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Prevention of hate speech crimes: digital versus real-life environment

BACHELOR THESIS

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I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

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Abstract

Extending use of social media and other digital networks, as well as technology development and impact of the pandemic have raised the problem of how to prevent hateful speech from occurring. Limitations on hate speech closely correlate with restriction of freedom of speech, therefore balance between the two should be met to ensure both fundamental democratic right on the freedom of speech, as well as to restrict limitations out on one's honour, dignity and safety. With the objective to answer whether mechanisms for combating the crimes of hate speech in the digital environment are as effective as they are in a real life situation, the author analyses the international (United Nations) and Council of Europe related bodies' views on defining what hate speech is and what are the implications to consider when dealing with hate speech online, then the analysis of current legal framework within the European Union (hereinafter also – the EU) and the Strasbourg mechanism follows in order to grasp the contextual framework and examine existing online and offline hate-speech related case-law. Subsequently, the research describes some of the upcoming regulations (both in Europe and on the national level) towards tackling hate speech and its use in the online environment. In conclusion, although the European Court of Human Rights take into consideration and strictly evaluate the characteristics of hate speech in an online environment, self-regulation of online intermediaries is the most effective solution to prevent hate speech under the current legal framework.

Keywords: Hate speech, Hate crime, Council of Europe, ECHR, Online social networks, Social media regulation.

Summary

In this Research, the author aims to answer the question whether existing mechanisms on hate speech regulation are as effective as in a real-life environment. This is achieved by providing an overview of what constitutes hate speech, how and whether the term has been defined, and analysing the existing legal framework, both in terms of European Union legislation and the Council of Europe mechanism, with a focus on assessing existing case law to provide a more contextual framework and draw conclusions. The author then examines some of the future/planned legal frameworks in both the member states of the European Union and the Council of Europe in order to gain objectives on how to solve regulatory gaps in existing legal regimes.

The digital environment possesses certain characteristics that set online hate speech incidents apart, such as anonymity of the users, automatic detection, borderless structure of the world-wide-web, etc. According to the European Court of Human Rights (hereinafter – the ECtHR, the Court) case law, the accountability of internet intermediaries for content created by their users extends to the degree that it covers hate speech. As there is no clear definition of what hate speech is, however, it reduces the legal certainty under which online intermediaries are accountable for the content, leaving it to the Court to decide such matter on a case-by-case basis.

As regards to the current legal framework of the European Union, the case law reflects that issues such as irregularities in the Court of Justice of European Union rulings regarding the exemption from liability provisions motivate online intermediaries to impose self-regulation and ethical standards, rather than implement minimum requirements of what the framework covers. Digital Services Act, the newly-introduced legislative proposal of the European Commission seem to tackle existing legal issues, such as social media company liability, effectiveness of reporting tools, and clarification of its users regarding the use of algorithms, to name a few. Although many types of intolerance are not addressed accordingly within the legal framework, such as sexual and gender identity, the European Court of Human Rights take into consideration the characteristics of what the online environment possesses and judgments are decided accordingly to the extent of consequences the digital environment imposes.

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INTRODUCTION

SIGNIFICANCE OF THE RESEARCH

In turbulent times, people tend to shift their behaviour and perspective. Unstable events result in initiation, intensification, or changes in consumption habits in an effort to handle the unknown, causing people to think, behave and communicate differently.¹ Since the beginning of Covid-19 pandemic in the first months of 2020, the relevance of how to deal with hate speech has increased. Statistical research shows that during the outbreak, social and mass media consumption increased, turning social networks into one of the main platforms where hate speech propagates, and new forms of stigmatisation arises.² Increase in use of social media correlates with spreading hate speech online, which can be possible to detect thanks to different tools, such as automatic detection and user reporting systems.³

In fact, the rise in hate speech during pandemics historically is also nothing of novelty. Xenophobia and racial prejudice have been associated with infectious disease outbreaks in Europe and in Asia in the 16th century, when affected states created a narrative blaming their neighbouring countries or enemies for the spread of disease.⁴ Unfortunately also today, scapegoating has been targeted to people of Asian origin - a Vietnamese woman was attacked in Poland, with attackers shouting racist slurs connecting the victim's origin to the virus, a person of Malaysian origin in Estonia was shouted at and blamed for bringing the virus into the country, to name a few.⁵ In January 2020, a Latvian blogger posted a video on Facebook about the alleged arrival of a person with COVID-19 in Riga, stating "generally those Chinese [censored] should be liquidated, the entire country should be [...]."⁶ He was arrested on the

¹ Mathur, Anil, George P. Moschis, and Euehun Lee. "Life events and brand preference changes." *Journal of Consumer Behaviour: An international research review* 3, no. 2 (2003): pp. 129-141.

² Cotik, Viviana, Natalia Debandi, Franco M. Luque, Paula Miguel, Agustín Moro, Juan Manuel Pérez, Pablo Serrati, Joaquín Zajac, and Demián Zayat. "A study of Hate Speech in Social Media during the COVID-19 outbreak." (2020).

³ Ullmann, Stefanie, and Marcus Tomalin. "Quarantining online hate speech: technical and ethical perspectives." *Ethics and Information Technology* 22, no. 1 (2020): pp. 69-80.

⁴ Ng, E., 'The Pandemic of Hate is Giving COVID-19 a Helping Hand. Editorial', *Am. J. Trop. Med. Hyg.*, 102(6), 2020, pp. 1158–1159.

⁵ European Network Against Racism (ENAR), *Impact of COVID-19 on racialised communities: Key findings*, 2020, available on: https://www.enar-eu.org/IMG/pdf/key_findings_of_the_map.pdf. Accessed 21 April, 2022.

⁶ *Coronavirus pandemic in the EU —Fundamental rights implications*, European Union Agency for Fundamental Rights, Bulletin 1, Publications Office of the European Union, Luxembourg, 2020, pp. 33. Available on: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf. Accessed 29 April, 2022.

same day and charged with incitement to ethnic hatred in accordance with Section 78(2) of the Criminal law of Latvia.⁷ Unfortunately, according to the available data, racial prejudice is not the only type of hate speech form that has risen in recent years. As reported by the Finnish Association of People with Physical Disabilities, even persons with disabilities were blamed in the context of the outbreak, for taking health care resources that are needed to tackle the pandemic.⁸ Considering the length and impact of Covid-19, registered cases are still analysed, not to mention the ones unreported.

