁵ Harris, O'Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p. 613.

26. During the UNESCO World Press Freedom Day hosted by *Finland* in May 2016 on the main themes of Freedom of Information, Press Freedom and Safety of Journalists, freedom of cultural expressions was also highlighted, especially at side events organised within the framework of the Finnish 2016 Presidency of the Nordic Council of Ministers. The objective of the seminar “Re-shaping cultural policies”, jointly organised with UNESCO, was to increase awareness of the significance of diversity of cultural expressions in sustainable development and cultural expression in the Nordic countries and discuss how these could be utilised in the implementation of the UN Agenda 2030. The Nordic Ministers of Culture adopted a Declaration on Promoting Diversity of Cultural Expressions and Artistic Freedom in a Digital Age.¹⁶

Article 10 of the ECHR

- **Scope**

27. Concerning the scope of the rights protected under the freedom of expression, Article 10 (1) of the Convention explicitly refers to three components:

- a. The freedom to hold opinions, which is a prior condition to the other freedoms guaranteed by Article 10 and enjoys an absolute protection in the sense that the possible restrictions set forth in Article 10 (2) are inapplicable to it.¹⁷ This means in substance that the State must not try to indoctrinate its citizens and that the State may not distinguish between those holding specific opinions and others.
- b. The freedom to receive information and ideas which includes the right to gather information and to seek information through all possible lawful sources. 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.¹⁸
- c. 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.

- **Permissible limitations**

28. It is clear that any restrictions to the freedom of expression have to be construed strictly so as to avoid any risk of undermining the fundamental principles of a democracy. Article 10 (2) of the Convention explicitly recognises that the exercise of the freedom of expression “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”.

¹⁶ *Declaration by the Nordic Ministers of Culture on Promoting Diversity of Cultural Expressions and Artistic Freedom in a Digital Age*, published on 2 May 2016.

¹⁷ Monica Macovei, *Freedom of Expression, Human rights handbook*, No. 2, Council of Europe, 2004, p. 7.

¹⁸ *Magyar Helsinki Bizottság v. Hungary* (application no.18030/11), Grand Chamber judgment of 8 November 2016, §§ 157-180. The case concerned the right of access to information, and, more specifically, the right of access to State-held information. The Court held that whether and to what extent the denial of access to information constituted an interference with an applicant's freedom of expression had to be assessed in each individual case and in the light of its particular circumstances including: (i) the purpose of the information requested; (ii) the nature of the information sought; (iii) the role of the applicant; and (iv) whether the information was ready and available.

29. Usually exceptions to the principle of freedom of expression provided by domestic law are aimed at protecting public order, fundamental rights and human dignity of others¹⁹; 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.

30. In *France*, 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.

31. In *Germany*, the Basic Law trusts in the power of free debate, commitment of civil society and education as the most effective weapons against the dissemination of totalitarian, inhumane ideologies. In principle, freedom of expression can only be limited on the basis of "general laws". A law that restricts opinions is deemed impermissible "special legislation" if it is only directed against certain opinions and not drafted in a sufficiently open manner.

32. 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.

Maintaining the authority and impartiality of the judiciary

33. The need to maintain the authority and impartiality of the judiciary can be, among others, a valid reason for restricting the freedom of expression. Indeed, "as the guarantor of justice, a fundamental value in a law-governed State, the 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".²⁰

34. Another situation where the freedom of expression becomes relevant in the administration of justice concerns the publishing of information regarding on-going criminal cases. Such publication may be contrary to the presumption of innocence guaranteed by Article 6 (2) of the Convention.²¹ 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.

35. 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 court²². 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.²³

¹⁹ This is the case in e.g. *Hungary, Latvia, Republic of Moldova, Poland, Serbia and Spain*.

²⁰ *Morice v. France* (application no. 29369/10), Grand Chamber judgment of 23 April 2015, § 128.

²¹ *Bédat v. Switzerland* (application no. 56925/08), Grand Chamber judgment of 29 March 2016, §§ 68-69.

²² *Morice v. France*, cited above, § 137.

²³ *Ibid.*, § 132.

36. 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. They cannot 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 as a gratuitous personal attack.²⁴

37. Several member States²⁵ 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.

38. 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 behaviour 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.

39. *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.

40. 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 caselaw 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.

41. In *Switzerland* journalists who want to keep the chronicle of the judicial activity of the Federal Supreme Court (Tribunal fédéral), as well as of many cantonal courts 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.

42. 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.

43. In connection with the general rule on impartiality of the judge under section 61 in the *Danish* Administration of Justice Act (AJA) ("retsplejeloven") and in light of "Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities", the Danish Association of Judges decided to create guidelines on the ethical principles for judges, which include a section on impartiality. Furthermore section 56 of AJA, stipulates that a judge may not appear in court in a way that is apt to be perceived as an indication of his or her religious or political affiliations or his or her attitude towards religious or political matters. The provision was adopted in 2009 as a codification of an existing custom within the judicial branch to appear politically and religiously neutral. Another limitation to the freedom of expression in relation to the wearing of religious symbols is found in AJA section 168(2). This provision, adopted in 2010, stipulates that witnesses may not wear articles of clothing that hides his or her face, unless otherwise decided by the court. Failure to comply with section 168(2) is a punishable offence under section 178 of AJA.

²⁴ *Ibid.*, §§ 136-139.

²⁵ E.g. Austria, Croatia, Denmark, Estonia, Republic of Moldova, Poland, Serbia, Spain and Switzerland.

- **States' obligations**

44. In correlation to the above findings, States have a positive obligation to protect and guarantee the individual rights inherent to the freedom of expression. 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.²⁶

45. 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.).

46. Member States enjoy a margin of appreciation in their fulfilment of positive and negative obligations with regard to freedom of expression.²⁷ This margin of appreciation differs according to the context, in particular the historic, demographic and cultural context.²⁸ It also differs depending on the circumstances of the case and on the rights and freedoms engaged.²⁹

- **Access to information online and offline**

47. Access to information is a central part of freedom of expression. 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.³⁰ These innovations have also brought new challenges.³¹ As underlined in Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom, the ECHR applies both offline and online, in particular with regard to the right to freedom of opinion and expression and the right to privacy, which also includes the protection of personal data.³² Member States should seek measures to promote a pluralistic offer of services via the internet which caters to the different needs of users and social groups.³³ To protect the right to private life, with regard to the automatic processing of personal data, the Council of Europe elaborated the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.³⁴ In 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.³⁵ 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.

²⁶ *Palomo Sánchez and Others v. Spain* (application nos. 28955/06, 28957/06, 28959/06 and 28964/06), Grand Chamber judgment of 12 September 2011, §§ 58-59. *Khadija Ismayilova v. Azerbaijan*, (application nos. 65286/13 and 57270/15), judgment of 10 January 2019, §§164-166.

²⁷ *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (application nos. 9214/80, 9473/81 and 9474/81), judgment of 28 May 1985, § 67.

²⁸ *Soulas and Others v. France* (application no. 15948/03), judgment of 10 July 2008, § 38.

²⁹ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, cited above, principle 6.

³⁰ Report by the Secretary General for the Ministerial Session in Helsinki, 16-17 May 2019, *Ready for future challenges – reinforcing the Council of Europe*, p. 31.

³¹ For example, see Maja Brkan, *Freedom of expression and Artificial Intelligence: on personalisation, disinformation and (lack of) horizontal effect of the Charter*, posted on 9 Apr 2019, available at <https://ssrn.com/abstract=3354180>, pp. 2-3.

³² *Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom*, adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies, §1; *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, § 6; Human Rights Council Resolution 20/8, *The promotion, protection and enjoyment of human rights on the Internet*, 16 July 2012, document A/HRC/RES/20/8, §1; Human Rights Council Resolution 32/13, *The promotion, protection and enjoyment of human rights on the Internet*, 1 July 2016, document A/HRC/RES/32/13, § 1.

³³ *Declaration on freedom of communication on the Internet*, cited above, principle 5.

³⁴ *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108), opened for signature in Strasbourg on 28 January 1981. A *Protocol amending the Convention* was adopted at the 128th session of the Committee of Ministers (Elsinore, Denmark, 17-18 May 2018). The Protocol recognises the need to promote at the global level the fundamental values of respect for privacy and protection of personal data, thereby contributing to the free flow of information between people. The principles of transparency, proportionality, accountability, data minimisation, privacy by design, etc. are now acknowledged as key elements of the protection mechanism and have been integrated in the modernised instrument.

³⁵ *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)* (application nos. 3002/03 and 23676/03), judgment of 10 March 2009, § 27.

48. The new *Georgian* Constitution guarantees in its Article 17 § 4 freedom to access and use the internet. In *France* the “Conseil Constitutionnel” 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).

49. In *EU member States*, Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 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.

50. *Finland* was the first country to make broadband internet access a legal right in 2009.

51. The *Finnish* Ministry of Education and Culture promotes research information availability and open science through an Open Science and Research Initiative aimed at:

- ensuring that open science is widely utilised in the society,
- promoting the trustworthiness of science and research,
- supporting the culture of open science within the research community,
- increasing the societal and social impact of research and science.

It calls for an extensive accessibility to open publications, open research data, open research methods and tools, as well as increasing skills, knowledge and support. It involves higher education institutions such universities and polytechnics which are evaluated for their status of the openness of research organisations’ operational culture. Libraries play a key role in promoting openness in higher education institutions at the local level.

52. Transparency of public authorities is a key feature of good governance and an indicator of whether or not a society is genuinely democratic and pluralist.³⁶ The right of access to official documents is essential to the self-development of people and to the exercise of fundamental human rights. It also strengthens public authorities’ legitimacy in the eyes of the public, and its confidence in them. National legal systems should recognise and properly enforce a right of access for everyone to official documents produced or held by the public authorities.³⁷

53. The Council of Europe Convention on Access to Official Documents³⁸ is the first binding international legal instrument to recognise a general right of access to official documents held by public authorities. The Convention draws its principal source of inspiration from Recommendation Rec(2002)2 of the Committee of Ministers to member States on access to official documents which guarantees the right of everyone to have access, on request, to official documents held by public authorities.³⁹ In addition, a public authority should, at its own initiative and where appropriate, take the necessary measures to make public information which it holds when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest.⁴⁰

³⁶ *Council of Europe Convention on Access to Official Documents* (CETS No. 205) opened for signature on 18 June 2009, Explanatory Report, II.1.

³⁷ *Ibid.*

³⁸ The Convention will enter into force upon the ratification of 10 member States. On 1 March 2019 it had been ratified by the following 9 member States: Bosnia and Herzegovina, Estonia, Finland, Hungary, Lithuania, Montenegro, North Macedonia, Norway, Republic of Moldova and Sweden. Belgium, Georgia, Serbia, Slovenia and Ukraine have signed but not yet ratified it.

³⁹ *Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents*, adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers’ Deputies, Section II; *Council of Europe Convention on Access to Official Documents*, Art. 2.1

⁴⁰ *Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents*, Section XI; *Council of Europe Convention on Access to Official Documents*, Art. 10.

54. Most of the member States⁴¹ have adopted laws on access to public information which allow individuals to request information held by public authorities.

55. For example, in *Finland, Latvia, North Macedonia, 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.

56. The *Finnish* Government's Communication Recommendation further highlights transparency of the administration in its daily work. It underlines that open and interactive communication is central to good governance; that reliability is the basis of all activities of the authorities; and that transparency and confidence go hand in hand.⁴²

57. Public authorities are often 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.

58. 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. In accordance with Article 20 of the *Finnish* Act on the Openness of Government Activities (621/1999), the authorities shall ensure that the documents or the pertinent indexes which are essential to the general public's access to information are available where necessary in libraries or public data networks, or otherwise easily accessible to the members of the public.

59. According to *Norwegian* law, administrative agencies must keep a record of case documents that have been received by or submitted by the agency. To facilitate the Freedom of Information Act, "Elnnsyn" is a tool used by central government agencies to publish these records online.⁴³ 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.

60. In *Denmark* in 2014, the new Access to Public Administration Files Act entered into force with the purpose *inter alia* of expanding openness among public authorities in the light of the changing conditions in society, including the increased use of digital communication and the development in the co-operation structures of the central administration. However, the Act provides for restricting the principle of openness in certain cases in order to ensure that the relevant protection interests – e.g. the internal and political decision-making process – continue to be protected. With a view to expanding the principle of openness the Act includes *inter alia* non-listed companies where the public sector owns more than 75 per cent of the company shares.

⁴¹ E.g. Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Latvia, Netherlands, North Macedonia, Norway, Poland, Serbia, Spain, Switzerland.

⁴² The Finnish Government's Communication Recommendation is available at <http://vnk.fi/documents/10616/3541383/Valtionhallinnon-viestintasuositus-2016.pdf/>

⁴³ Public record data is stored in a searchable database available at www.einnsyn.no.

61. With the aim to promote greater transparency and openness, as of June 2017 the Government of *North Macedonia* is publishing on the official Government's website the minutes with the agenda of the Government's sessions, its conclusions and announcements.

62. In *Finland* a great variety of public information resources is available as open data, such as data on terrain, the environment, weather, climate, sea, transport, financing, statistics and culture. Many local authorities are also providing open data. Measures taken under the Finnish Open Data Programme have accelerated the opening up of information resources in 2013–2015. For example, Tutkihankintoja.fi online service enables the citizens, companies and interest groups to explore the state spending. The website is based on the state invoicing data published on www.avoindata.fi service. It improves transparency in the use of public funds and provides information on the market to companies. Tutkibudjettia.fi is an interactive visualisation of the state budget which enables citizens, politicians, interest groups and others to explore the content of the budget in a user friendly and dynamic way.

B. Specific actors and their relation to freedom of expression

- **Media**

63. 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 culturally diverse societies.⁴⁴

64. The *Finnish* Foundation for Media and Development ('Vikes') is a journalists' solidarity organisation set up in 2005 devoted to strengthening democracy and active civil society by supporting freedom of expression, quality journalism and media diversity around the world. Most of Vikes funding comes from the development budgets of the EU and the Finnish Ministry for Foreign Affairs. Donations from the Finnish Union of Journalists and other organisations, as well as individuals and private companies are also crucial in sustaining Vikes activities.⁴⁵

65. Since their emergence as a means of mass communication, media have been the most important tool for freedom of expression in the public sphere, enabling people to exercise their right to seek and receive information. Developments in information and communication technologies and their application to mass communication have led to significant changes in the media ecosystem. This has led to new ways of disseminating content on a large scale and often at considerably lower cost and with fewer technical and professional requirements. Media-related policy must therefore take full account of these and future developments, embracing a broad notion of media which is appropriate for such a fluid and multi-dimensional reality. All actors – whether new or traditional – who operate within the media ecosystem should be offered a policy framework which guarantees an appropriate level of protection of freedom of expression and provides a clear indication of their duties and responsibilities.⁴⁶

66. It is important for States to engage in dialogue with all actors in the media ecosystem in order for them to be properly apprised of the applicable legal framework.⁴⁷ Furthermore it is important to adopt strategies to promote, develop or ensure suitable levels of public service delivery so as to guarantee a satisfactory level of pluralism, diversity of content and consumer choice and ensure close scrutiny or monitoring of developments.⁴⁸

⁴⁴ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, cited above, principle 69.

⁴⁵ For more details see <https://vikes.fi/en/>

⁴⁶ *Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States on a new notion of media* sets out criteria for identifying whether certain activities, services and actors might be categorised as media and provide guidance for a graduated and differentiated policy approach in respect of the various activities, services or actors that are part of the media ecosystem.

⁴⁷ *Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States on a new notion of media*

⁴⁸ *Ibid.* See also *Recommendation CM/Rec(2012)1 of the Committee of Ministers to member States on public service media governance*, adopted by the Committee of Ministers on 15 February 2012 at the 1134th meeting of the Ministers' Deputies.

67. In *Austria* and *Poland* the independence of media and broadcasting is warranted on the constitutional level. The *Hungarian* Fundamental Law states in its Article IX Paragraph (2) that “Hungary shall recognize and protect the freedom and diversity of the press and shall ensure the conditions for the freedom to receive and impart information as is necessary in a democratic society.”

68. Several member States have adopted legislation providing that broadcasting shall include programmes for, and in the languages of, different minorities or groups and satisfy their media-related needs.

69. In *North Macedonia* there is a variety of television and radio outlets broadcasting programming in languages of the (minority) ethnic communities in the country in addition to those broadcasting only in Macedonian. There are 29 television outlets and 15 radio outlets broadcasting in minority languages.

70. In *Georgia*, the Law on Broadcasting enjoins the Georgian Public Broadcaster to reflect ethnic, cultural, 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.

71. In *Poland* Article 18(4) of the Act of 6 January 2005 on national and ethnic minorities and on regional languages provides “support for TV programmes made by minorities”, and Article 24 of the Broadcasting Act obliges public service broadcasters to pay due regard to the needs of national and ethnic minorities and communities speaking regional languages, including broadcasting news programmes in the language of national and ethnic minorities and in regional languages.

72. The European Court of Human Rights has noted that “the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism.”⁴⁹

73. In several member States self-regulatory measures in the media system have been developed alongside regulatory measures. They provide in particular the opportunity to file complaints before a specific body or board. States should invite traditional and new media to exchange good practice and, if appropriate, consult each other in order to develop self-regulatory tools, including codes of conduct, which take account of, or incorporate in a suitable form, generally accepted media and journalistic standards.⁵⁰

74. In *Finland*, *Georgia*, *Ireland* and *Latvia* public liability of media is increased through codes or charters of journalistic ethics, often promoted by voluntary unions of journalists.

75. In *Denmark*, the Media Liability Act stipulates the norms for the exertion of mass media. By decision of September 2013, the Danish Press Council stated that posts on professional blog sites are a common part of the media in question and that such blog posts must therefore meet the general press ethical requirements made for media content. Furthermore, the Act stipulates that the content and conduct of the media shall be in accordance with sound press ethics under section 34(1). The Press Council determines whether the conduct of the media is contrary to sound press ethics. Its decision is based on the Advisory Rules of Sound Press Ethics which were part of the Media Liability Bill of 1991. However, the “sound press ethics” standard keeps pace with developments in determination of what is unethical and adopts standpoints on new situations that arise. The advisory rules of sound press ethics were revised on 22 May 2013.⁵¹

⁴⁹ *Stoll v. Switzerland* (application no. 69698/01), Grand Chamber judgment of 10 December 2007, §§ 103-104.

⁵⁰ *Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States on a new notion of media*, cited above, § 7.

⁵¹ More details available on the website in English of the Danish Press Council at <http://www.pressnaevnet.dk/press-ethical-rules/>.

76. In *Norway*, the Ethical Code of Practice for the Press applies to both printed press, radio, television and internet publications, and has been adapted to address special issues concerning web publication. Article 4.3 of the Ethical Code states: "Always respect a person's character and identity, privacy, ethnicity, nationality and belief. Be careful when using terms that create stigmas." The last sentence, as well as the term "ethnicity", was added in 2013.

77. In *North Macedonia*, the Council of Media Ethics, a non-governmental, non-political and non-profit self-regulatory body, aims at achieving the following goals stated in the Statute:

- Protection of media freedom and the right of public to be informed;
 - Prevention of influence of the state, political parties and other centres of power over the media;
 - Protection of public interests by providing an independent, efficient and fair process of resolving complaints about the media contents;
 - Raising public awareness on the professional and ethical standards to be observed by the media;
- Promotion of the Code of Journalists and Reduction of all forms of censorship and self-censorship in journalism.

78. Legislation on broadcasting may forbid language or content inciting hate or discrimination (see below Part II - *Specific focus area*: HATE SPEECH). In several member States the self-regulatory editorial codes include guidelines on discrimination, and campaigns against racism and hate speech are run not only in the traditional media but also in the internet and social media.

79. In *Belgium* the government of Flanders organised in 2016-2017 the competition "De Clichékillers", in which journalism students were challenged to report, in nuanced ways and without falling into clichés, on poverty, gender, disability, origin or sexual identity.⁵² 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).

80. 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 help improve the reporting on minority issues.

81. 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.

⁵² More details available at <http://declichekillers.be>

82. Recent assessment reports have made clear that violence against journalists has increased significantly over the last decade.⁵³ In response the Council of Europe set up in 2015 a Platform for the Protection of Journalism and Safety of Journalists, in co-operation with prominent international NGOs active in the field of the freedom of expression and associations of journalists, to provide information which may serve as a basis for dialogue with member States about possible protective or remedial action.⁵⁴ The Platform sends daily alerts on physical attacks, detention and imprisonment of journalists, harassment and intimidation, impunity and other acts which have a chilling effect on media.⁵⁵

83. Journalists and other media actors are often specifically targeted on account of their work, and additionally their real or perceived gender, gender identity, sexual orientation, ethnic identity, membership of a minority group, religion, or other particular characteristics which may expose them to discrimination and dangers in the course of their work.⁵⁶ These violations are increasingly taking place online.⁵⁷ Such abuses and crimes, which in practice are committed by both State and non-State actors, have a grave chilling effect on freedom of expression, including on the public watchdog role of journalists and other media actors.⁵⁸ *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors* provides specific guidelines to member States to act in the areas of prevention, protection, prosecution, promotion of information, education and awareness raising.

84. In March 2016, the Council for Mass Media in *Finland* adopted and published a statement saying that improper feedback and direct threats may reduce or completely prevent the handling of certain issues in the media. “Self-censorship, either conscious or unconscious, is a threat to freedom of expression and to social debate and thus to the whole democratic social order.” It required the police and the prosecutor to have a more active attitude towards such threats to freedom of expression.

- **Civil society actors**

85. Civil society actors, including human rights defenders, play an important role in protecting and promoting human rights in culturally diverse societies.⁵⁹

86. The European Court has found that the function of creating forums for public debate is not limited to media. This 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.⁶⁰ 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, National Human Rights

⁵³ Report by the Secretary General, *Ready for future challenges –reinforcing the Council of Europe*, cited above, p. 16.

⁵⁴ See report Annual Report 2019 by the Partner Organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists “*Democracy at Risk: threats and attacks against media freedom in Europe*” published on 12 February 2019, available at <https://rm.coe.int/annual-report-2018-democracy-in-danger-threats-and-attacks-media-freed/1680926453>

⁵⁵ Report by the Secretary General, *Ready for future challenges –reinforcing the Council of Europe*, cited above, p. 16: In 2018, the number of reported threats – including death threats – doubled, with the majority of violent incidents allegedly committed by unknown or non-state actors. The murders of at least two journalists in Europe for reasons related to their work in 2018 highlight the price that media professionals continue to pay for investigating corruption and organised crime.

⁵⁶ *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors*, adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers’ Deputies, § 2; *Resolution 2035 (2015) on the protection of the safety of journalists and of media freedom in Europe*, adopted by PACE on 29 January 2015; *Resolution 2141 (2017) on attacks against journalists and media freedom in Europe*, adopted by PACE on 24 January 2017; Council of Europe study, *Journalists under pressure - Unwarranted interference, fear and self-censorship in Europe* (2017), by Marilyn Clark and Anna Grech; Annual Report 2019 by the Partner Organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists, “*Democracy at Risk: threats and attacks against media freedom in Europe*”, cited above.

⁵⁷ *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors*, cited above, § 2.

⁵⁸ *Ibid.*, § 3.

⁵⁹ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, cited above, principle 69.

⁶⁰ *Guseva v. Bulgaria* (application no. 6987/07), judgment of 17 February 2015, § 38.

Institutions (NHRIs),⁶¹ and individuals related to matters of public interest therefore warrant similar protection to that afforded to the press.⁶²

87. Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe⁶³ underlines the positive, important and legitimate roles of all human rights defenders, including NHRIs and civil society organisations, in independently promoting the realisation of all human rights by, inter alia, engaging with Governments, across local, regional, national and international levels, organising awareness-raising and education activities, and contributing to the efforts to implement the obligations and commitments of States in this regard.⁶⁴ Civil society organisations, which express a diverse range of views and interests, are a manifestation of the right to freedom of association under Article 11 of the European Convention and of their host country's adherence to principles of democratic pluralism and commitment to human rights and the rule of law.⁶⁵

88. Numerous NHRIs closely cooperate with journalists, such co-operation including trainings, regular meetings and exchange of information.⁶⁶

89. During 2017 the Human Rights Defender (the Ombudsman) in *Armenia* periodically organised capacity building trainings and workshops for media representatives to enhance their capacities in investigating, as well as more accurately and duly reporting on human rights issue.

90. The Office of the Ombudsman of *Croatia* works directly with journalists, providing them with information regarding the human rights situation in the country, but also connecting them with communication officers of international human rights organisations (e.g. FRA, Council of Europe) and providing specifically for their reports.

91. 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 co-operation 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 co-operation between NGOs and the Cabinet of Ministers.

• Internet intermediaries

92. The internet plays a particularly important role with respect to the right to freedom of expression by enhancing the public's ability to seek, receive and impart information without interference and regardless of frontiers. Internet intermediaries, who represent a wide, diverse and rapidly evolving range of service providers that facilitate interactions on the internet between natural and legal persons, play an increasingly important role in modern societies. Their actions influence the choices people make, the way they exercise their rights, and how they interact. The market dominance of some places them in control of principal modes of public communication.

⁶¹ Report of the Special Rapporteur of the Human Rights Council on Human Rights Defenders of 13 January 2013, A/HRC/22/47; *Guidelines on the Protection of Human Rights Defenders*, OSCE/ODIHR, published on 10 June 2014, § 7.

⁶² *Youth Initiative for Human Rights v. Serbia* (application no. 48135/06), judgment of 25 June 2013, § 20.

⁶³ Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe, adopted by the Committee of Ministers on 28 November 2018 at the 1330th meeting of the Ministers' Deputies.

⁶⁴ *Ibid.*, preamble.

⁶⁵ *Ibid.*

⁶⁶ See also *Compilation of measures and practices in place in the Council of Europe member States*, prepared by the CDDH Drafting Group on Civil Society and National Human Rights Institutions (CDDH-INST) within the framework of its work on the protection and promotion of the civil-society space, document CM(2018)149. It contains examples of national measures and practices on the right to information and freedom of expression with respect to Civil Society Organisations (section 3.3.) and Human Rights Defenders (section 4.3).

93. The European Court has paid attention to the role, and ensuing responsibilities, that internet intermediaries play in the distribution of content online. Indeed, it 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”.⁶⁷ 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,⁶⁸ 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.⁶⁹

94. Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries⁷⁰ provides guidelines for States on actions to be taken vis-à-vis internet intermediaries with due regard to their roles and responsibilities.⁷¹ The Recommendation underlines that it is primarily the obligation of States to make sure that laws, regulations and policies applicable to internet intermediaries effectively safeguard the human rights and fundamental freedoms of users.⁷² However, at the same time and in line with the United Nations Guiding Principles on Business and Human Rights and Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, internet intermediaries have the responsibility to respect the internationally recognised human rights of their users and of third parties affected by their activities.⁷³ The scale and complexity of the means through which intermediaries meet their responsibilities may vary taking into account the severity of impact on human rights that their services may have.⁷⁴ In general, the greater the impact and the potential damage to the objects of legal protection and the higher the value of the services for the exercise of human rights, the greater the precautions that the intermediary should employ when developing and applying their terms and conditions of service, community standards and codes of ethics aiming, notably, to prevent the spread of abusive language and imagery, of hatred and of incitement to violence.⁷⁵

95. The EU Directive on electronic commerce⁷⁶ requires EU member States to 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.⁷⁷

⁶⁷ *Delfi AS v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, § 113.

⁶⁸ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (application no. 22947/13), judgment of 2 February 2016.

⁶⁹ *Pihl v. Sweden* (application no. 74742/14), decision on admissibility of 9 March 2017.

⁷⁰ *Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries*, adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies.

⁷¹ See Appendix to Recommendation CM/Rec(2018)2 which contains “Guidelines for States on actions to be taken vis-à-vis internet intermediaries with due regard to their roles and responsibilities”

⁷² Appendix to Recommendation CM/Rec(2018)2, principle 1.

⁷³ *Ibid.*, principle 2.

⁷⁴ *Ibid.*, principle 2.1.2.

⁷⁵ *Ibid.*

⁷⁶ *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')*.

⁷⁷ See *Delfi AS v. Estonia*, cited above, §§ 50; 57.

96. A 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.⁷⁸

97. 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.⁷⁹

98. 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 and adults on issues of internet security.

99. 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 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 use media safely and responsibly.

100. In *Norway* 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".

101. 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.

102. In *Denmark*, there are examples of users of internet intermediary platforms, who have set out policies and measures themselves regulating the online content on their Facebook pages etc. This is the case with the Danish news networks, DR and TV2. Their guidelines on debates on their Facebook pages state as follows; “hateful comments, condescending comments or gross personal attacks are not welcome” (DR) and “we do not allow offensive language, personal attacks, harassment and calls for violence” (TV2).

i. Specific focus area: Freedom of expression in political discourse

103. Freedom of expression is crucial for political debate in a pluralist society. Pluralist democratic political activity is guaranteed by the European Convention on Human Rights in Article 10 on freedom of expression as well as in Article 11 on freedom of assembly and association, which both are essential for the work of political parties. During election periods, freedom of expression is one of the conditions necessary to ensure the free expression of the opinion of the people in the choice of the legislature (Article 3 of Protocol No.1).⁸⁰ However Articles 10 and 11 are not absolute rights and may be qualified by consideration of competing public interests, including the prevention

⁷⁸ See also below section II. Specific focus area: HATE SPEECH - Self-regulation by public and private institutions.

⁷⁹ See also below § 170 of this Guide.

⁸⁰ PACE report adopted on 11 September 2003 on “Racist, xenophobic and intolerant discourse in politics”, Summary. See also Council of Europe factsheet on Freedom of expression and elections, available at <https://rm.coe.int/factsheet-on-media-and-elections-july2018-pdf/16808c5ee0>

of crime and the protection of public order and of the rights of others. The prevention of racism, xenophobia and intolerance is also a public interest with which the freedoms of expression and association may not unduly interfere.⁸¹ This is made clear by Articles 14 and 17 of the Convention and Protocol No. 12 to the Convention.

- **Freedom of political debate**

104. Freedom of political debate is at the very core of the concept of a democratic society.⁸² For this reason there is little scope for restrictions on political speech or debates on questions of public interest.⁸³ The European Court of Human Rights has stated that whilst an individual taking part in a public debate on a matter of general concern is required not to overstep certain limits, as regards in particular respect for the rights of others, he or she is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements.⁸⁴

105. In *Norway*, political discourse has been given a particularly strong protection in the constitutional article establishing the right to freedom of expression. According to Article 100, third paragraph, of the Constitution 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.

106. The Constitutional Court of *Poland* held in its judgment of 21 September 2015⁸⁵ that the rights provided for in Article 54, paragraph 1, of the Constitution consist of the right to political debate constituting a material element of the democratic legal system. 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, free exchange of views does not include 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.

107. Moreover, the Court has underlined the need for ensuring transparency and the responsible exercise of the functions public officials.⁸⁶ In ascertaining whether a positive obligation to act exists in a particular situation, certain regard must be had to the fair balance that has to be struck between the general interest of the community and interests of individuals.⁸⁷ In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion.⁸⁸ Thus with respect to political speech the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician.⁸⁹ Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.⁹⁰

⁸¹ PACE report adopted on 11 September 2003 on “Racist, xenophobic and intolerant discourse in politics”, II. Explanatory memorandum.

⁸² *Bowman v. the United Kingdom* (application no.24839/94), Grand Chamber judgment of 19 February 1998, § 42;

Lingens v. Austria (application no. 9815/82), judgment of 8 July 1986, § 41.

⁸³ *Dichand and others v. Austria*, (application no. 29271/95), judgment of 26 February 2002, § 38; *Savva Terentyev v. Russia* (application no. 10692/09), judgment of 28 August 2018, § 62.

⁸⁴ *Willem v. France* (application no.10883), judgment of 16 July 2009, § 33.

⁸⁵ Judgment of 21 September 2015 of Constitutional Court of Poland, case no. K 28/13.

⁸⁶ *OOO Ivpress and Others v. Russia* (application nos. 33501/04, 38608/04, 35258/05 and 35618/05), judgment of 22 January 2013, § 55. See also Council of Europe, Committee of Ministers, *Declaration on freedom of political debate in the Media*, adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers’ Deputies, IV.

⁸⁷ *Ozgur Gundem v. Turkey* (application no. 23144/93), judgment of 16 March 2000, § 43.

⁸⁸ *Sürek v. Turkey (no. 1)* (application no.26682/95), Grand Chamber judgment of 8 July 1999, § 61.

⁸⁹ *Ibid.*, § 61.

⁹⁰ *Ibid.*

108. In addition, political parties in democratic societies play an essential role in ensuring pluralism and the proper functioning of democracy.⁹¹ The formation of collective entities by individuals for any lawful purpose is protected by freedom of assembly and association in Article 11 of the Convention. As freedom of expression is particularly important for political parties and their active members, Article 11 must also be interpreted in light of Article 10⁹². As put forward by the Court, the reason behind the link between the two freedoms is the fact that the activities of political parties form part of a collective exercise of freedom of expression.⁹³

109. As an example, Articles 10 and 11 of the Convention are reflected in several provisions of the Constitution of *Croatia* which includes clear conditions for exercising these rights. Under the Public Assembly Act 1999, prohibitions of peaceful assembly and public protest can be ordered where the goals of the assembly focus on calling for and incitement to national, racial or religious hatred or any form of intolerance.

• Responsibility of political leaders and political parties

110. Political discourse carries with it special duties and responsibilities. It may therefore be subject to restrictions in accordance with certain conditions. Political leaders, in their role of opinion leaders, have a particular responsibility which is inherent to free speech in culturally diverse societies.⁹⁴ 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.⁹⁵ In this context Recommendation No. R 97(20) of the Committee of Ministers to member States on “Hate Speech” calls on national authorities and officials “to refrain from statements, in particular to the media, which may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimising, spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance. Such statements should be prohibited and publicly disavowed whenever they occur.”⁹⁶

111. Recent years have seen an increase in racist discourse in politics in Europe, not only amongst what might be termed “far-right” parties, but also on the part of mainstream politicians.⁹⁷ In many countries in Europe nationalist and xenophobic political parties are exploiting public anxieties over migration and expressing populist views that seek to exclude other voices.⁹⁸ These parties collude in stoking intolerance and damaging community relations with the risk of dragging their societies further away from a more consensual and inclusive political culture in which all sides respect democratic norms.⁹⁹ Members of minority groups perceive the prevailing social

⁹¹ *United Communist Party of Turkey v. Turkey* (application no. 19392/92), Grand Chamber judgment of 30 January 1998. § 43.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, cited above, principle 21. See also OSCE/ODIHR - Venice Commission joint guidelines on political party regulations regarding ‘Commitment to Non-Violence’, p. 15: “Parties in democratic systems must reject the use of violence as a political tool and should not advocate or resort to violence, maintain their own militias or use hate speech as a political tool. Parties should not seek to disrupt meetings of rival parties, nor should they hinder the free speech rights of those with opposing views.” Available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)024-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)024-e)

⁹⁵ *Ibid.*, principle 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 *The Ljubljana Guidelines on Integration of Diverse Societies*, published on 7 November 2012 by the OSCE High Commissioner on National Minorities, principle 27. Furthermore see OSCE, 14th Ministerial Council, Brussels, 4 – 5 December 2006, *Decision No. 13/06 “Combating intolerance and discrimination and promoting mutual respect and understanding”*, § 8.

⁹⁶ *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, Appendix.

⁹⁷ PACE report “Racist, xenophobic and intolerant discourse in politics”, adopted on 11 September 2003, Summary.

⁹⁸ Fourth annual report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe, *Populism - How strong are Europe’s checks and balances?*, presented at the 127th session of the Committee of Ministers, Nicosia, 19 May 2017, Foreword; ECRI, *General Policy Recommendation 15 on combating Hate Speech (GPR No. 15)*, adopted on 8 December 2015, Explanatory memorandum § 158. See also ECRI *Declaration on the use of racist, anti-Semitic and xenophobic elements in political discourse*, adopted on 17 March 2005.

⁹⁹ Fourth annual report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe, *Populism - How strong are Europe’s checks and balances?*, Foreword. See also 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.

climate as condoning racism, xenophobia and intolerance.¹⁰⁰ This underlines the need for States to address the effects that incitement to violence or hatred have on the population groups it targets.¹⁰¹

112. The rise of populism is facilitated by technological developments such as the creation of online platforms and big data which facilitate the spread of information disorder and hate speech (see below under *ii. Specific focus area: Information disorder* (“fake news”). The rise of populism is also impacted by the demise of gatekeepers such as legacy media which obey common standards of decency, respect for opponents and fact-based debate, who unlike technology operators, can be held accountable for the negative impacts on a pluralistic, fact-based political debate.