RESEARCH AIM

In this research, the author first aims to provide an overview of what is hate speech, how and whether a definition has been provided to the term, to analyse existing legal framework both from the perspective of the European Union legislation, as well as the Council of Europe mechanism, mainly assessing existing case law to provide a more contextual framework and derive conclusions. Then, the author intends to look at some of the future/planned legal framework in both European Union and Council of Europe mechanisms and attempts to obtain recommendations on how to fill regulatory gaps in the existing legal regimes. The overall question the Research aims to provide answers to is whether mechanisms for combating the crimes of hate speech in the digital environment are as effective as they are in a real-life situation.

METHODOLOGY

The doctrinal and socio-legal methods will be used to create broader understanding in order to build more contextual analysis of the topic. It will incorporate non-legal issues into the context of the law, mainly for the ethical aspect of the research as both legal and ethical characteristics are important aspects of this topic. It will consider legal and ethical characteristics of hate speech according to existing case-law and field experts to better understand the need and purpose of development in legislation. As the progress of hate speech legislation is based on multiple factors, especially political, the author finds the use of the previously stated approaches as most suitable for this kind of research.

⁷ LETA. Apelācijas instance par aicinājumu «likvidēt ķīniešus» Endziņam piespriež sešu mēnešu cietumsodu, (in Latvian) available on: <https://www.lsm.lv/raksts/zinas/latvija/apelacijas-instance-par-aicinajumu-likvidet-kiniesus-endzinam-piespriez-sesu-menesu-cietumsodu.a422554/>. Accessed 14 February, 2022.

⁸ *Supra* note 6.

1.1. UNDERSTANDING WHAT IS HATE SPEECH

What is hate speech, and how does the term differ from expression of opinion, intimidation, psychological harassment? There are various definitions depending on different jurisdictions and no uniform international definition has been made. Organisations focusing on specific human rights violations (racial discrimination, offences related to religion, sexual orientation, political views, etc.) may view hate speech crimes exclusively to that particular selection on crimes, while bodies with broader jurisdiction are compelled to apply a more universal definition. As the term is not a definite crime but rather a criminological concept and an umbrella term that refers to a group of crimes as defined by national criminal laws, hate speech is not a single offense; rather, it can take multiple forms, ranging from property damage to murder.⁹

1.1.1 Definition within the United Nations

Although not expressly defined under the term “hate speech”, there is a consensus in International Human Rights law¹⁰ that the term is what Article 20(2) of the International Covenant on Civil and Political Rights encloses, which is:

« Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. »¹¹

In this definition, what sets expression of personal views or opinion (protected by the right to freedom of expression and information) apart from hate speech is the element of incitement, meaning the encouragement of provoking unlawful behaviour or to commit a crime.¹² Further explanation says that hate speech poses grave dangers for the cohesion of a democratic society, the protection of human rights and the rule of law.

⁹ Bárd, Petra. "Prerequisites for the effective fight against hate crimes." *Hungarian Journal of Legal Studies* 61, no. 3 (2021): pp. 255-268.

¹⁰ United Nations Human Rights Office of the High Commissioner, Hate speech and incitement to hatred or violence, available on: <https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Santiago/TobyMendel.pdf>. Accessed 6 May, 2022.

¹¹ International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹² Definition as found in Cambridge Dictionary: *offense of incitement or solicitation consists of urging or requesting another to commit a crime.* Available at: <https://dictionary.cambridge.org/dictionary/english/incitement>. Accessed: 2 May 2022.

However, there exists also a different set of rules, also called CERD (The Committee on the Elimination of Racial Discrimination) regime, operating under the Convention on the Elimination of All Forms of Racial Discrimination, overviewed by the Office of the United Nations High Commissioner for Human Rights (OHCHR). Under this Convention, Article 4 provides for protection measures only on discrimination of race, colour, and ethnic origin. Opposed to the ICCPR regime, not all provisions of Article 4 call for incitement, as provisions (1) and (2) of Article 4(a) prohibit the mere dissemination of ideas that are based on racial superiority and hatred, not requiring intent nor incitement, whether that be an act or just a state of mind.¹³ Additionally, the Convention only indirectly guarantees the right of freedom of expression as Article 4 requires that measures be taken in accordance with the principles set out in the Universal Declaration of Human Rights (UDHR).

1.1.2. Definition within the Council of Europe

As it can be seen from the examples of different international mechanisms, United Nations institutions provide tailored definitions for each of its structures, rather than a uniform portrayal of the subject-matter. For the purposes of this research, the author will primarily conduct the analysis via the European Convention of Human Rights mechanism, the reasoning of which is elaborated in more depth in the Third Part of the Research.

Although the European Convention on Human Rights (hereinafter - the ECHR, the Convention) does not offer an accepted definition for "hate speech", the case-law of European Court of Human Rights (hereinafter - the ECtHR, the Court) collected instead offers parameters by which prosecutors can decide if the case is entitled to the protection of freedom of speech or the right has been abused. Additionally, the Committee of Ministers of the Council of Europe in its Recommendation No R 97(20) of 30.10.1997 have described hate speech as:

“all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism 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”.¹⁴

¹³ International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 Mar. 1966) 660 U.N.T.S. 195, 5 I.L.M. 352 (1966), entered into force 4 Jan. 1969, Art 4.

¹⁴ Appendix to Recommendation No. R (97) 20, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680505d5b. Accessed 10 May, 2022.