113. During the 2017 Municipal Elections in *Finland*, the Non-Discrimination Ombudsman, the Advisory Board for Ethnic Relations and the Finnish League for Human Rights stressed the importance of election campaigns that are respectful of all people and free from hate speech. The Non-Discrimination Ombudsman, who actively monitors municipal election campaigns, particularly on social media, and addressing hate speech, sent a letter to all the political parties participating in the election, reminding them of the significant role that political decision-makers play and of their effect on the social climate. As part of the monitoring, automatic text analysis to recognise hate speech was experimented. This experiment helped detect public Twitter and Facebook messages sent by candidates that contained elements of hate speech. The material collected was analysed by the Non-Discrimination Ombudsman to determine whether it contained hate speech. People were also able to contact the Non Discrimination Ombudsman via an online form.

114. In *Estonia*, the Network of Estonian Nonprofit Organisations ‘Valimiste valvurid’ (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 highlight any shortcomings publicly.

- **Measures to combat political statements that incite to violence or hatred**

115. Manifestations of racism, xenophobia and intolerance in political discourse may take a variety of forms and have impacts of varying gravity. Accordingly, a progressive range of measures needs to be put in place so as to accommodate and address fully the complexity of each situation.¹⁰²

116. In the *Czech Republic*, the Constitutional Court concluded in its decision¹⁰³ 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.

¹⁰⁰ FRA, *Incitement in media content and political discourse in EU Member States*, Contribution to the second Annual Colloquium on Fundamental Rights, cited above, Conclusions.

¹⁰¹ *Ibid.*

¹⁰² PACE Resolution 1345 (2003) on racist, xenophobic and intolerant discourse in politics, adopted on 29 September 2003, § 10.

¹⁰³ 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.

a. Self-regulation

117. Self-regulation by political parties and elected bodies as well as public institutions, such as the Parliament¹⁰⁴, is in many instances the most effective means of preventing and condemning manifestation of racism, xenophobia and intolerance in political discourse.¹⁰⁵ The existence of such codes of conduct is particularly relevant where the position of the speaker may entail immunity, such as in the case of parliamentarians, since it may preclude any other forms of action being taken against the use of hate speech by the person concerned.¹⁰⁶ These institutions are often best-placed to identify certain uses of statement that incite to violence and hatred and to prevent their continuation. The nature of such institutions can vary significantly which may have a bearing on the exact way how their regulations are set up and function.¹⁰⁷

118. 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 procedure accompanied by certain sanctions for non-compliance with their provisions.¹⁰⁸ 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.¹⁰⁹ At the Council of Europe level, the Parliamentary Assembly has launched a “No Hate Parliamentary Alliance” with a Charter of commitments for membership.¹¹⁰

119. The *Czech* Ministry of Justice has joined the Hate Free Zone Network.

120. All political parties of the Parliament of *Finland* re-signed the Charter of European Political Parties for a Non-Racist Society on 5 August 2015. The Charter was initially signed by a majority of political parties in 2003 and resigned in 2011. The parties have committed to upholding all articles of the Charter, including committing themselves to not display, publish or distribute views and positions which stir up or invite prejudice, hostility or division. The parties have also pledged to ensure that persons partaking in campaigning or other party activities are obliged to act in accordance with the Charter. Parties have committed themselves to provide guidance to their candidates with regard to respectful campaigning.

121. The effective use of such codes is more likely 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.¹¹¹ For more detail on combating hate speech see below Section II of the Guide.

¹⁰⁴ Fifth annual report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe, *Role of institutions - Threats to institutions*, presented at the 128th session of the Committee of Ministers, Elsinore, 18 May 2018, Chapter 4, p.71.

¹⁰⁵ ECRI GPR No. 15, preamble.

¹⁰⁶ ECRI GPR No. 15, Recommendation 6.a, and its Explanatory memorandum §§ 118-119.

¹⁰⁷ ECRI GPR No. 15, Explanatory memorandum § 116.

¹⁰⁸ In its concluding observations on periodic reports submitted by States Parties to the ICCPR, the Human Rights Committee (HR 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.

¹⁰⁹ *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 International 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. See also *European Code of conduct for the political integrity of local and regional elected representatives*, adopted by the Congress of Local and Regional Authorities of the Council of Europe on 17 June 1999, available at <https://rm.coe.int/1680718fbf>

¹¹⁰ The “No Hate Parliamentary Alliance”, launched on 29 January 2015, is open to members of the Parliamentary Assembly and to members of delegations having observer and partner for democracy status with the Assembly. Their commitment is formalised by signing the Charter of commitments available at <http://website-pace.net/documents/19879/1110723/20150129-CharteEngagementsNHPA-BIL.pdf/95347ed9-8d91-4271-bbeb-3226ac95fd25>

¹¹¹ ECRI GPR No. 15, Explanatory memorandum §§ 119-120.

122 Such 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.¹¹²

123. For example, 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).

124. In *Hungary*, Act XXXVI of 2012 “Maintaining the order of the discussion, the disciplinary power” in the National Assembly deals with the limits of freedom of expression. Accordingly, the Chair of the session shall reprimand a 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. If the speaker nevertheless uses such term after being warned, the Chair of the session shall withdraw his or her right to speak. In addition, measures may be taken to exclude the Member concerned from the remaining part of the session day, and the remuneration payable to him or her may be decreased.

125. The Parliament of *Latvia* has a standing “Mandate, Ethics and Submissions Committee” tasked with the supervision of observing the Code of Ethics for Members of the Parliament¹¹³ which is an integral part of the Parliament’s Rules of Procedure. The decisions of the Committee are publicly available.¹¹⁴ 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 or 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”.

126. 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.¹¹⁵ 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.¹¹⁶

127. In the event that internal complaints mechanisms are not sufficient to deal effectively with 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.¹¹⁷

128. To combat racism in *Croatia*, hate speech is prohibited under national legislation, on the grounds that the rights of others need to be protected 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.

¹¹² *Ibid.*

¹¹³ For more detail see website at: <http://www.saeima.lv/en/legislation/rules-of-procedure/8>

¹¹⁴ For more detail see website at: <http://mandati.saeima.lv/lemuma-projekti/par-saeimas-deputtu-tikas-kodeksa-prkpumiem>

¹¹⁵ ECRI GPR No. 15, Recommendation 6.c., and its Explanatory memorandum §§ 122-123.

¹¹⁶ ECRI GPR No. 15, Explanatory memorandum §§ 126-127.

¹¹⁷ *Ibid.*, § 129.

b. Withdrawal of public financial and other forms of support

129. In the context of cultural diversity in European societies, measures should be in place to suppress public financing of political parties and other organisations that promote hatred, intolerance and xenophobia.¹¹⁸ It is of particular importance to ensure that such provisions are effectively enforced.¹¹⁹ 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 political parties and other organisations or, where they fail to sanction its use by their members.¹²⁰

130. 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 forms of practical assistance such as the availability of public facilities or staff. These measures should extend to political parties and organisations that have a formal legal status as well as those having a more informal or *de facto* character.¹²¹

131. 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 Convention. 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 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.¹²²

132. 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.¹²³

133. In *Germany*, Article 20 (3) of the German Basic Law was amended in 2017 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.¹²⁴ The exclusion from public funding is limited to a period of six years but can be extended.¹²⁵

134. In the *Netherlands*, when a political party is found guilty of discrimination it loses its 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, 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. This decision was reversed in 2007 when the party decided to admit women.

¹¹⁸ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, cited above, principle 38.

¹¹⁹ Article 4 (a) of the ICERD 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 the ICERD, to criminalize hate speech, hate crimes and the financing of racist activities.

¹²⁰ 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.

¹²¹ ECRI GPR No.15, Explanatory memorandum § 157.

¹²² *Ibid.*, § 168.

¹²³ *Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe*, § 10.

¹²⁴ The new Article 20 (3) of the Basic Law is available at https://www.gesetze-im-internet.de/gg/art_21.html. 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 N. 91. 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.

¹²⁵ See also above § 31 of the Guide.

c. Prohibition and dissolution of political parties and organisations in exceptional cases

135. The dissolution of a political party that seeks to open a political debate, regardless of whether it challenges the state ideology and structure, is a drastic measure in a pluralist democracy.¹²⁶ According to the European Court, the limitations set out in Article 11 of the Convention, where political parties are concerned, are to be construed strictly, and only “convincing and compelling reasons” may justify restrictions on the freedom of association of political parties.¹²⁷

136. However, in Europe’s increasingly culturally diverse societies, appropriate responses against political parties and organisations that promote hatred, intolerance and xenophobia will need to be taken.¹²⁸ In the event of racist, xenophobic or intolerant discourse of exceptional gravity such measures should, as a last resort, lead to the dissolution of political parties and organisations that incite racial hatred.¹²⁹

137. At the global level, the ICERD obliges the State 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 the ICERD, under Article 4(b) to declare illegal and prohibit organisations that promote or incite racial discrimination. The Committee on the Elimination of Racial Discrimination (CERD) has underlined the positive obligation for States to declare illegal and prohibit organisations that promote or incite racial discrimination.¹³⁰ In addition, in its concluding observations on periodic reports submitted by State Parties to the ICCPR, the Human Rights Committee has called for specific legislation criminalising racist organisations.¹³¹

138. 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.¹³²

139. 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. In determining whether a necessity within the meaning of Article 11 (2) exists, the Contracting States have only a limited margin of appreciation.¹³³ This approach should be translated into an obligation for States to also adopt a strict approach to the use of such sanctions by substantiating the need for their application¹³⁴ and then only doing so as a measure of last resort¹³⁵ and in accordance with the procedures which provide all the necessary guarantees to a fair trial.¹³⁶ 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.¹³⁷ 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.¹³⁸ It provides: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any

¹²⁶ *United Communist Party of Turkey v. Turkey*, cited above, § 46.

¹²⁷ *Ibid.*, § 31. See also OSCE Copenhagen Document. Meeting of the Conference on the Human Dimension of the CSCE. § 24.

¹²⁸ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, cited above, principle 38

¹²⁹ *Association nouvelle des Boulogne Boys v. France* (application no. 6468/09), decision on the admissibility of 22 February 2011.

¹³⁰ CERD, *Recommendation No.35, Combating hate speech*, adopted by the Committee at its eighty-third session (12–30 August 2013), CERD/C/GC/35.

¹³¹ E.g. CCPR concluding observations on the periodic report of Bosnia and Herzegovina, 2017, CCPR/C/BIH/CO/3, §22; CCPR concluding observations on the periodic report of Slovenia, 2016, CCPR/C/SVN/CO/3, §8; CCPR concluding observations on the periodic report of Poland, 2016, CCPR/C/POL/CO/7, §16; CCPR concluding observations on the periodic report of the United Kingdom of Great Britain and Northern Ireland, 2015, CCPR/C/GBR/CO/7, § 10

¹³² ECRI GPR No. 15, Recommendation 6. See also GPR No. 7 on national legislation to combat racism and racial discrimination, Part III, §§ 16-17.

¹³³ *United Communist Party of Turkey v. Turkey*, cited above, § 46.

¹³⁴ *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* (application no. 37083/03), judgment of 8 October 2009.

¹³⁵ European Commission for Democracy through Law (Venice Commission) and OSCE/ODIHR, *Guidelines on Freedom of Association* (2014), §248; PACE Resolution 1308 (2002) on restrictions on political parties in the Council of Europe member States, adopted on 18 November 2002, § 11.

¹³⁶ PACE Resolution 1308 (2002), cited above, § 11.

¹³⁷ 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 41st plenary session (Venice, 10-11 December 1999), §3, Explanatory memorandum § 15.

¹³⁸ *Ibid.*, § 5.

of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention". Similar provisions exist in other international human rights treaties, for instance in Article 5, paragraph 1 of the ICCPR.

140. *Estonia, Croatia, Germany, Hungary, Latvia, Netherlands, Poland, Serbia and Spain* have legal provisions, either at the Constitutional level or within their civil or criminal legislation, which allow them to prohibit or dissolve political parties and organisations, notably those that support racial or national hatred, incite violence and are a threat to democracy.

141. Additionally in *Latvia*, under the law on "Associations and Foundations" 2004, registration in the registry of associations and foundations might be refused, in the case the aim of these entities amounts to an infringement of any legislative acts binding upon the State.

142. 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 6° 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 and that their activities threaten public order and public security. Several associations were dissolved on this basis, under the supervision of the *Conseil d'État*, which has each time validated the measure as necessary, appropriate and proportionate (see in particular *Conseil d'État's* decrees of 15 December 2017 No. 401378 or of 30 December 2014 No. 372320). However, in order to strike a balance between freedom of association and freedom of expression, on the one hand, and public order and the rights of others, on the other hand, these measures of dissolution, which constitute administrative police measures, are used only exceptionally when it is established that these associations use hate speech and that their activities threaten public order and safety. These measures are placed under the control of a judge, as regards both the emergency character (under the *référé liberté* procedure), and the substance. The judge's control is thorough, including the necessary and proportionate nature of the measure, particularly in view of the disturbances to which it aims to put an end and other possible measures.

143. Legal measures directed to the prohibition or dissolution of a political party or other organisation should only be ordered by a court in a procedure offering all guarantees of due process, openness and a fair trial. 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.¹³⁹

144. In *Germany*, the Federal Constitutional Court in its history has only 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.¹⁴⁰

¹³⁹ *Ibid.*, § 7.

¹⁴⁰ An unofficial English translation of this judgement can be found at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html.

145. 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 violating guaranteed human and minority rights and inciting to racial, national and religious hatred. In its reasoning, the Constitutional Court exposed a very detailed analysis of both the subject association and the Serbian society.¹⁴¹

146. In the *Czech Republic*, the political party “Dělnická strana” was dissolved by decision of the Supreme Administrative Court,¹⁴² which concluded that the political programme of the party was xenophobic, homophobic and included racist features.¹⁴³ 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.

- **Higher degree of tolerance of criticism towards politicians**

148. 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. Therefore, the limits of acceptable or permissible criticism are wider as regards a politician as such than as regards a private individual.¹⁴⁴ Politicians must consequently display a greater degree of tolerance towards criticism notably in a situation in which they themselves make public statements that are susceptible of criticism, otherwise public debate may be stifled altogether.¹⁴⁵

149. 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.¹⁴⁶

150. However, a distinction should be drawn between statements of facts, of which the truth or falseness can be proven or demonstrated, and value judgments, which is a fundamental part of freedom of opinion secured by Article 10 of the Convention.¹⁴⁷

151. The Constitutional Court of *Hungary* has examined the relationship between freedom of speech and the freedom of the press with the protection of the personality rights of public figures in the criminal law context.¹⁴⁸ Following a decision in 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.¹⁴⁹ 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 referred to in Section 2:44 of Act V of 2013 on the Civil Code.

¹⁴¹ Constitutional Court’s decision no. VIIIU - 249/2009 from 12 June 2012.

¹⁴² Judgment ref. no. Pst 1/2009 – 349 of 17 February 2010.

¹⁴³ 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.

¹⁴⁴ *Linens v. Austria*, cited above; *Castells v. Spain*, (application no. 11798/85), judgment of 23 April 1992; *Oberschlick v. Austria (no. 2)* (application No. 20834/92), judgment of 1 July 1997; *Vona v. Hungary* (application no. 35943/10), judgment of 9 July 2013.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Association nouvelle des Boulogne Boys v. France*, cited above; *Refah Partisi (the Welfare Party) and Others v. Turkey* (application no. 41340/98), Grand Chamber judgment of 13 February 2003, §§ 101, 111-115; *Kalifatstaat v. Germany* (application no. 13828/04), decision on the admissibility of 11 December 2006; *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998, *The United Macedonian Organisation Ilinden and Others v. Bulgaria* (application no. 59491/00), judgment of 19 January 2006, *Tourkiki Enosi Xanthis and Others v. Greece* (application no. 26698/05), judgment of 27 March 2008; *Association of Citizens Radko & Paunkovski v. “the former Yugoslav Republic of Macedonia”* (application no. 74651/01), judgment 15 January 2009; *Socialist Party and Others v Turkey* (application no. 21237/93), Grand chamber judgment of 25 May 1998, conclusion.

¹⁴⁷ *Ibid.*

¹⁴⁸ Decision 36/1994. (VI. 24.) AB.

¹⁴⁹ Decision 7/2014. (III. 7.) AB available at http://hunconcourt.hu/uploads/sites/3/2017/10/en_0007_2014.pdf

152. In *Austria*, when examining claims for compensation in respect of alleged insults relating to politicians under Sec. 6 of the Media Act, 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.¹⁵⁰

153. 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. Accordingly, public figures in practice are expected to be more tolerant to public criticism. Nonetheless, a 2017 judgement of the Supreme Court of Cassation shows 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 he or she suffered as a consequence.¹⁵¹

154. In 2016, on the occasion of the presidential elections in the *Republic of Moldova*, the Central Electoral Commission adopted a regulation which expressly forbade attacks 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 offence, verbal, written or non-verbal expressions that do not comply with the general acceptable behaviour norms in political debates.

155. However, the establishment of conditions for free exchange of views does not include, in principle, clearly insulting statements. Moreover, the private life and family life of political figures and public officials is protected under Article 8 of the Convention unless it concerns information of direct public concern to the way in which they carry out their functions. However, where political figures and public officials draw public attention to parts of their private life they must accept that those parts are subject to scrutiny and criticism.¹⁵²

156. In any event, political figures are not expected to tolerate discrimination based on grounds prohibited by Article 14 of the Convention, nor do they have to tolerate racist or hate speech. This all the more so if the harassment is aimed at or has the effect of restricting or violating their freedom of expression.¹⁵³

157. 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 national institutions, including by the President of Estonia. As a result, the Minister of Finance resigned.

158. In the *Netherlands*, in 2018 in the criminal case related to a coloured and female politician the court found 21 persons guilty of group insult and incitement to discrimination.

159. In *Denmark* several cases have occurred in recent years of politicians being threatened, for example a 73-year old person was sentenced to 40 days in prison, after having threatened two politicians on Facebook.¹⁵⁴

¹⁵⁰ See, for example, *Haupt v. Austria* (application no. 55537/10), decision on the admissibility of 2 May 2017.

¹⁵¹ Judgment of the Supreme Court of Cassation Rev 605/2017 of 6 April 2017.

¹⁵² *Declaration on freedom of political debate in the media*, cited above, IV and VII.

¹⁵³ For example, see study *Sexism, harassment and violence against women in parliaments in Europe* by the Inter-Parliamentary Union (IPU) and the Parliamentary Assembly of the Council of Europe (PACE), October 2018, p. 13. The study also includes a section with solutions and good practices, pp. 14-17. Available at <http://website-pace.net/documents/19879/5288428/20181016-WomenParliamentIssues-EN.pdf/7d59e7c5-4a88-4d23-a6cd-7404449fd45f>

¹⁵⁴ See “*Ugeskrift for Retsvæsen*” 2017, p. 2246.

ii. Specific focus area: Information disorder (“fake news”)

160. The recent growth in information disorder creates new global challenges in the field of freedom of expression. It concerns information which is potentially misleading and interferes with the public's right to know, the right of individuals to seek and receive, as well as to impart, information and ideas of all kinds.¹⁵⁵

161. There is no agreement yet on the definition of the phenomenon¹⁵⁶ and not even on the use of the term “fake news”.¹⁵⁷ Some forms of information disorder may harm individual reputations and privacy, or incite to violence, discrimination or hostility against certain groups in society.¹⁵⁸ There is ongoing discussion on how the phenomenon is influencing democratic political processes and values. Targeted disinformation campaigns designed specifically to sow mistrust and confusion may sharpen existing socio-cultural divisions in society using nationalistic, ethnic, racial and religious tensions.¹⁵⁹

162. Although false information, rumours and propaganda have always existed and have always been particularly prevalent in politically charged times, namely before elections such information can today be rapidly produced and disseminated on the internet, in particular via social media platforms, often without prior verification of accuracy or correctness and without editorial control.¹⁶⁰ Disinformation is one of the most important forms of attack against all societal players from governments down to individuals: it is disseminated through websites that deliberately publish hoaxes, propaganda and misleading information or disinformation purporting to be real news – often misusing social media to drive web traffic and amplify their effect. It is still too early to know how efficient these techniques are in influencing the behaviour of voters, however there is good reason to believe that their impact is set to grow.¹⁶¹

¹⁵⁵ 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, fourth preambular paragraph.

¹⁵⁶ The meaning of the term has been clarified in the following two reports:

- 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), available at <https://shorensteincenter.org/information-disorder-framework-for-research-and-policy-making/>

- Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Action Plan against Disinformation*, 2018 JOIN(2018) 36 final, adopted on 5 December 2018, Introduction: “Disinformation is understood as verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm. Public harm includes threats to democratic processes as well as to public goods such as Union citizens' health, environment or security. Disinformation does not include inadvertent errors, satire and parody, or clearly identified partisan news and commentary. The actions contained in this Action Plan only target disinformation content that is legal under Union or national law.”

¹⁵⁷ Report to the Council of Europe, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, cited above, consciously refrains from using the term 'fake news' which is woefully inadequate to effectively capture the complexity of the phenomenon of information pollution, not to mention that it is increasingly becoming politicised, p. 5. The EU Commission has also moved away from using the term 'fake news', see Final report from the EU Commission High Level Expert Group on Fake News, *A Multi-Dimensional Approach to Disinformation*, released on 13 March 2018. See also *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>

¹⁵⁸ *Joint Declaration on the freedom of expression and “Fake news”, Disinformation and Propaganda*, cited above, preamble.

¹⁵⁹ *Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries*, Preamble. See also report to the Council of Europe, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, cited above, p. 4.

¹⁶⁰ Report of the Secretary General Thorbjørn Jagland: *Populism – How strong are Europe's check and balances?*, cited above, p. 37.

¹⁶¹ Fifth annual report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe, *Role of institutions - Threats to institutions*, presented at the 128th session of the Committee of Ministers, Elsinore, 18 May 2018, Chapter 4, p.70.

163. The harmful effect of fake news was the centre of a court case in *Denmark*, where a politician was rewarded a compensation of approx. EUR 10,000 after a webpage had posted an article claiming that the politician had been found dead.

- **Regulations at national level**

164. In many member States there is ongoing discussion on the necessity of regulating information disorder in order to safeguard pluralistic discourse based on objective information and professional journalism as a condition for a democratic decision-making.

165. Any efforts to tackle information disorder should be based on a human rights approach guaranteeing, on the one hand, freedom of expression and freedom to receive and impart information and, on the other hand, the protection of public order and the rights of others, including the right to reputation.¹⁶²

166. Under Article 3 of the Protocol to the European Convention on Human Rights, member states undertake to guarantee free and democratic elections. The freedom and fairness of elections, being a central element of the democratic process, are jeopardised by broad and increasingly aggressive attacks against all societal players from governments down to individuals.¹⁶³ Special attention should be paid to the protection of the integrity of the democratic process by identifying and implementing effective responses to multiple threats that interfere with the electoral processes and manipulate voter behaviour, notably through the use of technologies and social media.¹⁶⁴

167. 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 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.¹⁶⁵

168. In *Poland* the distribution of false or manipulating information is also regulated in case of the elections and referenda period. According to the Election Code Act, dissemination of electoral materials (in particular posters, leaflets and passwords), statements or other forms of election campaign containing information which is not true, gives to the candidate or electoral representative of the committee concerned the right to submit an application to the court with the view to a particularly speedy procedure:

- This application is examined within 24 hours in non-litigious proceedings.
- The court's decision may be appealed to the Court of Appeal within 24 hours, which recognizes them within 24 hours.
- The Court of Appeal's decision shall not be subject to a cassation appeal and shall be immediately enforceable.
- The publication of a correction, reply or apology takes place within 48 hours at the expense of the obligator.

¹⁶² Final report from the EU Commission High Level Expert Group on Fake News, *A Multi-Dimensional Approach to Disinformation*, cited above.

¹⁶³ Fifth annual report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe, *Role of institutions - Threats to institutions*, cited above, p. 70.

¹⁶⁴ *Ibid.*, p. 7. The draft joint report of the Venice Commission and the Directorate of Information Society and Action against Crime of the Directorate General of Human Rights and Rule of Law on *digital technologies and elections* addresses the issue of information disorder as a challenge to deliberative democracy, but states also that legislation aimed at fighting it may pose a threat to the fundamental right of freedom of expression and information. It concludes that, while States have a positive obligation to prevent undue interference with civil and political rights by third parties, undue state intervention can result in undermining the very rights that it is meant to protect. Alternative means need to be employed to counter information disorder, such as fact-checking, media literacy programmes aimed at sensitisation about the problem and recognition of false content, and investments in quality journalism. Any measures to address the information disorder must be designed with great care, so as not to undermine the principle of "net neutrality".

¹⁶⁵ According to Sec. 264 of the Austrian 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.

169. The spread of false news is prohibited in *France* by Law of 29 July 1881 on the Freedom of the Press (Article 27 paragraph 1) which makes it punishable by a fine of €45,000 if made in bad faith, has disturbed or is likely to disturb public peace. Any conviction on the basis of this law 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. Moreover, two bills “against the manipulation of information” (“loi n° 2018-1202” and “loi organique n° 2018-1201 relatives à la lutte contre la manipulation de l’information”) were adopted on 22 December 2018 to fight against information disorder during electoral periods while protecting the right to freedom of expression. They include new tools to fight against the spreading of “fake news” during the electoral period, such as introducing specific judicial interim measures to prevent the publication of the “false information”, imposing transparency on internet platforms, strengthening the co-operation duty of the intermediaries or granting the “Conseil Supérieur de l’Audiovisuel” the power to suspend, prevent or put an end to a television service, controlled by a foreign State, when it is proven that it attacks the fundamental interest of the States or tends to destabilise institutions.

170. In *Germany* the new Act to Improve Enforcement of the law in Social Networks (Network Enforcement Act, NetzDG)¹⁶⁶ entered into force in October 2017. The law aims to fight hate crime, criminally punishable fake news and other unlawful content on social networks more effectively. The law obliges the operators of large social media platforms to establish an efficient complaints management system which makes it easy for users to report unlawful content. If such content is reported to the operator, it has to take down or block this within 24h with regard to manifestly unlawful content, and generally within seven days with regard to unlawful content (i.e. content not protected by freedom of expression e.g. incitement to hatred, insult or defamation). Operators also have to publish reports about their handling of complaints. Non-compliance with these obligations can result in fines up to 50 million. Such fines will not apply with regard to the non-removal of individual posts but only for systematic failure to comply with said obligations. Also, such fines are subject to judicial review (which includes a proportionality test). The law only serves to ensure that the operators of social media platforms meet their already existing legal obligations.

171. 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 appropriate due diligence 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.

172. In *Spain*, the National Security Act 36/2015, of 28 September, although not specifically focusing on the threat of information disorder (“fake news”), nevertheless, in its Article 4, refers to the National Security Strategy. The Strategy approved by the Government on 1 December 2017 mentions the threat of online misinformation aimed at influencing the electoral processes.¹⁶⁷ The Strategy shall undertake new second level strategies in certain spheres such as cybersecurity. Furthermore, as a means of tackling information disorder (“fake news”) 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.

¹⁶⁶ An unofficial English translation of final draft of the NetzDG can be found at:

https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf

¹⁶⁷ http://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/presidencia/gobierno/Documents/2017-1824_Estrategia_de_Seguridad_Nacional_ESN_doble_pag.pdf

173. The observation of election campaigns is an integral part of the OSCE/ODIHR's election observation missions, which have been deployed across 56 of the 57 OSCE participating States. In recent years, the OSCE/ODIHR has increased its attention to how freedom of expression standards are respected in the online campaign and redoubled its focus on under-represented groups, for example women and national minorities. The OSCE/ODIHR is currently developing a dedicated handbook on the observation of election campaigns, as part of its comprehensive election observation methodology.

- **Multi-dimensional approach**

174. Given the complexity of information disorder a multi-dimensional approach is needed to tackle the problem which includes all parties involved with a view to identifying the roles and responsibilities of relevant stakeholders, such as internet intermediaries, media outlets, civil society, education establishments and the academia as well as States and international organisations.¹⁶⁸ All stakeholders should be supported in developing participatory and transparent initiatives for creating a better understanding of the impact on democracy, freedom of expression, journalism and civic space, as well as appropriate responses to these phenomena.¹⁶⁹ 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.¹⁷⁰

175. To advise on policy initiatives to counter fake news and disinformation spread online the European Commission of the EU engaged with all stakeholders within the framework of a High-level group of experts. The outcome of the Group's work was a report designed to review best practices in the light of fundamental principles, and suitable responses stemming from such principles.¹⁷¹ An Action Plan against Disinformation was adopted in December 2018.¹⁷²

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

176. Both traditional media and social media have reacted to the concerns expressed about the distribution of false information. Several media organisations have adopted codes of principles to strengthen their fact-checking capabilities¹⁷³ and provided advice on how to debunk "fake news."¹⁷⁴ Various types of measures that leverage on artificial intelligence (AI) and machine learning are being used to tackle specific facets of the disinformation phenomenon and filtering systems enabling the exposure of fact-checked information.¹⁷⁵ 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.¹⁷⁶

¹⁶⁸ 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; Joint Declaration on the freedom of expression and "Fake news", Disinformation and Propaganda, cited above; Report to the Council of Europe, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, cited above, Part 5; Final report from the EU Commission High Level Expert Group on Fake News, *A Multi-Dimensional Approach to Disinformation*, cited above.

¹⁶⁹ European Commission High Level Expert Group on Fake News, *A Multi-Dimensional Approach to Disinformation*, cited above, § 6.a., available at <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>

¹⁷⁰ 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

¹⁷¹ European Commission High Level Expert Group on Fake News, *A Multi-Dimensional Approach to Disinformation*, cited above.

¹⁷² Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Action Plan against Disinformation*, cited above.

¹⁷³ In 2016, the International Fact-Checking Network (IFCN) launched a "Code of principles for journalists to check facts", which is signed by most major fact-checkers in the world and entails an extensive accreditation process. <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*.

¹⁷⁴ Poynter Institute, *Tips on debunking fake news stories*, <https://www.poynter.org/news/6-tips-debunk-fake-news-stories-yourself>

¹⁷⁵ Final report entitled "A Multi-Dimensional Approach to Disinformation" from the EU Commission High Level Expert Group on Fake News, cited above, p. 16.

¹⁷⁶ *Ibid.*, p. 14; See also 2016 Reuters Institute study on European fact-checking "The Rise of Fact-Checking Sites in Europe", available at <https://reutersinstitute.politics.ox.ac.uk/our-research/rise-fact-checking-sites-europe>

177. Social media has also started using “trust indicators” to provide more context concerning the reliability content sources, media ownership and/or verified identity so that the users are better equipped to assess whether news derive from a credible source.¹⁷⁷

178. In the *Czech Republic*, a number of non-governmental initiatives focus on fact-checking such as www.demagog.cz, www.factczech.cz, www.manipulatori.cz and www.hatefree.cz. A NGO implemented project for media fact-checking was also developed in *North Macedonia*.¹⁷⁸ Similarly, “Faktisk.no AS” in *Norway* 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.

179. 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 verified 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.

180. In the *Netherlands*, on the basis of a co-operation agreement between Facebook, the news website NU.nl and Leiden University, editors from both NU.nl and Leiden University have access to a special Facebook-dashboard in which articles can be labelled as ‘fake news’ by Facebook-users. Whenever these articles appear to be factual incorrect, the articles will be flagged.

181. Representatives of online platforms, leading social networks, advertisers and advertising industry agreed on a self-regulatory Code of Practice on Disinformation¹⁷⁹ within the framework of the *European Commission’s* High-level group of experts on fake news and online disinformation. The European Commission will closely monitor its implementation with a third-party review by fact-checkers, academia, media and civil society organisations.¹⁸⁰

182. Print press organisations and broadcasters are intensifying efforts to enforce certain trust-enhancing practices. Individual news media, international organisations such as the International Federation of Journalists¹⁸¹, as well as national bodies have issued journalism guidelines. Guidelines include deontological codes, ethics and standards to guarantee quality in the methods used in producing news.¹⁸² Most print press and broadcasting organisations have codes of conduct. Moreover, in most countries, broadcasters are obliged to be transparent on media ownership and ensure impartiality of news.¹⁸³

¹⁷⁷ 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>

¹⁷⁸ More detail is available at www.proverkanafakti.mk

¹⁷⁹ Code of Practice on Disinformation, available at <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>. The Code includes an annex identifying best practices, available at https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54455.

¹⁸⁰ available at <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>

¹⁸¹ International Federation of Journalists (IFJ), *Declaration of Principles of Conduct for Journalist*, first adopted in 1954 by the IFJ’s World Congress and amended in 1986. They have formed the bedrock of the IFJ’s uncompromising stand in defence of a quality and ethical journalism.

<https://www.ifj.org/who/rules-and-policy/principles-on-conduct-of-journalism.html>

See also UNESCO, *Journalism, ‘Fake News’ and Disinformation: A Handbook for Journalism Education and Training*, Published in 2018, available at <https://unesdoc.unesco.org/ark:/48223/pf0000265552/PDF/265552eng.pdf.multi>

¹⁸² Final report entitled “A Multi-Dimensional Approach to Disinformation” from the EU Commission High Level Expert Group on Fake News, cited above, 2 (ii).

¹⁸³ *Ibid.*

183. In *Finland*, 21 chief editors of the most important media houses published in March 2016 a joint declaration in defence of “trustworthy journalism”, as opposed to new online magazines using news formats. The Finnish Union of Journalists welcomed the pledge and said it should concern also their freelancers and short timers.

184. In *Serbia*, according to the Journalists’ Code of Ethics:

- 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, rumour, insult or defamation (heading IV, paragraph 6),
- 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 (heading V, paragraph 2).
- Readers/viewers/listeners must be notified regarding direct benefits that the source can achieve from publishing the said information (heading V, paragraph 2).
- Keeping secret facts that might significantly affect the public perception of an event is equal to their deliberate distortion or lying (heading V, 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 objective reporting (heading V, paragraph 3).

185. Data-driven journalism based on data analysis is used by news publishers to increase accuracy in reporting. As a continuation of this development automated systems through artificial intelligence (AI) software is increasingly being used to deliver news service with more speed and broadness.¹⁸⁴ Enhancing transparency regarding the algorithmic processes used to produce news is crucial for building trust and ensuring due rights protection.¹⁸⁵ Ethics Guidelines on Trustworthy AI, prepared by European Commission’s High-Level Expert Group on Artificial Intelligence, set key requirements for AI systems to be met in order to be deemed trustworthy such as on human agency and oversight, transparency, accountability, diversity, non-discrimination and fairness.¹⁸⁶

186. To counteract information disorder *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 innovation¹⁸⁷.
- the programme “Medialab Prado” which since 2011 has worked on promoting data journalism.¹⁸⁸ In co-operation with the Madrid City Council it has organised two competitions on journalism data¹⁸⁹.
- the “Datadista” initiative which was selected by Google, Digital News Initiative Innovation Fund to produce a prototype (EUR 50,000)¹⁹⁰.

¹⁸⁴ Council of Europe, *Algorithms and Human Rights: Study on the Human Rights Dimensions of Automated Data Processing Techniques and Possible Regulatory Implications*, Council of Europe study, No. DGI (2017) 12, 2018. Available at <https://www.coe.int/en/web/freedom-expression/-/algorithms-and-human-rights-a-new-study-has-been-published>, p. 5.

¹⁸⁵ Conference “Governing the Game Changer - Impacts of artificial intelligence development on human rights, democracy and the rule of law”, organised by the Council of Europe and the Finnish Presidency of the Council of Europe’s Committee of Ministers (Helsinki, 26- 27 February 2019), Conclusion § 9, available at <https://rm.coe.int/conclusions-from-the-conference/168093368c>

¹⁸⁶ *Ethics Guidelines For Trustworthy AI*, prepared by the European Commission’s High-Level Expert Group on Artificial Intelligence and published on 8 April 2019, available at <https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai>. The next steps will include the setting up of a forum discussion to foster the exchange of best practices.

¹⁸⁷ For more information see <https://civio.es/nosotros/>

¹⁸⁸ For more information see 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>

¹⁸⁹ For more information see <http://medialab-prado.es/article/premio-periodismo-de-datos-ciudad-de-madrid-2017>

¹⁹⁰ For more information see <https://datadista.com/>

- the “Maldita.es” project aimed at providing the readers with “tools for not being tricked”.¹⁹¹ Through its different branches it monitors political discourse and the information circulating in social networks and analyse 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.