As previously mentioned, there exists various bodies that focus on specific human rights violations. Such commissions are also a part of the Council of Europe, designed to observe hate speech offences solely in relation to that particular set of human rights breaches. One of such, the Council of Europe Commission against Racism and Intolerance (hereinafter - ECRI) have defined hate speech as:

« Form of expression which advocate, incite, promote or justify hatred, violence and discrimination against a person or group of persons for a variety of reasons. »¹⁵

ECRI also suggests that restrictions on hate speech closely correlate with constraints on freedom of speech, which is one of the key foundations in a democratic society.¹⁶ However, if hate speech is left unaddressed, it may limit other fundamental human rights, such as the right to liberty and security, and in cases when the form of hate speech includes death threats, even limitations on the right to life are at risk. In result, hate speech often involves in discriminatory behaviour and hate crimes. ECRI definition of hate speech covers not only the act of incitement, but also advocacy, promotion and justification of hatred, violence, and discrimination. Therefore, what is defined under the term of hate speech shall be viewed upon in correlation with the body responsible in each case. Interestingly, in the case *Vejdeland and Others v. Sweden*¹⁷, the European Court of Human Rights took advantage of the opportunity to close loopholes left by the Council of Ministers definition provided in relation to homophobic speech, arguing that homophobic speech should be prohibited in the same way as racist speech, emphasizing that "discrimination based on sexual orientation is as serious as discrimination based on race, origin, or colour."¹⁸

For the purposes of this Research, the author will mainly focus on the Council of Europe regime and the European geographical legal framework therein due to the rich European Court of Human Rights case-law, as well as the fact that combating hate speech is one of the primary causes of concern for its member states.¹⁹ As the Parliamentary Assembly, the Congress of Local and Regional Authorities, and the Committee of Ministers, which are the political bodies of the Council of Europe, have adopted charters and recommendations outlining human rights

¹⁵ Council of Europe, About the European Commission against Racism and Intolerance (ECRI), available on: <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/hate-speech-and-violence>. Accessed 10 May, 2022.

¹⁶ *Ibid.*

¹⁷ *Vejdeland and Others v. Sweden*, App. no. 1813/07 (ECtHR, 9 February 2012), para. 55.

¹⁸ *Vejdeland case*, *supra* note 17.

¹⁹ Council of Europe, Council of Europe's work on Hate Speech, available on: <https://www.coe.int/en/web/no-hate-campaign/coe-work-on-hate-speech>. Accessed 28 April, 2022.

standards and providing guidelines to member states on how to deal with hate speech and support victims, it is therefore evident that preventing hate speech crimes are of interest of the Strasbourg regime. Various field experts and lawyers have conducted studies that specifically focus on hate speech in an online environment in collaboration with the Council of Europe bodies, such as the “Starting points for combating hate speech online”²⁰, and the “The Council of Europe against online hate speech: Conundrums and challenges”²¹, notwithstanding other types of work, such as surveys²², campaigns²³ and expert groups activity linked to preventing hate speech online.²⁴

1.2. DIFFERENCES BETWEEN ONLINE AND OFFLINE ENVIRONMENT

1.2.1. Scope of online environment

Today, the digital content that people consume daily, its volume and importance have long been nothing of novelty. Social media and online communication platforms have established its significance, the data reflecting that there are more than 4.62 billion social media users around the world as of January 2022, equating to 58.4 percent of the total global population.²⁵ In fact, that number is still largely growing, as a result of the increase in accessibility in developing countries, as social media user numbers have seen strong expansion over the past 12 months too, with 424 million new users joining social media since January 2022. In Latvia, it is reported that 1.38 out of 1.87 million (approximately 74%) are active social media users.²⁶

²⁰ Council of Europe, STARTING POINTS FOR COMBATING HATE SPEECH ONLINE, available on: <https://rm.coe.int/starting-points-for-combating-hate-speech-online/16809c85ea>. Accessed 30 March, 2022.

²¹ Tarlach McGonagle, “The Council of Europe against online hate speech: Conundrums and challenges”, *Institute for Information Law (IViR) Faculty of Law* available on: https://www.ivir.nl/publicaties/download/Expert_paper_hate_speech.pdf. Accessed 27 April, 2022.

²² Robin Wilson, Indignity, indifference, indignation: tackling hate speech online, available on: <https://rm.coe.int/16806efc98>. Accessed 12 May, 2022.

²³ Council of Europe, No Hate Speech Movement, available on: <https://www.coe.int/en/web/no-hate-campaign/no-hate-speech-movement>. Accessed 12 May, 2022.

²⁴ Council of Europe, ADI/MSI-DIS Committee of Experts on Combating Hate Speech, Available here: <https://www.coe.int/en/web/committee-on-combating-hate-speech/home>. Accessed 17 April, 2022.

²⁵ DataReportal, GLOBAL SOCIAL MEDIA STATS Available at: <https://datareportal.com/social-media-users>. Accessed 12 May, 2022.

²⁶ Statista, Number of monthly active mobile social media users in Europe as of January 2021, by country, available here: <https://www.statista.com/statistics/299496/active-mobile-social-media-users-in-european-countries/>. Accessed 4 May, 2022.

Although it is difficult to obtain accurate estimates, there is a consensus that cyberhate is increasing both in extent, and in the variety of strategies used.²⁷

However, various factors create regulations of such type of harassment difficult to impossible to control. For example, the sheer scale of the amount of online hate, the pseudonymity afforded by the internet, or jurisdictional issues when the perpetrators of hate and their victims do not live in the same country.²⁸ Additionally, the forever-conflicting question of appropriate limitations on the freedom of speech leave online abusers not subjected to any form of consequences for their hurtful actions. What are the implications that make the online environment different when it comes to tackling and preventing hate speech crimes? This Subchapter aims to distinguish these dissimilarities in order to determine what are the characteristics necessary to take into account when discussing how online hate speech crimes can be resolved more effectively.

1.2.2. Distinct characteristics of online environment

Role of social media companies

Opposed to the offline environment, law enforcement agencies have proven to be ineffective in combating hate speech crimes, as social media platforms have technical control over their networks.²⁹ In fact, since the beginnings of the widespread use of the world-wide-web, the legal framework has been built on the principles of proportionality and limited state interference. Section 10 of the Preamble of the 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 (hereinafter - Directive on electronic commerce) states that “the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal

²⁷ *Supra* note 20, p. 28.

²⁸ Bakalis, Chara, and Julia Hornle. "The Role of Social Media Companies in the Regulation of Online Hate Speech." In *Studies in Law, Politics, and Society*. Emerald Publishing Limited, 2021.

²⁹ *Ibid.*

market.”³⁰, therefore not all Member state countries would address hate speech the same way.³¹ Moreover, Article 14 of the Directive on electronic commerce base immunity for hosting providers on a knowledge standard, meaning that the service provider is not liable for the information stored at the request of a recipient of the service provided the provider is unaware the content of such information is illegal.³²

Role of other online intermediaries

In contrast to traditional media, blogs and other online community-driven media are characterised by a fundamental convergence of the roles of content producers and consumers because every user has the opportunity to both consume and create content.³³ Apart from social media platforms like Facebook, Youtube etc., in which each user creates his/her own profile, many online news outlets provide for the possibility for its users to publish comments via their website, including anonymously, thus creating content under the news articles published. While democratic participation and active citizenship through online media is encouraged, such a mechanism raises questions of liability.³⁴ One of the landmark cases on such online intermediary liability of hateful content in ECtHR is the case *Delfi AS v. Estonia*³⁵, in which the court ruled that online news portal Delfi was, in fact, liable for defamation as the publisher of the comments made by its users as it has the possibility to edit and remove such defamatory content. Additionally, in the analysis of Article 10, the Grand Chamber of ECtHR determined that the threatening or offensive comments posted on Delfi were not entitled to protection under the ECHR.

³⁰ The 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, *OJ L 178, 17.07.2000*, p. 1–16. Available on: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000L0031>. Accessed 14 March, 2022.

³¹ Chetty, Naganna, and Sreejith Alathur. "Hate speech review in the context of online social networks." *Aggression and violent behavior* 40 (2018): pp. 108-118.

³² *Supra* note 30.

³³ Paulussen, Steve, David Domingo, Ari Heinonen, Jane Singer, Thorsten Quandt, and Marina Vujnovic. "Citizen participation in online news media. An overview of current developments in four European countries and the United States." *Journalismus online-Partizipation oder Profession?* (2008): pp. 263-283.

³⁴ *Ibid.*

³⁵ *Delfi v. Estonia*, no. 64569/09, ECHR 2013-I.

Accessibility of Open-Source Information

A group of Oxford University Press authors present a case in the introductory chapter of their book, published in 2020, which reflects the overall importance of open source information, meaning the collection and analysis of data published online by Internet users (user-generated content) that can aid in detection of crimes and human rights breach investigations.³⁶ The example provided describes how a video published on YouTube helped cover the killing of multiple women and children tied to the government of Cameroon by analysing clues in the background of the video.³⁷ Indications such as military uniforms, flora and fauna, topography, accents and visible objects helped Amnesty International to pinpoint the place, date and time of filming of the video, and to further advance the investigation.³⁸ Although this case is a matter of Article 2 of the Convention, information found online can serve as a tool to be compared to any human rights violation not only as evidence but a tool to authenticate and verify data found online. Despite the fact that digital evidence (audio and video files, photographs, etc.) have been around for long, such data can discover crimes that otherwise would go undetected without explicit authentication. Additionally, the problems encountered with “digital evidence” include issues of data acquisition, preservation and aggregation, as well as data privacy legislation and boundaries of different jurisdictions.³⁹ Insufficient evidence can serve as one of the grounds for dismissal of a case in ECtHR, therefore procedural, data privacy legislation and issues of jurisdiction should not serve as reasons why a case cannot be determined.⁴⁰ Due to insufficient procedural steps taken by local authorities to investigate crimes of hate, the suspects may be treated with a less severe judgement and not receive the justice deserved. Therefore, it can be said that finding and using open-source information available online and piecing together corroborating information to challenge existing narratives are crucial to human rights work today.

³⁶ Sam Dubberley, Alexa Koenig and Daragh Murray, *Digital Witness* (Oxford: Oxford University Press, 2020), pp. 3-5.

³⁷ *Ibid*, p. 4.

³⁸ Amnesty International, Digitally dissecting atrocities – Amnesty International’s open source investigations, available on: <https://www.amnesty.org/en/latest/news/2018/09/digitally-dissecting-atrocities-amnesty-internationals-open-source-investigations/>. Accessed 11 May, 2022.

³⁹ Hegarty, Robert, David J. Lamb, and Andrew Attwood. "Digital Evidence Challenges in the Internet of Things." In *INC*, pp. 163-172. 2014.

⁴⁰ In the case *Šečić v. Croatia*, the investigating authorities had knowledge on the defendants' Skinhead identities, and the attackers of Mr. Šečić also screamed racist obscenities. Despite this, the state authorities did not investigate if the crime had a racial motive. According to the ruling, treating prejudiced offences as ordinary base crimes has negative human rights consequences and amounts to a violation of the European Convention on Human Rights.

Automatic detection of hateful content

Technological development and use of tools containing machine learning algorithms make it possible to implement automatic detection of hate speech in social media data to decrease the burden of manual moderation of online content. Approaches such as the use of simple templates, keywords, and combinations of feature extraction and classical machine learning algorithms have been discussed by researchers in order to improve detection of hate speech online. Although such mechanisms exist, it is not without challenges to implement their use in practice. For example, for keyword-based approaches, users have learned to avoid automatic content moderation to replace letters with similar looking numbers, for example “E”s with 3s, or “l”s with 1s, and so on.⁴¹ Furthermore, many expressions are not explicitly offensive, but they might be when used in the wrong context. Facebook claims that their AI has proactively detected 94.7 percent of hate speech in 2020, up from 80.5 percent a year ago and up from just 24 percent in 2017.⁴² However, Facebook also admits that not all hate speech is straightforward, as combination of text and images, use of sarcasm and slang, as well as cultural differences make it challenging to effectively detect hate speech in their platform.⁴³

1.2.3. Extent of Damage

One of the characteristics upon which a case can be analysed is the extent of the damage, meaning whether the incitement to hatred has occurred in public, what is the scope of audience that a message reaches, whether it is accessible or restricted. A study prepared by the Office of the High Commissioner for Human Rights emphasises that to qualify as incitement under Article 20 of ICCPR, the communication has to be directed at a non-specific audience (general public) or to a number of individuals in a public space.⁴⁴ It also describes that, in the light of modern environment and means of communication, the Internet shall also be

⁴¹ Kovács, György, Pedro Alonso, and Rajkumar Saini. "Challenges of hate speech detection in social media." *SN Computer Science* 2, no. 2 (2021): pp. 1-15.

⁴² Mike Schroepfer, How AI is getting better at detecting hate speech, available on: <https://ai.facebook.com/blog/how-ai-is-getting-better-at-detecting-hate-speech/>. Accessed 12 May, 2022.