Furthermore in 2017, the Association of Journalists in Madrid approved a code of conduct to fight “fake news” or false information.¹⁹²

187. While AI technologies and automated techniques can help detect information disorder at a faster speed than was previously possible as well as help ensure that the information disseminating is more trustworthy, verified content, it can also be used by actors who wish to create and spread information disorder.¹⁹³ There is the risk that individuals may not be able to form their opinions and take decisions independently of automated systems, and that they may even be subjected to manipulation due to the use of advanced digital technologies, in particular micro-targeting techniques.¹⁹⁴ States are therefore encouraged to address this growing threat by taking a number of steps:

- take appropriate and proportionate measures to ensure that effective legal guarantees are in place against illegitimate interferences and to empower users by promoting critical digital literacy skills.¹⁹⁵
- assess the regulatory frameworks related to political communication and electoral processes in order to safeguard the fairness of elections and to ensure that voters have access to comparable levels of information across the political spectrum and are protected against unfair practices and manipulation.¹⁹⁶
- pay attention to the significant power that technological advancement confers to those – be they public entities or private actors – who may use algorithmic tools without adequate democratic oversight or control, and necessary responsibility of the private sector to act with fairness, transparency and accountability under the guidance of public institutions.¹⁹⁷

- **Promoting media pluralism and diversity**

188. Access to various sources of information without discrimination allows an individual to form an educated opinion and thereby directly contributes to pluralistic political debates and informed electorates.¹⁹⁸ The growing problem of information disorder is linked to the need to promote media pluralism and maximise diversity in the digital environment.¹⁹⁹ Public authorities should ensure an enabling environment for substantial media pluralism through the protection of the rights to free expression and diverse information, including appropriate forms of support for private sector media, and by supporting independent public service media to help produce quality information and counter information disorder.²⁰⁰

¹⁹¹ For more information see <https://maldita.es/>

¹⁹² <http://www.apmadrid.es/decalogo-para-combatir-las-fake-news-o-noticias-falsas-en-la-era-de-la-posverdad/>

¹⁹³ Brundage, M., Avin, S., Clark, J., Toner, H., Eckersley, P., Garfinkel, B., Dafoe, A., Scharre, P., Zeitzoff, T., Filar, B. and Anderson, H. (2018). *The malicious use of artificial intelligence: Forecasting, prevention, and mitigation*: “In addition to augmenting dissemination of misleading information, the writing and publication of fake news stories could be automated, as routine financial and sports reporting often are today”, p. 46. Available at <https://arxiv.org/ftp/arxiv/papers/1802/1802.07228.pdf>.

¹⁹⁴ *Declaration by the Committee of Ministers on the manipulative capabilities of algorithmic processes*, adopted by the Committee of Ministers on 13 February 2019 at the 1337th meeting of the Ministers’ Deputies.

¹⁹⁵ *Ibid.*, § 9.

¹⁹⁶ *Ibid.*, § 9.

¹⁹⁷ *Ibid.*, § 8.

¹⁹⁸ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, principle 66. See also Report of the Secretary General Thorbjørn Jagland: *Populism – How strong are Europe’s check and balances?*, cited above, p. 37

¹⁹⁹ Final report entitled “A Multi-Dimensional Approach to Disinformation” from the EU Commission High Level Expert Group on Fake News, cited above, p. 14.

²⁰⁰ *Joint Declaration on the freedom of expression and “Fake news”, Disinformation and Propaganda*, cited above, Point No. 3. These include inter alia (i) a clear regulatory framework protecting broadcasters against political or commercial interference; (ii) an independent and resourced public service media; (iii) measures to support media diversity, including (as warranted) subsidies or other support for the production of diverse, quality content; (iv) rules addressing media concentration and transparency of media ownership; and (v) programmes to support media and digital literacy. See also Recommendation CM/Rec(2012)1 of the Committee of Ministers to member States on public service media governance, cited above.

189. The Council of Europe has underlined the importance of media pluralism and transparency of media ownership for safeguarding public debate in democratic societies. Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership²⁰¹ builds on existing framework while adjusting, supplementing and reinforcing them to the technological, financial, regulatory and other changes in the current multimedia ecosystem in Europe.

190. The *United Kingdom* Government 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. To bolster the United Kingdom's commitment to the promotion of media freedom and diversity as well as the protection of journalists, the UK Government is investing £100m over five years to counter State-sponsored disinformation. As part of its diplomatic efforts to promote human rights and democracy, the Foreign Secretary has announced the UK's media freedom campaign, which will include an international conference, during which the UK will seek to work with other countries and various stakeholders to defend the rights of a robust, free, vibrant and varied media (itself an antidote to disinformation).

191. Between September 2013 and August 2015, *Albania, Bosnia-Herzegovina, Kosovo*²⁰², *Montenegro, North Macedonia* and *Serbia* implemented a project aimed at developing legal and institutional guarantees for freedom of expression, higher quality journalism, and a pluralistic media landscape. This project, organised by the Council of Europe in South-East Europe, was financed by a voluntary contribution of Norway.

- **Awareness-raising and media literacy**

192. Greater public awareness of the problem is essential for improving societal resilience against the threat that information disorder poses. The starting point is a better understanding of the sources of disinformation and of the intentions, tools and objectives behind it, but also of our own vulnerability.²⁰³ Building resilience includes specialised trainings, public conferences and debates as well as other forms of common learning including for the media. It involves empowering all sectors of society and, in particular, improving citizens' media literacy to understand how to spot and fend off information disorder.²⁰⁴ A comprehensive response to the problem requires active participation by civil society.²⁰⁵

²⁰¹ Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership, adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies.

²⁰² All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nation's Security Council Resolution 1244 and without prejudice to the status of Kosovo.

²⁰³ Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Action Plan against Disinformation*, cited above, Section 3. Pillar 4.

²⁰⁴ *Ibid.*

²⁰⁵ *Joint Declaration on the freedom of expression and "Fake news", Disinformation and Propaganda*, cited above, § 3.e. See also *Mapping of media literacy practices and actions in EU-28* Audiovisual Observatory report published in March 2017, available at <https://www.obs.coe.int/en/web/observatoire/reports>.

193. In connection with the parliamentary election in *Norway* in September 2017, the Norwegian Media Authority, in co-operation 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 on Facebook.

194. In *France*, the “Délégation Interministérielle à la Lutte Contre le Racisme, l’Antisémitisme et la Haine anti-LGBT” (DILCRAH) 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 analyse and deconstruct conspiracy speech, and false news or “fake news”. For example, the latter association posted in November 2017 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.²⁰⁶ Moreover, action is taken as part of the media and information education plan launched in March 2018 and renewed in 2019, in addition to the provisions of the law against information manipulation, which provides for media and information education measures to be put in place by the platforms (see above § 169).

195. In the *Republic of Moldova*, since November 2015 the Independent Press Association (IPA) in partnership with the Independent Journalism Centre and the Association of Independent Tele-journalists has 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 the citizens’ capacities to critically analyse the received information. In addition, IPA launched the application *StopFals* for mobile phones, through which the users can report information they find as being false or distorted where after IPA then checks its veracity.

196. In the *Netherlands*, the Government started in 2019 a campaign (“Stay Curious, Stay Critical”) with the website www.blijfkritisch.nl (“stay critical”) in order to make people aware of the existence of disinformation so as to prevent its influence on them.

197. Initiatives to improve media literacy skills are already undertaken across Europe and various studies are available on national policies across Europe.²⁰⁷ For media and information literacy to be effective, it should be implemented on a massive scale with clear methods of evaluation and cross-country comparison.²⁰⁸

198. Given the particularly high number of children and youth using the internet digital citizenship education programmes that emphasise media and information literacy and human rights education are essential to help young people develop the necessary critical thinking skills to navigate the digital space. Such efforts should be implemented through various means, including formal and non-formal education.²⁰⁹

²⁰⁶ Further details available at <http://what-the-fake.com/2017/11/15/reddit-4chan-forum-fake-news/>

²⁰⁷ Frau-Meigs D., Velez I., and Flores-Michel J. (eds), *Public Policies in Media and Information Literacy across Europe: CrossCountry Comparisons*, Routledge, London, 2017; Council of Europe Audiovisual Observatory, “Mapping of media literacy practices and actions in EU-28” published in March 2017. The report provides a snapshot of some trends in media literacy projects carried out by stakeholders in the 28 EU member states, with a view to highlighting some of the most diverse, interesting and innovative ones in the hope of encouraging future collaboration across Europe <https://rm.coe.int/1680783500>

²⁰⁸ Recommendation CM/REC(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers’ Deputies, § 12; Final report from the EU Commission High Level Expert Group on Fake News, *A Multi-Dimensional Approach to Disinformation*, cited above, 2 (iii).

²⁰⁹ See *Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries*, cited above, § 8. 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

199. 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 analyse the sources and to distinguish between true and false information and to develop critical minds from an early age.²¹⁰

200. *Finland* has put in place the following efforts to promote media literacy skills for children and young people:

- Many schools use newspapers every day, either as teaching material or as a teaching tool. The Finnish Newspapers Association also published source material for teachers of different subjects and levels. These are provided free of charge.
- More than 100 journalists in *Finland* participated in the autumn of 2017 in a campaign to promote fact based journalism in schools all over the country. Journalists visited schools nationwide and lectured about journalist work, in purpose to encourage the students in an independent evaluation of information and to raise their responsibility. Media literacy materials by newspaper and magazine publishers and the public broadcaster were involved in the campaign, which was supported by the Union of Journalists and several Publishers and Haaga-Helia University of Applied Sciences.

201. In the *Czech Republic* progressive media education for students is implemented by the Czech NGO “People in Need” at www.jsns.cz. A popular student project has also been developed which focuses on fact checking and media education at www.zvolsi.cz.

202. In addition to media and information literacy education for children and youth, similar efforts should address citizens of all ages, including older persons, as well as all demographic groups without discrimination of any kind. Training modules should also be available for teachers, as well as for journalists and other media professionals. Developing knowledge of the media and increasing digital skills may engage libraries as well.²¹¹

203. 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.

²¹⁰ *Swedish kids to learn computer coding and how to spot fake news in primary school*, TheLocal.se, 13 March 2017, available at <https://www.thelocal.se/20170313/swedish-kids-to-learn-computer-coding-and-how-to-spot-fake-news-in-primary-school>.

²¹¹ Final report from the EU Commission High Level Expert Group on Fake News, *A Multi-Dimensional Approach to Disinformation*, cited above, p. 27.

204. The “Mind over Media in EU” project is implemented in six European Union countries in eight different languages. It is part of “Media Literacy for All” pilot project funded by DG Connect. It was launched in January 2018 to teach and learn about contemporary propaganda as inspired by the ever-changing world of news, entertainment, advertising, and social media. This project is developed by the Evens Foundation in co-operation with the *Center for Citizenship Education (Poland)*, the *Association for Communication and Media Culture (Croatia)*, *Finnish Society on Media Education*, *IMEC/Mediawijs (Belgium)*, *Mediawise Society (Romania)*, and *Media Maker/Citizen Press (France)*. Its aim is to develop a European network of educators and professionals and to create an educational multilingual crowd sourced online platform “Mind over Media”. The platform actions will be accompanied by sets of contextualised educational resources and online and offline workshops and seminars for teachers, librarians and media leaders.²¹²

- **Coordinated responses and continued research**

205. In recent years, information disorder has grown at a rapid scale globally and a clearer understanding of its direct and indirect implications is still emerging. Any effective action will require further co-operation between States at the national and international level, especially as regards information-sharing. It will also require continuous research on the way in which it is created and circulated, on the impact of some forms of the information disorder as well as increased transparency, and access to relevant data, combined with evaluation of responses on a regular and ongoing basis.²¹³ This is particularly important as information disorder is a multi-faceted and evolving problem that does not have one single root cause, and, therefore, not one single solution.²¹⁴

206. At the international level, a Joint Declaration on “Fake News”, Disinformation and Propaganda²¹⁵ was adopted in 2017 by 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), which, inter alia, calls for support to all stakeholders to develop participatory and transparent initiatives for creating a better understanding of the impact of information disorder on democracy, freedom of expression, journalism and civic space, as well as appropriate responses to these phenomena.²¹⁶ In Recommendation CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries, the Committee of Ministers urges the Council of Europe member States to engage in a regular, inclusive and transparent dialogue with all relevant stakeholders with a view to sharing and discussing information and promoting the responsible use of emerging technological developments related to internet intermediaries.²¹⁷

²¹² More details available at www.mindovermedia.eu.com. The Polish version is as follows Mind Over Media Polska. Szkoła krytycznego myślenia

²¹³ Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Action Plan against Disinformation*, cited above, Section 3, Pillar 3.

²¹⁴ Final report entitled “A Multi-Dimensional Approach to Disinformation” from the EU Commission High Level Expert Group on Fake News, cited above, p.3.

²¹⁵ *Joint Declaration on the freedom of expression and “Fake news”, Disinformation and Propaganda*, cited above.

²¹⁶ *Ibid.*, 6.a.

²¹⁷ *Recommendation CM/REC(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries*, cited above, § 12; Report to the Council of Europe, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, cited above, Part 6: Conclusions

207. 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,²¹⁸ including with the Director of the NATO STRATCOM Center of Excellence who mainly focused on cybersecurity issues.²¹⁹

208. The *Danish* Minister of Defence – conjointly with his Swedish colleague – announced that Denmark and Sweden are to boost defence co-operation to counter what is described as a growing threat from “dangerous” fake news campaigns and cyber-incidents.²²⁰ Furthermore, one of the tasks of the Commission on Freedom of Expression established at the end of 2017 is also look into the concept of fake news from a freedom of expression-point of view.

209. At the Western Balkans Digital Summit 2018, held in Skopje, *North Macedonia*, in April 2018, a special session addressed the “fake news” phenomenon. It brought together high-profile journalists and representatives from regional and global media as well as the European Commission and government representatives. Its purpose was to raise awareness of the “fake news” phenomenon and deliver a comprehensive overview of the shifting media landscape. The aim was also to define the actors’ responsibilities, while securing freedom of expression, media pluralism as well as the right of citizens to receive diverse and reliable information. The key players in the field provided a value-added advantage for identifying and prioritising the main challenges for the era of democracy and mapped the path towards a multi-stakeholder strategy in the fight against “fake news” in the Western Balkans.

210. At the national level research studies are also being carried out to examine the problem within the respective countries. It is important that the methodology used for such research be consistent so that different countries can be accurately compared.²²¹

211. Moreover, there is increasing concern with regard to the close link between information disorder and hate speech, incitement to violence or perpetration of hate crimes or even terrorist attacks (see below chapter IV. *Specific focus area: HATE SPEECH*). In some cases the problem may constitute the first stage of a process of radicalization by a loss of the usual benchmarks.²²² Information disorder is therefore also a security concern for most States.

212. The *Czech* Government has set up two specialised bodies aimed at identifying and analysing 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.²²³

²¹⁸ More details available at

http://www.congreso.es/portal/page/portal/Congreso/GenericPopUpAudiovisual?next_page=wc/audiovisualdetalisedisponible?codSesion=10&codOrgano=319&fechaSesion=23/11/2017&mp4=mp4&idLegislaturaElegida=12 and at 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

²¹⁹ More details available at

http://www.congreso.es/portal/page/portal/Congreso/GenericPopUpAudiovisual?next_page=wc/audiovisualdetalisedisponible?codSesion=12&codOrgano=319&fechaSesion=14/12/2017&mp4=mp4&idLegislaturaElegida=12

²²⁰ Link to the article in English at <https://www.theguardian.com/world/2017/aug/31/denmark-and-sweden-boost-defence-ties-to-fight-russian-cyber-attacks>

²²¹ Council of Europe report, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, cited above. The authors recommend using the conceptual map provided in the report, Part 6.

²²² Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Action Plan against Disinformation*, cited above, Introduction: “Disinformation campaigns, in particular by third countries, are often part of hybrid warfare, involving cyber-attacks and hacking of networks. Evidence shows that foreign state actors are increasingly deploying disinformation strategies to influence societal debates, create divisions and interfere in democratic decision-making.”

²²³ For more information (including a link to the English translation of NSA) see at <http://www.mvcr.cz/cthh/clanek/audit-narodni-bezpecnosti>.

- The Centre Against Terrorism and Hybrid Threats under the Czech Ministry of Interior, which began operating on 1 January 2017, aims, 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.²²⁴

²²⁴ For more information in English see at <http://www.mvcr.cz/cthh/clanek/centre-against-terrorism-and-hybrid-threats.aspx>.

IV. Specific focus area: HATE SPEECH

213. 'Hate speech' is a broad concept which captures a wide range of expressions of hate towards persons or groups of persons that are discriminatory.²²⁵ It can endanger social cohesion and pluralism and undermines the protection and promotion of human rights for every member of society.²²⁶ If left unaddressed, hate speech and incitement can lead to acts of violence, hate crimes²²⁷ and eventually to conflict on a wider scale posing a serious security challenge.²²⁸

- **The challenge of defining 'hate speech'**

214. At present there is no agreement internationally on the use of the term 'hate speech' or on its meaning.²²⁹

United Nations

215. The Committee on the Elimination of Racial Discrimination (CERD) understands 'hate speech' as "a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society."²³⁰

216. However in other contexts, such as in resolutions of the UN Human Rights Council (UN HRC), the term 'hate speech' is avoided in favour of more elaborate formulations such as "intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief,"²³¹ or "the spread of discrimination and prejudice," or "incitement of hatred."²³²

²²⁵ ARTICLE 19 'Hate Speech' Explained. A Toolkit, p. 10 [https://www.article19.org/data/files/medialibrary/38231/Hate-Speech-Explained---A-Toolkit-\(2015-Edition\).pdf](https://www.article19.org/data/files/medialibrary/38231/Hate-Speech-Explained---A-Toolkit-(2015-Edition).pdf)

²²⁶ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, cited above, preamble recital 13; UN Human Rights Council, *Report of the Special Rapporteur on minority issues*, 5 January 2015, A/HRC/28/64, § 102; Committee of Ministers' reply to PACE Recommendation 2098 (2017) on "Ending cyberdiscrimination and online hate", § 2.

²²⁷ OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes, adopted in Athens on 2 December 2009, defines hate crimes as "criminal offences committed with a bias motive"; such definition was agreed upon all OSCE, i.e. also EU and Council of Europe, member States and is further endorsed by the (EU) Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law and Guidance on the mentioned Framework Decision of November 2018, see https://ec.europa.eu/newsroom/just/document.cfm?doc_id=55607. According to the mentioned definition, in order to be considered a hate crime, two elements need to be fulfilled: First, the act must constitute an offence under criminal law; second, the act must have been motivated by bias. Hate crimes are to be understood as primarily physical offences targeting individuals, groups of individuals or property; offences that include abusive, threatening, harassing or insulting behaviour or threats can also be a hate crime. Such an approach is also shared by the European Court's case-law which explicitly sets forth a positive obligation to unmask and effectively investigate possible racist motives behind acts of violence under Articles 2 and 3 in connection with Article 14 of the Convention: "Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts which are particularly destructive of fundamental rights.", see, among others, *Šečić v. Croatia* (application no. 40116/02), judgment of 31 May 2007, §67. Recently, the Court has expanded the same obligation to direct threats with racist motivation under Article 8 of the Convention, see *R.B. v. Hungary* (application no. 64602/12), judgment of 12 April 2016, § 84. It is worth mentioning that, under the Court's case law, no similar positive obligation has been introduced in cases of advocacy of/incitement to hatred or discrimination where an individual's physical's integrity or private life are not at stake.

See also FRA reports *Ensuring justice for hate crime victims: professional perspectives* and *Making hate crime visible in the European Union: acknowledging victims' rights*

²²⁸ OSCE/ODIHR, *What is hate crime*, available at <http://hatecrime.osce.org/what-hate-crime>

²²⁹ The different definitions at international and regional levels are further broadened by private actors approach to 'hate speech'. For example, YouTube has a definition in its community guidelines as: "content that promotes violence or hatred against individuals or groups based on certain attributes, such as: race or ethnic origin, religion, disability, gender, age, veteran status, or sexual orientation/gender identity."

²³⁰ CERD, *General Recommendation No. 35 on combating racist hate speech*, 26 September 2013, CERD/C/GC/35, § 7.

²³¹ UN HRC Resolution 16/18 on Combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief, A/HRC/Res/16/18, adopted on 24 March 2011.

²³² UN HRC Resolution 16/18 on situation of human rights of Rohingya Muslims and other minorities in Myanmar, A/HRC/Res/29/21, adopted on 3 July 2015.

Council of Europe

217. At the Council of Europe level, Recommendation No. R (97) 20 of the Committee of Ministers to member States on 'hate speech' refers to it 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".²³³

218. With regard to the dissemination of racist and xenophobic propaganda through computer systems, the Additional Protocol to the Convention on Cybercrime defines racist and xenophobic material, in its Article 2, as "any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors".

219. ECRI has in its General Policy Recommendation No. 15 on combating hate speech (GPR No. 15) clarified that the term covers "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".²³⁴

220. According to an EU-funded yearly review in 2016 hate speech incidents have increased over the internet; in particular xenophobia (anti-migrant hatred, often conflated with anti-Muslim hatred) is the most widespread form of hate speech in social platforms.²³⁵ Furthermore, online right wing extremist views have been reported as increasingly growing.²³⁶ Hate speech based on gender is also common and more often targets women than men.²³⁷ The widespread experience of hate speech, abuse and threats in online spaces makes users hesitant to engage in debates on different topics on social media.²³⁸ As a consequence, many users surrender their freedom of expression and refrain from participating in the debate.²³⁹

- **Developing comprehensive national strategies**

221. Discouraging and preventing the use of hate speech and reducing and remedying the harm caused by it requires a multitude of measures involving various sectors of the society as well as national authorities at different levels.²⁴⁰ For these measures to be fully effective it will be necessary to ensure co-operation and coordination between the different stakeholders involved.²⁴¹

²³³ 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.

²³⁴ ECRI, GPR No. 15 on combating hate speech, preamble.

²³⁵ The VOX-Pol Network of Excellence (NoE) "Violent Extremism and Terrorism Online in 2016: The Year in Review"; available at https://www.voxpol.eu/download/vox-pol_publication/Year-In-Review-WEB.pdf

²³⁵ European Commission, *Special Eurobarometer on Media pluralism and democracy*, published in November 2016.

²³⁶ European Commission, *Special Eurobarometer on Media pluralism and democracy*, cited above.

²³⁷ Danish Institute for Human Rights, *Hate Speech in the Public Online Debate*, published in 2017, summary in English p. 12, available at https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/ligebehandling_2017/rapport_hadefulde_ytringer_online_2017.pdf

²³⁸ European Commission, *Special Eurobarometer on Media pluralism and democracy*, Conclusions, published in November 2016 ; available at http://ec.europa.eu/information_society/newsroom/image/document/2016-47/sp452-summary_en_19666.pdf

²³⁹ Danish Institute for Human Rights, *Hate Speech in the Public Online Debate*, published in 2017, Summary in English p. 12, available at https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/ligebehandling_2017/rapport_hadefulde_ytringer_online_2017.pdf

²⁴⁰ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, principles 77 and 78.

²⁴¹ ECRI GPR No 15, Recommendation 3.e.

222. 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 a focused action plan to combat hate speech or part of a broader-comprehensive strategy to fight extremism, racism and intolerance.²⁴² Such plans and strategies should include concrete tasks for ministries, municipalities and police and be drawn up and evaluated annually. It is crucial that these efforts are carried out continuously and that multi-annual national action plans on hate speech are developed.²⁴³

223. Some of the relevant issues to take account of in any comprehensive national strategy and action plan on tackling hate speech are set out in the following sections.

224. The *Norwegian* Government has adopted a Strategy against Hate Speech 2016-2020. The Strategy focuses on some specific areas such as:

- facilitating forums for discussion,
- combating hate speech among children and youth,
- enhancing the legal response to hate speech,
- combating hate speech in the employment sector,
- combating hate speech in the media sector,
- increasing knowledge and research on hate speech.²⁴⁴

225. The Ministry of Interior of the *Czech Republic* publishes an annual report on extremism. In 2016 it elaborated the National Security Audit (see above § 212) focusing *inter alia* on radicalisation of the population via incitement to hatred directed towards specific ethnic and religious communities.

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

- campaigns aiming to tackle hate speech in sports
- expert seminars for law enforcements, lawyers, prosecutors, judges and NGOs 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.

227. 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. Furthermore, in July 2017 the Government presented an Action Plan to safeguard freedom of expression, by protecting journalists, artists and politicians against threats and hatred.

228. *Spain* 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 launched in order to comply with the objectives of the Strategy.

²⁴² ECRI GPR No. 15, Recommendation 4, and its Explanatory memorandum § 103

²⁴³ *Ibid.*; Equinet, European Network of Equality Bodies, The Equinet Perspective *Extending the Agenda. Equality Bodies addressing Hate Speech*, Conclusions and Looking Forward; available at http://www.equineteurope.org/IMG/pdf/hate_speech_perspective_-_web.pdf

²⁴⁴ Further details available at <https://www.regjeringen.no/en/dokumenter/the-governments-strategy-against-hate-speech-20162020/id2520975/>.

229. In *Latvia*, the guidelines “Latvian Cyber security Strategy 2014-2018” examines the issue of identification and combating of hate crimes and instances of hate speech in the virtual environment and its close link to cybercrimes as automated data processing system may be used as a medium for circulation of illegal information and information damaging reputation.

230. *Germany* has taken action to tackle hate speech in a broader context so as to address the underlying root causes:

- In 2016, the Federal Government, for the first time, adopted a harmonised Strategy to Prevent Extremism and Promote Democracy, which targets 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 co-operation across the board. Approaches that have proved successful will be expanded across Germany. Efforts will also be made to intensify co-operation 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.²⁴⁵
- In 2017 the Federal Government 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.²⁴⁶

231. A priority area of the *Finnish* National Action Plan for Fundamental and Human Rights 2017–2019²⁴⁷ is Fundamental Rights and Digitalisation which include freedom of expression and hate speech. Measures against hate speech are also included in every other chapter of the Action Plan. The Action Plan includes a total of 43 projects, one of which is the Fundamental Rights Barometer which will complement the European survey on the EU’s fundamental rights which is being prepared by the European Union Agency for Fundamental Rights. The barometer will map, for example, the general knowledge of fundamental rights among different population groups, conceptions about the importance of different rights and experiences on their realisation in people’s daily life.

232. The *Danish* Institute for Human Rights published a report in 2017 on “Hate Speech in the Public Online Debate”²⁴⁸ which as a starting point uses the broad definition of hate speech from ECRI’s General Policy Recommendation No. 15 while supplementing it with “political and social status”.

²⁴⁵ English version of the Federal Government Strategy available at <https://www.bmfsfj.de/blob/115448/cc142d640b37b7dd76e48b8fd9178cc5/strategie-der-bundesregierung-zur-extremismuspraevention-und-demokratiefoerderung-englisch-data.pdf>

²⁴⁶ National Action Plan on Combating Racism available at <https://www.bmi.bund.de/SharedDocs/downloads/DE/publikationen/2017/nap.pdf>

²⁴⁷ Further details available at <http://urn.fi/URN:ISBN:978-952-259-588-1>

²⁴⁸ Report in Danish: “Hædefulde Ytringer i den Offentlige Online Debat”, 2.2 available at https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/ligebehandling_2017/rapport_hædefulde_ytringer_online_2017.pdf

- **Enacting legislation in accordance with international and regional obligations**

233. To effectively combat hate speech national legislation should reflect international and regional standards to protect and promote freedom of expression and equality.²⁴⁹ Under international human rights law it is the protection of dignity for all people, without discrimination, which motivates most responses to 'hate speech', including restrictions on the right to freedom of expression.²⁵⁰ States should enact legislation on hate speech in accordance with their international and regional obligations and preferably include specific reference to the terms used in the relevant international and regional instruments.²⁵¹ They should ensure that the national law allows for the effective prosecution of illegal online hate speech in conformity with the case law of the European Court of Human Rights, while fully respecting freedom of expression²⁵². They should also ensure that national legislation covers all forms of online incitement to violence against a person or a group of persons, bullying, harassment, threats and stalking, so that these can be effectively prosecuted under national law.²⁵³

United Nations

234. Under international law there is an obligation to prohibit particularly severe forms of hate speech. Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."²⁵⁴ The Human Rights Committee has stressed that while States are required to prohibit such expression, these limitations must nevertheless meet the conditions for restrictions on freedoms of opinion and expression set out in Article 19(3).²⁵⁵

235. The term "prohibit by law" does not necessarily mean criminalisation; the Human Rights Committee has stated that it only requires States to "provide appropriate sanctions" in cases of incitement.²⁵⁶ Civil and administrative penalties will in many cases be most appropriate, with criminal sanctions as an extreme measure of last resort.²⁵⁷

236. Other forms of hate speech may be prohibited by States to protect the rights of others under Article 19(3)²⁵⁸ of the ICCPR, such as discriminatory or bias-motivated threats or harassment.²⁵⁹ However, hate speech that is lawful may nevertheless raise concerns in terms of intolerance and discrimination, meriting a critical response by the State.²⁶⁰

²⁴⁹ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, Preamble, principles 19-22, 27 and 29.

²⁵⁰ *General Recommendation No. 35 on combating racist hate speech*, CERD/C/GC/35, 9 September 2013, § 8.

²⁵¹ ARTICLE 19, *Responding to 'hate speech': Comparative overview of six EU countries (2018)*, Conclusions.

²⁵² PACE Resolution 2144 (2017): *Ending cyberdiscrimination and online hate*, § 7.2.1.

²⁵³ *Ibid.*, § 7.2.2.

²⁵⁴ ECRI recommends to States that have made reservations in favour of the rights to freedom of assembly, association and expression to Article 20 of the ICCPR 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. ECRI also recommends States to recognise the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals under Article 14, GPR No. 15, Recommendation 2.

²⁵⁵ General Comment No. 34 § 52. See also *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*.

²⁵⁶ HR Committee, *General Comment 11: prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)*, 29 July 1983, § 2.

²⁵⁷ ARTICLE 19, *Responding to 'hate speech': Comparative overview of six EU countries (2018)*, p. 11.

²⁵⁸ See also General Comment No 34 on Article 19 of the ICCPR.

²⁵⁹ CERD, *General Recommendation No. 35 on combating racist hate speech*, CERD/C/GC/35, 9 September 2013, § 12. Refers also HR Committee General Comment No. 34, §§ 22- 25, 33-35

²⁶⁰ ARTICLE 19 *'Hate Speech' Explained. A Toolkit*, cited above, p. 18.

237. Moreover, Article 4 of the ICERD²⁶¹ requires States to “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention”.²⁶² The CERD recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups.²⁶³

238. Criminal provisions directly restricting the most serious forms of hate speech are provided in the criminal laws of most countries. For example, in *Latvia*, hate speech is prohibited under several provisions of the criminal law:

- Article 78 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 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.
- Article 150 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 this context 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. The scope of the provision is formulated very broadly and is not limited only to gender, age or disability of the person, but also to any other characteristics.

239. Similarly, in *Poland*, hate speech is considered an offence under several provisions of the Criminal Code. In accordance with Art. 256 anyone who publicly promotes a fascist or other totalitarian system of state or incites hatred based on national, ethnic, racial or religious differences or for reason of lack of any religious denomination shall be subject to a fine, restriction of liberty or deprivation of liberty for up to two years. The regulations concerning verbal forms of hate crimes are also included in Art. 257 and Art. 126a of the Criminal Code. According to the Art. 257, anyone who publicly insults a population group or an individual because of national, ethnic, race or religious affiliation, or because of not being religious shall be liable to imprisonment up to 3 years. Art.126a stipulates the offence of publicly inciting others to the commission or publicly commends the commission of acts described in Articles 118 (acting with an intent to destroy in full or in part, any ethnic, racial, political or religious group, or a group with a different perspective on life, commits homicide or causes a serious detriment to the health of a person belonging to such a group).

²⁶¹ International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965. ECRI recommends that States which have made reservations in favour of the rights to freedom of assembly, association and expression to Article 4 of the ICERD 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, GPR No. 15 on combating hate speech, Recommendation 2. The CERD Committee has also called on States that have made reservations to Article 4 to withdraw them.

²⁶² For clarification regarding the scope of these provisions vis-à-vis the protection of the right to freedom of expression see CERD, *General Recommendation No. 35 on “combating racist hate speech”*, CERD/C/GC/35, 9 September 2013.

²⁶³ CERD, *General Recommendation No. 35 on “combating racist hate speech”*, CERD/C/GC/35, 9 September 2013.

Council of Europe

240. The European Court of Human Rights excludes hate speech from protection under the *European Convention on Human Rights* on a case-by-case approach either by applying:

- Article 17 [prohibition of abuse of rights] where hate speech is of such nature which negates the founding principles of a pluralist democracy and thus is removed from the protection of Article 10 [freedom of expression].²⁶⁴ As a matter of principle, the Court has considered that it may be 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.²⁶⁵
- Article 10(2) on the right to freedom of expression which allows for certain limitations. Thus, there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.²⁶⁶ It also is obvious that hate speech which implies glorification of violence will not be protected.²⁶⁷ Where criminal sanctions have been imposed by the State, the Court has in many instances found that the imposition of a criminal conviction violated the proportionality principle.²⁶⁸

241. The *Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*²⁶⁹ intentionally and without right obliges Parties to establish criminal offences under their domestic law for:

- Dissemination of racist and xenophobic material through computer systems (Article 3)
- Racist and xenophobic motivated threat (Article 4)
- Racist and xenophobic motivated insult (Article 5)
- Aiding and abetting the commission of any of the above offences (Article 7).²⁷⁰

242. 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.

243. Sexist hate speech, a phenomenon only beginning to be addressed, relates to expressions which spread, incite, promote or justify hatred based on sex.²⁷¹ Some groups of women are particularly targeted by sexist hate speech notably young women, women in the media or women politicians²⁷² (see above Specific focus area: Freedom of expression in political discourse). The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) refers to forms of violence against women which can also be manifestations of online/offline sexist hate speech: sexual harassment (Article 40) and stalking (Article 34). It requires that Parties take the necessary legislative or other measures. Article 12 (1)

²⁶⁴ For example, *Seurot v. France* (application no. 57383/00), decision on the admissibility of 18 May 2004; *Delfi AS v. Estonia*, cited above; *Leroy v. France* (application no. 36109/03), judgment of 2 October 2008; *M'Bala M'Bala v. France* (application no. 25239/13), decision on admissibility of 20 October 2015. See also fact sheet on Court's caselaw on Hate Speech available at https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf.

²⁶⁵ See for example *Gündüz v. Turkey* (application no. 35071/97), judgment of 4 December 2003, § 40; *Erbakan v. Turkey* (application no. 59405/00), judgment of 6 July 2006, § 56; *Féret v. Belgium* (application no. 15615/07), judgment of 16 July 2009, § 63.

²⁶⁶ See for example *Jersild v. Denmark* (application No 15890/89), Grand Chamber judgment of 23 September 1994, § 35.

²⁶⁷ See for example *Sürek v. Turkey* (No. 1) (application no. 26682/95), Grand Chamber judgment of 8 July 1999, § 62.

²⁶⁸ *Jersild v. Denmark*, cited above, § 35.

²⁶⁹ *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), adopted on 28 January 2003.

²⁷⁰ ECRI urges States, which have not already done so, to ratify the Additional Protocol as parts of their efforts to combat hate speech, GPR Recommendation No. 15 on combating hate speech, Recommendation 1.

²⁷¹ The Council of Europe Gender Equality Strategy 2018-2023 includes the combat against sexist hate speech (strategic objective 1), the Internet Governance Strategy for 2016-2019 (para. 10.d); Recommendation CM/Rec (2016)4 of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors, cited above, § 17 and the No Hate Speech Movement youth campaign.

²⁷² For more information on sexist hate speech see Report on the Seminar Combating Sexist Hate Speech on 10-12 February 2016 by the European Youth Centre, and *Factsheet on Combating Hate Speech and Background Note on Sexist Hate Speech*, prepared by the Gender Equality Unit on 1 February 2016, available at: <https://www.coe.int/en/web/genderequality/sexist-hate-speech>.

provides that “Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men”.

244. As regards criminal law, ECRI emphasises that criminal offences in national laws should be defined clearly, but also in a way that allows their application to keep pace with technological developments.²⁷³

245. ECRI in its General Policy Recommendation No. 15 on combating hate speech²⁷⁴ sets out a number of recommendations to the governments of member States, such as:

- seek to identify the conditions conducive to the use of hate speech as a phenomenon and the different forms it takes, as well as to measure its extent and the harm that it causes, with a view to discouraging and preventing its use and to reducing and remedying the harm caused, and accordingly (Recommendation 3)
- undertake a vigorous approach not only to raising public awareness of the importance of respecting pluralism and of the dangers posed by hate speech but also to demonstrating both the falsity of the foundations on which it is based and its unacceptability, so as to discourage and prevent the use of such speech, and accordingly (Recommendation 4)
- provide support for those targeted by hate speech both individually and collectively, and accordingly (Recommendation 5)
- 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, and accordingly (Recommendation 6)
- use regulatory powers with respect to the media (including internet providers, online intermediaries and social media), to promote action to combat the use of hate speech and to challenge its acceptability, while ensuring that such action does not violate the right to freedom of expression and opinion, and accordingly (Recommendation 7)
- clarify the scope and applicability of responsibility under civil and administrative law for the use of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those who are targeted by it while respecting the right to freedom of expression and opinion, and accordingly (Recommendation 8)
- withdraw all financial and other forms of support by public bodies from political parties and other organisations that use hate speech or fail to sanction its use by their members and provide, while respecting the right to freedom of association, for the possibility of prohibiting or dissolving such organisations regardless of whether they receive any form of support from public bodies where their use of hate speech is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it (Recommendation 9)
- take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected, and accordingly (Recommendation 10).