⁴³ *Ibid.*

⁴⁴ Office of the High Commissioner for Human Rights, Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred Work in Progress, available on: https://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/CRP7Callamard.pdf. Accessed 12 May, 2022.

considered as a public space due to its characteristics on accessibility and extent of which a message can be delivered.

In the case *Delfi AS v Estonia*, the ECtHR argues that “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.”⁴⁵ In *Shtekel v. Ukraine*⁴⁶, when comparing the extent of Internet and printed press, the Court found that:

*“The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press.”*⁴⁷

It should be pointed out however, that online news intermediaries are responsible only to the extent that the comments constitute clearly unlawful speech. In *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*⁴⁸, the Court ruled that, although the comments posted on the Internet subsidiary were offensive and vulgar, they did not correspond to hate speech as the subject-matter in the Delfi case.⁴⁹ Therefore, the ECtHR in this case found that a violation of Article 10 has been made by the news portal “Index.hu” and self-regulatory body “Magyar Tartalomszolgáltatók Egyesülete”, as the Court did not find comments made by their users to constitute hate speech.

Therefore, both United Nations and Council of Europe organs take the general approach of claiming hate speech is more harmful in an online environment due to the characteristics of the world-wide-web. Notwithstanding, each case may differ as online hate speech is not always available to the general public. Harmful comments can be also made using direct means of communication, such as e-mails and private messages, in which the extent is limited. In cases when hateful content is published online, the Court also takes into account the degree of

⁴⁵ *Delfi case*, *supra* note 35.

⁴⁶ *Shtekel v. Ukraine*, no. 33014/05, ECHR 2011-V.

⁴⁷ *Ibid*, para. 63.

⁴⁸ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* [GC], no. 22947/13, ECHR 2016-V.

⁴⁹ *Index.hu Zrt case*, *supra* note 48.

defamation, which is not identical to hate speech and is subject to provisions under Article 8 of the ECHR.⁵⁰

1.2.4. Issue of Anonymity

Online hate speech crimes seem to offer a level of anonymity - starting with simple solutions like the use of abbreviations and coded usernames, up until complex technological networks and threats of cyber security. There are a lot of both psychological and technological aspects that may contribute to engagement of hate speech online, for one that because the online hate speaker is not physically present, he or she does not have to worry about an immediate physical backlash, or promise of anonymity may incline a person to engage in acts of hate speech or to be more inclined to do so on a regular basis if they can use anonymous online identities which give no clue as to their true identities.⁵¹

In the ECHR case *K.U. v. Finland*⁵², a twelve-year-old child was the victim of an anonymous person who used an Internet dating site to post a sexual advertisement about him. His father had been unable to pursue legal action because Finnish law at the time prohibited police or courts from requiring Internet service providers to identify the individual who had posted the advertisement.⁵³ The Court ruled that national authorities must consequently provide for appropriate and effective investigations and prosecutions to deal with such offences, even if this includes interfering with individuals' private lives.⁵⁴ In *Perrin v. the United Kingdom*, ECtHR ruled that “*the fact that there may be other measures available to protect against the harm does not render it disproportionate for a Government to resort to criminal prosecution, particularly when those other measures have not been shown to be more effective.*”⁵⁵

⁵⁰ Council of Europe, Liability and jurisdictional issues in online defamation cases, available on: <https://rm.coe.int/liability-and-jurisdictional-issues-in-online-defamation-cases-en/168097d9c3>. Accessed 26 April, 2022.

⁵¹ Brown, Alexander. "What is so special about online (as compared to offline) hate speech?." *Ethnicities* 18, no. 3 (2018): pp. 297-326.

⁵² *K.U. v. Finland* [GC], no. 2872/02, ECHR 2009-III.

⁵³ Council of Europe, Internet: case-law of the European Court of Human Rights, available on: https://www.echr.coe.int/documents/research_report_internet_eng.pdf. Accessed 8 May, 2022.

⁵⁴ *K.I.* case, *supra* note 52, para. 46.

⁵⁵ *Perrin v. The United Kingdom* (dec.), no. 5446/03, ECHR 2005-V.

1.2.5. Interim conclusions

In order to improve hate speech legislation, the fact that there is no universally accepted definition of hate speech contributes to the problem of successful prevention of hate speech crimes. Although under the Council of Europe regime, the definition seems universal and the Council of Europe website claims that: “*thanks to the Committee of Ministers, the Council of Europe is the first and only international intergovernmental organisation to have adopted an official definition of hate speech*”⁵⁶, the Appendix to Recommendation No. R (97) 20 states that the principles set out apply to hate speech particularly disseminated through the media. Due to this clarification made by the Committee of Ministers, the definition, although it provides for a certain viewpoint, cannot be viewed as fully universal. If a certain case arises in which the subject-matter is not explicitly linked to the dissemination through media (as in the case of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, when one of the claimants could not be defined as a media portal under the national law) and one wishes to challenge the Committee of Ministers definition posed, it may be done so. Additionally, due to the non-binding nature of the Recommendation, implementation in Council of Europe member countries is not a given.

Under the case-law of ECtHR, it can be concluded that as regards to online intermediaries, the liability of content made by their users extends so far as it constitutes hate speech. However, in cases when there is no clear definition of what hate speech is, it limits the legal certainty under which online intermediaries are liable for the content, thus leaving for the Court to determine this on a case-by-case basis. In order to prevent situations under which the claimant is required to bring action before the ECtHR, the Council of Europe responsible bodies shall establish common guidelines for member states' online intermediaries on how to avoid such disputes. Whether it is problematic or not that the term of hate speech does not have a precise meaning and no specific test/criteria for it is open for discussion. On one hand, precise definition aids in applying the term in practice as it is clearly defined and contains specific provisions for a case to qualify under the definition. On the other hand, however, the clear definition may result in narrowing its use and limiting interpretation in a case-by-case approach.

⁵⁶ *Supra* note 15.