²⁷³ ECRI GPR No. 15, Recommendation 10.

²⁷⁴ Adopted by ECRI on 8 December 2015. See also its Explanatory Memorandum.

European Union

246. As a follow up to its Joint Action concerning action to combat racism and xenophobia,²⁷⁵ the European Council's *Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law*²⁷⁶ requires States to sanction racism and xenophobia through "effective, proportionate and dissuasive criminal penalties".²⁷⁷ The Framework Decision establishes in its Article 1 four categories of incitement to violence or hatred offences that States are required to criminalize with penalties of up to three years. States are afforded the discretion of choosing to punish only conduct which is carried out in "a manner likely to disturb public order" or "which is threatening, abusive, or insulting".²⁷⁸

247. In *Spain*, several provisions of the Criminal Code 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 reflects the rejection of all acts inciting to 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). The new legal framework efficiently improves the courts response against conducts of hate speech regarding groups or minorities on political or ideological grounds among others.

248. On 1 March 2018, the EU European Commission adopted a Recommendation on measures to effectively tackle illegal content online.²⁷⁹ The Recommendation contains a set of operational measures – accompanied by the necessary safeguards – to be taken by companies and EU Member States and applies to all forms of illegal content, including racist and xenophobic incitement to hatred and violence.

249. While the objective of the E-Commerce Directive²⁸⁰ is not to harmonise the field of criminal law as such, but instead to create a legal framework to ensure the free movement of information society services between Member States²⁸¹, it requires in Article 14 (1) EU member States to shield intermediaries from liability for illegal third party content where the intermediary does not have actual knowledge of illegal activity or information and, upon obtaining that knowledge, acts expeditiously to remove or disable access to the content at issue.²⁸² The Directive thus in Article 15 prohibits EU member States from imposing general obligations on intermediaries to monitor activity on their services.²⁸³

250. In January 2018, the Austrian Supreme Court referred a case²⁸⁴ concerning online 'hate speech' to the European Court of Justice (CJEU) for clarification as to whether such an order would conflict with the provisions of the E-Commerce Directive, Article 15 (1). The CJEU proceedings are pending at the time of the publication of this guide but may be crucial towards determining future practices in this area.

²⁷⁵ European Council Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia.

²⁷⁶ European Council, *Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*; available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008F0913>

²⁷⁷ *Ibid.*, preamble (13); *Guidance note on the practical application of Council Framework Decision 2008/913/jha on combating certain forms and expressions of racism and xenophobia by means of criminal law*, available at https://ec.europa.eu/newsroom/just/document.cfm?doc_id=5560 See also above footnote 218.

²⁷⁸ *Ibid.* Article 1 (2).

²⁷⁹ Commission *Recommendation on measures to effectively tackle illegal content online*, C(2018) 1177 final.

²⁸⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.,

²⁸¹ *Ibid.*, preamble (8)

²⁸² *Ibid.*, Article 14(1).

²⁸³ *Ibid.*, Article 5. Also the European Court of Human Rights has dealt with intermediary liability for third-party illegal content e.g. *Delfi AS v. Estonia*, cited above; *Magyar Tartalomszolgáltatók Egyesülete and Index. hu Zrt v. Hungary*, (application no. 22947/13), judgment of 2 February 2016; *Pihl v. Sweden*, cited above.

²⁸⁴ *Glawischnig-Piesczek v. Facebook Ireland Limited*. The case concerns proceedings brought by the former Austrian Green party leader Eva Glawischnig, who was subjected to offensive comments (termed 'hate speech') posted by a fake account on Facebook. Glawischnig first brought a suit against Facebook in 2016. The court of first instance ordered Facebook to remove the posts and all verbatim copies, and an appeals court also ruled that Facebook must apply the injunction globally. Glawischnig appealed, claiming Facebook should also have to find and remove similar posts.

- **Strengthening the prosecution of hate speech offences**

Effective investigation of complaints and prosecution of offenders on a non-discriminatory basis

251. States should ensure that prosecutions for hate speech offences are brought on a non-discriminatory basis.²⁸⁵ Moreover they should ensure the effective participation for those targeted by hate speech in the relevant proceedings. It is important that relevant NGOs and other bodies be allowed to bring proceedings even without an individual complainant.²⁸⁶ It will also be necessary for States to monitor the effectiveness of the investigation of complaints and the prosecution of offenders. Finally, States should ensure effective co-operation and co-ordination between police and prosecution authorities. This could include co-operation with other States in tackling the transfrontier dissemination of prohibited hate speech, whether in a physical or electronic format.²⁸⁷

252. 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.

Training of criminal justice actors

253. The judiciary, law enforcement agencies and public bodies should be provided with comprehensive and regular training including on relevant international human rights standards²⁸⁸. This would include receiving guidance on the prosecution of incitement cases and the assessment of the cases based on international human rights law²⁸⁹ to recognise the seriousness of hate speech and to apply the law effectively. In particular the police should have the technical capacity to investigate and know where to turn for assistance, if need be. They need to know what mechanisms can be used to identify anonymous internet users, how to contact social media and other relevant platforms in online hate cases, and how to work with victims of online hate speech.²⁹⁰ Such training should include awareness of cultural diversity in today's society so as to be able to identify individuals and communities most at risk of being targeted by hate speech and to understand the impact of negative stereotypes, prejudices and any form of intolerance.²⁹¹ It will also be necessary to include gender considerations into such training on hate speech.²⁹²

²⁸⁵ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, cited above, principle 41.

²⁸⁶ PACE, Report on Ending cyberdiscrimination and online hate, cited above, § 43.

²⁸⁷ ECRI GPR No. 15, Recommendation 10.

²⁸⁸ See also the online course on Hate Crime and Hate Speech developed as a joint initiative by the European Programme for Human Rights Education for Legal Professionals "HELP" of the Council of Europe and the OSCE's Office of Democratic Institutions and Human Rights (ODIHR), available in several languages at: <http://help.elearning.ext.coe.int/index.php>

²⁸⁹ ECRI GPR No. 15, Recommendation 10.

²⁹⁰ PACE, Report on Ending cyberdiscrimination and online hate, § 51.

²⁹¹ Although it is necessary to distinguish between hate speech and hate crime (see above footnote 227) it is worth noting that in the context of addressing hate crimes, OSCE/ODIHR has developed *Training against Hate Crimes for Law Enforcement* (TAHCLE) which in its Annex 6 includes awareness of cultural diversity, available at <https://www.osce.org/odihr/tahcle?download=true>. Also, ODIHR's "Prosecutors and Hate Crimes Training (PAHCT)" includes in its Annex 5 awareness of cultural diversity although it does not deal with hate speech, available at <https://www.osce.org/odihr/pahct?download=true>

²⁹² In the context of addressing hate crimes, ODIHR has developed "Prosecutors and Hate Crimes Training (PAHCT)" which includes gender considerations, available at <https://www.osce.org/odihr/pahct?download=true>

254. In *Poland*, since 2005 workshops on “Combating racist and xenophobic offences” have been carried for the police officers of investigative units of criminal services. The workshops focus on the legal aspects of fighting crimes motivated by prejudices, including offences committed through the internet. An important element consists of discussion on international legal and constitutional regulations referring to hate speech and freedom of expression. In total, between 2005 and 2017, approximately 120 police officers attended from all police offices which conducted preliminary proceedings related to hate crimes.

255. In *Turkey*, the Human Rights and Equality Institution established by the Law No. 6701 has the duty to provide training on human rights and the fight against discrimination. Furthermore, guides concerning investigations are being prepared within the context of the project “Developing Investigation Techniques of Public Prosecutors and Enhancing Activities in accordance with European Standards of Human Rights”.

256. In *Belgium*, within the framework of the joint circular of the Minister of Justice, the Minister of the Interior, and the College of Public Prosecutors to the Court of Appeal “Circular on the investigation and prosecution policy on discrimination and hate crimes (including discrimination based on sex)” of 2013 (Circular COL 13/2013), training courses on cyberhate are offered to magistrates, judicial trainees and judges on cyberhate in co-operation with the Interfederal Centre for Equal Opportunities and against Racism (Unia). In 2017 the training of judges of reference included the subject of discrimination. Moreover, specific training is organised for the police where the issue of hate speech is discussed as well as how to strike a fair balance between humour in the workplace, harassing behaviour and freedom of expression. The aim of the circular is to standardise policies in the field of research and prosecution on discrimination and hate crime, in particular cyberhate, and to this end specific collaborations are envisaged. For example, coordinating the meeting of magistrates each year with bench magistrates in order to evaluate the application of the circular and to make adjustments or develop instruments with a view to ensuring its implementation.

257. In the *Czech Republic*, as part of the Government’s “Campaign against Racism and Hate Crime”, various capacity building activities for police officers have been implemented. In particular, a Czech NGO “In Iustitia” organised trainings for 400 police officers (including, for instance, spokespersons and investigators).

258. In co-operation with the *Estonian Academy of Security Sciences*, police officers receive sensitivity trainings to improve their skills on how to communicate with victims and how to motivate victims to seek help and services under the victim’s support system

259. 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, the German Institute for Human Rights in co-operation with the Federal Ministry of Justice and Consumer Protection is planning a more far-reaching project to develop further training modules on racism incorporating the legal framework on human rights. These modules will then be tested and made available for inclusion in the established initial and further training structures of the German Länder. This will help judges and prosecutors to respond appropriately to crimes motivated by racism and hatred and provide them with the necessary skills in criminal proceedings to affront the experiences of those who have been affected by racism.

260. In *Latvia*, several types of trainings and awareness-raising activities are conducted such as:

- The foundation “Latvian Judicial Training Centre” (LJTC) provides initial and on-going training to judges and court staff on topics related to hate speech in an annual training programme. Training on issues related to racism is incorporated in anti-discrimination topics or training on the Court’s practice. Some of the activities use an interdisciplinary approach to improve general understanding across different legal professions. For example, in April 2017 a seminar on “Honour and dignity, limitations on freedom of speech” took place, and in November a seminar on “Hate crimes and freedom of speech” was organised.

- The Office of the Prosecutor General also offers relevant training and education. Thus a seminar “Equality and elimination of discrimination” took place in 2012. 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.
- Likewise the prosecutors attended in 2013 a 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 organised by the Latvian Human Rights Centre on approaches to prevention of hate crimes and hate speech.

261. In *Georgia*, with the support of the Council of Europe and within the framework of the joint Programme “Human Rights for Everyone” between EU and Office of the UN High Commissioner for Human Rights (OHCHR) a training was held in June 2017 on “Freedom of Expression, Including Issues Related to Hate Speech” in which participated 17 judges of the common courts.²⁹³ This was a follow-up to a training course in October 2016 attended by 20 judges.²⁹⁴

262. In *Spain*, training courses of the General Council of the Judiciary, included a three-day course in February 2017 on “Crimes of hatred and discrimination” 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 organised in Seville “Training sessions on hatred crimes and discrimination” in order to create a specific Court Duty (Free Justice) on defending victims of such crime.

263. In *France*, magistrates are trained on existing national and international instruments, particularly during training sessions on freedom of expression including hate speech. Specific sessions are also offered on hate speech. To ensure that racially motivated and/or homo/transphobic offences are recorded initial and ongoing training is provided to the staff of the National Police. Pedagogical tools of a procedural nature are made available online to investigators.

• Self-regulation by public and private institutions

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 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.²⁹⁵

265. For more details on self-regulation by political parties and elected bodies as well as public institutions see above section a. *Self-regulation* under “Measures to combat political statements that incite to violence or hatred”.

266. 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 Disciplinary Code of the International Federation of Football Association (FIFA) and the guidelines of the European Union Football Association (UEFA). The reach of these codes can be quite wide, notably in the case of those connected with sporting activities, as they apply not only to those engaged in the sport itself or involved in its organisation and management but they also apply to those attending or supporting the activities.²⁹⁶

²⁹³ Further details available at http://www.hsoj.ge/eng/media_center/news/947-freedom-of-expression-including-issues-related

²⁹⁴ Further details available at: http://www.hsoj.ge/eng/media_center/news/746-gamoxatvis-tavisufleba-mat-shoris-sidzulvilis

²⁹⁵ ECRI GPR No. 15, Recommendation 6 and its Explanatory memorandum §§ 114-115.

²⁹⁶ ECRI GPR No. 15, Explanatory memorandum § 119.

267. In May 2016, the European Commission agreed with Facebook, Twitter, YouTube and Microsoft — on a voluntary Code of Conduct on countering illegal hate speech online²⁹⁷ to help users notifying illegal hate speech in these social platforms, improve the support to civil society as well as the coordination with national authorities. The IT companies agreed to assess the majority of users' notifications in 24h also respecting EU and national legislation on hate speech and commit to remove, if necessary, those messages assessed illegal. The companies also agreed to further work on improving the feedback to users and being more transparent towards the general society. Evaluations are regularly being carried out of monitoring exercises, based on notifications issued by civil society organisations and on a methodology that has been commonly agreed upon. The results of the third evaluation in January 2018 showed important progress made at different levels.²⁹⁸

268. 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.

269. 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 the 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, para. 1, that all journalists must oppose hate speech and any kind of violence. Para. 15 of the Code also prescribes that journalists' profession is incompatible with any kind of stereotypes. In addition, colloquial, abusive and imprecise reference to a group is prohibited. It is also stipulated that information about criminal offences, nationality, race, religious belief, ideology and political affiliation, sexual orientation, social and marital status can only be mentioned in reports if those characteristics are directly relevant for the criminal offence committed.

270. In *Finland*, any person who considers that there has been a breach of good professional practice by media may bring this to the attention of the Council for Mass Media (CMM) which is a self-regulating committee established in 1968 by publishers and journalists in the field of mass communication. Its task is to interpret good professional practice and defend the freedom of speech and publication. Once the CMM has established that good professional practice has been breached, it issues a notice which the party in violation must publish within a short time span. Under certain circumstances involving important principles, the CMM can initiate an investigation. It can also issue policy statements regarding questions of professional ethics. The CMM handles complaint investigations free of charge, within an average timeframe of five months. The Chairman may give independent resolutions on matters which clearly do not refer to a breach of good professional practice and are of no significant importance. The Ministry of Justice has annually allocated the CMM a grant which in 2017 was 80,000 euros.

- **Increasing the reporting of hate speech**

271. It is important that those having suffered damage on account 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 minorities or vulnerable groups. Information about the various possibilities of taking action might in addition to central government be disseminated through local governments.²⁹⁹

²⁹⁷ Further details available at https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300.

²⁹⁸ Further details available at <https://merlin.obs.coe.int/iris/2018/3/article7.en.html>.

²⁹⁹ ECRI GPR No. 15, Explanatory memorandum §§ 108-109.

272. There may also be other factors seen as obstacle to reporting hate speech, such as it not being worth the trouble and a lack of certainty that the complaint will be 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, there is a necessity of putting in place a complaint procedure or hate speech reporting mechanism that is as straightforward, user-friendly and inexpensive as possible. Appropriate training for those dealing with complaints, whether public authorities or private organisations, is essential to ensure a process as smooth as possible.³⁰⁰

273. In *Finland*, the project Against Hate by the Ministry of Justice during 1 January 2017 to 30 November 2019 aims to develop the work against hate crime and hate speech. The project focuses on the development of hate crime reporting, on the enhancement of the capacity of the police, prosecutors and judges to act against hate crime and hate speech, and on the development of support services for victims of hate crime.³⁰¹ A communications campaign aiming to combat hate speech was launched February 2019 as part of the project. The campaign aims to increase internet users' awareness of what kinds of content constitute punishable hate speech and seeks to encourage people to report punishable hate speech to the police. The Against Hate campaign consists of TV public service announcements, a social media campaign and online materials to help people identify punishable hate speech. The core message of the campaign is that hate speech can be a punishable offence. The internet is subject to the same rules as anywhere else. The idea of the campaign is to take part in the public discussion on hate speech from the perspective of the punishability of the act. The campaign hashtag is #againsthate.³⁰²

274. 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 complaint's office for online discrimination "MiND" (Meldpunt internetdiscriminatie) which, examines whether the online utterance in question constitutes a criminal offence. If it is 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.

275. 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 "jugendschutz.net" which is the joint competence centre for the protection of minors on the internet at federal and state level. Jugendschutz.net, which is not a 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.

276. In *Austria*, several helpdesks and reporting offices have been established 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.

³⁰⁰ ECRI GPR No. 15, Explanatory memorandum, §§ 110-111.

³⁰¹ Further details available at <https://oikeusministerio.fi/en/project?tunnus=OM005:00/2018>

³⁰² Further details available at https://oikeusministerio.fi/en/article/-/asset_publisher/vihapuheen-vastainen-against-hate-kampanja-kaynnistyy.

277. In *Latvia*, the State Police increasingly uses social media platforms – Facebook, Twitter – to inform the public and 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 particular websites³⁰³. Information received by these sites is then forwarded to the competent law enforcement authorities.

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

- An 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-LGBTI defamation, and hate provocation. This project has been validated for experimental purposes in an inter-ministerial action plan for the years 2018 to 2020 (Plan Interministériel de Lutte contre le Racisme et l'Antisémitisme - PILCRA). However, any hate speech must be reported to the judicial authority by filing a complaint.
- A reporting platform of the General Inspectorate of the National Police (IGPN) and the General Inspectorate of the National Gendarmerie (IGGN) for citizens who feel victims or who have witnessed conduct likely to constitute professional misconduct, an ethical breach or even an offence by a member of the police force.
- Partner associations and specialised "aid to victims" police officers present in the police stations on whom victims and witnesses can rely. 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, a platform "Stop-Discri" was developed by the national gendarmerie for its staff who considers themselves victims of discrimination or harassment. An identical platform "Signal-discri" intended for national police personnel was created on 22 September 2017. Likewise, a national listening unit "Allo Discri" 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).

279. *France* has also created a fast and effective mechanism for reporting illegal content on the internet - 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). It centralizes reports by Internet users of content and racist behaviour broadcasts on the Internet.³⁰⁴ The platform received more than 17,000 reports of hate messages and discrimination in 2016. 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 used for the purposes of investigation.

280. In *Greece*, a special hotline has been created and a special form for complaints is available on the Police website³⁰⁵ 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.

281. In *Finland* in light of cases of threatening and slandering campaigns against journalists experienced in late 2015 and early 2016, the Union of Journalists (UJF) has addressed the problem in numerous seminars, meetings, debates and union magazine and website Articles. In 2013, UJF together with the Finnish Media Federation made a recommendation on the actions in editorial offices in case of threats and threatening situations against journalists. These included reporting violations to police. Early 2016, the Union Magazine made and published a large survey on threats against journalists according to which every one of six journalists had received threatening messages, mainly through e-mail or social media, but some also face-to-face or over telephone.

³⁰³ The websites in question are <http://www.naidanoziegumi.lv> (in Latvian) and <http://cilvektiesibas.org.lv> (in Latvian, Russian and English).

³⁰⁴ For more details see website at www.internet-signalement.gouv.fr

³⁰⁵ The website in question is available at www.astynomia.gr

- **Supporting victims of hate speech**

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

283. Victims of hate speech should not fear consequences from reporting it or providing evidence as witnesses to it. There should therefore be in place a specific criminal prohibition on any retaliation action.³⁰⁶

284. Beyond redress through legal proceedings there can also be supporting measures that reassure and help the victims return to their normal life. Such measures could include, among others, support groups, counselling, public declarations or condemnations of the attacking speech.

285. In the *Czech Republic*, Act no. 45/2013 (on victims of crime) provides for rights to victims of crime and financial support. Victims of hate crime and in some instances of hate speech fall under the legal category of especially vulnerable persons for which enhanced protection and support is available. Legal assistance is provided to victims of crime so as to ensure the functioning of the system in practice.³⁰⁷

286. Victim Support *Denmark*, an organisation offering free services available to everyone, whether or not a crime has been reported and regardless of when it happened, is available to victims and witnesses of hate speech. The organisation acts under a duty of confidentiality and as an organisation independent from the Danish authorities. Victim Support Denmark does not replace support from public institutions but provides an independent supplement.³⁰⁸

- **Enhancing research and monitoring, including data collection**

287. Whereas hate speech seems to be spreading, in particular in the social media, the actual extent of the spread and impact of hate speech remains uncertain. 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 its impact, there is a need for further research in the form of surveys and field studies and, where practicable, of a comparative nature. This means that data collection and analysis regarding the actual use of hate speech should be undertaken on a consistent, systematic and comprehensive basis.³⁰⁹ Such research and monitoring of hate speech, which is crucial for developing adequate policies, should be done separately from data collection of hate crime as the two phenomena may require different responses. States should support the monitoring of hate speech by civil society, equality bodies and national human rights institutions and promote co-operation in undertaking this task between them and public authorities.³¹⁰

288. 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.³¹¹

³⁰⁶ ECRI GPR No. 15, Explanatory memorandum § 110.

³⁰⁷ E.g. see <http://www.in-ius.cz/dwn/praktalegdopo/zotc-web-final.pdf>.

³⁰⁸ Link the website to Victim Support Denmark (in Danish *Offerrådgivningen*) in English available at <https://www.offerraadgivning.dk/om/english/>.

³⁰⁹ ECRI GPR No. 15, Explanatory memorandum §§ 74 and 78.

³¹⁰ ECRI GPR No.15, Recommendation 3e.

³¹¹ ECRI GPR No. 15, Explanatory memorandum § 86.

289. A report by the *Finnish* Ministry of Justice found that hate speech had become the most common form of discriminatory behaviour targeting minorities. Of the 1475 people polled for the report, 61 % stated that hate speech had eroded their general sense of safety over the preceding 12 months, indicating that the problem has become worse over a relatively short period.³¹²

290. The EU-project Research – Report – Remove: Countering Cyber Hate Phenomena (2016-2017), developed by the International Network Against Cyber Hate (INACH), collects data from all project members from multiple countries (Austria, Belgium, France, Germany, the Netherlands and Spain) in order to synthesise a comprehensive and extensive picture of cyber hate in Europe in the 21st century. As part of this EU-project, the *Austrian* Federal Chancellery and the Ministry for Europe, Integration and Foreign Affairs is responsible for:

- 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 in Austria will particularly focus on the monitoring of antisemitism, hate against Roma and Sinti, hate against Muslims and homophobia.

291. In *Spain*, the Statistical Criminal System is underway, allowing the State Security Forces to identify offences regarding actions of extremism and terrorism, in order to record, obtain, evaluate and extract statistical data regarding racism and xenophobia. One of the main adjustments of the system was adopting the ECRI's definition for racism or xenophobia so as to ensure a broad approach to racism.

292. *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 victims of criminal offences. Beyond the quantified data provided by the investigative or judicial services, it provides quantitative data on victims of hate speech and their treatment, in order to better target public policies in this area. Such victimization surveys were conducted in 2016 by the National Demographic Institute (INED), as well as by the National Institute of Statistics and Economic Studies (INSEE) on an annual basis since 2007.

293. The *United Kingdom* Government supported the Institute of Jewish Policy Research's work on Antisemitism in contemporary Great Britain. The research was based on the largest and most detailed survey of attitudes towards Jews and Israel ever conducted in Great Britain. It concludes that 3 % 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.

³¹² "Survey on hate speech and harassment and their influence on different minority groups", available at http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/76633/omso_7_2016_vipu-raportti_158_s.pdf

294. In *North Macedonia*, there is a Guide to Monitor Hate Speech, issued by the Agency of Audio and Audiovisual Media Services.³¹³ It encompasses international standards and principles relating to freedom of expression and hate speech, coupled with the relevant case-law of the European Court of Human Rights, and the applicable national legislation. The Guide is intended to be used as a concrete tool by both broadcasters and the Agency alike. The Guide has received wider regional acknowledgment and recognition.

295. The *Nordic Ombudsmen for Equality and Non-Discrimination* cooperate on combating hate speech and misogyny within a Nordic network (sharing good practices and studies on hate speech, learning from the national action plans of the neighbouring countries against hate speech etc.).

- **Education and awareness-raising, including intercultural dialogue**

296. An important tool in combating and preventing hate speech is education - both inside and outside the formal education system - and awareness-raising about the dangers posed by the use of hate speech, as well as the promotion of respect for diversity within society.³¹⁴

Education

297. Schools should include online behaviour as part of their work in the field of education for democratic citizenship.³¹⁵ 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 as well as for the production of the materials to be used in these programmes.

298. 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:

- In 2017/18, under the heading “Against radicalisation and marginalisation: strengthening democratic culture and digital courage”, online hate speech was addressed, and counter-strategies developed. Civil courage and solidarity actions as well as political and social participation were also covered.³¹⁶
- In 2016, several materials on human rights were prepared concerning prevention of violence and digital competence, addressing hate speech, (for use in school and extracurricular). Moreover, a handbook was translated into German on work in schools from 2014, elaborated in the course of the Council of Europe’s initiative “Movement against Hate speech”.
- 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 2017. 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” was highlighted.

299. *Spain* is part of the Google Project: “AGAINST HATE AND RADICALISM #WEAREMORE”. The project includes courses for over 28,000 boys and girls between the ages of 14 and 18 and more than 600 educators of youth groups, associations, public and private schools.³¹⁷

³¹³ Available in Macedonian at <http://avmu.mk/wp-content/uploads/2017/05/Vodic-za-monitoring-za-govorot-na-omraza-Mak.pdf>, in Albanian at <http://avmu.mk/wp-content/uploads/2017/06/Shpjegues-p%C3%ABr-monitorimin-e-%E2%80%9Egjuh%C3%ABs-s%C3%AB-urretjes.pdf>, and in English at <http://avmu.mk/wp-content/uploads/2017/11/Guide-to-monitor-hate-speech-FINAL-9.pdf>

³¹⁴ ECRI GPR No. 15, Recommendation 4 and its Explanatory memorandum §§ 91, 93 and 99; *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, principles 61, 73-74.

³¹⁵ See *Bookmarks manual for combating online hate speech through human rights education*, published to support the No Hate Speech Movement youth campaign of the Council of Europe for human rights online as young people are directly concerned as agents and victims of online abuse of human rights. Available at <http://www.theewc.org/Content/Library/Research-Development/Project-documents-and-reports/Bookmarks-Combating-hate-speech-online-through-human-rights-education>.

³¹⁶ See at <http://www.politik-lernen.at/site/praxis/workshopreihe2017>.

³¹⁷ More information is available at <http://www.somos-mas.es/>.

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

301. In *Poland*, a website with all relevant information about hate speech was created within the framework of the Citizens for Democracy programme.³¹⁸ Moreover, the project "Hate - I'm against » is being implemented in co-operation with the European Wergeland Centre under the Citizens for Democracy programme, financed with funds from the European Economic Area (EEA). Finally, a Council of Europe youth campaign aiming at reducing the levels of acceptance of hate speech was also carried out in years 2012-2017.

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

303. As part of the Government's long-term objective by 2025 to make *Finland* a country where everyone can feel at home, the Ministry of Education and Culture launched the following two actions and campaigns:

- an Action Plan ("Meaningful in Finland") in 2016 to prevent hate speech and racism and to foster social inclusion. The objectives cover e.g. improving the skills of teaching staff and other professionals who work with children and young people.³¹⁹
- a campaign called 'I say NO to hate speech' October 2017.³²⁰

304. To promote well-being and prevent bullying and harassment of any kind in the school culture in *Finland*:

- the KiVa anti-bullying programme was adopted by all Teacher training schools.
- the Kivakoulu ("Nice school"), which is supported by the Ministry of Education and Culture and aims at reducing school bullying, was used by about 90% of all comprehensive schools (ca. 2500 schools) leading to good results. The University of Turku coordinates and develops the programme.
- a programme "Study Buddies" (Opintokamut), which is funded by the Ministry of Education and Culture, aims at decreasing bullying, improving life- and learning skills, motivation and mental wellbeing of youth in upper secondary schools. The programme piloted in 2016–2017 and mainstreamed broadly to all upper secondary schools (including in VET) in 2018.
- a comprehensive guidebook for schools and educators about strengthening democratic inclusion, preventing hate speech and violent radicalism, which takes into account international materials available, such as from UNESCO and the Council of Europe was published in 2017 by the National Agency for Education.³²¹

Awareness-raising including intercultural dialogue

305. Civil society initiatives are essential to engage in particular young people in fighting against online hate. The Council of Europe's No Hate Speech Movement 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 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.

³¹⁸ The website is available at <http://www.mowanienawisci.info/>.

³¹⁹ See at http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/75432/Meaningful_in_Finland.pdf

³²⁰ See at http://minedu.fi/en/article/-/asset_publisher/sitoudun-torjumaan-vihapuhetta-haastekampanja-alkaa-2-10-

³²¹ See at http://www.oph.fi/download/182479_rakentavaa_vuorovaikutusta.pdf.

306. Intercultural dialogue – involving an open and respectful exchange of views between individuals and groups belonging to different cultures – should be facilitated so as to remove barriers to understanding. This could be implemented through undertaking shared cultural events and research projects, the provision of language courses, 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.³²²

307. In *Croatia*, the Ministry of Interior organised campaigns in schools for raising awareness of hate speech problems and implemented activities in accordance with the No Hate Speech Movement campaign of the Council of Europe.

308. 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.

309. In *Belgium*, to support the Council of Europe campaign No Hate Speech Movement, the government of Flanders 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.³²³

310. ActionAid *Denmark* launched in 2015 the project ‘Together Against Racism’ in collaboration with teachers, social workers and journalists in order to counter every day and structural racism in Denmark through awareness-raising, trainings and debate initiatives.³²⁴ In 2017, the municipality of Copenhagen started a volunteer initiative with five Youtubers in order to create awareness on online bullying. It contains a number of videos where young people speak of their own experiences with bullying and what to do in order to stop online bullying.³²⁵

311. The *Finnish Union of Journalists* had a Twitter-campaign against hate speech in social media in 2016 to prepare for the *UNESCO’s World Press Freedom Day (WPDF) Conference* in Helsinki in 2016. Many Union members and others gave the “responsibility of expression oath by tweeting: “I express myself – mindful of human rights. Hate speech won’t silence me. I’m responsible for what I say. #SANANVASTUUVALA”. Moreover, the Network against Hate Speech, founded by governmental organisations and NGOs working on human rights, launched awareness-raising campaigns (in the social media, media, schools and public transportation) and organised educational events against hate speech and recently published a guidebook for young people against gendered hate speech.

³²² ECRI GPR No. 15, Recommendation 4, and its Explanatory memorandum § 95.

³²³ The website is available at <https://nohate.mediawijs.be/>

³²⁴ The description of the project in English is available at <https://www.ms.dk/en/together-against-racism>.

³²⁵ Link to the initiative in Danish is available at <https://www.kk.dk/nyheder/youtubere-tager-kampen-op-mod-online-mobbere-i-koebenhavn>

- **Dialogue with media at large including social media platforms, civil society and other relevant actors**

312. To efficiently tackle hate speech, it will often be necessary to coordinate and cooperate with media at large including social media platforms, civil society and other relevant actors. Such cooperation is important for the elaboration of communications and engagement strategies on hate speech, including steps such as outreach to local communities, partnerships with civil society, public awareness campaigns to combat hate speech and a media strategy to ensure the appropriate dissemination of information on hate speech prosecutions to the public.

313. Cooperation, consisting in particular of the sharing of experiences, technological solutions and best practices, is essential.³²⁶ Online platforms should be encouraged to develop effective processes to detect, identify and remove illegal content, including hate speech, especially through automatic detection and filtering technologies driven by algorithms.³²⁷

314. It is also important for States to ensure that a regulatory framework for diverse and pluralistic media is in place, which promotes pluralism and equality.³²⁸ Such a framework should respect the fundamental principle that any oversight of the media should only be undertaken by bodies which are independent of the government, publicly accountable, and operate transparently.³²⁹ Moreover, the framework should promote the right of different communities to freely access and use media and information and communications technologies for the production and circulation of their own content, as well as for the reception of content produced by others, regardless of frontiers.³³⁰ Indeed, 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.³³¹

315. 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.³³² 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 resulted in some initial improvements. 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 (nevertheless the large social media platforms were not sufficiently successful in establishing effective user complaints mechanisms and deleting illegal content on a voluntary basis which was the reason for the adoption, in 2017, of the new Act to Improve Enforcement of the Law in Social Network, (see above paragraph 170).

316. In *France*, the “Délégation Interministérielle à la Lutte Contre le Racisme, l'Antisémitisme et la Haine anti-LGBT” (DILCRAH) and the Delegation for security industries and cyber threats from the Ministry of the Interior established in 2017 a dialogue between the various State services and the internet operators (Google, Facebook, Twitter, Dailymotion, Jeuxvideo.com, Gandi, OVH), in order, on the one hand, to ensure better execution of judicial orders, and, on the other hand, to promote the emergence of self-regulation of hatred on the internet by an effective treatment, by the internet operators of reported hate speech.

³²⁶ EU European Commission *Recommendation on measures to effectively tackle illegal content online*, cited above, (30).

³²⁷ *Ibid.*, 18. See also Maja Brkan, *Freedom of expression and Artificial Intelligence: on personalisation, disinformation and (lack of) horizontal effect of the Charter*, cited above, p. 7.

³²⁸ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, principle 69; ARTICLE 19 ‘Hate Speech’ Explained. A Toolkit, cited above, p. 52.

³²⁹ See *Recommendation Rec (2000) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector*, adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies.

³³⁰ ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality* (2009), principle 5.

³³¹ PACE, Report on Ending cyberdiscrimination and online hate, § 57.

³³² More information is available at <http://www.fair-im-netz.de>.

317. In *Finland*, the Advisory Board for Ethnic Relations (ETNO) is a broad-based consultative body established by the Government and co-ordinated under the auspices of Ministry of Justice. It is mandated to:

- (1) promote interaction between ethnic minorities, public authorities, employer and employee unions, NGOs and political parties in Parliament,
- (2) monitor the state on ethnic relations, promote the participation of migrant and ethnic minorities, their sense of security and positive attitudes on diversity,
- (3) provide expertise to all ministries on matters related to migration, integration and equality,
- (4) partake in research related to the promotion of good relations,
- (5) disseminate general information on good ethnic relations to society.

In addition to its national advisory board, ETNO has seven regional advisory boards throughout the country co-ordinated by regional centres for Economic Development, Transport and the Environment. In order to encourage constructive dialogue at regional and local level, regional boards utilise local expertise especially from migrant, ethnic and/or religious communities in collaboration with local civil service actors from municipalities and regional Government. ETNO organises one of the major annual forums on ethnic relations ETNO forum. ETNO provides information and partakes in the capacity building of migrant, ethnic and religious organisations. In addition ETNO publishes reports on matters related to ethnic relations. ETNO has a number of Good Will Ambassadors who use their expertise and well established public profiles to further good ethnic relations around the country. For example, ETNO's annual theme for 2016 was Enhancing Decent Dialogue Culture. ETNO is to establish a workgroup on cultural and religious dialogue for a third consecutive term: the working group aims to promote interreligious dialogue and co-operation between religious communities.

318. A useful tool for the wider understanding of the concept of hate speech is the regional publication "Media regulatory authorities and Hate Speech" prepared within the framework of the Council of Europe and the European Union project "Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX)".³³³ It includes theoretical background information concerning the issue of hate speech, the relevant legislation of the participating countries from the region as well as the case-law of the ECtHR and concrete cases on hate speech dealt with by the regulatory authorities of Albania, Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Serbia and Kosovo³³⁴.

319. A particular contribution to combating hate speech can be made by NGOs, equality bodies and national human rights institutions, whether individually or in co-operation with one another.³³⁵ They can play an integral role in developing and implementing policies to tackle the root causes such as inequality and discrimination.³³⁶

³³³ More details are available at <https://edoc.coe.int/en/media/7431-media-rgulatory-authorities-and-hate-speech.html>

³³⁴ All reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

³³⁵ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, principles 67 and 68; ECRI GPR No. 15, Recommendation 4, and its Explanatory memorandum § 101.