2. EXISTING LEGAL FRAMEWORK IN THE EU

2.1. Directive on electronic commerce (Directive 2000/31/EC)

The Directive 2000/31/EC⁵⁷ (hereinafter in this Subchapter also - the Directive on electronic commerce; the Directive) came into force on 17 July 2000 and the implementation date for the Member states was until 17 January 2002. As of this day, the Directive on electronic commerce serves as the baseline legislative framework on electronic commerce in the EU.⁵⁸ As mentioned in Chapter 1.2.2. of Part 1 of the Research, Directive on electronic commerce has underlined the general framework of “online information society service providers”. Introducing the principles therein, Directive on electronic commerce shaped EU legal framework, at the time of the drafting the main issue being lack of legal certainty for online services.⁵⁹ In order to promote European competitiveness in the global market and establish electronic commerce within the member states, the European Union intended to achieve a high level of Community harmonisation, promote the digital economy for small and medium-sized enterprises and ensure higher consumer confidence and legal certainty within the digital market.⁶⁰

2.1.1. Scope

Article 2(a) of the Directive on electronic commerce defines an information society service as "any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service". The Directive applies to a range of online activities, including the sale of goods on e-commerce platforms such as Amazon and AliExpress, the provision of online commercial information for monetary gain, the provision of online search engine tools (Google, Bing), the transmission or hosting of information

⁵⁷ *Supra* note 30.

⁵⁸ European Parliament, Liability of online platforms, available on: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU\(2021\)656318_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU(2021)656318_EN.pdf). Accessed 12 March, 2022.

⁵⁹ Crabit, Emmanuel (2000). "La directive sur le commerce électronique : le projet "Méditerranée"" (in French). *Revue du Droit de l'Union Européenne*: pp. 753–757.

⁶⁰ *Ibid.*

through internet intermediaries, and many other services involving electronic communications through a provider.⁶¹

2.1.2. Provisions on Liability

Article 14 of the Directive on electronic commerce base immunity for hosting providers on a knowledge standard, meaning that the service provider is not liable for the information stored at the request of a recipient of the service provided the provider is unaware the content of such information is illegal.⁶² Additionally, Article 15(1) of the Directive does not impose an obligation to Member states on providers to monitor the information which they transmit or store in accordance with Article 12 ("Mere conduit"), Article 13 ("Caching") and Article 14 (Hosting), nor a general obligation actively to seek facts or circumstances indicating illegal activity.⁶³ In practice, the liability exemption regime revealed multiple limitations and shortcomings relating to the divergences of national implementation of the Directive, numerous differences resulting from European and national case law adopted by the courts, a non-harmonized notice and takedown system, and the uncertainty of the extent of such exemptions.⁶⁴

In the CJEU case *L'Oréal v. eBay*, in which, following significant trademark infringement on eBay, L'Oréal filed infringement lawsuits against the e-commerce platform, its European companies, and individual defendants who had sold counterfeit items with L'Oréal brand names, the Court ruled that such exemption from liability only applies when the information society service merely acts as an intermediary and not when it "*plays an active role of such a kind as to give it knowledge of, or control over, those data [entered by recipients]*"⁶⁵, therefore not granting the exemption from liability offered in Article 14(1) of the Directive. Additionally, the judgement also introduces a new term, "diligent economic operator," which strongly implies that active online economic operators will need to take additional due diligence measures to protect their commercial platforms from content uploaded

⁶¹ Julià-Barceló, Rosa, and Kamiel J. Koelman. "Intermediary liability: intermediary liability in the e-commerce directive: so far so good, but it's not enough." *Computer Law & Security Review* 16, no. 4 (2000): pp. 231-239.

⁶² *Supra* note 30.

⁶³ Hoffmann, Thomas, and Sander Sagar. "Intermediary Liability in the EU Digital Common Market—from the E-Commerce Directive to the Digital Services Act." *IDP: revista de Internet, derecho y política= revista d'Internet, dret i política* 34 (2021): p. 3.

⁶⁴ *Ibid.*

⁶⁵ Judgment of the Court (Grand Chamber) of 12 July 2011, *L'Oréal SA and Others v. eBay International AG and Others*, C-324/09, EU:C:2011:474.

by their users.⁶⁶ In another case brought before the CJEU, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*, the Court found that the Article 14 and 15(1) does not prohibit a Member State from ordering a hosting provider to remove or block content that has been declared unlawful, or content that is identical or equivalent to such unlawful information, because such an order would fall within the scope of monitoring in a "specific case" and thus would not violate the Directive's general monitoring prohibition.⁶⁷

2.1.3. Conclusions

As a result of these disparities in court rulings, it is believed that internet service providers would rather actively protect their own rights through private agreements, out-of-court settlements, and self-censorship by removing flagged content on request, rather than protecting the right to freedom of expression and the circulation of online content submitted by their customers, as it is a significantly more expensive alternative to maintain. Such a proactive approach is also in line with modern corporate social responsibility (CSR) standards, in which business' social responsibility has long been much more than about making profit. Many in the business community have challenged the traditional capitalistic approach of business⁶⁸ (*see* Friedman's "Capitalism and Freedom" essay, in which the Nobel prize awarded economist states that "*there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud*")⁶⁹. Instead, the relationship between the corporate world and society has increased the social and ethical standards to a more socially responsible manner, driven both by consumer demand and the corporations themselves as implementing CSR strategies have proven to benefit the businesses and become regular corporate practice.⁷⁰

Additionally, the Directive on electronic commerce does not seem to provide a clear and reliable framework to either parties (providers of information society services and it's users)

⁶⁶ Judgement of *L'Oreal*, C-324/09, EU:C:2011:474, para. 120.

⁶⁷ Judgement of *Glawischnig-Piesczek*, C-18/18, EU:C:2019:821, para. 44.

⁶⁸ McBarnet, Doreen. "Corporate social responsibility beyond law, through law, for law." *U. of Edinburgh School of Law Working Paper* 2009/03 (2009).

⁶⁹ Friedman, Milton. *Capitalism and freedom*. University of Chicago press, 2020.

⁷⁰ Denise Wallace, *Human Rights and Business: A Policy-Oriented Perspective* (Boston: Brill Nijhoff, 2014), pp. 90-95.

due to the fragmentation of both the CJEU and national case-law decisions in deciding the limits of the liability exemption regime and its transposition. Since the Directive's introduction in 2000, there have been numerous flaws in the digital legal framework and the intermediary liability regime's ability to properly defend the aims and protection of fundamental freedoms established in the Directive.⁷¹

2.2. Council Framework Decision 2008/913 on combatting certain forms of expressions of racism and xenophobia by means of criminal law

On 28 November 2008, the Council of the European Union approved the Council Framework Decision 2008/913 (hereinafter - the Framework Decision on Combating Racism and Xenophobia or the Decision).⁷² The purpose of which was to introduce a framework inciting to criminalise hateful behaviour that is manifesting racism and xenophobia in national legal frameworks of the Member States. The Commission recognised the need for such a framework after thorough research, which reflected that a large majority of such crimes were left unreported due to fears of retaliation or the disbelief in the effectiveness of the judicial system.⁷³

2.2.1. Scope

As a general rule, crimes covered by the Decision must be accompanied by an *incitement* [emphasis added] of violence or hatred towards the targeted group or individual as stipulated by Paragraph 1 (a) of Article 1, including those arising from hate speech.⁷⁴ For particular crimes specified within the Statute of the International Criminal Court (Genocide, Crimes against

⁷¹ Lillà Montagnani, Maria, and Alina Yordanova Trapova. "Safe harbours in deep waters: a new emerging liability regime for Internet intermediaries in the Digital Single Market." *International Journal of Law and Information Technology* 26, no. 4 (2018): pp. 294-310.

⁷² Council Framework Decision 2008/913 on combatting certain forms of expressions of racism and xenophobia by means of criminal law, *OJ L* 328, 6.12.2008, pp. 55–58. Available on: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32008F0913>. Accessed 12 April, 2022.

⁷³ Garman, John J. "The European Union combats racism and xenophobia by forbidding expression: an analysis of the framework decision." *U. Tol. L. Rev.* 39 (2007): p. 843.

⁷⁴ "Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable: (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin".

humanity, War crimes, Crime of aggression)⁷⁵ and the Charter of the International Military Tribunal (Nazi war crimes of World War II)⁷⁶ must involve an attempt of incitement for violence or hatred against the relevant group or individual: “(...) *when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group*”.⁷⁷ The formulation “likely to incite” therefore does not expressly require for an element of incitement to be present for specified crimes, but points that there should be at least a degree of probability that such action may incite to violence or hatred. Therefore, as regards to what applies to hate speech under the Decision, the element of incitement shall be covered upon implementation insofar as it does not constitute further hate crimes under any of the exemptions under Paragraph 1 (c) and (d) of Article 1. Additionally, to the element of incitement, Article 1 also requires for the punishable conduct to be made public, which is especially paramount when conduct has taken place online.

Due to inconsistencies in countries' attitudes to the nature of hate speech, the boundaries of free speech, and how hate speech should be addressed, uniform execution of this Framework Decision throughout EU Member States is difficult, if not impossible.⁷⁸ For example, various national frameworks, including Article 74.1 of the Criminal Law of Latvia broadens the requirement presented in Paragraph 1 (c) and (d) of Article 1. When the norm is implemented in practice, law enforcement must analyse the motivation of the person who made the relevant statements so as to avoid a situation, for instance, in which criminal sanctions are applied in relation to academic debates about the interpretation of historical events that are a sensitive matter for various groups in society, which differ from the position stated under the Decision.⁷⁹

⁷⁵ Rome Statute of the International Criminal Court. Available here: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>. Accessed 15 April, 2022.

⁷⁶ Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945. Available on: https://www.un.org/en/genocideprevention/documents/atrocitycrimes/Doc.2_Charter%20of%20IMT%201945.pdf. Accessed 15 April, 2022.

⁷⁷ c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

⁷⁸ Alkiviadou, Natalie. "The legal regulation of hate speech: the international and European frameworks." *Politička misao* 55, no. 04 (2018): pp. 203-229.

⁷⁹ Artūrs Kučš. "The European Union's Framework Decision on the Use of Criminal Law to Combat Specific Types and Manifestations of Racism and Xenophobia and the Implementation of the Decision in the Latvian Law", *Juridiskā zinātne / Law*, No. 5, (2013): pp. 173-189. Available on:

Furthermore, given that the Decision calls for means of criminal law, the threshold necessary for speech to be considered hate speech in the context of this document is definitely higher due to the characteristics of criminal law.

2.2.2. Applicability of online environment

However, despite its general importance, the Decision does not deal specifically with hate speech online as there is no provision referencing online platforms, thereby leaving a serious regulatory gap. Indeed, the year 2014 Implementation report published by the Commission⁸⁰ reflected that due to its special character, including the difficulty of identifying the authors of illegal online content and removing such content, hate speech on the internet creates special demands on law enforcement and judicial authorities in terms of expertise, resources, and the need for cross-border cooperation. The Guidance Note on the Practical Application of the Decision also points out various drawbacks when applying the framework for the online environment, stipulating that gathering of evidence and the issue of anonymity are one of the main obstacles when dealing with online hate speech.⁸¹ Additionally, Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online advocates for Member states to seek further cooperation between them and online platforms.

2.2.3. Conclusions

Therefore, it can be concluded that the Decision is not a sufficient tool to effectively tackle hate speech issues online, and further legal framework should be introduced to fill regulatory gaps of the existing framework. Furthermore, as with all of the other legal means discussed in this Research, the speech must be racist or xenophobic, with the EU ignoring other key types of hate speech forms, such as homophobia and transphobia, narrowing down the

https://www.journaloftheuniversityoflatvialaw.lv/fileadmin/user_upload/lu_portal/projekti/journaloftheuniversityoflatvialaw/No5/7.Arturs_Kucs.pdf. Accessed 14 April, 2022.

⁸⁰ See European Commission (2014). Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law. COM(2014) 27 final Brussels, European Commission. , p. 9.

⁸¹ European Commission, *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 here: <https://equineteurope.org/guidance-note-on-the-practical-application-of-council-framework-decision-on/>. Accessed 5 May, 2022.

scope of the Decision. Given the nature of the Decision handling criminal law provisions, the threshold of which is higher than civil law means, it can be disputed whether the EU has gone too far in threshold requirements introduced by the Framework Decision on Combating Racism and Xenophobia.