³³⁶ European network of equality bodies, *The Equinet Perspective 'Extending the Agenda. Equality Bodies addressing Hate Speech'* published in 2018, Executive summary: While few national equality bodies have an explicit mandate on hate speech, many have, however, interpreted their mandate to include hate speech. http://www.equineteurope.org/IMG/pdf/hate_speech_perspective_-_web.pdf

320. In *Latvia*, 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.

321. In 2017, the *Danish* Institute for Human Rights prepared a report “Hate Speech in the Public Online Debate”.³³⁷ The report contained a number of recommendations including the proposal to prepare a national action plan focusing on both lawful and unlawful hate speech.

- **Counter-speech**

322. Counter-speech in the form of alternative narratives is increasingly viewed as key to responding effectively to hate speech. Such response should include stressing that diversity is a source of enrichment, call for mutual understanding and respect for each other, and demonstrate both the falsity of the foundations on which hate speech is based and its unacceptability.³³⁸ Those targeted by hate speech also have the right to respond through counter-speech.³³⁹

323. In *Croatia*, during the celebration of the Human Rights Day 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 on the labels, the Office designed an adhesive label with a message of humanity appearing in the treetop.

324. In the *Czech Republic*, the Hate Free Culture project focuses, among others, on refuting hoaxes and contributing with positive stories about negatively stereotyped 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.³⁴⁰

325. In *Serbia*, two NGOs “The Umbrella Organization of Youth of Serbia (KOMS)” and the “Institute for Media and Diversity - Western Balkans” organised trainings in Belgrade in July 2017 which dealt with hate speech and its relationship with freedom of expression, appropriate reaction to hate speech as well as 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.

326. Within the framework of co-operation between the members of the *Equinet* (European Network of Equality Bodies) to combat hate speech at European and national level, strong focus is put on communication against hate speech (*i.e.*, on social media) and on creating counter-speech to strengthen the values of equality and non-discrimination.³⁴¹ The equality bodies are also cooperating with Facebook and Twitter to develop their policies against hate speech, racism and misogyny.

³³⁷ Report in Danish includes a summary in English available at https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/ligebehandling_2017/rapport_hadefulde_ytringer_online_2017.pdf

³³⁸ *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, Recommendation 4 and its Explanatory memorandum §§ 88 and 90.

³³⁹ ECRI GPR No. 15, Explanatory memorandum § 92.

³⁴⁰ See <http://jsmetomy.cz/kdo-jsou-uprchlici-a-kdo-jsme-my-odpovedi-hledame-v-kampani-jsme-to-my/>

³⁴¹ The Equinet Perspective *Extending the Agenda. Equality Bodies addressing Hate Speech*; available at http://www.equineteurope.org/IMG/pdf/hate_speech_perspective_-_web.pdf

V. FREEDOM OF EXPRESSION IN RELATION TO SPECIFIC OTHER HUMAN RIGHTS

327. Many of the preceding paragraphs set out general principles regarding the scope and limitations of freedom of expression. This section attempts to highlight in more detail issues and challenges that arise in the relation between freedom of expression and specific other human rights, and the way in which those rights are to be balanced.

328. Human rights are universal, indivisible, interdependent and interrelated³⁴² and should be enjoyed by everyone without discrimination.³⁴³ In today's increasingly diverse societies in Europe there is a need to find a fair balance between conflicting interests which may result from the exercise of competing human rights and fundamental freedoms.³⁴⁴ 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.³⁴⁵ On the other hand, the exercise of the right to freedom of expression carries with it special duties and responsibilities and it may therefore be subject to certain restrictions. Special attention should thus be paid to the link between freedom of expression and the right to private life, freedom of thought, conscience and religion, freedom of assembly and association and finally the prohibition of discrimination.³⁴⁶

A. Freedom of expression and right to private life

329. One of the most obvious situations requiring a balancing between the right to freedom of expression and 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 European Convention on Human Rights.³⁴⁷

330. The protection of the reputation of others is still used as one of the most common grounds for limiting freedom of expression.³⁴⁸ Both the Committee of Ministers and the Parliamentary Assembly³⁴⁹ have urged member States to ensure that defamation laws include freedom of expression safeguards in conformity with European and international human rights standards and the principle of proportionality. The Commissioner for Human Rights has further underlined that freedom of expression must be guaranteed more effectively in criminal defamation proceedings and has spoken out against imprisonment as a sanction for defamation.³⁵⁰ Both imprisonment and the imposition of disproportionate damages can produce a significant chilling effect on journalists.³⁵¹

331. It is well-established in the case-law of the European Court 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.³⁵² The Court has formulated several principles that are applicable when a balance between freedom of expression and the right to private life is sought.³⁵³ First of all, the Court has noted that for the State to have an obligation to conduct a balancing exercise, in other words for

³⁴² United Nations, *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, I.5.

³⁴³ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, preamble, recital 4.

³⁴⁴ *Ibid.*, principle 5.

³⁴⁵ *Ibid.*, principle 19.

³⁴⁶ *Ibid.*, principles 8 and 27.

³⁴⁷ See *Guidelines on Safeguarding Privacy in the Media*, approved jointly in June 2018 by the CDMSI and the Committee of Convention 108 (Council of Europe Data Protection Convention), available at <https://rm.coe.int/guidelines-on-safeguarding-privacy-in-the-media-additions-after-adopti/16808d05a0>

³⁴⁸ Draft a report on the Examination of the alignment of the laws on defamation with the relevant case-law of the European Court of Human Rights, including the issue of decriminalisation of defamation (2005); "Study on the alignment of laws and practices concerning defamation with the relevant caselaw of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality" (2012), prepared by the CDMSI.

³⁴⁹ PACE Resolution 1577 (2007) "Towards decriminalisation of defamation" and the corresponding Recommendation 1814 (2007), both texts adopted on 4 October 2007.

³⁵⁰ Fourth annual report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe, *Populism - How strong are Europe's checks and balances?*, p. 37.

³⁵¹ Council of Europe publication of the study on "Freedom of expression and defamation. A study of the case-law of the European Court of Human Rights" (2016) by Tarlach McGonagle in collaboration with Marie McGonagle and Ronan Ó Fathaigh.

³⁵² *A. v. Norway* (application no.28070/06), judgment of 9 April 2009, § 64; *Delfi AS v. Estonia*, cited above, § 137.

³⁵³ See also Factsheet on "Protection of reputation" available at https://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf

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”.³⁵⁴ 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.³⁵⁵ The distinction between statements of fact and value judgements likewise remains relevant.³⁵⁶

332. As regards the balancing of private life and the freedom of the press, the Court uses the following criteria in evaluating the compliance with the requirements of Article 10, particularly the “necessity” and “proportionality” requirements:³⁵⁷

- 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.

333. One of the rights that interacts most significantly with the right to freedom of expression is the right to data protection guaranteed under Article 8 of the ECHR. To protect the right to respect of private life, with regard to the automatic processing of personal data, the Council of Europe elaborated the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data³⁵⁸ (see above III. A. “Access to information online and offline”). The Convention enshrines, inter alia, in its Articles 8 and 9, the individual’s right to know that information is stored on him or her and, if necessary, to have it corrected.³⁵⁹ The new Protocol amending the Convention³⁶⁰ reinforces the protection of privacy in the digital arena by extending the catalogue of information to be transmitted to individuals when they exercise their right of access. Furthermore, individuals are entitled to obtain knowledge of the reasoning underlying the data processing, the results of which are applied to her/him, which is particularly important in terms of personal profiling. Individuals also have the right not to be subject to a decision affecting him or her which is based solely on an automated processing, without the individual having her/his views taken into consideration.³⁶¹

³⁵⁴ *Delfi AS v. Estonia*, cited above, § 137.

³⁵⁵ *Axel Springer AG v. Germany* (application no.39954/08), Grand Chamber judgment of 7 February 2012, § 78.

³⁵⁶ *Diena and Ozolins v. Latvia* (application no.16657/03), judgment of 12 July 2007, § 79.

³⁵⁷ *Von Hannover v. Germany (no. 2)* (application nos.40660/08 and 60641/08), Grand Chamber judgment of 7 February 2012, §§ 109-113.

³⁵⁸ *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108), opened for signature in Strasbourg on 28 January 1981.

³⁵⁹ Article 9 (1) (e) of Modernised Convention 108, also includes the right to erasure (“the right to be forgotten”).

³⁶⁰ The *Protocol amending the Convention* (CETS No. 223) was adopted at the 128th session of the Committee of Ministers (Elsinore, Denmark, 17-18 May 2018). See also *FRA Handbook on European data protection* - 2018 edition.

³⁶¹ Article 9 of the Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data.

334. In EU member States, the General Data Protection Regulation (GDPR)³⁶² is directly binding and applicable since 25 May 2018. It aims to harmonise the framework for the digital single market, put individuals in control of their personal data and formulate a modern data protection governance. According to Article 85 of the GDPR, entitled “Processing and freedom of expression and information” member States shall reconcile the right to personal data protection with the right to freedom of expression and information. In particular, exemptions and derogations from specific chapters of the Regulation shall be made for journalistic purposes or the purpose of academic, artistic or literary expression, insofar as they are necessary to reconcile the right to personal data protection with the freedom of expression and information.³⁶³

335. Legislation in several member States includes special provisions regarding the protection of personal rights against violations by media. Those national laws 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.

336. In *Germany*, as a consequence of the European 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 and vice versa.

337. In *Switzerland*, the Federal Office of Communication launched an information campaign “Petites histoires d’Internet”,³⁶⁴ which gives simple and accessible advice on the protection of one’s own private sphere in the internet.

338. 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 on the relationship between the freedom of expression and defamation with respect to unproven defamatory allegations of fact.³⁶⁵ In *Hungary*, the Minister of Justice has recently asked the Venice Commission for its legal opinion on question related to the protection of privacy. The answers of the Commission were taken into account during the preparation of the relevant draft bill.

339. In *Portugal*, freedom of expression and the critical comparison of domestic decisions with the case-law of the European Court of Human Rights are still included in the curricula for judicial training activities and at conferences organised by the Centre for Legal Studies. In addition to this general training, in 2016, 2017 and 2018 specific events were organised on the theme “Humour, Law and Freedom of Expression” involving magistrates, journalists, university professors, writers, historians, comedians, actors, religious representatives and with high level of participation and interest. Audio and video recordings of these events are now available as well as an e-book on the topic.³⁶⁶

340. 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 comes from a private individual. Indeed, under Article 8 the State also has positive obligations which may involve the adoption of measures designed to secure respect for private and family life, even in the sphere of the relations of individuals between themselves.³⁶⁷ 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.

³⁶² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

³⁶³ CJEU, Case C-3/07 *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, judgment on 16 December 2008. See also *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy (application no. 931/13)*, Grand Chamber judgment of 27 June 2017, § 198.

³⁶⁴ Further details available at <http://www.thewebsters.ch/fr/>.

³⁶⁵ Venice Commission, 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).

³⁶⁶ More information on these events is available at <http://www.cej.pt/cej/recursos/ebooks/outros/eb>

³⁶⁷ *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.

341. In most member States the right to protection of reputation, honour and privacy is protected by means of civil and/or criminal law; criminal offences of insult or defamation are usually punishable by a fine.

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

342. 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.³⁶⁸ Responsible exercise of the right to freedom of expression should not overstep the limits of acceptable criticism, as established by the European Court of Human Rights.³⁶⁹

343. In the case of attacks on religious beliefs, the conflicting interests at stake will typically be, on the one hand, the applicant's right to communicate his or her ideas on religious beliefs to the public, and, on the other hand, the right of other persons to respect of their right to freedom of thought, conscience and religion.³⁷⁰ Here the issue may be the extent to which State authorities may take action against expression in order to protect the religious sensibilities of adherents of particular faiths by preventing or punishing the display of insulting or offensive material that could discourage adherents from practising or professing their faith through ridicule.³⁷¹ The scope of Article 10's guarantee for freedom of expression encompasses, after all, ideas which "offend, shock or disturb", and in any case the maintenance of pluralist society also requires that adherents of a faith at the same time accept that their beliefs may be subject to criticism and to the propagation of ideas that directly challenge these beliefs.³⁷² It should also be recalled that historically the criticism of religious dogmas lies at the very beginning of the development of freedom of expression and, indeed, human rights in general. On the other hand, those who exercise the freedom of expression under Article 10 also undertake duties and responsibilities, among them an obligation to ensure the peaceful enjoyment of the rights of other persons, e.g. those guaranteed under Article 9 of the Convention.³⁷³

344. However, it is not exclusively or even primarily for the courts to find the right balance between freedom of religion and freedom of expression, but rather for society at large, through rational discussions between all parts of society, including believers and non-believers.³⁷⁴ Intercultural dialogue is promoted both by the Council of Europe and the European Union through their policies and programmes in the field of youth and in other sectors, such as education, multilingualism, culture and integration. In the Council of Europe, it is understood as an 'open and respectful exchange of views between individuals, groups with different ethnic, cultural, religious and linguistic backgrounds and heritage on the basis of mutual understanding and respect. It operates at all levels – within societies, between the societies of Europe and between Europe and the wider world'.³⁷⁵ The White Paper on Intercultural Dialogue "Living Together As Equals in Dignity", launched by the Council of Europe in 2008 provides guidance on how to manage Europe's increasing cultural diversity – rooted in the history of our continent and enhanced by globalisation. It argues that our common future depends on our ability to safeguard and develop human rights, as enshrined in the European Convention on Human Rights, democracy and the rule of law and to promote mutual understanding.

³⁶⁸ *Report 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 76th Plenary Session (Venice, 17-18 October 2008), document CDL-AD(2008)026, § 95.

³⁶⁹ *Ibid.*

³⁷⁰ *Otto-Preminger-Institut v. Austria* (application no. 13470/87), judgment of 20 September 1994, §§ 55-56.

³⁷¹ *Ibid.*; *Wingrove v. the United Kingdom*, judgment of 25 November 1996, § 60.

³⁷² *Otto-Preminger-Institut v. Austria*, §47; *Klein v. Slovakia* (application no. 72208/01), judgment of 31 October 2006, § 47.

³⁷³ *Otto-Preminger-Institut v. Austria*, §§ 47, 55-56; *Klein v. Slovakia*, judgment of 31 October 2006, § 47.

³⁷⁴ Venice Commission, *Report 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*, cited above, § 94.

³⁷⁵ *White Paper on Intercultural Dialogue "Living Together As Equals in Dignity"*, launched by the Council of Europe Ministers of Foreign Affairs at their 118th Ministerial Session (Strasbourg, 7 May 2008).

345. Since 2008 the Council of Europe has organised a series of Exchanges on the religious dimension of intercultural dialogue, with the participation of representatives of religious communities, non-religious convictions, NGOs and other civil society actors, as well as representatives of member States' governments. The 2017 Exchange focused on "Migrants and refugees: challenges and opportunities – What role for religious and non-religious groups?"

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

347. World conferences on Inter-Religious and Inter-Civilization Dialogue are organised in *North Macedonia* with the support of UNESCO, triennially since 2007. The Council of Europe 2010 Exchange of the Religious Dimension of the Intercultural Dialogue dedicated to "The role of the media in fostering intercultural dialogue, tolerance and mutual understanding: freedom of expression of the media and respect towards cultural and religious diversity" was held in Ohrid.

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

348. Freedom of expression and the freedom of thought, conscience and religion are closely interrelated rights³⁷⁶ and the interaction between them 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 of the Convention falls within the 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 in a way that does not qualify as a "manifestation" of belief under Article 9 of the Convention.

349. 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 also has "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.³⁷⁷ 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.³⁷⁸

350. The Court has also been very clear in saying that hate speech against, *inter alia*, a religious group³⁷⁹ 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".³⁸⁰

351. Furthermore, the ICCPR 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.

³⁷⁶ A/HRC/31/18 Report of the Special Rapporteur on freedom of religion or belief (Focus: Two closely interrelated rights: freedom of religion or belief and freedom of opinion and expression).

³⁷⁷ *Otto-Preminger-Institut v. Austria*, cited above, § 49.

³⁷⁸ *Ibid.*, § 56. See also *E.S. v. Austria* (application no. 38450/12), Grand Chamber judgment 25 October 2018, §53.

³⁷⁹ *Norwood v. the United Kingdom* (application no. 23131/03), admissibility decision of 16 November 2004.

³⁸⁰ *Otto-Preminger-Institut v. Austria*, cited above, § 47; *Klein v. Slovakia*, cited above.

352. 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.

- **Religious symbols in public areas**

353. Increased cultural diversity has led to an intensive debate in many European countries on the public display of religious symbols,³⁸¹ such as the wearing of the *burqa* and the *niqab*. The European Court of Human Rights has delivered several rulings regarding restrictions on the wearing of items of clothing or other conspicuous signs of religious belief. In its decisions, the Court has highlighted the importance of the way in which the national authorities have reached their decisions. In this respect, actual and good faith domestic engagement with the principles enshrined in the European Convention on Human Rights, will be a significant factor in the Court's assessment. The compatibility with Article 9 of such restrictions will depend on the reasons advanced for the restrictions and also on the proportionality of the interference and whether a fair balance has been struck.

354. The grounds for limitation have to be assessed carefully in each case taking into account its particular circumstances. In *Ahmet Arslan and Others v. Turkey*³⁸² the Court found a violation of Article 9 holding, in particular, that there was no evidence that the applicants had represented a threat to the public order or that they had been involved in proselytism by exerting inappropriate pressure on passers-by during their gathering. The Court emphasised that in contrast to other cases, the case concerned punishment for the wearing of particular dress in public areas that were open to all, and not regulation of the wearing of religious symbols in public establishments, where religious neutrality might take precedence over the right to manifest one's religion.³⁸³ In *S.A.S. v. France*³⁸⁴ which concerned the ban on veil of the face, the Court held that France had a wide margin of appreciation in the present case, in particular as there was little common ground amongst the member States of the Council of Europe as to the question of the wearing of the full-face veil in public. The Court thus observed that there was no European consensus against a ban. Consequently, the impugned ban could be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others".³⁸⁵

355. The Court has also examined a number of cases on the wearing of religious symbols in schools and other educational institutions – both by pupils and students³⁸⁶ as well as by teachers.³⁸⁷ In *Leyla Şahin v. Turkey*,³⁸⁸ the Grand Chamber reiterated the wide margin of appreciation (i.e. discretion) which it affords to States on this matter.³⁸⁹

356. The Court of Justice of the European Union (CJEU) issued a joint judgment on the interpretation of EU Equal Treatment Directive³⁹⁰ in the cases of two women, from France and Belgium, who were dismissed for refusing to remove headscarves.³⁹¹ In both cases the CJEU gave

³⁸¹ *Lautsi and others v. Italy* (application no. 30814/06), Grand Chamber judgment of 18 March 2011. Concerned the presence of crucifixes in State-school classrooms.

³⁸² *Ahmet Arslan and Others v. Turkey* (application no. 41135/98), judgment of 23 February 2010.

³⁸³ *Ibid.* §§ 50-52.

³⁸⁴ *S.A.S. v. France* (application no. 43835/11), Grand Chamber judgment of 1 July 2014.

³⁸⁵ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, principle 7. See also *Manual on the wearing of religious symbols in public areas* by Prof. Malcolm D. Evans, cited above.

³⁸⁶ See, for example, *Kervanci v. France* (application no. 31645/04), judgment of 4 December 2008; *Aktas v. France* (application no.43563/08), decision of 30 June 2009; *Ranjit Singh v. France*, (application no. 27561/08) decision of 30 June 2009.

³⁸⁷ See for example *Dahlab v. Switzerland* (application no. 42393/98), decision 15 February 2001.

³⁸⁸ *Leyla Şahin v. Turkey* (application no. 44774/98), Grand Chamber judgment of 10 November 2005, §§ 115-116. See also *Kose and Others v. Turkey* (application no. 26625/02), decision of 24 January 2006.

³⁸⁹ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, principle 15. See also *Lautsi and others v. Italy*, cited above.

³⁹⁰ 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).

³⁹¹ Cases C-157/15, *Samira Achbita*, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* and 188/15 *Bougnauoui and Association de défense des droits de l'homme (ADDH) v. Micropole Univers*, CJEU of 14 March 2017.

a broad interpretation of the protected characteristic “religion or belief” in conformity with the freedom of thought, conscience and religion as enshrined in Article 9 of the European Convention and Article 10 of the EU Charter. In line with the ECtHR jurisdiction the CJEU considers that not only the fact of having a religious belief, but also the public manifestation of that belief is protected. Though, in the *Achbita*-case the Court used a narrow interpretation of the concept of discrimination according to the EU Equal Treatment Directive, it considered a general prohibition to manifest whichever religion or belief on the workplace (thus including philosophical and political symbols) could lead to indirect discrimination. Based on the freedom to conduct a business, as enshrined in Article 16 of the EU Charter, the CJEU recognised also the right for private, commercial companies to pursue an image of neutrality of belief towards customers. The employer must achieve this legitimate aim with appropriate and necessary means. In the *Bougnaoui*-case the CJEU stated that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be a sufficient justification if this employer itself has no neutrality policy.

357. 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 openly manifest a religious affiliation is also prohibited; however, this does not apply to State universities. Moreover, no one may, in public places, wear clothing that is designed to conceal the face.

358. In *Germany*, the 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.

359. In *Spain*, the Observatory for Religious Pluralism prepared 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.

360. In *Norway*, the Courts Administration Board in a case in June 2010 concerning the use of religious and political conditional garments and symbols in the courts 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 affirms 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.

- **Whistle-blowing**

361. The protection of Article 10 of the European Convention extends to the workplace in general and to civil servants in particular.³⁹² At the same time employees have a duty of loyalty, reserve and discretion to their employer.³⁹³ Civil servants often have access to information which the government, for various legitimate reasons, may have an interest in keeping confidential or secret. However, a civil servant may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a strong public interest. The signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large. In determining the proportionality of an interference with a civil servant’s freedom of expression in such a case, the Court³⁹⁴ must also have regard to a number of other factors:

³⁹² *Wille v. Liechtenstein* (application no. 28396/95), Grand Chamber judgment of 28 October 1999.

³⁹³ *De Diego Nafria v. Spain* (application no. 46833/99), judgment of 14 March 2002.

³⁹⁴ *Guja v. Moldova* (application no. 14277/04), Grand Chamber judgment of 12 February 2008; *Heinisch v. Germany* (application no. 28274/08), judgment of 21 July 2011; *Bucur and Toma v. Romania* (application no. 40238/02), judgment of 13 January 2013.

- i. whether the person who has made the disclosure had at his or her disposal alternative channels for making the disclosure
- ii. the public interest in the disclosed information
- iii. the authenticity of the disclosed information
- iv. the detriment to the employer. Is the public disclosure so important in a democratic society that it outweighs the detriment suffered by the employer?
- v. whether the disclosure is made in good faith
- vi. the severity of the sanction imposed on the person who made the disclosure and its consequences.

362. In *Hungary*, an integrity management system supports public servants in cases related to integrity, based on the Government Decree no. 50/2013. This includes e.g. appointment of integrity advisors, anti-corruption training for civil servants, risk assessment related to corruption.

363. The *Norwegian* Ministry of Local Government and Modernisation helps fund a website called Etikportalen (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 codes of conducts to secure and safeguard freedom of expression for both local politicians and employees.³⁹⁵

364. In *Denmark* if employees are dismissed because of their public statements, there are several ways to settle a dispute regarding whether the dismissal (and thus the statement) was justified or not. The dispute can be settled by arbitration, or the case can be tried by the Danish Labour Court. Employees in the public sector can furthermore file a complaint to the Danish Ombudsperson. Public employees, who are employed under special conditions as civil servants, can also have their case tried before the Danish Civil Service Tribunal, a special court for cases related to civil servants. Examples of recent practice include the Ombudsman observation regarding the dismissal of a school teacher who had complained about the school management.³⁹⁶ In a recent arbitration case a hospital porter was awarded compensation after he was dismissed for an alleged breach of loyalty.³⁹⁷

365. Whistleblowing is a fundamental aspect of freedom of expression and freedom of conscience and is important in the fight against corruption and tackling gross mismanagement in the public and private sectors. 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.³⁹⁸ Furthermore, the Court has added additional prerequisites in order to broaden the protection offered by Article 10 of the Convention to whistle-blowers. On the one hand, it must be taken into account whether the individual had alternative channels for the disclosure. Moreover, it is necessary to have regard to the public interest involved in the disclosed information and to the authenticity of the information disclosed. On the other side of the scale, the Court must weigh the damage, if any, suffered by the public authority as a result of the disclosure in question and assess whether such damage outweighed the interest of the public in having the information revealed. The motive behind the actions of the reporting person is another factor in deciding whether a particular disclosure should be protected or not. Lastly, in connection with the review of the proportionality of the interference in relation to the legitimate aim pursued, attentive analysis of the penalty imposed on the applicant and its consequences is required.³⁹⁹

³⁹⁵ The address is www.etikkportalen.no.

³⁹⁶ Referenced in case no. 16/01523 (FOB 2016-37) 'Upper Secondary School acted contrary to the guidelines on freedom of expression for public employees' (in Danish *Gymnasium handlede i strid med rammerne for offentligt ansattes ytringsfrihed*).

³⁹⁷ Referenced in FV 2016.0207.

³⁹⁸ *Guja v. Moldova*, cited above.

³⁹⁹ *Ibid.* §§ 73-78

366. Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistle-blowers⁴⁰⁰ 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. It underlines the need for national frameworks to foster an environment that encourages reporting or disclosure in an open manner. Individuals should feel safe to freely raise public interest concerns.

367. The European Union Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure⁴⁰¹ stresses that it is essential that the exercise of the right to freedom of expression and information which encompasses media freedom and pluralism is not restricted, in particular with regard to investigative journalism and the protection of journalistic sources. The measures, procedures and remedies provided for in this Directive should not restrict whistleblowing activity. Therefore, the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing or illegal activity is revealed.

368. The proposal for a European Union Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law will guarantee a high level of protection for whistleblowers in the EU member States who report breaches of EU law by setting new, EU-wide standards. The proposed text will establish safe channels for reporting both within an organisation and to public authorities. It will also protect whistleblowers against dismissal, demotion and other forms of retaliation and require national authorities to inform citizens and provide training for public authorities on how to deal with whistleblowers.⁴⁰²

369. Several member States have recently adopted special legislation or other measures on the protection of whistle-blowers. For example, *Georgia* has introduced several in order to provide additional guarantees for whistleblowers in particular, the whistle-blower protection rules have 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. The *Netherlands* established by law an independent house for whistleblowers in 2016.

370. In the course of transposing European directive 2016/943/EU, *Germany* will introduce amendments to its national legislation specifying 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.

371. 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 whistleblower 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 whistleblowers are complementary.

372. Following the considerations and recommendations by the *Danish* Committee on Freedom of Expression for Public Employees and Whistleblowing Systems, the Ministry of Justice published in October 2016 a guide on the freedom of expression of public employees supplemented in October 2017 by an online course on the subject. The aim of the guide and course is to increase the involvement of public employees in the public debate and to promote sincerity and debate on the working conditions in the public sector.

⁴⁰⁰ CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistle-blowers, adopted by the Committee of Ministers on 30 April 2014 at the 1198th meeting of the Ministers' Deputies.

⁴⁰¹ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 15 June 2016 OJ L 157/1, (19) and (20).

⁴⁰² The proposed Directive is available at https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-218_en.

373. In *France*, the Bill on transparency, the fight against corruption and the modernisation of the economy⁴⁰³ created a general and protective status for whistleblowers. According to Article 8-III of this bill, public and private bodies of at least 50 employees, State administrations, municipalities with more than 10 000 inhabitants, public establishments for cooperation between local authorities of which they are a member, departments and regions must set up proceedings to collect alerts from members of staff and external collaborators.

- **Blasphemy, religious insult and incitement to religious hatred**

374. Personal religious beliefs and convictions of persons may be offended by blasphemous expression in regard to objects of veneration.⁴⁰⁴ 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 necessity and extent of such interference.⁴⁰⁵

375. 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.⁴⁰⁶

376. In its Recommendation 1805(2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion, the PACE considers that “national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence”.⁴⁰⁷

377. In its Report 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.⁴⁰⁸

378. In most 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.⁴⁰⁹

379. 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’s case-law, freedom of expression is limited, in this particular area, only when it degenerates into hate speech or incitement to discrimination. Similar regulations exist in *Norway*.

⁴⁰³ Law “Sapin 2” No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of the economy - Sapin II law.

⁴⁰⁴ Harris, O’Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p. 669.

⁴⁰⁵ *Otto-Preminger-Institut v. Austria*, cited above, § 50. See also *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, principle 15.

⁴⁰⁶ *Otto-Preminger-Institut v. Austria*, cited above, § 47. See also *E.S. v. Austria*, cited above.

⁴⁰⁷ PACE Recommendation 1805 (2007) on Blasphemy, religious insults and hate speech against persons on grounds of their religion, adopted on 29 June 2007

⁴⁰⁸ 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 76th Plenary Session (Venice, 17-18 October 2008), §§ 89-90.

⁴⁰⁹ *Members of the Gldani Congregation of Jehovah’s Witnesses and others v. Georgia* (application no. 71156/01), judgment 3 May 2007.

380. 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.

381. 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 dedicated to the public celebration or religious rites.

382. In 2017, the *Danish* Parliament decided to abolish section 140 of the Danish Criminal Code on certain forms of contempt and mockery of religious symbols (blasphemy). However other provisions in the Criminal Code may – depending on the circumstances – be applicable to the defamation of religious symbols, inter alia provisions on serious criminal damage, racism, defamation, hate speech and disturbance of a service or another public church ceremony, etc.

C. Freedom of expression and freedom of assembly and association

383. The purpose of the freedom of peaceful assembly and freedom of association protected by Article 11 of the Convention is to allow individuals and groups to come together—to collectively address and resolve challenges and issues that are important to society, and where those interests are political in the widest sense, the function of the Article 11 freedoms is central to the effective working of a pluralistic and the democratic system.⁴¹⁰ The Court considered that the protection of personal opinions, as secured by Article 10, is one of the objectives of freedom of peaceful assembly and association as enshrined in Article 11.⁴¹¹

384. For example, in *Denmark*, NGOs play an important role in the established political process in Denmark and contribute by working towards greater influence for marginalized groups and interests. NGOs are often involved, when bills are submitted to consultation, whereby they have a potential influence on the regulatory content.

385. 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.⁴¹² The Court considered it “unacceptable from the standpoint of Article 11 of the Convention that an interference with the right to freedom of peaceful assembly could be justified simply on the basis of the authorities’ own view of the merits of a particular protest”.⁴¹³ Instead, States have an obligation to foster a permissive environment for peaceful gatherings.⁴¹⁴

386. 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.⁴¹⁵

⁴¹⁰ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, principle 23.

⁴¹¹ *Ezelin v. France* (application no.11800/85), judgment of 26 April 1991, § 37.

⁴¹² 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.

⁴¹³ *Hyde Park and Others v. Moldova (no. 1)* (application no. 33482/06), judgment of 31 March 2009, § 26.

⁴¹⁴ Fourth annual report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe, *Populism - How strong are Europe's checks and balances?*, cited above, Chapter 3, Introduction.

⁴¹⁵ See OSCE/ODIHR – Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, adopted on 4 June 2010; OSCE/ODIHR, *Handbook on Monitoring Freedom of Peaceful Assembly and Human Rights Training Guide to Policing Assemblies*.

387. In *Latvia*, the Law on Meetings, Processions, and Pickets stipulates that it is prohibited to act against the independence of the Republic, to incite to violent change of the country's political system, to call for disobedience of laws, propagate violence, national and racial hatred, open Nazism, fascism, or communism ideology, to propagate war, or to glorify or incite to committing crimes and other offences. In 2013, this Law was amended, providing that a local government can adopt a decision prohibiting an event if it is established that having it organised will endanger the rights of others, the democratic state system, public security, welfare or morals and the above-mentioned threats cannot be eliminated through putting restrictions on the course of the event.

388. Similarly, in the *Republic of Moldova*, the Law on Assemblies adopted in 2008 guarantees the freedom of peaceful assembly. The Law introduces such principles as proportionality and legality when restricting the right to freedom of assembly, non-discrimination and the presumption in favour of holding meetings. The Law forbids assemblies that urge to war, national, racial, ethnical, religious hatred, incite to discrimination or public violence, undermine the national security and the territorial integrity of the state that follow the commission of crimes, violate the public order or morality, the rights and freedoms of others or endanger their lives or health.

389. In March of 2015, the Supreme Court of *Estonia*, upon the application of Chancellor of Justice, found that three-day requirement for giving notice of support strike is not lawful. As a result, since July of 2015, after the provision was repealed, there is no term for advance notice at all.

390. 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.

391. 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.

392. In the *Netherlands*, the Mayor of Amsterdam launched in 2018 a Guide for dealing with public manifestations in order to facilitate these as much as possible.⁴¹⁶

393. 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 the new 2016 Act.

394. Any restriction on peaceful assembly and association has to be strictly defined. This also applies to the work of NGOs which should be allowed proper conditions and an enabling environment to function.⁴¹⁷

⁴¹⁶ For more details see the Dutch website at <https://www.amsterdam.nl/wonen-leefomgeving/veiligheid/demonstratierecht/>

⁴¹⁷ Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe, cited above. See also Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies, principle 68.

D. Freedom of expression and prohibition of discrimination

395. International human rights law requires States to jointly protect and promote the rights to freedom of expression and the right to equality: one right cannot be prioritised over the other, and any tensions between them must be resolved within the boundaries of international human rights law. The *Camden Principles on Freedom of Expression and Equality* promotes greater consensus about the proper relationship between respect for freedom of expression and the promotion of equality.⁴¹⁸

396. The European Convention on Human Rights provides for non-discrimination in the enjoyment of rights, and in this context specifically freedom of expression, respectively in Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention. The Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies encourages member States to ensure the promotion of the principle of equality and the right of every person to be free from all forms of discrimination on any ground.⁴¹⁹

397. In the context of culturally diverse societies, the task to combat all forms of intolerance and discrimination is particularly important. The Court has established a clear link between combating racism and promoting a vision of a democratic society based on respect for diversity.⁴²⁰ Based on the premises that “racial discrimination is a particularly invidious kind of discrimination”⁴²¹ and that “racial violence is a particular affront to human dignity”,⁴²² it requires “special vigilance and a vigorous reaction”⁴²³ from State authorities.⁴²⁴

398. A 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. Hate speech is linked to racist and xenophobic attitudes and can thus lead to discrimination, stigmatization of whole cultures or groups and even to violence.

399. As underlined by the Committee on the Elimination of Racial Discrimination (CERD), 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.⁴²⁵

400. 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”.⁴²⁶ In the case of denial of the Holocaust⁴²⁷, defamation in public of a

⁴¹⁸ *The Camden Principles on Freedom of Expression and Equality* were prepared by ARTICLE 19 on the basis of discussions involving a group of high-level UN and other officials, and civil society and academic experts in international human rights law on freedom of expression and equality issues at meetings held in London on 11 December 2008 and 23-24 February 2009. The Principles represent a progressive interpretation of international law and standards, accepted State practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognised by the community of nations.

⁴¹⁹ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, principle 29.

⁴²⁰ *Nachova v. Bulgaria* (application nos. 43577/98 and 43579/98) Grand Chamber judgment of 6 July 2005, §145. See also *Bekos and Koutropoulos v. Greece* (application no.15250/02), judgment of 13 December 2005; *Timishev v. Russia* (application nos. 55762/00 and 55974/00), judgment of 13 December 2005; *Ognyanova and Choban v. Romania* (application no. 46317/99), judgment of 23 February 2006.

⁴²¹ *Timishev v. Russia*, § 56.

⁴²² *Nachova v. Bulgaria*, § 145.

⁴²³ *Timishev v. Russia*, § 56; *Nachova v. Bulgaria*, § 145.

⁴²⁴ Françoise Tulkens, Contribution, on freedom of expression and racism in the case law of the European Court of Human Rights, to ECRI's Expert Seminar on Combating Racism while Respecting Freedom of Expression (Strasbourg, 16 and 17 November 2006).

⁴²⁵ CERD, *General Recommendation No. 15: Organized violence based on ethnic origin*, 1993.

⁴²⁶ *Erbakan v. Turkey* (application no.59405/00), judgment of 6 July 2006, § 56.

⁴²⁷ *D.I. v. Germany* (application no. 26551/95), Commission decision on the admissibility of 26 June 1996.

specific group of persons,⁴²⁸ incitement to racial hatred⁴²⁹ or racist statements⁴³⁰ the Court did not find a violation of Article 10 of the Convention. Moreover, Article 17 on the prohibition of abuse of rights excludes from the protection of the Convention those comments and statements that amount to hate speech and negate the fundamental values of the Convention (see above Part II - *Specific focus area*: HATE SPEECH, § 240).

401. 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 Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies. The Guidelines recall that pluralism is built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious and other beliefs, artistic and socio-economic ideas, works and concepts.⁴³¹ However, pluralism, tolerance and broadmindedness may not be sufficient: a proactive, a structured and widely shared effort in managing cultural diversity is needed. Intercultural dialogue is a major tool to achieve this aim, without which it will be difficult to safeguard the freedom and well-being of everyone living on our continent⁴³² (on intercultural dialogue see also above under B. Freedom of expression and freedom of thought, conscience and religion).

402. 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 (inter alia, *Germany, Republic of Moldova, Turkey*). National plans or strategies to fight racism and discrimination or to promote inclusive diversity are often adopted (inter alia, *Croatia, Germany, Georgia, Republic of Moldova, the Netherlands*). Authority to monitor implementation of anti-discrimination legislation may also be vested with the Public Defender or Ombudsman, entitled to examine individual complaints (inter alia, *Georgia, Greece*).

403. In *Finland*, new non-discrimination legislation took effect in January 2015 strengthening the legal protection of victims of discrimination, enlarged the scope of prohibitions of discrimination and expanded the obligations to promote equality.⁴³³ It obliges authorities, employers and providers of education and training to assess and promote equality. The Act on Equality between Women and Men prohibits discrimination based on gender, gender identity and gender expression. An Equality Plan covering all grounds of discrimination is obligatory for all employers who regularly employ more than 30 persons, for organisers of education and for authorities. Equality planning is a platform to promote diversity and positive actions targeting sections of the society that require special treatment. The Ministry of the Justice has published online material on equality impact assessment and equality planning, organised trainings and workshops on equality planning and produced different kind of awareness raising material on equality and non-discrimination.⁴³⁴

404. In *Finland*, the Ministry of Justice maintains a national discrimination monitoring system which consists of:

- (1) collecting up-to date discrimination information and research and publishing it at a specific website,
- (2) an annual discrimination study, and
- (3) a report on discrimination in Finland published once every electoral term (4 years).

The latest report on discrimination in Finland was published on in December 2017.⁴³⁵

⁴²⁸ *Pavel Ivanov v. Russia* (application no. 35222/04), decision on admissibility of 20 February 2007.

⁴²⁹ *Garaudy v. France* (application no. 65831/01), decision on the admissibility of 24 June 2003.

⁴³⁰ *Glimmerveen and Hagenbeek v. the Netherlands* (applications nos. 8348/78 and 8406/78), Commission decision on the admissibility of 11 October 1979.

⁴³¹ *Gorzelik and Others v. Poland* [GC], no. 44158/98, 17 February 2004, § 92.

⁴³² *White Paper on Intercultural Dialogue "Living Together As Equals in Dignity"*, launched by the Council of Europe Ministers of Foreign Affairs, at their 118th Ministerial Session (Strasbourg, 7 May 2008), 2.1.

⁴³³ www.syrjintatieto.fi in Finnish.

⁴³⁴ <http://yhdenvertaisuus.finlex.fi/en/>

⁴³⁵ Such reports on discrimination in Finland are available at www.dataondiscrimination.fi.

405. 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.

406. The *Republic of Moldova* introduced a new administrative offence related to violation of labour equality.

407. The *Estonian* Diversity Charter is a voluntary commitment put in place by the Tallinn University of technology in 2012, which 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 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.

408. In *France*, a “citizenship internship” (“stage de citoyenneté”) can be imposed to those who commit racist or anti-Semitic offences. These internships diversify the judicial answers likely to be given to this type of acts. It is an educational response that must recall the republican values of tolerance and respect for human dignity. The issues of living together, relating to each other and differences are discussed.

409. There is also a need to ensure equality between women and men in culturally diverse societies and to ensure a systematic integration of a gender equality dimension in securing human rights and fundamental freedoms.⁴³⁶ Recommendation CM/Rec(2019)1 of the Committee of Ministers to member States on preventing and combating sexism stresses that language and communication are essential components of gender equality and must not consecrate the hegemony of the masculine model.⁴³⁷ It calls for the use of non-stereotypical communication to educate, raise awareness and prevent sexist behaviour.⁴³⁸ For example, it recommends ending the use of sexist expressions, and using gender-sensitive language.⁴³⁹ The Recommendation furthermore underlines that the internet and social media are both vehicles for freedom of expression and promoting gender equality, but they also allow perpetrators to express their abusive thoughts and engage in abusive behaviour.⁴⁴⁰ States are encouraged to take responsibility for combating hate speech and ensuring that the same rules apply to sexist hate speech as those developed for racist hate speech when it comes to the use of criminal law sanctions.⁴⁴¹ It takes into account artificial intelligence and how algorithms can transmit and strengthen existing gender stereotypes and therefore may contribute to the perpetuation of sexism.⁴⁴²

⁴³⁶ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, principle 32. The Council of Europe Gender Equality Strategy 2018-2023 includes the combat against sexist hate speech (strategic objective 1).

⁴³⁷ *Recommendation CM/Rec(2019)1 of the Committee of Ministers to member States on preventing and combating sexism*, adopted by the Committee of Ministers on 27 March 2019 at the 1342nd meeting of the Ministers' Deputies, II.A. See also *Committee of Ministers Recommendation Rec(2003)3 on the balanced participation of women and men in political and public decision-making*, adopted by the Committee of Ministers on 12 March 2003 at the 831st meeting of the Ministers' Deputies, Explanatory Memorandum.

⁴³⁸ *Recommendation CM/Rec(2019)1 of the Committee of Ministers to member States on preventing and combating sexism*, II.A.

⁴³⁹ *Ibid.*

⁴⁴⁰ *Recommendation CM/Rec(2019)1 of the Committee of Ministers to member States on preventing and combating sexism*, II.B.

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.*

410. In *Belgium*, a new Law was passed in 2014 to combat sexism, which is now classified as a criminal offence. A charge of sexism in the public space was retained and resulted in a conviction in late 2017.⁴⁴³

411. 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.

VI. CONCLUSIONS

Protection of freedom of expression

412. Freedom of expression constitutes one of the essential foundations of a democratic society. This right is not absolute; it carries with it duties and responsibilities and can be subject to limitations in accordance with Article 10 (2) of the European Convention on Human Rights.

413. Member States enjoy a margin of appreciation in their fulfilment of positive and negative obligations with regard to freedom of expression. This margin of appreciation will differ according to the context, in particular the historic, demographic and cultural context.

414. The good and promising practices received from a number of member States show that freedom of expression is given high priority in their legal systems and national policies. Several States have recently adopted new legislation or revised their existing legislation; some have set up commissions to examine the protection of freedom of expression in their society, in particular in the light of the development of the internet. There are also examples of co-operation at the regional and international levels on promoting diversity of cultural expressions. It is important that freedom of expression online is protected in the same manner as offline.

Access to information

415. Access to information is a central part of freedom of expression. While developments in information and communication technologies have created new opportunities to disseminate information, they have also brought new challenges. It is therefore good practice to provide access to information in general, including to public information and official documents, offline and also online to everyone without discrimination.

416. When the Council of Europe Convention on Access to Official Documents enters into force, it will have a positive impact on access to information.

Specific actors and their relation to freedom of expression

Media

417. The media is the most important tool for freedom of expression in the public sphere. Media-related policy must take full account of present and future developments in information and communication technologies, embracing a broad notion of media which is appropriate for multi-dimensional reality. All actors – whether new or traditional – should be offered a policy framework which guarantees an appropriate level of protection of freedom of expression and provides a clear indication of their duties and responsibilities.

⁴⁴³ https://igvm-iefh.belgium.be/fr/actualite/premiere_condamnation_pour_sexisme_dans_lespace_public

418. It is important for States to engage in dialogue with all actors in the media ecosystem in order for them to be properly apprised of the applicable legal framework. Moreover, it is important to adopt strategies to promote and develop public service media so as to guarantee a satisfactory level of pluralism, diversity of content and choice.

419. The role of the media carries with it responsibilities to act in good faith and on an accurate factual basis, in accordance with the ethics of journalism.

Civil society actors

420. Civil society actors, including human rights defenders, which express a diverse range of views and interests, play an important role in protecting and promoting human rights in culturally diverse societies. It is essential that States and civil society actors work together to promote freedom of expression in culturally diverse societies.

Internet intermediaries

421. The internet plays a particularly important role with respect to the right to freedom of expression by enhancing the public's ability to seek, receive and impart information without interference and regardless of frontiers.

422. It is primarily the obligation of States to make sure that laws, regulations and policies applicable to internet intermediaries effectively safeguard the human rights and fundamental freedoms of users. At the same time internet intermediaries have the responsibility to respect the internationally recognised human rights of their users and of third parties affected by their activities. Codes of ethics aiming, notably, to prevent the spread of abusive language and imagery, of hatred and of incitement to violence will be useful to achieve that end. States and intermediaries therefore have a shared responsibility and they are encouraged to work together.

Specific focus area: Freedom of expression in political discourse

Freedom of political debate

423. Political discourse must be strongly protected as an essential part of any effective pluralist democracy. The main focus should be on promoting freedom of expression and increasing media literacy.

Responsibility of political leaders and political parties

424. Political leaders, in their role of opinion leaders, have a particular responsibility which is inherent to free speech in culturally diverse societies. They should speak and act in such a way as to foster a climate of mutual understanding, respect and diversity, based on universally recognised human rights.

Combating political statements that incite to violence or hatred

425. In culturally diverse societies, a progressive range of measures should be in place to combat political statements that incite to violence or hatred:

- ° Self-regulatory schemes, such as codes of conduct (or ethics) and similar sets of standards, are in many instances the most effective means of preventing and condemning manifestations of racism, xenophobia and intolerance in political discourse. Such codes of conduct should be reinforced and applied through the use of sanctioning mechanisms.
- ° Public financial and other forms of support should be withdrawn from political parties and other organisations that clearly promote hatred, intolerance and xenophobia or fail to sanction its repeated use by their members.
- ° Only as a last resort should such measures lead to the prohibition and dissolution of political parties and organisations.

Higher degree of tolerance of criticism towards politicians

426. Politicians will need to display a greater degree of tolerance towards criticism than a private individual notably in a situation in which they themselves make public statements that are susceptible to criticism. However, political figures are not expected to tolerate discrimination based on grounds prohibited by Article 14 of the Convention, nor do they have to tolerate racist or hate speech directed at them. The widespread experience of hate speech, abuse and threats, in particular in online spaces and often directed at women politicians, needs to be addressed to ensure that all citizens, including politicians, feel free to safely take part in a political debate where pluralist opinions can be expressed.

Specific focus area: Information disorder (“fake news”)

Approaches to tackle information disorder

427. Concern has been expressed at the international, regional as well as at the national level about the impact that information disorder can have on democratic political processes and values in a society. In particular, it may harm individuals' reputation and privacy, as well as incite to discrimination, hostility or violence against certain groups in society. Any response to tackle information disorder should be based on a human rights approach guaranteeing, on the one hand, freedom of expression and freedom to receive and impart information and, on the other hand, the protection of public order and the rights of others. Moreover, given the complexity of information disorder, a multi-dimensional approach is needed to tackle the problem which includes all parties involved with a view to identifying the roles and responsibilities of relevant stakeholders.

Fact-checking and trust-enhancing initiatives

428. Self-regulatory codes may strengthen the fact-checking capabilities of media. Media co-operation with third-party fact-checking organisations, such as independent editorial organisations, civil society organisations and academia, may serve the same goal. The use of “trust indicators” by social media may provide more context concerning the reliability of content sources, media ownership and/or verified identity so that the users are better equipped to assess whether news derive from a credible source.

Promoting media pluralism and diversity

429. A key means of addressing information disorder is to promote media pluralism and diversity. Thus, presence of strong, independent and adequately resourced public service media is crucial for setting and maintaining high standards of journalism. Regular monitoring by States of media pluralism in national media markets may serve to counter threats to media freedom and pluralism, including the lack of transparency of media ownership.

Awareness-raising and media literacy

430. Improving media and information literacy for all sectors of society is a means of building societal resilience against the threat posed by information disorder. Initiatives to improve media literacy skills are undertaken across Europe; however, in order to be effective, such initiatives should be implemented on a massive scale with clear methods of evaluation and cross-country comparison.

Coordinated responses and continued research

431. As information disorder has grown at a rapid scale globally and a clearer understanding of its direct and indirect implications is still emerging, there is a need for continued research on the impact of disinformation in Europe in order to evaluate the measures taken by different actors and constantly adjust the necessary responses.

Freedom of expression and AI

432. The development of artificial intelligence (AI) will likely have implications for the exercise of the freedom of expression, presenting both challenges and opportunities. This phenomenon is still emerging and the international response to it is yet to be fully developed.

Specific focus area: hate speech

433. Intergovernmental committees and monitoring bodies emphasize the need to combat hate speech so that freedom of expression does not encourage harm and intolerance against others. Combating 'hate speech' requires sustained and wide-ranging efforts, including strong equality and non-discrimination legislation and policy frameworks.

Legislation

434. It will be important to enhance national legislation on hate speech on the basis of the existing relevant international and regional standards to ensure the coverage of all grounds on which victims may be targeted, and that criminal as well as civil and administrative responses are in place to address hate speech. In this respect, it is important for member States to be guided by the European Convention on Human Rights, the jurisprudence of the European Court of Human Rights, the Committee of Ministers' Recommendation Rec(97)20 to member States on "hate speech" and ECRI's General Policy Recommendation No. 15 on combating hate speech.

435. It will be important to enhance national legislation on hate speech on the basis of the existing relevant international and regional standards to ensure the coverage of all grounds on which victims may be targeted, including sexist hate speech, and that criminal as well as civil and administrative responses are in place to address hate speech. In this respect, it is important for member States to be guided by the European Convention on Human Rights, the jurisprudence of the European Court of Human Rights, the Committee of Ministers' Recommendation Rec(97)20 to member States on "hate speech", the Committee of Ministers Recommendation Rec(2019)1 to member States on preventing and combating sexism and ECRI's General Policy Recommendation No. 15 on combating hate speech.

Enhancing research and monitoring, including data collection

436. Data collection and analysis regarding the actual use of hate speech should be undertaken on a consistent, systematic and comprehensive basis. Such research and monitoring of hate speech, which is crucial for developing adequate policies, should be done separately from data collection on hate crimes as the two phenomena may require different responses.

Possible other responses

437. Comprehensive national strategies and co-operation of relevant stakeholders will help to tackle the problem effectively. Possible responses to hate speech include improving the efficacy of investigations, training relevant actors, counter-speech, and support for victims.

Online hate speech

438. Whilst the positive role played by digital technology companies in society is recognised, social media platforms and internet intermediaries are increasingly being seen as enablers of hate speech. Generally, addressing hate speech online and hate speech enabled by digital technologies is seen as a priority issue for both policy-makers and civil society.

439. The widespread experience of hate speech, abuse and threats in online spaces needs to be addressed to ensure that all citizens feel free to safely express themselves in the online sphere. This requires further reflection based on research and collection of data with a view to putting in place appropriate regulation and develop new innovative means of combating hate speech in the online space.

Need for co-operation

440. Online hate speech is a cross-border problem that can best be tackled by sharing experiences and good practice between States. A better understanding of the phenomenon will require co-operation and coordination among States to obtain comparable research by using harmonised definitions of hate speech. This would further mean that data collection and analysis regarding the actual use of hate speech should be undertaken on a consistent, systematic and comprehensive basis.

Non-governmental organisations, equality bodies and national human rights institutions

441. Non-governmental organisations, equality bodies and national human rights institutions could usefully take action to explore and develop full and comprehensive strategies to address hate speech. They could also develop their communication work to include sustained and substantial work on promoting alternative narratives and build the alliances and networks required to drive and implement this work to full effect. States' support for their work to combat hate speech will be useful.

Reconciling freedom of expression and other human rights

442. Freedom of expression as well as other fundamental human rights and freedoms must be adequately and effectively guaranteed in the national legal systems.

Freedom of expression and right to private life

443. Article 8 of the Convention, as interpreted by the ECtHR, protects the right to private life which includes several aspects, such as the protection of reputation or rights of others. The protection of the reputation of others requires balancing with the freedom of expression according to the criteria developed by the ECtHR. Likewise, freedom of the press needs to be balanced with the right to private life of the individuals concerned.

Freedom of expression and freedom of thought, conscience and religion

444. In culturally diverse societies, the responsible exercise of the right to freedom of expression should endeavour to respect the religious beliefs and convictions of others. Responsible exercise of the right to freedom of expression should not overstep the limits of acceptable criticism, as established by the ECtHR.

445. The right balance between freedom of religion and freedom of expression is primarily achieved through rational discussions between all parts of society, including believers and non-believers. To this end intercultural dialogue, and namely exchanges on the religious dimension of intercultural dialogue, can play an important role.

Religious symbols in public areas

446. The ECtHR has delivered several rulings regarding restrictions on the wearing of items of clothing or other conspicuous signs of religious belief. The Court has highlighted the importance of the way in which the national authorities have reached their decisions. The compatibility with Article 9 of such restrictions will depend on the reasons advanced for the restrictions and also on the proportionality of the interference and whether a fair balance has been struck.

Whistleblowing

447. Whistleblowing is a fundamental aspect of freedom of expression and freedom of conscience and is important in the fight against corruption and tackling gross mismanagement in the public and private sectors. The protection of whistleblowers should accord with the criteria developed by the ECtHR.

Blasphemy, religious insult and incitement to religious hatred

448. Criminal sanctions are only appropriate in respect of incitement to hatred, including religious hatred; it is neither necessary nor desirable to create an offence of religious insult, without the element of incitement to hatred as an essential component.

Freedom of expression and freedom of assembly and association

449. Freedom of peaceful assembly and freedom of association allow individuals and groups to collectively address and resolve challenges and issues that are important to society. These freedoms are central to a pluralistic and democratic system.

450. 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. Instead, States have an obligation to foster a permissive environment for peaceful gatherings.

Freedom of expression and prohibition of discrimination

451. International human rights law requires States to jointly protect and promote the right to freedom of expression and the right to equality. Hate speech based on gender is common and more often targets women than men, it also affects women in a different way. The widespread experience of hate speech, abuse and threats including in online spaces, by women, especially some groups of women (young women, women public figures) limits their freedom of expression and their participation in different types of activities. Gender aspects therefore need to be taken into account in all policies related to freedom of expression and prevention of hate speech.

APPENDIX

ANALYSIS OF THE RELEVANT JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND OTHER COUNCIL OF EUROPE INSTRUMENTS⁴⁴⁴

I. INTRODUCTION

A. Brief presentation of the following issues

i. Recent developments in Europe

1. Freedom of expression is a fundamental right upon which many other freedoms are based. It holds a prominent place in democratic societies as according to the European Court of Human Rights (hereinafter, 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"."

2. 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.

3. Recent events such as the murder of *Charlie Hebdo* journalists committed in Paris on 7 January 2015 raise questions with regard to the implementation of freedom of expression in democratic societies. Several issues are raised in this context. These include addressing 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. Finally, it 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. The central issue in this analysis is the link between freedom of expression and other human rights such as the right to private life, freedom of thought, conscience and religion, freedom of assembly and association and finally the prohibition of discrimination.

ii. Mandate

4. At their 1241st meeting in November 2015, the Ministers' Deputies adopted terms of reference of intergovernmental structures for the period 2016-2017. Regarding the Steering Committee for Human Rights (CDDH), the Deputies assigned the CDDH the following mandate (see "Development and promotion of human rights"):

"Freedom of expression and links to other human rights

- (i) Following the work already carried out by the CDDH in promoting pluralism and tolerance and contributing to maintaining cohesive societies, conduct an analysis of the relevant jurisprudence of the European Court of Human Rights and other Council of Europe instruments to provide additional guidance on how to reconcile freedom of expression with other rights and freedoms, in particular in culturally diverse societies (deadline: 31 December 2016).

⁴⁴⁴ Adopted by the CDDH at its 87th meeting (6-9 June 2007).

- (ii) On this basis, prepare a guide to good national practices on reconciling the various rights and freedoms concerned (deadline: 30 June 2017). If necessary, a draft recommendation of the Committee of Ministers on “cyber security and human rights” is prepared (deadline: 31 December 2017).”

5. Ms. Kristīne LĪCIS (Latvia) was appointed by the CDDH as Rapporteur on freedom of expression and links to other human rights. The CDDH furthermore determined the composition of the Drafting Group on freedom of expression and links to other human rights (CDDH-EXP) and appointed Mr Hans-Jörg BEHRENS (Germany) as chairperson of the Group.

iii. International legal context

6. A number of international instruments protect freedom of expression: Article 19 of the Universal Declaration of Human Rights;⁴⁴⁵ Article 19 of the International Covenant on Civil and Political Rights (ICCPR);⁴⁴⁶ Article 5.d.viii of the International Convention on the elimination of all forms of racial discrimination (ICERD);⁴⁴⁷ Article 13 of the American Convention on human rights;⁴⁴⁸ Article 9 of the African Charter on human and peoples' rights;⁴⁴⁹ Article 11 of the Charter of Fundamental Rights the European Union;⁴⁵⁰ etc. To these can be added specific texts whose very existence highlights the importance of this fundamental freedom in democratic societies: General Comment No. 10 on Freedom of expression⁴⁵¹ updated by General Comment No. 34⁴⁵² and the General Comment No. 11 on the prohibition of propaganda for war and incitement to national hatred, racial or religious grounds⁴⁵³ prepared by the UN Human Rights Committee; the Declaration of principles on freedom of expression adopted in part by the Organisation of American States and by the African Union;⁴⁵⁴ the Amsterdam Recommendations on Freedom of the Media and the Internet⁴⁵⁵ prepared by the Organisation for Security and Co-operation in Europe (OSCE) and the Bishkek Declaration on Media in multicultural and multilingual societies.⁴⁵⁶

7. Some instruments recognise that the right is not absolute in all its forms. 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.

8. At the Council of Europe level, Article 10 of the European Convention on Human Rights (hereinafter, the Convention)⁴⁵⁷ specifically protects freedom of expression. The European Social Charter also mentions specific aspects of this freedom, for example in terms of the right to be informed of health risks, of workers' right to information, or the right of migrant workers to receive training in their own language (Charter of 1961, additional Protocol to the 1961 Charter and revised Charter), 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.⁴⁵⁸

⁴⁴⁵ Adopted by the UN General Assembly on 10 December 1948.

⁴⁴⁶ Adopted by the UN General Assembly on 16 December 1966.

⁴⁴⁷ Adopted by the UN General Assembly on 21 December 1965.

⁴⁴⁸ Adopted by the General Assembly of the Organization of American States on 22 November 1969.

⁴⁴⁹ Adopted by the Assembly of Heads of State and Government of the Organization of African Unity on 28 June 1981.

⁴⁵⁰ Adopted by the European Union on 7 December 2000.

⁴⁵¹ Adopted by the UN Human Rights Committee on 29 July 1983.

⁴⁵² Adopted by the UN Human Rights Committee on 29 July 2011.

⁴⁵³ Adopted by the UN Human Rights Committee on 29 June 1983.

⁴⁵⁴ Adopted by the African Commission on Human Rights and Peoples on 23 October 2002.

⁴⁵⁵ Adopted on 14 June 2003.

⁴⁵⁶ Adopted at the "Fifth Central Asia Media Conference," Media in Multi-Cultural and Multi-Lingual Societies "Bishkek 17-18 September 2003".

⁴⁵⁷ Signed on 4 November 1950 and entered into force on 3 September 1953.

⁴⁵⁸ Adopted by the Committee of Ministers on 10 November 1994.

9. Additional legal instruments include declarations, recommendations and guidelines adopted by other bodies of the Council of Europe⁴⁵⁹ which, although not legally binding, are an integral part of the Council of Europe standards.⁴⁶⁰ 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.⁴⁶¹ Also of relevance is the Declaration on freedom of communication on the Internet of 28 May 2003.

10. Furthermore, international courts and control mechanism bodies have dealt with the implementation of freedom of expression and its relationship with other rights. In addition, special procedures have been established within the United Nations Human Rights Council to report and advise on human rights from a thematic or country-specific perspective, namely the Special Rapporteur on the protection and promotion of the right to freedom of expression and opinion, but also the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on the right to peaceful assembly and association. Moreover, the OSCE Representative on Freedom of the Media plays a role in observing media developments as part of an early warning function, and helping participating States abide by their commitments to freedom of expression and free media.

11. The *Human Rights Guidelines on Freedom of Expression Online and Offline*⁴⁶² of the European Union 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.

B. Method/approach

12. This document provides an overview of existing standards in the Council of Europe and beyond, as well as the case law of the European Court of Human Rights - not only judgments in which the Court found a violation of Article 10, but also instances when no violation was found - and the decisional practice of the supervisory bodies on the issue of freedom of expression and its links with other fundamental rights.

13. A combined reading of these documents is intended to clarify the links between freedom of expression and other human rights and to provide States with tools enabling them to reconcile the various fundamental rights in culturally diverse societies.

II. General principles and definitions

14. Article 10 of the Convention reads as follows:

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.*

⁴⁵⁹ Committee of Ministers, Parliamentary Assembly and other institutions such as the Congress of Local and Regional Authorities, the Commissioner for Human Rights and the European Commission for Democracy through Law (Venice Commission).

⁴⁶⁰ See document SG (2014) 1 Final. Report of the Secretary General of the Council of Europe on the situation of democracy, human rights and the rule of law in Europe, Summary, "Setting standards".

⁴⁶¹ Adopted by the Committee of Ministers on 2 March 2016, §§19-22.

⁴⁶² Council of the European Union, Foreign Affairs, *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, Brussels 12 May 2014.

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.*

15. The structure of Article 10 of the Convention is very close to that of Articles 8, 9 and 11 of the Convention in that the first and second sentence of §1 define the freedoms that are protected by this provision, while the third sentence in §1, and entire §2 describe the circumstances in which the State may interfere with the exercise of the freedom of expression. The present chapter follows this structure and first of all examines the concept of the freedom of expression, its role in a democratic society, as well as the scope of the protection offered by Article 10 §1. It then looks into the nature of the State's obligations under Article 10, and into the concept of "duties and responsibilities" related to the exercise of the freedom of expression. Finally, this chapter outlines the requirements that must be observed for an interference with the freedom of expression to be compatible with the Convention, and the margin of appreciation the States enjoy.

a. Freedom of expression and its role in a democratic society

16. Freedom of expression is considered as having a "constitutional" importance,⁴⁶³ since it is not only a right in itself, but also plays an important role in the protection of other rights under the Convention, for example, the freedom of thought, conscience and religion. Even more importantly, the freedom of expression protects the very ideals of democracy highlighted in the Preamble to the Convention: "Without a broad guarantee of the right to freedom of expression protected by independent and impartial courts, there is no free country, there is no democracy".⁴⁶⁴ In almost every case where it examines a complaint under Article 10 of the Convention, the Court reiterates that "the freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment".⁴⁶⁵

17. This approach has led the Court to two important observations. Firstly, the protection offered by Article 10 applies 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.⁴⁶⁶ In this regard the Court has further stressed that "such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'".⁴⁶⁷ The second observation is directly linked to the first, namely, that every "formality", "condition", "restriction" or "penalty" imposed on the freedom of expression must be construed strictly, and the need for any restrictions must be established convincingly.⁴⁶⁸ The Court has consistently held that the adjective "necessary" in Article 10 §2 implies the existence of a pressing social need and that even though the States have a margin of appreciation in assessing whether such a need to interfere with the freedom of expression exists, this margin of appreciation goes hand in hand with European supervision, "embracing both the law and the decisions that apply it, even those given by independent courts".⁴⁶⁹

⁴⁶³ Harris, O'Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.613.

⁴⁶⁴ Jochen Abr. Frowein, "Freedom of expression under the European Convention on Human Rights", in Monitor/Inf (97) 3, Council of Europe, available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2436634&SecMode=1&DocId=584134&Usage=2>

⁴⁶⁵ *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.

⁴⁶⁶ *Handyside v. the United Kingdom* (application no.5493/72), judgment of 7 December 1972, §49.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *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.

⁴⁶⁹ *Palomo Sánchez and Others v. Spain* (applications nos. 28955/06, 28957/06, 28959/06 and 28964/06), Grand Chamber judgment of 12 September 2011, §55; *Perinçek v. Switzerland* (application no.27510/08), Grand Chamber judgment of 15 October 2015, §196.

18. The two observations mentioned above must be borne in mind when seeking to balance freedom of expression with other rights, for example, when deciding on the permissible interferences with the freedom of expression to protect the right to fair trial and the presumption of innocence, the right to private life, and others. When faced with such conflicting interests, the Court has sought to establish a pre-eminence of one right over another in light of the facts specific to the individual case. In order to decide the extent to which a particular form of expression should be protected, the Court therefore examines, among others, the type of expression (political, commercial, artistic, etc.), the means by which the expression is disseminated (personal, written media, television, etc.), and its audience (adults, children, the entire public, a particular group, etc.).⁴⁷⁰

b. The protection offered by Article 10

19. Article 10 §1 explicitly refers to three elements included in the freedom of expression. First, it is the freedom to hold opinions, which is a prior condition to the other freedoms guaranteed by Article 10, and enjoys an absolute protection in the sense that the possible restrictions set forth in 10 §2 are inapplicable to it.⁴⁷¹ 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.

20. 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.⁴⁷² For example, in the case of *Kalda v. Estonia* the Court examined a complaint that concerned a particular means of accessing the information in question: namely that the applicant, as a prisoner, wished to be granted access – specifically via the Internet – to information published on the websites of the Council of Europe Information Office in Tallinn, the Chancellor of Justice, and the Parliament, which according to the Court, predominantly contained legal information and information related to fundamental rights, including the rights of prisoners. The Court noted that under the Estonian domestic law prisoners have been granted limited access to the Internet via computers specially adapted for that purpose and under the supervision of the prison authorities, but that the domestic courts undertook no detailed analysis as to the security risks allegedly emerging from the access to the three additional websites in question, particularly having regard to the fact that these were websites of State authorities and of an international organisation. The Court concluded that the interference with the applicant's right to receive information, in the specific circumstances of the case, could not be regarded as having been necessary in a democratic society.⁴⁷³

21. The case of *Magyar Helsinki Bizottság v. Hungary*⁴⁷⁴ marked an important development in the Court's case-law regarding the right of access to information, and, more specifically, the right of access to State-held information. The applicant, a Hungarian non-governmental organisation (NGO), relied on Article 10 of the Convention and claimed that the refusal of the Hungarian courts to order the disclosure of names of public defenders and the number of their appointments – information that the applicant NGO sought in relation to a survey it was conducting – amounted to a breach of applicant NGO's right to freedom of expression. The Court examined the question of whether Article 10 of the Convention could be interpreted as guaranteeing the applicant NGO a right of access to information held by public authorities, and consequently whether the denial of the applicant's request for information resulted, in the circumstances of the case, in an interference with its right to receive and impart information as guaranteed by Article 10 of the Convention.⁴⁷⁵ In light of the national legislation in the majority of Contracting States, as well as taking into account a high degree of consensus that had emerged at the international level, the Court did not consider that it was prevented from interpreting Article 10 § 1 as including a right of access to information.⁴⁷⁶ The Court recalled that the right to receive information could not be constructed as imposing positive

⁴⁷⁰ Monica Macovei, *Freedom of Expression*, Human rights handbook, No.2, Council of Europe, 2004, page 7.

⁴⁷¹ *Ibid.*, page 8.

⁴⁷² *Guseva v. Bulgaria* (application no.6987/07), judgment of 17 February 2015, §§36-37 with further references.

⁴⁷³ *Kalda v. Estonia* (application no.17429/10), judgment of 19 January 2016, §53. See also *Jankovskis v. Lithuania* (application no. 21575/08), judgment of 17 January 2017.

⁴⁷⁴ *Magyar Helsinki Bizottság v. Hungary* (application no.18030/11), judgment of 8 November 2016.

⁴⁷⁵ *Ibid.*, §71.

⁴⁷⁶ *Ibid.*, §149.

obligations on a State to collect and disseminate information of its own motion and Article 10 did not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information to the individual. However, such a right or obligation could arise, firstly, where disclosure of the information had been imposed by a judicial order which had gained legal force and, secondly, in circumstances where access to the information was instrumental for the individual's exercise of his or her right to freedom of expression, in particular the freedom to receive and impart information and where its denial constituted an interference with that right.⁴⁷⁷ Whether and to what extent the denial of access to information constituted an interference with an applicant's freedom of expression had to be assessed in each individual case and in the light of its particular circumstances including: (i) the purpose of the information requested; (ii) the nature of the information sought; (iii) the role of the applicant; and (iv) whether the information was ready and available.⁴⁷⁸ Applying these principles to the facts of the case, the Court ruled that there had been an interference with the applicant NGO's right, and that there had not been a reasonable relationship of proportionality between the measure complained of and the legitimate aim pursued.

22. Within the field of freedom to receive information and ideas the Court has developed extensive case-law in relation to press freedom, the purpose of which is to impart information and ideas on matters of public interest. The Court has pointed out that in cases where the applicant was an individual journalist and human rights defender, the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom, and that obstacles created in order to hinder access to information which is of public interest may discourage those working in the media, or related fields, from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs" and their ability to provide accurate and reliable information may be adversely affected.⁴⁷⁹ Thus in the case of *Dammann v. Switzerland* the Court found that a criminal conviction of an investigating journalist for having obtained, in breach of official secrecy laws, information about previous convictions of private persons, to in breach of Article 10 of the Convention. The Court noted that the information had been of a kind that raised matters of public interest in that it had concerned a very spectacular break-in that had been widely reported in the media. The Court further noted that no damage had been done to the rights of the persons concerned – while there might have been a risk, at a particular time, of interference with other persons' rights, the risk had disappeared once the applicant had himself decided not to publish the information in question. The Court underlined that conviction of the applicant, even if the penalty imposed was not very harsh, had nonetheless amounted to a kind of censorship which was likely to discourage him from undertaking research, inherent in his job, with a view to preparing an informed press article on a topical subject.⁴⁸⁰

23. The Court has also 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 and that in such a situation the NGO is exercising a role as a public watchdog of similar importance to that of the press.⁴⁸¹ For example, in the case of *Guseva v. Bulgaria* the applicant, a member and representative of an association active in the area of animal rights protection, complained before the Court that the mayor of a town failed to comply with three final Supreme Administrative Court's judgments requiring the mayor to provide the applicant with information relating to the treatment of stray animals found on the streets of the town over which he officiated. The Court found that the applicant had sought access to information about the treatment of animals in order to exercise her role of informing the public on this matter of general interest and to contribute to public debate, and that the existence of her right of access to such information had been recognised both in the domestic legislation and in three final Supreme Administrative Court judgments. The Court further found that applicable domestic legislation provided no clear time-frame for enforcement of the judgments, thus creating unpredictability as to the likely time of enforcement, which, in the applicant's case, never materialised. The Court therefore concluded that the domestic law lacked the requisite foreseeability resulting in the interference with the applicant's Article 10 rights not being "prescribed by law".⁴⁸²

⁴⁷⁷ *Ibid.*, §156.

⁴⁷⁸ *Ibid.*, §§157-180.

⁴⁷⁹ *Shapovalov v. Ukraine* (application no.45835/05), judgment of 31 July 2012, §68.

⁴⁸⁰ *Dammann v. Switzerland* (application no.77551/01), judgment of 24 April 2006.

⁴⁸¹ *Guseva v. Bulgaria* (application no.6987/07), judgment of 17 February 2015, §38 with further references.

⁴⁸² *Ibid.*, §§58-60

24. Furthermore, the Court has held that the right to receive information also prohibits a Government from preventing a person from receiving information that others wished or were willing to impart.⁴⁸³ For example, in the case of *Autronic AG v. Switzerland* the Court examined a complaint that the granting of permission to receive uncoded television broadcasts for general use from a telecommunications satellite had been made subject to the consent of the broadcasting State and thus constituted an infringement of the right to receive information. In this case the Court held that the reception of television programmes by means of a dish or other aerial comes within the right laid down in the first two sentences of Article 10 §1, without it being necessary to ascertain the reason and purpose for which the right is to be exercised. As the administrative and judicial decisions complained of prevented the applicant from lawfully receiving transmissions from a Soviet telecommunications satellite, they therefore amounted to "interference by public authority" on the exercise of freedom of expression.⁴⁸⁴ In a comparable case of *Khurshid Mustafa and Tarzibachi v. Sweden* the Court found a violation of Article 10 under the head of "freedom to receive information" due to the decisions of the domestic courts not to prolong private tenancy agreement owing to refusal by immigrant tenants to remove satellite dish used to receive television programmes from their country of origin.⁴⁸⁵

25. 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, considering, for example, that meaningful free elections are not possible in the absence of this freedom, and that the exercise of this freedom allows for a free criticism of the government, which is among the main indicators of democracy.⁴⁸⁶ For example, in the case of *Şener v. Turkey* the Court underlined that "[i]n a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion".⁴⁸⁷

26. As regards whistleblowers, 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 (1) of the Convention.⁴⁸⁸

27. It follows from the structure of Article 10, the Court's case-law and principles defined therein (see §17 above), that there is a strong general presumption towards protection, meaning that the burden to prove that restrictions to the exercise of the freedom of expression were justified lies with the State. However, there are situations where the threshold for overturning this presumption is lower; conversely, there also are situations where this threshold is higher. The following paragraphs will outline these various situations and the relevant conclusions from the jurisprudence of the Court that introduce certain nuances depending on the facts of the specific case.

28. First of all, in exceptional situations there are content-based restrictions on the exercise of the freedom of expression, and these restrictions are applicable to the dissemination of ideas promoting racism and the Nazi ideology, incitement to hatred and racial discrimination, and the glorification of violence.

29. There are two approaches used by the Court in dealing with incitement to hatred and freedom of expression. The first approach is an exclusion from the protection of the convention based on Article 17 and will be covered in more detail later in the document (see §§ 47-52 below).

⁴⁸³ *Kalda v. Estonia* (application no.17429/10), judgment of 19 January 2016, §§41-42 with further references.

⁴⁸⁴ *Autronic AG v. Switzerland* (application no.12726/87), judgment of 22 May 1990, §47.

⁴⁸⁵ *Khurshid Mustafa and Tarzibachi v. Sweden* (application no.23883/06), judgment of 16 December 2008.

⁴⁸⁶ Monica Macovei, *Freedom of Expression*, Human rights handbook, No.2, Council of Europe, 2004, page 8.

⁴⁸⁷ *Şener v. Turkey* (application no.26680/95), judgment of 18 July 2000, §40.

⁴⁸⁸ *Guja v. Moldova* (application no.14277/04), Grand Chamber judgment of 12 February 2008.

30. The second approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention, and therefore instead of excluding it entirely from the protection of the Convention, the protection is restricted under Article 10 §1. For example, in the case of *Soulas and Others v. France* the Court examined a complaint concerning criminal proceedings brought against the applicants following the publication of a book entitled “The colonisation of Europe”, with the subtitle “Truthful remarks about immigration and Islam”. The proceedings resulted in their conviction for inciting hatred and violence against Muslim communities from northern and central Africa. The Court observed that the disputed passages in the book were not sufficiently serious to justify the application of Article 17 (prohibition of abuse of rights) of the Convention in the applicants’ case, at the same time holding that there had been no violation of Article 10 of the Convention, because the grounds put forward in support of the applicants’ conviction had been sufficient and relevant.⁴⁸⁹

31. Sufficient protection of freedom to impart information and ideas also requires making a clear distinction between information (facts) and opinions (value judgments), as the dissemination of the former enjoy very strong protection. The case of *Lingens v. Austria* was the first occasion where the Court stated that “the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof”, therefore provisions of the domestic law that require proof of all statements, even those containing opinions, are impossible of fulfilment and thus infringe freedom of opinion itself.⁴⁹⁰ The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive.⁴⁹¹ As regards value judgments which have been found by the national courts to be of a defamatory character, the Court has assessed the national court’s findings on the question of whether the language used in the statement was of an excessive or dispassionate nature, whether an intention of defaming or stigmatising the opponent was disclosed, and if the statement had a sufficient factual basis.⁴⁹²

32. Distinction must also be made between criticism and insult. In the case *Palomo Sánchez and Others v. Spain* the Court analysed the difference between these two concepts in the context of the application of six employees of a private company who had been dismissed because of the publication in a newsletter of a cartoon and two articles with offensive, injurious and vexatious content against other employees. The Court held that insulting language may, in principle, justify an appropriate sanction, which would not constitute a violation of Article 10 of the Convention when the limits of acceptable criticism are overstepped.⁴⁹³ When language amounts to wanton denigration and its sole intent is to insult, it falls outside the protection of Article 10 of the Convention.⁴⁹⁴

33. It should be further emphasised that Article 10 protects not only the *substance of the ideas and information* expressed but also the *form* in which they are conveyed,⁴⁹⁵ meaning that persons exercising the right to freedom of expression are entitled to choose the modality, free from state interference, which they consider most effective in reaching the widest possible audience.⁴⁹⁶ The term “expression” extends also to non-verbal forms,⁴⁹⁷ and Article 10 protection therefore extends also to conduct intended to convey a particular message, artistic work and display of symbols. In its practice the Court has found that Article 10 applies to, for example, handing out leaflets and showing

⁴⁸⁹ *Soulas and Others v. France* (application no.15948/03), judgment of 10 July 2008

⁴⁹⁰ *Lingens v. Austria* (application no.9815/82), judgment of 8 July 1986, §46.

⁴⁹¹ *Mustafa Erdoğan and Others v. Turkey* (applications nos.346/04 and 39779/04), judgment of 27 May 2014, §36.

⁴⁹² See, among others, *Lindon, Otchakovsky-Laurens and July v. France* (applications nos.21279/02 and 36448/02), Grand Chamber judgment of 22 October 2007, §§56-57; and *Aurelian Oprea v. Romania* (application no.12138/08), judgment of 19 January 2016, §71.

⁴⁹³ *Palomo Sánchez and Others v. Spain* (applications nos. 28955/06, 28957/06, 28959/06 and 28964/06), Grand Chamber judgment of 12 September 2011, §67.

⁴⁹⁴ *Rujak v. Croatia* (application no. 57942/10), decision of inadmissibility of 2 October 2012, §30.

⁴⁹⁵ *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.

⁴⁹⁶ *Women on Waves and Others v. Portugal* (application no.31276/05), judgment of 3 February 2009, §39.

⁴⁹⁷ Lech Garlicki, “Symbolic speech”, in “Freedom of Expression. Essays in Honour of Nicolas Bratza”, pp.331-348, Wolf Legal Publishers, September 2012.

a poster above a demonstrator's rucksack,⁴⁹⁸ a puppet show,⁴⁹⁹ use of a historic flag,⁵⁰⁰ a painting,⁵⁰¹ a political performance,⁵⁰² and a workshop on women's reproductive rights to be held on a boat in territorial waters.⁵⁰³

34. Finally, Article 10 by implication also guarantees a "negative right" not to be compelled to express oneself, that is to say, the right to remain silent.⁵⁰⁴ This "negative right" is closely linked with the right not to incriminate oneself, as well as the presumption of innocence.

- *Press freedom*

35. 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 (see also §22 above), which is reflected in three principles. Firstly, in the *Lingens* case mentioned above the Court highlighted the special role of the press as public watchdog and held that freedom of the press "affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention".⁵⁰⁵ The Court has further held that the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information; and is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.⁵⁰⁶

36. The second principle relates to the dissemination in the media of statements made by other persons and requires stronger protection of the journalists. Thus, in the case of *Jersild v. Denmark* the applicant – a journalist – complained that his conviction and sentence for having aided and abetted the dissemination of racist remarks violated his right to freedom of expression within the meaning of Article 10. In its judgment the Court underlined that news reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog" and that the punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.⁵⁰⁷ In its finding of a violation of Article 10 of the Convention the Court in particular noted that taken as a whole, the disputed feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas; instead, in the Court's view, the feature clearly sought – by means of an interview – to expose, analyse and explain the particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that was of great public concern.⁵⁰⁸ It is important to underline that the remarks of those interviewed by the applicant in the feature were more than insulting to members of the targeted groups and, in the light of Article 17 of the Convention, did not enjoy the protection of Article 10,⁵⁰⁹ but this "exclusion of protection"⁵¹⁰ did not extend to the applicant in view of the aims and context of the disputed feature.

37. Third, journalistic sources are also protected under Article 10. The Court's understanding of the concept of journalistic "source" is that it includes "any person who provides information to a journalist"; and the Court understands "information identifying a source" to include, as far as they are likely to lead to the identification of a source, both "the factual circumstances of acquiring information from a source by a journalist" and "the unpublished content of the information provided by a source to a journalist".⁵¹¹ The Court further views the protection of the journalistic sources as

⁴⁹⁸ *Chorherr v. Austria* (application no.13308/87), judgment of 25 August 1993.

⁴⁹⁹ *Alves da Silva v. Portugal* (application no.41665/07), judgment of 20 October 2009.

⁵⁰⁰ *Faber v. Hungary* (application no.40721/08), judgment of 24 July 2012.

⁵⁰¹ *Vereinigung Bildender Künstler v. Austria* (68354/01), judgment of 25 January 2007.

⁵⁰² *Tatar and Faber v. Hungary* (applications nos.26005/08 and 26160/08), judgment of 12 June 2012.

⁵⁰³ *Women on Waves and Others v. Portugal* (application no.31276/05), judgment of 3 February 2009.

⁵⁰⁴ *Strohal v. Austria* (application no.20871/92), Commission decision of 7 April 1994, §2.

⁵⁰⁵ *Lingens v. Austria* (application no.9815/82), judgment of 8 July 1986, §42.

⁵⁰⁶ *Dalban v. Romania* (application no.28114/95), Grand Chamber judgment of 28 September 1999, §49.

⁵⁰⁷ *Jersild v. Denmark* (application no.15890/89), Grand Chamber judgment of 23 September 1994, §35.

⁵⁰⁸ *Ibid.*, §33.

⁵⁰⁹ *Ibid.*, §35.

⁵¹⁰ For further discussion of Article 17 see the "Prohibition of abuse of rights" subchapter e. below.

⁵¹¹ *Nagla v. Latvia* (application no.73469/10), judgment of 16 July 2013, §81.

one of the basic conditions of press freedom. For instance, in the *Goodwin* case the Court argued that without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.⁵¹² The Court has also emphasised that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources.⁵¹³ As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.

- *Human rights defenders*

38. Even though not explicitly mentioned in Article 10, a set of international instruments refer explicitly to protection of freedom of expression of human rights defenders. At the level of Council of Europe, the Committee of Ministers⁵¹⁴, the Parliamentary Assembly⁵¹⁵ and the Human Rights Commissioner⁵¹⁶ have called to ensure the protection of human rights defenders. The UN Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, also known as “the Declaration on human rights defenders” was adopted in 1998 and its preamble recognises the right and the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels.⁵¹⁷ This has been supported by other regional European instruments such as the EU Guidelines on Human Rights Defenders⁵¹⁸ and OSCE/ODIHR Guidelines on the protection of human rights defenders⁵¹⁹.

39. Article 6 of the UN Declaration also states that everyone has the right, individually and in association with others (a) to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems; (b) as provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; (c) to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.

40. As already noted in the present study (see §23 above), the function of creating forums for public debate is not limited to the press and may also be exercised by NGOs. In light of the above-mentioned Declaration, and 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,⁵²⁰ and individuals related to matters of public interest therefore warrant similar protection to that afforded to the press.⁵²¹

⁵¹² *Goodwin v. the United Kingdom* (application no.17488/90), Grand Chamber judgment of 27 March 1996, §39.

⁵¹³ *Nagla v. Latvia* (application no.73469/10), judgment of 16 July 2013, §82.

⁵¹⁴ *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities* (2008), *Recommendation CM/Rec(2007)14 of Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe* (2007).

⁵¹⁵ *PACE Resolution 2095 (2016) on Strengthening the protection and role of human rights defenders in Council of Europe member States*

⁵¹⁶ As part of the support for the work of human rights defenders, their protection and the development of an enabling environment for their activities, the Commissioner has also intervened before the European Court of Human Rights in a number of cases concerning human rights defenders. See for example *Rasul Jafarov v. Azerbaijan* (application no.69981/14) judgment of 17 March 2016. With regard to alleged violation of Article 18 of the Convention, taken in conjunction with Article 5, the Court considered that a combination of factors supported the argument that the actual purpose of the measures against applicant had been to silence and to punish him for his activities as a human rights defender, §162.

⁵¹⁷ UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted by resolution of the General Assembly, 8 March 1999, A/RES/53/144

⁵¹⁸ *Ensuring protection – European Union Guidelines on Human Rights Defenders*.

⁵¹⁹ *OSCE/ODIHR Guidelines on the protection of human rights defenders*,

⁵²⁰ 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

⁵²¹ *Youth Initiative for Human Rights v. Serbia* (application no.48135/06), judgment of 25 June 2013, §20.

c. Obligations of States under Article 10

41. Article 1 of the Convention imposes a general obligation on the Contracting Parties to the Convention to “secure to everyone within their jurisdiction the rights and freedoms” defined in the Convention. This means that the States must refrain from any action that disproportionately interferes with the Convention rights.

42. However, on a number of occasions the Court has held that in addition to this primarily negative undertaking of a State to abstain from interference in the rights guaranteed by the Convention, there may be positive obligations inherent in those rights, and the State must act to protect them. This is also the case for freedom of expression, as the genuine and effective exercise of this right does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals.⁵²² The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive.⁵²³ Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. The Court has also stressed that States are required to create a favourable environment for participation in public debate by all persons concerned, enabling them to express their opinions and ideas without fear.⁵²⁴

d. “Duties and responsibilities” related to the exercise of freedom of expression

43. Unlike other Articles of the Convention, Article 10 in its text explicitly recognises that the freedom of expression “carries with it duties and responsibilities”. The Court has admitted that “people exercising freedom of expression, including journalists, undertake ‘duties and responsibilities’ the scope of which depends on their situation and the technical means they use”.⁵²⁵

44. However, this text cannot be interpreted as a separate circumstance automatically limiting the freedom of expression of individuals belonging to certain professional categories that may carry with it “duties and responsibilities”. And if at first the Court’s approach was to leave the States more chances to invoke this provision in justifying an interference with the freedom of expression,⁵²⁶ then the current jurisprudence of the Court leaves the States little discretion, and even where the existence of a category of civil servants with special “duties and responsibilities” is accepted, the restrictions applied on their right to freedom of expression must be examined on the same criteria as the restriction applied to others’ freedom of expression.⁵²⁷

45. Furthermore, as attested by the *Observer and Guardian* case,⁵²⁸ under the “duties and responsibilities” approach, the Court also argued that the fact that a person belongs to a particular category is a basis for limiting rather than increasing the public authorities’ powers to restrict the exercise of that person’s rights. Editors and journalists would fall into this category. In this regard in the case of *Fressoz and Roire v. France* the Court stated that by reason of the “duties and responsibilities” inherent in the exercise of freedom of expression, the protection of journalists under Article 10 is subject to the proviso that they “are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism”.⁵²⁹ Politicians also have a duty or responsibility to refrain from advocating racial discrimination and to avoid using words or attitudes which are vexatious or humiliating. Such behaviour risks fostering reactions among the public which are incompatible with a peaceful social climate and could erode the confidence in democratic institutions.⁵³⁰ In their public discourse it is crucially important for politicians to avoid expression that are likely to foster intolerance.⁵³¹

⁵²² *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.

⁵²³ See, for example, *mutatis mutandis*, *Observer and Guardian v. the United Kingdom* (application no.13585/88), judgment of 26 November 1991, §59.

⁵²⁴ *Dink v. Turkey* (applications nos.2668/07, 6102/08, 30079/08, 7072/09 and 7124/09), judgment of 14 September 2010, §137.

⁵²⁵ *Fressoz and Roire v. France* (application no.29183/95), judgment of 21 January 1999, §52.

⁵²⁶ See, for example, *Engel and Others v. the Netherlands* (applications nos.5100/71; 5101/71; 5102/71; 5354/72; 5370/72), judgment of 8 June 1976.

⁵²⁷ Monica Macovei, *Freedom of Expression*, Human rights handbook, No.2, Council of Europe, 2004, page 22; *Süreker v. Turkey (No. 1)*, (application no.26682/95), Grand Chamber judgment of 8 June 1999, §§63-64.

⁵²⁸ *Observer and Guardian v. the United Kingdom* (application no.13585/88), judgment of 26 November 1991.

⁵²⁹ *Fressoz and Roire v. France* (application no.29183/95), judgment of 21 January 1999, §54.

⁵³⁰ *Féret v. Belgium* (application no. 15615/07), judgment of 16 July 2009, §77.

⁵³¹ *Erbakan v. Turkey*, (application no. 59405/00), judgment of 6 July 2006, §64.

e. Prohibition of abuse of rights

46. The most tangible manifestation of “duties and responsibilities” in the exercise of freedom of expression is enshrined in Article 17 of the Convention that prohibits abuse of the rights.

47. Article 17 of the Convention states that “*nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention*”. This approach in fact is an “exclusion from the protection of the Convention” of those comments and statements that amount to hate speech and negate the fundamental values of the Convention. For example, in the case of *Kühnen v. Germany*⁵³² the former Commission held that freedom of expression may not be used in order to lead to the destruction of the rights and freedoms granted by the Convention, while in the case of *Seurot v. France* the Court concluded that “there is no doubt that any remark directed against the Convention’s underlying values would be removed from the protection of Article 10 by Article 17 [prohibition of abuse of rights]”.⁵³³ Other examples of such speech examined by the Court under Article 17 have included statements denying the Holocaust, justifying a pro-Nazi policy, linking all Muslims with a grave act of terrorism, or portraying the Jews as the source of evil in Russia.⁵³⁴

48. In *Gündüz v. Turkey*⁵³⁵ the Court declared inadmissible the application of the leader of an Islamic sect who had been convicted of incitement to commit an offence and incitement to religious hatred on account of statements reported in the press. The Court considered the applicant’s statements as amounting to hate speech promoting the glorification of violence and therefore could not be regarded as compatible with the values of justice and peace set forth in the Preamble to the Convention. The Court considered that the severity of the penalty (4 years and 2 months imprisonment and a fine) was not disproportionate, in so far as it had a deterrent effect which could have been necessary to prevent public incitement to commit offences. However, under this approach, when statements do not encourage violence, armed resistance or insurrection, do not glorify any crime, they are protected.⁵³⁶

49. In *Leroy v. France*⁵³⁷ a drawing representing the 9/11 attack on the World Trade Centre with a caption “We have all dreamt of it... Hamas did it” - was published in a Basque weekly newspaper. The domestic court ordered the cartoonist to pay a fine for “condoning terrorism”. The Strasbourg Court upheld the measure imposed, finding that the applicant glorified terrorism. In the Court’s opinion, the date of publication was such as to increase the cartoonist’s responsibility in his account of, and even support for, a tragic event, whether considered from an artistic or a journalistic perspective. Also, the impact of such a message in a politically sensitive region, namely the Basque Country, was not to be overlooked. According to the Court, the cartoon had provoked a certain public reaction, capable of stirring up violence and demonstrating a plausible impact on public order in the region. The Court considered that the grounds put forward by the domestic courts in convicting Mr. Leroy had been “relevant and sufficient”. Having regard to the modest nature of the fine and the context in which the impugned drawing had been published, the Court found that the measure imposed on the cartoonist was not disproportionate.

50. In a recent inadmissibility decision, the Court has applied this approach in a case concerning a comedy performance. The Court concluded that “this was a demonstration of hatred and anti-Semitism, supportive of Holocaust denial. It is unable to accept that the expression of an ideology which is at odds with the basic values of the Convention, as expressed in its Preamble, namely justice and peace, can be assimilated to a form of entertainment, however satirical or provocative, which would be afforded protection by Article 10 of the Convention. In addition, the Court emphasises that while Article 17 of the Convention has, in principle, always been applied to

⁵³² *Kühnen v. the Federal Republic of Germany* (application 12194/86), Commission decision of 12 May 1988.

⁵³³ *Seurot v. France* (application no.57383/00) decision on the admissibility of 18 May 2004.

⁵³⁴ *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §136.

⁵³⁵ *Gündüz v. Turkey* (application no. 59745/00), decision of inadmissibility, 13 November 2003.

⁵³⁶ See *Dicle v. Turkey (no.2)* (application no. 46733/99), judgment 11 April 2006; *Erdal Taş v. Turkey* (application no. 77650/01), judgment 19 December 2006; *Faruk Temel v. Turkey* (no. 16853/05), judgment of 1 February 2011; *Önal v. Turkey* (application nos. 41445/04 and 41453/04), judgment of 2 October 2012.

⁵³⁷ *Leroy v. France* (application no. 36109/03), judgment of 2 October 2008.

explicit and direct remarks not requiring any interpretation, it is convinced that the blatant display of a hateful and anti-Semitic position disguised as an artistic production is as dangerous as a fully-fledged and sharp attack (...). It thus does not warrant protection under Article 10 of the Convention”.⁵³⁸

51. Such decisions apply the theory of the paradox of tolerance: an absolute tolerance may lead to the tolerance of the ideas promoting intolerance, and the latter could then destroy tolerance.⁵³⁹ As a rule, the Court will declare inadmissible, on grounds of incompatibility with the values of the Convention, applications which are inspired by totalitarian doctrine or which express ideas that represent a threat to the democratic order and are liable to lead to the restoration of a totalitarian regime.⁵⁴⁰

f. Possible interferences (formalities, conditions, restrictions or sanctions)

“existence of an interference”

52. Before examining the validity of an interference under Article 10 §2, the Court examines whether such an interference has actually taken place. In other words, it must first be ascertained whether the disputed measure amounted to interference with the exercise of freedom of expression, in the form, for example, of a “formality, condition, restriction or penalty”.⁵⁴¹ Criminal sanctions⁵⁴² and fines in defamation proceedings⁵⁴³ imposed on the applicants, an injunction prohibiting publication of a specific article,⁵⁴⁴ clearly interfere with the exercise of the freedom of expression, as can a search at the journalist’s home.⁵⁴⁵ On the other hand, in the case of *Petropavlovskis v. Latvia* the Court did not agree with the applicant that the refusal to grant Latvian citizenship to the applicant had prevented him from expressing his disagreement with government policies or from participating in meetings or movements, as on the contrary, his views on the education reform had been widely reported in the media and he had remained politically active even after his application for naturalisation was refused.⁵⁴⁶ It can thus be concluded that the existence of an interference within the meaning of the Convention to a large extent depends on specific facts of the case, in particular on whether or not the person concerned could have (could have reasonable been expected) to continue to express his or her opinion in the wake of the measure complained.

53. Any interference with the right to freedom of expression needs to comply with three cumulative criteria, namely, the interference needs to be prescribed by law, it must pursue a legitimate aim, and is necessary in a democratic society. As already noted (see §17 above), these criteria are to be interpreted strictly, while “[s]trict interpretation means that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions, and these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning”.⁵⁴⁷ In other words, the Court established a legal standard that in any borderline case, the freedom of the individual must be favourably weighted against the State’s claim of overriding interest.⁵⁴⁸

⁵³⁸ *M’Bala M’Bala v. France* (application no. 25239/13) §§39–40.

⁵³⁹ Monica Macovei, *Freedom of Expression*, Human rights handbook, No.2, Council of Europe, 2004, page 7.

⁵⁴⁰ See, among others, *B.H, M.W, H.P and G.K. v. Austria* (application no.12774/87), Commission decision of 12 October 1989; *Nachtmann v. Austria* (application no.36773/97), Commission decision of 9 September 1998; *Schimanek v. Austria* (application no.32307/96), decision on the admissibility of 1 February 2000.

⁵⁴¹ *Glaserapp v. Germany* (application no. 9228/80), judgment of 28 August 1986, §50.

⁵⁴² *Vajnai v. Hungary* (application no.33629/06), judgment of 8 July 2008, §29.

⁵⁴³ *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §118.

⁵⁴⁴ *Observer and Guardian v. the United Kingdom* (application no.13585/88), judgment of 26 November 1991, §49.

⁵⁴⁵ *Nagla v. Latvia* (application no.73469/10), judgment of 16 July 2013, §84, §101.

⁵⁴⁶ *Petropavlovskis v. Latvia* (application no.44230/06), judgment of 13 January 2015.

⁵⁴⁷ *The Sunday Times v. the United Kingdom* (no.1) (application no.6538/74), Commission report of 18 May 1977, §194.

⁵⁴⁸ Monica Macovei, *Freedom of Expression*, Human rights handbook, No.2, Council of Europe, 2004, page 30 with further references.

“prescribed by law”

54. The expression “prescribed by law” requires firstly that the impugned measure should have some basis in domestic law.⁵⁴⁹ According to the Court, it has always understood the term “law” in its “substantive” sense, not its “formal” one; it has included both “written law”, encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. “Law” must be understood to include both statutory law and judge-made “law”. In sum, the “law” is the provision in force as the competent courts have interpreted it.⁵⁵⁰

55. The concept of “prescribed by law” refers not only to the mere existence of a legal provision, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects.⁵⁵¹

56. “Accessibility” usually means that the law has been duly announced and its text, including, where appropriate, case-law on its interpretation and application, are available to the person concerned.⁵⁵²

57. As regards “foreseeability” as one of the requirements inherent in the phrase “prescribed by law” in Article 10 § 2 of the Convention, the Court has underlined that “[a] norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen - if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.⁵⁵³ This does not however mean that every legal provision must be formulated with absolute precision, or that the consequences need to be foreseeable with absolute certainty. The Court has recognised the impossibility of such a presumption, particularly in fields in which the situation changes according to the prevailing views of society.⁵⁵⁴ In this regard the Court has noted that there is a need to avoid excessive rigidity and to keep pace with changing circumstances, which in turn means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The level of precision required of domestic legislation depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed. The Court has found that persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can on this account be expected to take special care in assessing the risks that such activity entails.⁵⁵⁵

58. An aspect that is relevant for the assessment of the quality of the law is the existence of legal safeguards. In other words, the law in question must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. The Court has held that in matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.⁵⁵⁶ For example, in the case of *Sanoma Uitgevers B.V. v. the Netherlands* the Court stated that, for the protection of journalistic sources and of information that could lead to their identification, the first and foremost safeguard is the guarantee of review by a judge or other independent and impartial decision-making body.⁵⁵⁷ In this particular case the Court found a violation of Article 10 because the power to order disclosure had been

⁵⁴⁹ *Ahmet Yildirim v. Turkey* (application no.3111/10), judgment of 18 December 2012, §57; *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §120.

⁵⁵⁰ *Sanoma Uitgevers B.V. v. the Netherlands* (application no.38224/03), judgment of 14 September 2010, §83 with further references.

⁵⁵¹ *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §120.

⁵⁵² See, *mutatis mutandis*, *Oliveira v. the Netherlands* (application no.33129/96), judgment of 4 June 2002, §51, *Volokhy v. Ukraine* (application no.23543/02), judgment of 2 November 2006, §48.

⁵⁵³ *Gaweda v. Poland* (application no.26229/95), judgment of 14 March 2002, §39.

⁵⁵⁴ *Müller and Others v. Switzerland* (application no.10737/84), judgment of 24 May 1988, §29.

⁵⁵⁵ *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §122 with further references.

⁵⁵⁶ *Sanoma Uitgevers B.V. v. the Netherlands* (application no.38224/03), judgment of 14 September 2010, §82, with further references.

⁵⁵⁷ *Sanoma Uitgevers B.V. v. the Netherlands* (application no.38224/03), judgment of 14 September 2010, §§88-89.

entrusted to the public prosecutor, rather than to an independent judge. Although bound by the requirements of basic integrity, in procedural terms the prosecutor was a “party” defending interests potentially incompatible with the protection of journalistic sources and could hardly be seen as objective and impartial. The Court concluded that the quality of the law in question had been deficient in the absence of a procedure attended by adequate legal safeguards enabling an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources.

59. In the case of *Ahmet Yıldırım v. Turkey* the Court also examined the quality of the domestic law from the perspective of the legal safeguards, and found that the judicial-review procedures concerning the blocking of Internet sites were insufficient to meet the criteria for avoiding abuses; domestic law did not provide for any safeguards to ensure that a blocking order concerning a specified site was not used as a means of blocking access in general.⁵⁵⁸

“legitimate aim”

60. According to Article 10 §2, an interference will comply with the “legitimate aim” criterion if it is aimed at protecting one or more of the following interests or values: national security; territorial integrity; public safety; prevention of disorder or crime; protection of health; morals; reputation or rights of others; preventing the disclosure of information received in confidence; and maintaining the authority and impartiality of the judiciary. This list is exhaustive and needs to be interpreted narrowly.

61. The requirement that the interference needs to pursue a legitimate aim usually elicits little comment from the Court, as in most cases the States have been able to show how the purpose of the interference falls within one of the aims listed in Article 10 §2. For example, in the case of *Karácsony and others v. Hungary* the Court accepted that a fine imposed on the Members of Parliament for their conduct in Parliament pursued two legitimate aims within the meaning of Article 10 §2 of the Convention. Firstly, it was aimed at preventing disruption to the work of Parliament so as to ensure its effective operation and thus pursued the legitimate aim of the “prevention of disorder”. Secondly, it was intended to protect the rights of other members of parliament, and thus pursued the aim of the “protection of the rights of others”.⁵⁵⁹ In the case of *Bédát v. Switzerland* the Court likewise accepted that a fine imposed on the applicant in criminal proceedings for having published information covered by the secrecy of criminal investigations pursued legitimate aims, namely preventing “the disclosure of information received in confidence”, maintaining “the authority and impartiality of the judiciary” and protecting “the reputation [and] rights of others”.⁵⁶⁰

62. With regard to the aim of preventing disturbance to public order, the Court places the burden on the government to show that statements are capable of “leading or actually led to disorder.” Where the government fails to present any specific evidence showing that statements are capable of leading to public disturbance or unrest the Court holds that the government’s interference is not properly intended to protect such objective.⁵⁶¹

63. In the case of *Baka v. Hungary* the Court concluded that the termination of the applicant’s mandate as President of the Supreme Court was aimed at maintaining the authority and impartiality of the judiciary within the meaning of Article 10 §2. The Court took the view, however, that a State Party cannot legitimately invoke the independence of the judiciary in order to justify a measure such as the premature termination of the mandate of a court president for reasons that had not been established by law and which did not relate to any grounds of professional incompetence or misconduct. The Court considered that this measure could not serve the aim of increasing the independence of the judiciary, since it was simultaneously a consequence of the previous exercise of the right to freedom of expression by the applicant, who was the highest office-holder in the judiciary. In these circumstances, rather than serving the aim of maintaining the independence of the judiciary, the premature termination of the applicant’s mandate as President of the Supreme Court appeared to be incompatible with that aim.⁵⁶²

⁵⁵⁸ *Ahmet Yıldırım v. Turkey* (application no.3111/10), judgment of 18 December 2012, §68.

⁵⁵⁹ *Karácsony and Others v. Hungary* (application nos.42461/13 and 44257/13), Grand chamber judgment of 17 May 2016, §129; *Szanyi v. Hungary* (application no. 35492/13) judgment of 8 November 2016, §28.

⁵⁶⁰ *Bédát v. Switzerland* (application no.56925/08), Grand Chamber judgment of 29 March 2016, §46.

⁵⁶¹ *Perinçek v. Switzerland* (application no.27510/08), Grand Chamber judgment of 15 October 2015, §152.

⁵⁶² *Baka v. Hungary* (application no.20261/12), Grand Chamber judgment of 23 June 2016, §156.

“necessary in a democratic society”

64. As the Court stated in the case of *Observer and Guardian v. the United Kingdom*, “the adjective “necessary”, within the meaning of Article 10 §2, implies the existence of a ‘pressing social need’”. The Court has also held that as a matter of general principle, the “necessity” for any restriction on freedom of expression must be convincingly established,⁵⁶³ which means that in evaluating the measure complained of the Court looks at the alleged interference in the light of the case as a whole and determines whether the reasons adduced by the national authorities to justify the interference were “relevant and sufficient”, and whether the interference was “proportionate to the legitimate aim pursued.”⁵⁶⁴

65. A number of factors are taken into account by the Court in assessing the proportionality and thus the necessity of the alleged interference, including the nature and severity of the sanctions imposed.⁵⁶⁵ Chapter IV will examine in more detail the relevant case-law of the Court on the interpretation and application of the “necessity” criteria in specific areas relevant to the present study.

g. Margin of appreciation

66. In general terms margin of appreciation means that the State is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative and judicial action in the area of a Convention right.⁵⁶⁶ The case of *Handyside v. the United Kingdom* was the first occasion where the Court concluded that “[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them [and] /./ it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context. Consequently, Article 10 §2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (“prescribed by law”) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force”.⁵⁶⁷

67. The doctrine of the margin of appreciation is used to assess the State’s compliance with both obligations, negative and positive, that derive from the Convention.⁵⁶⁸

68. With regard to freedom of expression it is relevant to recall that the margin of appreciation granted to the States differs according to the context, in particular the historic, demographic and cultural context.⁵⁶⁹ For example, in *Soulas and Others v. France* the Court mentioned the particular problem regarding the social integration of immigrants and emphasised the public need for a wide margin of appreciation in relation to this delicate issue. It also differs depending on the aims pursued, for example the protection of morals is an area where national authorities are usually granted a wide margin of appreciation.⁵⁷⁰ In economic matters domestic authorities similarly enjoy a broader margin of appreciation, for example, as regards the necessity of restraining commercial advertising by the audio-visual media.⁵⁷¹ Conversely, political debate by the press enjoys very strong protection under Article 10, as does debates on other matters of public interest, and the Court constantly reiterates that there is little scope under Article 10 §2 of the Convention for restrictions

⁵⁶³ *Fressoz and Roire v. France* (application no.29183/95), judgment of 21 January 1999, §45.

⁵⁶⁴ *Lindon, Otchakovsky-Laurens and July v. France* (application nos.21279/02 and 36448/02), Grand Chamber judgment of 22 October 2007, §45 with further references.

⁵⁶⁵ *Baka v. Hungary* (application no.20261/12), Grand Chamber judgment of 23 June 2016, §160.

⁵⁶⁶ Harris, O’Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.14.

⁵⁶⁷ *Handyside v. the United Kingdom* (application no.5493/72), judgment of 7 December 1972, §48.

⁵⁶⁸ *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (applications nos.9214/80, 9473/81 and 9474/81), judgment of 28 May 1985, §67.

⁵⁶⁹ *Soulas and Others v. France*, (application no. 15948/03), judgment of 10 July 2008, §38.

⁵⁷⁰ *Handyside v. the United Kingdom* (application no.5493/72), judgment of 7 December 1972, §57.

⁵⁷¹ *Markt Intern Verlag GMBH and Klaus Beermann v. Germany* (application no.10572/83), judgment of 20 November 1989, §33.

on political speech or on debate on matters of public interest⁵⁷² and that the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its rightful role of “public watchdog” in imparting information of serious public concern.⁵⁷³

69. In the *Baka* case the Court noted that the remarks on the functioning of the judiciary are accorded high level of protection of freedom of expression, with the authorities thus having a narrow margin of appreciation.⁵⁷⁴ More detailed examination of the margin of appreciation in the area of freedom of expression is contained in Chapter IV of the present study.

III. Freedom of expression in the “digital world”

70. The development of information and communication technologies and their increasing presence is clearly evident in the cases examined by the Court. As it noted in the cases of *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, “[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”.⁵⁷⁵ Internet publications thus fall within the scope of Article 10 and its general principles examined in Chapter II of the present study.

71. The potential of Internet and digital media as a tool for accessing information, debate and political participation has been reiterated in a number of the Court’s rulings. However, the Court has also recognised the challenges it creates for the protection of human rights, particularly for the protection of private life and in the prevention of hate speech. As it noted in the *Delfi* case, “user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression, but alongside these benefits, certain dangers may also arise, for example, defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online”.⁵⁷⁶

72. These unique features of Internet have led the Court towards developing case-law specifically with respect to this medium, reflecting both the potential and challenges it creates. First of all, bearing in mind the positive role played by Internet in facilitating the exchange of information, including in the context of political debate, the Court examines whether the domestic authorities have exercised sufficient caution in ensuring that the interference with the general access to Internet resources is kept to the minimum. Thus in the case of *Ahmet Yildirim v. Turkey* the Court found that a blocking of a website as a preventive measure in the context of criminal proceedings also affected the applicant, who owns and runs a website which was set up using the Google Sites website creation and hosting service and on which he publishes material including his academic work. The Court further found that subsequent blocking of all access to Google Sites had rendered large amounts of information inaccessible, thus substantially restricting the rights of Internet users and having a significant collateral effect, and that his “collateral effect” was the crux of the case under Article 10.⁵⁷⁷

73. Another aspect of the above-mentioned principle relates to the protection of persons using information available on Internet. In the case of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* the Court, for the first time, acknowledged that Article 10 of the Convention had to be interpreted as imposing on States a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists’ freedom of expression on the Internet. In that case the applicants had been ordered to pay damages for republishing an anonymous text, which was objectively defamatory, that they had downloaded from the Internet (accompanying it

⁵⁷² *Baka v. Hungary* (application no.20261/12), Grand Chamber judgment of 23 June 2016, §159 with further references.

⁵⁷³ *Bladet Tromsø and Stensaas v. Norway* (application no.21980/93), Grand Chamber judgment of 20 May 1999, §59.

⁵⁷⁴ *Baka v. Hungary* (application no.20261/12), Grand Chamber judgment of 23 June 2016, §171.

⁵⁷⁵ *Times Newspapers Ltd v. the United Kingdom (nos.1 and 2)* (applications nos.3002/03 and 23676/03), judgment of 10 March 2009, §27.

⁵⁷⁶ *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §110.

⁵⁷⁷ *Ahmet Yildirim v. Turkey* (application no.3111/10), judgment of 18 December 2012, §52.

with an editorial indicating the source and distancing themselves from the text). They had also been ordered to publish a retraction and an apology – even though the latter was not provided for by law. Examining the case under Article 10 of the Convention, the Court found that the interference complained of had not been “*prescribed by law*”, as required by the second paragraph of that Article, because at the time, in Ukrainian law, there had been no statutory protection for journalists republishing content from the Internet. In addition, the domestic courts had refused to transpose to that situation the provisions that protected the print media.⁵⁷⁸

74. The availability of information on Internet has allowed the Court to justify restrictions on the freedom to impart information or ideas via the printed media. Thus in the case of *Mouvement raëlien Suisse v. Switzerland* the prohibition of an association’s public poster campaign was found to be in conformity with the Convention, in part because the association’s Internet site remained accessible.⁵⁷⁹ Along the same line of argument, in the case of *Editions Plon v. France* the availability on Internet of the content of a book revealing confidential information was considered by the Court as rendering the ban on the sale of the book illegitimate, as confidentiality could no longer constitute an overriding requirement.⁵⁸⁰

75. As regards the challenges posed by Internet, in the case of *Perrin v. the United Kingdom* ease of access to Internet was one of the reasons justifying the necessity to interfere with the applicant’s freedom of expression. The Court noted that the web page that contained photographs considered obscene by the domestic authorities and in respect of which the applicant was convicted, was freely available to anyone surfing the internet and that, in any event, the material was, as pointed out by the Court of Appeal, the very type of material which might be sought out by young persons whom the national authorities were trying to protect.⁵⁸¹ In conclusion the Court was satisfied that the applicant’s criminal conviction could be regarded as necessary in a democratic society in the interests of the protection of morals and/or the rights of others, and therefore rejected the complaint as manifestly ill-founded.

76. Another important aspect of the Court’s case-law regarding the Internet was highlighted in the *Delfi* case, which was the first occasion when the Court was called upon to rule on a complaint concerning the liability of a company running an Internet news portal because of comments posted on the portal by its users. In other words, the question was not whether the rights of the authors of the comments to freedom of expression had been infringed, but whether finding the applicant company *Delfi* liable for these third-party comments had infringed its right to impart information. The Court examined the case under the head of “duties and responsibilities”, and concluded 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”.⁵⁸² Considering that the case concerned a major professionally and commercially operated Internet news portal publishing news articles written by its staff on which users were invited to comment, and that the comments posted by users were clearly unlawful, the Court held that the commercial operator of an Internet news portal may be held accountable for offensive comments posted on the portal by users. However, the Court pointed out that the *Delfi* case did not concern other types Internet fora where third-party comments could be posted,⁵⁸³ which in turn means that the conclusions of the *Delfi* case cannot be automatically applied to, for example, Internet discussion groups, bulletin boards or certain social media platforms.

⁵⁷⁸ *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* (application no.33014/05), judgment of 5 May 2011.

⁵⁷⁹ *Mouvement raëlien Suisse v. Switzerland* (application no.16354/06), Grand Chamber judgment of 13 July 2012, §75.

⁵⁸⁰ *Editions Plon v. France* (application no.58148/00), judgment of 18 May 2004, §53.

⁵⁸¹ *Perrin v. the United Kingdom* (application no.5446/03), decision on admissibility of 18 October 2005.

⁵⁸² *Delfi v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §113.

⁵⁸³ *Ibid.*, §116.

77. The Court considered differently in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*.⁵⁸⁴ Although offensive and vulgar, the incriminated comments did not, in contrast to *Delfi AS*, constitute clearly unlawful speech; and they certainly did not amount to hate speech or incitement to violence.⁵⁸⁵ In this case when examining the Internet portals' liability for third-party comments, 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 such as one of those in question.⁵⁸⁶ The Court also emphasises in this regard that there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status.⁵⁸⁷ Furthermore, in *Pihl v. Sweden*⁵⁸⁸ the Court attached importance to the fact that the comment, although offensive, did not amount to hate speech or incitement to violence and was posted on a small blog run by a non-profit association which took it down the day after the applicant's request and nine days after it had been posted⁵⁸⁹

78. Finally, it is interesting to note that the Court has stated its views on the influence of the Internet compared with the other, more traditional, broadcast media, and for the time being has considered this impact to be less strong. For example, in the case of *Animal Defenders International v. the United Kingdom* the Court examined a complaint concerning the refusal of permission for a NGO to place a television advert owing to statutory prohibition of political advertising, and concluded that it was coherent to limit a ban on political advertising to certain specific media (radio and television), because of the "particular influence" of those traditional media. The Court stated that it "recognises the immediate and powerful effect of the broadcast media, an impact reinforced by the continuing function of radio and television as familiar sources of entertainment in the intimacy of the home (...) In addition, the choices inherent in the use of the Internet and social media mean that the information emerging therefrom does not have the same synchronicity or impact as broadcasted information. Notwithstanding therefore the significant development of the Internet and social media in recent years, there is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media (...) to undermine the need for special measures for the latter".⁵⁹⁰

⁵⁸⁴ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (application no. 22947/13), judgment of 2 February 2016.

⁵⁸⁵ *Ibid.*, §64.

⁵⁸⁶ *Ibid.*, §86

⁵⁸⁷ *Ibid.*, §84

⁵⁸⁸ *Pihl v. Sweden* (application no.74742/14) decision on admissibility of 9 March 2017.

⁵⁸⁹ *Ibid.*, §37.

⁵⁹⁰ *Animal Defenders International v. the United Kingdom* (application no.48876/08), Grand Chamber judgment of 22 April 2013, §119.

IV. Freedom of expression and links to other Human Rights: Seeking balance between the rights at stake

79. The present chapter examines the links between the freedom of expression and other human rights, particularly in situations where the exercise of this freedom comes into conflict with other rights.

1. Freedom of expression and right to private life

80. 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. 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,⁵⁹¹ and that under Article 8 the State has also positive obligations which may involve the adoption of measures designed to secure respect for private and family life, even in the sphere of the relations of individuals between themselves.⁵⁹² The issue of defamation has been the subject of considerable Court's case-law.

81. 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".⁵⁹³ 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.⁵⁹⁴

82. However, establishing the balance between conflicting values, namely the right to freedom of expression and the right to protection of the honor and reputation of others, is not always clear and unambiguous. In particular, where a political figure is involved, the limits permitted often raise difficulties and can result in divergences of analysis and conclusions both between the domestic courts and the Court, and between the judges of the Court.⁵⁹⁵

83. The subsequent paragraphs will first examine the practice of the Court as regards the balancing of private life and the freedom of expression of mass media, and will then look into other situations, for example, those concerning restrictions on the freedom of expression of NGOs, authors and publishers of books. An in-depth analysis of the Court's relevant jurisprudence is available in a recently published study "Freedom of expression and defamation".⁵⁹⁶

Mass media and private life

84. When balancing the freedom of expression of the press and the right to private life, the general principles concerning the essential functions that the press fulfils in a democratic society must be born in mind (see §§ 34-36 above), including the principle that the journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.⁵⁹⁷

⁵⁹¹ *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.

⁵⁹² *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.

⁵⁹³ *Delfi AS v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §137.

⁵⁹⁴ *Axel Springer AG v. Germany* (application no.39954/08), Grand Chamber judgment of 7 February 2012, §78.

⁵⁹⁵ See, *Jimenez Losantos v. Spain* (application no. 53421/10), judgment of 14 June 2016, as well as the dissenting opinion of Judge Lozano Cutanda.

⁵⁹⁶ Available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ac95b>

⁵⁹⁷ *Delfi AS v. Estonia* (application no.64569/09), Grand Chamber judgment of 16 June 2015, §132.

85. Once the Court establishes that Article 8 is indeed relevant, it uses the following criteria in evaluating the compliance with the requirements of Article 10, particularly the “necessity” and “proportionality” requirements:⁵⁹⁸

- a. the extent to which the article, photos or feature contributed to a debate of general interest, the definition of what constitutes a subject of general interest depending on the circumstances of the case; the existence of such an interest is not limited to publications on political issues or crimes;⁵⁹⁹
- 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; the Court has established that whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures; furthermore distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions.⁶⁰⁰ However, this criteria needs to be considered in light of the contribution to the debate of general interest. Thus in the first *Von Hannover* case, where the Court examined the complaint from the eldest daughter of Prince Rainier III of Monaco that the German courts have failed to protect her right to private life in that they have not prevented the publication of photos of her, the Court held that “the publication of the photos and articles in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public”;⁶⁰¹
- c. the prior conduct of the person concerned, including whether or not respective information has already appeared in an earlier publication. For example, in the case of *Shabanov and Tren v. Russia* the Court recalled that it has been the constant approach by the Convention organs that the claim to respect for private life is automatically reduced to the extent that an individual brings his private life into contact with public life. Thus, communication of statements made during public proceedings was not considered as giving rise to an interference with private life. The Court stated that “when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person’s reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. It is also relevant whether the individual voluntarily supplied the information and whether he could reasonably anticipate the later use made of the material.”⁶⁰² However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the report or photo at issue;⁶⁰³
- 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.⁶⁰⁴ In the case of *Von Hannover v. Germany* the method of obtaining the disputed photos – they were taken secretly at a distance of several hundred metres – was one of the factors that compelled the Court to decide in favour of protecting private life of the applicant;⁶⁰⁵

⁵⁹⁸ *Von Hannover v. Germany (no.2)* (applications nos.40660/08 and 60641/08), Grand Chamber judgment of 7 February 2012, §§109-113.

⁵⁹⁹ *Axel Springer AG v. Germany* (application no.39954/08), Grand Chamber judgment of 7 February 2012, §90 with further references.

⁶⁰⁰ *Von Hannover v. Germany* (application no.59320/00), judgment of 24 June 2004, §63.

⁶⁰¹ *Ibid.*, §65.

⁶⁰² *Shabanov and Tren v. Russia* (application no.5433/02), judgment of 14 December 2006, §46.

⁶⁰³ *Axel Springer AG v. Germany* (application no.39954/08), Grand Chamber judgment of 7 February 2012, §92.

⁶⁰⁴ *Ibid.*, §93.

⁶⁰⁵ *Von Hannover v. Germany* (application no.59320/00), judgment of 24 June 2004, §68.

- e. the content and form of the publication, involving an assessment of the way in which the report was published, the manner in which the person concerned was represented, as well as the extent to which the publication was disseminated (for example, whether the newspaper was national or local).⁶⁰⁶ For example, in the case of *Axel Springer AG v. Germany* the Court's finding that the disputed articles contained factual information about a person's arrest, (the) sentence imposed by the court and (the) legal assessment of the seriousness of the offence, and that the articles did not reveal details about the person's private life, and that they contained no disparaging expression or unsubstantiated allegation,⁶⁰⁷ contributed to the conclusion that the criminal sanction imposed on the applicant company – the publisher – was in violation of Article 10;
- f. potential negative consequences the person concerned might have suffered after the publication, and whether these consequences attain the level of gravity justifying a restriction on the right to freedom of expression.⁶⁰⁸ At the same time it must be recalled that the person cannot rely on Article 8 in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence;⁶⁰⁹
- g. the severity of the sanction imposed on the journalist or publisher, if any.⁶¹⁰

86. The Court has also held that "diligent journalists ought to attempt to contact the subjects of their articles and to give those persons a possibility to comment on the contents of such articles".⁶¹¹ The distinction between statements of fact and value judgements likewise remains relevant.⁶¹²

87. The application of the above-listed principles in the specific case will entirely depend on the individual facts of that case. Therefore, in cases which require the right to respect for private life to be balanced against the right to freedom of expression, the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the news report, or under Article 10 by the publisher.⁶¹³ For example, as noted above, in the case of *Von Hannover v. Germany* the complaint was brought before the Court under Article 8 and the right to respect for private life, while the analysis of the Court also employed principles regarding freedom of expression guaranteed by Article 10 of the Convention.

Freedom of expression of private individuals and protection of the rights of others

88. 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. 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. In such cases the margin of appreciation the States enjoy and the quality of legal reasoning given at the domestic level are of particular importance. Thus in the cases of *Ojala and Etukeno Oy v. Finland* and *Ruusunen v. Finland* the Court considered that there had been no violation of Article 10, since the restrictions on the exercise of the applicants' freedom of expression (the applicants – the publisher and the publishing company – wrote and published, together with the former girlfriend of the Finnish Prime Minister at the time, an autobiographical book about her relationship with the Prime Minister, but were subsequently convicted for disseminating information violating personal privacy) were established convincingly by the domestic courts, taking into account the Court's case-law. The Court also recalled its case-law according to which the Court would require, in such circumstances, strong reasons to substitute its view for that of the domestic courts.⁶¹⁴

⁶⁰⁶ *Axel Springer AG v. Germany* (application no.39954/08), Grand Chamber judgment of 7 February 2012, §94 with further references.

⁶⁰⁷ *Ibid.*, §108.

⁶⁰⁸ *Caragea v. Romania* (application no.51/06), judgment of 8 December 2015, §37.

⁶⁰⁹ *Axel Springer AG v. Germany* (application no.39954/08), Grand Chamber judgment of 7 February 2012, §83.

⁶¹⁰ *Ibid.*, §95.

⁶¹¹ *Mitkus v. Latvia* (application no.7259/03), judgment of 2 October 2012, §136.

⁶¹² *Diena and Ozolins v. Latvia* (application no.16657/03), judgment of 12 July 2007, §79.

⁶¹³ *Couderc and Hachette Filipacchi Associés v. France* (application no.40454/07), Grand Chamber judgment of 10 November 2015, § 91.

⁶¹⁴ *Ojala and Etukeno Oy v. Finland* (application no.69939/10), judgment of 14 January 2014, §57; *Ruusunen v. Finland* (application no. 73579/10), judgment of 14 January 2014, §52.

2. Freedom of expression and freedom of thought, conscience and religion

89. In the case of *Kokkinakis v. Greece*⁶¹⁵ the Court held that the freedom of thought, conscience and religion, which is safeguarded under Article 9 of the Convention, is one of the foundations of a “democratic society” within the meaning of the Convention. 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. The following paragraphs will examine these two situations.

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

90. Intimate religious beliefs and convictions of persons may be offended by blasphemous expression in regard to object of veneration,⁶¹⁶ and the Court has therefore held that amongst the “duties and responsibilities” of those exercising freedom of expression – 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. In other words, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines.⁶¹⁷ For example, in the case of *Otto-Preminger-Institut v. Austria* the Court examined a complaint under Article 10 of the Convention about the seizure and subsequent forfeiture of the film “Das Liebeskonzil” which the domestic authorities regarded as ridiculing the beliefs of Roman Catholics. The Court agreed that the disputed measures had a basis in domestic law and pursued a legitimate aim, namely “the protection of the rights of others”. The Court also noted that the domestic courts had due regard to the freedom of artistic expression, but that they did not consider that its merit as a work of art or as a contribution to public debate in Austrian society outweighed those features which made it essentially offensive to the general public within their jurisdiction. The trial courts, after viewing the film, had noted the provocative portrayal of God the Father, the Virgin Mary and Jesus Christ. Finally, the Court stated that it could not disregard the fact that the Roman Catholic religion was the religion of the overwhelming majority of Tyroleans and that in seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. For these reasons the Court concluded that there had been no violation of Article 10 of the Convention.⁶¹⁸

91. The Court has also been very clear that hate speech against a religious group is not protected under Article 10. Thus in the case of *Norwood v. the United Kingdom* the Court examined a complaint about a conviction of the applicant who, between November 2001 and 9 January 2002 had displayed in the window of his first-floor flat a large poster with a photograph of the Twin Towers in flame, the words “Islam out of Britain – Protect the British People” and a symbol of a crescent and star in a prohibition sign. The Court agreed with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. The Court went on to say that “[s]uch a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant’s display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14”.⁶¹⁹

⁶¹⁵ *Kokkinakis v. Greece* (application no.14307/88), judgment of 25 May 1993, §31.

⁶¹⁶ Harris, O’Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.669.

⁶¹⁷ *Otto-Preminger-Institut v. Austria* (application no.13470/87), judgment of 20 September 1994, §49.

⁶¹⁸ *Ibid.*, §§52-56.

⁶¹⁹ *Norwood v. the United Kingdom* (application no.23131/03), admissibility decision of 16 November 2004.

92. The denial of the Holocaust also is excluded from the protection of Article 10. For example, in the case of *D.I. v. Germany* the applicant, a historian, was fined for having made statements at a public meetings where he had denied the existence of the gas chambers in Auschwitz, stating that these gas chambers were fakes built up in the early post-war days and that the German tax-payers paid about 16 billion German marks for fakes. The former Commission found the complaint inadmissible, noting that the applicant's statements were contrary to the principles of peace and justice expressed in the Preamble to the Convention, and that they had advocated racial and religious discrimination.⁶²⁰

93. Also in the case of *Garaudy v. France* the Court held that the applicant, the author of a book entitled *The Founding Myths of Modern Israel*, who was convicted of the offences of disputing the existence of crimes against humanity, defamation in public of a group of persons (in this case the Jewish community), and incitement to racial hatred, was not entitled to rely on Article 10 of the Convention, and Article 17 of the Convention excluded the statements from the protection of the Convention, as the Court considered that the real purpose of the applicant's remarks was to rehabilitate the National Socialist regime and accuse the victims themselves of falsifying history.⁶²¹

94. 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".⁶²² In the case of *Klein v. Slovakia*⁶²³ the Court held that the conviction of a journalist for defamation of the highest representative of the Roman Catholic Church in Slovakia, thereby offending the members of that church, constituted a violation of Article 10 of the Convention. The journalist had written an article criticising the archbishop's attempts to prevent the distribution of Miloš Forman's film "The People vs. Larry Flynt"; the article also alluded to the archbishop's alleged co-operation with the former communist regime. The Court noted that the applicant's article had been a reaction to the Archbishop's statement, broadcast in the main evening news bulletin of a public TV station, and which he had considered to be contrary to the principles of a democratic society and, in particular, freedom of expression. The Court also felt that the fact that it was published in a weekly journal aimed at intellectually-oriented readers is in line with the applicant's explanation that he had meant the article to be a literary joke with ideas and associations to the film "The People vs. Larry Flynt" which he had not expected to be understood and appreciated by everyone. The journal was then published with a circulation of approximately 8,000 copies. The applicant's strongly worded pejorative opinion related exclusively to the person of a high representative of the Catholic Church in Slovakia. Contrary to the domestic courts' findings, the Court was not persuaded that by his statements the applicant discredited and disparaged a sector of the population on account of their Catholic faith, and therefore found a violation of Article 10.⁶²⁴

95. 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.⁶²⁵

⁶²⁰ *D.I. v. Germany* (application no.26551/95), Commission decision on the admissibility of 26 June 1996.

⁶²¹ *Garaudy v. France* (application no.65831/01), decision on the admissibility of 24 June 2003.

⁶²² *Otto-Preminger-Institut v. Austria* (application no.13470/87), judgment of 20 September 1994, §47.

⁶²³ *Klein v. Slovakia* (application no.72208/01), judgment of 21 October 2006.

⁶²⁴ *Ibid.*, §§45-55.

⁶²⁵ Harris, O'Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.670 with further references.

Exercise of the freedom of expression based on the freedom of thought, conscience and religion

96. In the early case of *Arrowsmith v. the United Kingdom* 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”. In the *Arrowsmith* case the applicant, who was pacifist, had been convicted for handing out to soldiers leaflets where the applicant expressed criticism of government policy in respect to Northern Ireland. The Commission found that as the leaflets expressed not the applicant’s own pacifist views, but her critical observations of government policy, the distribution of such leaflets could not be regarded as “manifestation” of belief under Article 9.⁶²⁶ In a comparable case the Commission examined a complaint where the applicant submitted that the injunction prohibiting him from handing out leaflets and showing photographs, which aim at expressing the applicant’s religiously inspired opinions about abortion, in the vicinity of an abortion clinic violates his rights to freedom of thought, conscience, religion, as well as the right to freedom of expression. The Commission held that the activities at issue did not constitute the expression of a belief within the meaning of Article 9 of the Convention; turning to compatibility of the disputed measures the Commission found that the injunction against the applicant was granted for a limited duration and a specified, limited area, particularly noting that the injunction was not aimed at depriving the applicant of his rights under Article 10 of the Convention but merely at restricting them in order to protect the rights of others. Taking these factors together, the Commission found that the interference was proportionate to the legitimate aim pursued, and therefore declared the complaint under Article 10 of the Convention manifestly ill-founded.⁶²⁷

97. On the other hand, prohibitions on the wearing of religious symbols the Court examines exclusively under Article 9 of the Convention, as in the case of *Dahlab v. Switzerland*,⁶²⁸ or, as in the case of *S.A.S. v. France*,⁶²⁹ finds that no separate issue arises under Article 10 of the Convention.⁶³⁰ In addition, the Court of Justice of the European Union (CJEU) recently issued a joint judgment on the interpretation of EU Equal Treatment Directive⁶³¹ in the cases⁶³² of two women, from France and Belgium, who were dismissed for refusing to remove headscarves.

3. Freedom of expression and freedom of assembly and association

98. 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”,⁶³³ The Court had ruled 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 11.⁶³⁴

⁶²⁶ *Arrowsmith v. the United Kingdom* (application no.7050/72), report of the Commission of 12 October 1978, §§71-72.

⁶²⁷ *Van den Dungen v. the Netherlands* (application no.22838/93), Commission decision on admissibility of 22 February 1995.

⁶²⁸ *Dahlab v. Switzerland* (application no.42393/98), admissibility decision of 15 February 2001.

⁶²⁹ *S.A.S. v. France* (application no.43835/11), Grand Chamber judgment of 1 July 2014.

⁶³⁰ 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.”, 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

⁶³¹ 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).

⁶³² Cases C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* and 188/15 *Bougnaoui and Association de défense des droits de l’homme (ADDH) v. Micropole Univers*, CJEU of 14 March 2017.

⁶³³ Harris, O’Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.710.

⁶³⁴ *Ezelin v. France* (application no.11800/85), judgment of 26 April 1991, §37.

99. In cases where the applicants have complained about a measure that interferes both, with the freedom of assembly and association, and the freedom of expression, the Court, most recently in the case of *Kudrevičius and Others v. Lithuania*, finds that Article 10 is to be regarded as a *lex generalis* in relation to Article 11, which is a *lex specialis*, and subsequently examines the complaints under Article 11 alone.⁶³⁵ However, in such situations the Court has repeatedly emphasised that notwithstanding its autonomous role and particular sphere of application, Article 11 must be considered in the light of Article 10, which in turn means that the conclusions of the Court in Article 11 cases can be of relevance also to Article 10 cases.

100. As regards the measures taken by States to combat terrorism, 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.⁶³⁶ 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”.⁶³⁷

4. Freedom of expression and prohibition of discrimination

101. Article 20 §2, of the 1966 International Covenant on Civil and Political Rights states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. As stressed by the UN Human Rights Committee in its General Comment no.11, this provision obliges the States to adopt the necessary legislative measures prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. The UN Human Rights Committee further emphasises that for Article 20 to become fully effective “there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation”.⁶³⁸

102. Article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination contains a comparable obligation of the States parties. As underlined by the UN Committee on the Elimination of Racial Discrimination, Article 4(a) 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.⁶³⁹

103. 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”.⁶⁴⁰

⁶³⁵ *Kudrevičius and Others v. Lithuania* (application no.37553/05), Grand Chamber judgment of 15 October 2015, §85 with further references.

⁶³⁶ 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.

⁶³⁷ *Hyde Park and Others v. Moldova (no. 1)* (application no. 33482/06, judgment of 31 March 2009, §26.

⁶³⁸ United Nations Human Rights Committee, General comment No.11: Article 20, 1983.

⁶³⁹ United Nations Committee on the Elimination of Racial Discrimination, General Recommendation No.15: Organized violence based on ethnic origin, 1993.

⁶⁴⁰ *Erbakan v. Turkey* (application no.59405/00), judgment of 6 July 2006, §56

104. The Court in its case-law has made abundantly clear that hate speech is intolerable in a democratic society, whether it is directed against an ethnic or religious group, or homosexuals, or whether it concerns religious insult. Thus, in the case of *Pavel Ivanov v. Russia* the Court declared incompatible *ratione materiae* with the Convention an application where the applicant, owner and editor of a newspaper, complained about his conviction of public incitement to ethnic, racial and religious hatred through the use of mass-media. The applicant had authored and published a series of articles portraying the Jews as the source of evil in Russia, calling for their exclusion from social life. He accused an entire ethnic group of plotting a conspiracy against the Russian people and ascribed Fascist ideology to the Jewish leadership. Both in his publications, and in his oral submissions at the trial, he consistently denied the Jews the right to national dignity, claiming that they did not form a nation. The Court had no doubt as to the markedly anti-Semitic tenor of the applicant's views and agreed with the assessment made by the domestic courts that through his publications, he had sought to incite hatred towards the Jewish people. Such a general, vehement attack on one ethnic group is directed against the Convention's underlying values, notably tolerance, social peace and non-discrimination. Consequently, by reason of Article 17 of the Convention, the applicant could not benefit from the protection afforded by Article 10 of the Convention.⁶⁴¹ In the case of *Vejdeland and Others v. Sweden* the applicants complained about their conviction for distributing in an upper secondary school approximately 100 leaflets considered by the domestic courts to be offensive to homosexuals. The statements in the leaflets were, in particular, allegations that homosexuality was a "deviant sexual proclivity", had "a morally destructive effect on the substance of society" and was responsible for the development of HIV and AIDS. The Court found that these statements had constituted serious and prejudicial allegations, even if they had not been a direct call to hateful act, and concluded that there had been no violation of Article 10 of the Convention, as the interference with the applicants' exercise of their right to freedom of expression had reasonably been regarded by the Swedish authorities as necessary in a democratic society for the protection of the reputation and rights of others.⁶⁴²

105. Racist statements are likewise excluded from the protection of Article 10. For example, in the case of *Glimmerveen and Hagenbeek v. the Netherlands*, where the applicants complained about their conviction for possessing leaflets addressed to "White Dutch People", the former Commission found that the policy advocated by the applicants had been inspired by the "overall aim to remove all non-white people from the Netherlands' territory, in complete disregard of their nationality, time of residence, family ties, as well as social, economic, humanitarian or other considerations".⁶⁴³ The Commission considered that this policy was clearly containing elements of racial discrimination which is prohibited under the Convention and other international agreements. For these reasons the Commission declared the complaint inadmissible.

5. Freedom of expression and maintaining the authority and impartiality of the judiciary

106. The need to maintain the authority and impartiality of the judiciary is recognised as one of the legitimate aims in Article 10 §2 that could be the reason for restricting the freedom of expression. However, the general principles remain relevant, in particular the principle that 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 offend, shock or disturb the State or any sector of the population. As the Court noted in the case of *The Sunday Times v. the United Kingdom (no. 1)*, "there is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest"⁶⁴⁴.

⁶⁴¹ *Pavel Ivanov v. Russia* (application no.35222/04), decision on admissibility of 20 February 2007.

⁶⁴² *Vejdeland and Others v. Sweden* (application no.1813/07), judgment of 9 February 2012.

⁶⁴³ *Glimmerveen and Hagenbeek v. the Netherlands* (applications nos.8348/78 and 8406/78), Commission decision on the admissibility of 11 October 1979.

⁶⁴⁴ *The Sunday Times v. the United Kingdom (no.1)* (application no.6538/74), judgment of 26 April 1979, §65.

107. In principle, the defamation of a judge by the press takes place as part of a debate on the malfunction of the judicial system or in the context of doubting the independence or impartiality of judges. Such issues are always important for the public and must not be left outside the public debate, which is why the national courts must weigh the values and interests involved in case where judges or other judicial actors are criticised, and must balance the honour of the judge in question against the freedom of the press to report on matters of public interest, and decide the priority in a democratic society.⁶⁴⁵ For example, in the case of *De Haes and Gijssels v. Belgium* the Court examined a complaint from two journalists who in five articles had criticised in virulent terms the judges of a Court of Appeal who had decided, in a divorce case, that two children of the divorced family would live with their father, who was a well-known notary, and had previously been accused by his former wife and her parents of sexual abuse of the two children. Three judges and a prosecutor sued the two journalists and the newspaper, asking civil damages for defamatory statements. In the judgment the Court recognised that members of the judiciary must enjoy public trust and therefore they must be protected against destructive attacks lacking any factual basis. The Court also recognised that since they have a duty of discretion, judges cannot respond in public to various attacks, as, for instance, politicians are able to do. The Court then considered the articles and noted that many details were given, including experts opinions, proving that the journalists had carried out serious research before informing the public on this case. The articles were part of a large public debate on incest and on how the judiciary dealt with it. Giving due importance to the right of the public to be informed on an issue of public interest, the Court found that the national courts' decision was not "necessary in a democratic society", and that therefore Article 10 had been violated.⁶⁴⁶

108. Another situation where the freedom of expression becomes relevant in the administration of justice concerns statements that do not comply with the presumption of innocence guaranteed by Article 6 §2 of the Convention. Thus in the case of *Bédât v. Switzerland*, when deciding on the proportionality of the applicant's conviction for publishing in an article information covered by investigative secrecy in an ongoing criminal case, the Court also examined the impact on the disputed article on the criminal proceedings. In this regard the Court reiterated that it is legitimate for special protection to be afforded to the secrecy of a judicial investigation, in view of what is at stake in criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent. The Court further emphasised that the secrecy of investigations is geared to protecting, on the one hand, the interests of the criminal proceedings by anticipating risks of collusion and the danger of evidence being tampered with or destroyed and, on the other, the interests of the accused, notably from the angle of presumption of innocence, and more generally, his or her personal relations and interests.⁶⁴⁷ The Court concluded that in the present case the impugned article was set out in such a way as to paint a highly negative picture of the accused, which was one of the elements in the Court's conclusion that Article 10 of the Convention had not been violated.

109. As concerns lawyers, relating to the performance of their duties in the courtroom, in *Steur v. the Netherlands* the Court stated that "In their capacity as officers of the court, they [the lawyers] are subject to restrictions on their conduct (...) but they also benefit from exclusive rights and privileges (...) among them, usually, a certain latitude regarding arguments used in court".⁶⁴⁸ For remarks outside the courtroom the protection of Article 10 can still apply, so a lawyer should be able to draw the public's attention to potential shortcomings in the justice system.⁶⁴⁹ However the Court noted that lawyers do not fulfil the same role as journalists, and cannot be equated as having a task of informing the public. Lawyers, for their part, are protagonists in the justice system, directly involved in its functioning and defence of the a party.⁶⁵⁰ Moreover, the Court underlined "the importance, in a State governed by the rule of law and in a democratic society, of maintaining the authority of the judiciary", notably by ensuring "mutual respect between (...) judges and lawyers".⁶⁵¹

⁶⁴⁵ Monica Macovei, *Freedom of Expression*, Human rights handbook, No.2, Council of Europe, 2004, pages 138-139.

⁶⁴⁶ *De Haes and Gijssels v. Belgium* (application no.19983/92), judgment of 24 February 1997, §§38-49.

⁶⁴⁷ *Bédât v. Switzerland* (application no.56925/08), Grand Chamber judgment of 29 March 2016, §§68-69.

⁶⁴⁸ *Steur v. the Netherlands* (application no. 39657/98), judgment of 28 October 2003 §38.

⁶⁴⁹ *Morice v. France* (application no. 29369/10), Grand Chamber judgment of 23 April 2015, §167.

⁶⁵⁰ *Ibid.*, §148.

⁶⁵¹ *Ibid.*, §170.

6. Freedom of expression in political discourse

110. The Court has held that “free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system”,⁶⁵² and for this reason restrictions on political discussions call for stringent review.⁶⁵³ In the case of *Willem v. France* the Court stated that whilst an individual taking part in a public debate on a matter of general concern is required not to overstep certain limits as regards – in particular – respect for the rights of others, he or she is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements.⁶⁵⁴ Thus in the case of *Sürek v. Turkey (no.1)* the Court held with respect to political speech that “the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries”.⁶⁵⁵

7. Political statements that incite to violence or hatred

111. Considering the key role that political leaders and political parties can and ought to play in combating racism, racial discrimination, xenophobia and related intolerance, it certainly remains open to the competent State authorities to adopt measures in reaction to political statements that incite to violence or hatred⁶⁵⁶ For example, in the case of *Féret v. Belgium*⁶⁵⁷ the Court held that the conviction of the president of an extreme right-wing party for inciting the public to discrimination or racial hatred in leaflets distributed in electoral campaign did not constitute a violation of Article 10 of the Convention. The disputed leaflets presented non-European immigrant communities as criminally-minded and keen to exploit the benefits they derived from living in Belgium, and also sought to make fun of them, with the inevitable risk of arousing feelings of distrust, rejection or even hatred towards foreigners. The domestic court found that the leaflets contained passages that represented a clear and deliberate incitation to discrimination, segregation or hatred, and even violence, for reasons of race, colour or national or ethnic origin. In its judgment the Court held that political speech that stirred hatred based on religious, ethnic or cultural prejudices was a threat to social peace and political stability in democratic States and that it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. It was their duty to defend democracy and its principles because their ultimate aim was to govern.

⁶⁵² *Bowman v. the United Kingdom* (application no.24839/94), Grand Chamber judgment of 19 February 1998, §42.

⁶⁵³ Harris, O’Boyle, and Warbick, *Law of the European Convention on Human Rights*, Third edition, Oxford University Press 2014, p.630 with further references.

⁶⁵⁴ *Willem v. France* (application no.10883), judgment of 16 July 2009, §33.

⁶⁵⁵ *Sürek v. Turkey (no. 1)* (application no.26682/95), Grand Chamber judgment of 8 July 1999, §61.

⁶⁵⁶ *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies* §§38, 70; See also *Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, available at <http://www.un.org/WCAR/durban.pdf>

⁶⁵⁷ *Féret v. Belgium* (application no.15615/07), judgment of 16 July 2009.

V. Conclusions

112. The links between freedom of expression and other human rights are not rigid and the balance between the respective rights is likely to evolve according to national contexts and general circumstances, in particular by taking into account the notion of the public interest of the statements in question and of the context of peaceful inter-community relations. Be that as it may, in the context of increasingly diverse societies, emphasis is placed by international bodies on the importance of “living together”⁶⁵⁸ and striking a balance between the various interests involved. In this regard, intergovernmental committees and monitoring bodies emphasise the need to combat hate speech so that freedom of speech does not encourage violence against others. Given the ever-increasing importance of new technologies, it is necessary to continue discussions on the development of a secure and free Internet.

113. In order to complete the work assigned to the CDDH, it is necessary to consider the best ways of obtaining information from member States, with regard to the preparation of a Guide to good practice on how to reconcile freedom of expression with other rights and freedoms, in particular in culturally diverse societies. Also, it should be considered to what extent information available within other bodies of the Council of Europe could be useful in the work of the Group.

⁶⁵⁸ *S.A.S v. France* (application number 43835/11) Grand Chamber judgment of 1 July 2014; *Guidelines of the Committee of Ministers to member States on the protection and promotion of human rights in culturally diverse societies*, §7.

Freedom of expression, which is protected by Article 10 of the European Convention on Human Rights, is integral to open and inclusive societies. Indeed, it is the cornerstone of culturally diverse, pluralistic societies. It is not, however, an absolute right and it can be subject to limitations in accordance with Article 10(2) of the Convention. This Guide responds to the wish of the Committee of Ministers to have a practical tool which can be used by member States when reconciling the right to freedom of expression with other human rights, in particular: the right to respect for private life; right to freedom of thought, conscience and religion; freedom of assembly and association; and the prohibition of discrimination. In this regard, the good and promising practices presented in the Guide detail the approaches and methods States use, and serve as an example for the development and incorporation of further measures and improved co-operation.

This Guide has been prepared by the Steering Committee for Human Rights (CDDH) and it builds on the standards, principles and recommendations from international, regional and national legal bodies. Moreover, the Guide provides succinct summaries of the principles established in the relevant jurisprudence of the European Court of Human Rights. Whilst the Guide is mainly intended for policy makers and public authorities, it is a useful tool for a wider audience.

In this Guide, the reader will find: an in-depth exposition on the scope and content of the right to freedom of expression; the relation of specific actors to freedom of expression; its importance for political discourse; links between freedom of expression and other human rights. The Guide draws attention to contemporary issues that interact with freedom of expression, such as information disorder (“fake news”) and hate speech. It also mentions the development of artificial intelligence (AI) which is likely to have implications for the exercise of the freedom of expression, presenting both challenges and opportunities.

The Council of Europe is the continent’s leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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