2.3. Directive 2010/13/EU (Audiovisual Media Services Directive)

The EU's Audiovisual Media Services Directive governs EU-wide coordination of national legislation on all audiovisual media - traditional TV broadcasts and on-demand services.⁸² Although the Directive 2010/13/EU is in force⁸³, it shall be set down that the current consolidated version of the Directive has not entered into force yet, therefore it is not a binding document as of the time when research has been conducted.⁸⁴

The current Directive regulates broadcast and on demand services, applying to programmes that are TV-like and for which providers have editorial responsibility. The Proposal stipulates that the Audiovisual Media Services Directive does not apply to content hosted by online video-sharing platforms and intermediaries.⁸⁵ These platforms and intermediaries, which play an increasingly important role, are regulated primarily by the Directive on electronic commerce, described in detail in Chapter 2.1.1. Since the consolidated version has not entered into force yet, and online media services are outside of the scope, the Directive 2010/13/EU will not be analysed in more detail.

⁸² *Supra* note 29.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ European Commission, REFIT Evaluation and Impact Assessment of the EU Audiovisual Media Services Directive 2010/13/EU (AVMSD), available on: https://ec.europa.eu/smart-regulation/roadmaps/docs/2015_cnect_006_cwp_review_avmsd_iaa_en.pdf. Accessed 4 May, 2022.

3. EXISTING LEGAL FRAMEWORK: COUNCIL OF EUROPE

Opposed to provision of Article 20(2) of ICCPR, ECtHR is not assessing whether statements qualify as “incitement” as a clear definition of hate speech is not provided. However, the ECtHR in its case-law has referred to the term without explicit formulation of what qualifies as hate speech.⁸⁶ The Court has defined different categories of hate speech (*Lilliendahl v. Iceland*)⁸⁷ distributing crimes on hate speech into two categories:

- 1) setting restrictions on protection of freedom of speech, provided for by Article 10, paragraph 2, of the Convention;
- 2) exclusion from the protection of the Convention, provided for by Article 17 (prohibition of abuse of rights), in cases when the amount and content of hate speech invalidates the fundamental values of the Convention.

3.1. Article 10

The first category is composed of forms of hate speech which the Court has not considered to fall entirely outside the protection of Article 10, but which it has considered permissible for the Contracting States to restrict (*see: Delfi v. Estonia, Levickas v. Lithuania*). To assess the matter via the test of proportionality, the Court often applies reference to the early cornerstone judgement of ECtHR *Handyside v. UK*⁸⁸, where it declared 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*".⁸⁹ This category is explicitly found to be applicable to internet news portals which, for commercial and professional purposes, provide a platform for user-generated comments (*Delfi v. Estonia*). The Court has also emphasised in several of its judgments that Article 10 of the Convention does not apply only to certain types of information, ideas or processes of expression, but also covers forms of freedom of

⁸⁶ *Dağtekin v. Turkey*, no. 36215/97, judgement of 13 January 2005; *Gümiş and Others v. Turkey* no. 40303/98, judgement of 15 March 2005; *Han v. Turkey* 50997/99 judgement of 15 September 2005; *Koç and Tambaş v. Turkey*, no. 50934/99 judgement of 21 March 2006.

⁸⁷ *Lilliendahl v. Iceland* (dec.), no. 64886/19, ECHR 2020-II.

⁸⁸ *Handyside v. the UK* judgment of 7 December 1976 no. 5493/72, ECHR 1976-IV.

⁸⁹ *Handyside* case, *supra* note 88.

expression such as artistic statements (*Müller and Others v. Switzerland*)⁹⁰, plays (*Ulusoy and Others v. Turkey*)⁹¹, the publication of photographs (*Axel Springer AG v. Germany*)⁹², as well as photomontage and commercial information (*Société de conception de presse et d'édition and Ponson v. France*)⁹³.

3.1.1. The Three-Step Analysis

Although the ECHR does not offer an accepted definition for "hate speech", the case-law collected instead offers parameters by which prosecutors can decide if the case is entitled to the protection of freedom of speech or the right has been abused. To determine whether there has been a legal restriction on freedom of expression, ECtHR in its practice has developed a mechanism of evaluation by applying the set of relevant questions, also known as the test of proportionality. The significance of the *Handyside* case lies within the fact that the "margin" analysis introduced in this judgement by the Court has been extended to not only the assessment of Article 10 but to the judicial review of most Articles of the ECHR, with the exception of those that are non-derogable, such as the right to life.⁹⁴ As the method is applied on case-by-case analysis, the research will not go through admissibility criteria of a specific claim but rather consider what are the prerequisites of applicability in general through different cases brought before the ECtHR.

Accordance with the law

The Court first starts the analysis by determining whether the limitation of Article 10 has been determined in accordance with the law. The analysis can be narrowed down to the following questions: whether the law has (i) been issued in accordance with the procedures provided for in regulatory enactments; (ii) promulgated and publicly available in accordance with regulatory requirements; (iii) is sufficiently clear to enable the addressee to understand his rights and obligations under the law.⁹⁵ In order to decide whether the law has been adopted

⁹⁰ *Müller and Others v. Switzerland*, no. 10737/84, ECHR 1988-IV, para. 27.

⁹¹ *Ulusoy and Others v. Turkey*, no. 54969/09, ECHR 2007-II.

⁹² *Axel Springer AG v. Germany*, no. 39954/08, ECHR 2012-IX.

⁹³ *Société de conception de presse et d'édition and Ponson v. France*, no. 26935/05, ECHR 2016-III.

⁹⁴ Arai-Takahashi, Yutaka. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. Intersentia nv, 2002.

⁹⁵ *Cangi v. Turkey*, no. 24973/15, ECHR 2019-V.

in accordance with the procedures provided for in regulatory enactments, it is necessary to assess whether the delegation has been complied with, meaning whether the law has been introduced by legitimate authority and the necessary procedural steps have been taken.⁹⁶ The ECtHR has also stated in its judgments that if the state interferes with a person's fundamental rights, the above criteria must be met, with additional emphasis on the fact that the law must be sufficiently clear for a person to be able to foresee a reasonable level of consequences.⁹⁷ As of today, hate speech is handled by different regulations in different countries. In addition to taking into account national “hard” laws, the Court in its case-law (*Kilin v. Russia, Atamanchuk v. Russia*) has also considered non-binding instruments to strengthen the argument, such as the Council of Europe General Policy Recommendation No. 15 on combating hate speech.⁹⁸

Legitimate aim

Protection of the legitimate goal has been established as one of the prerequisites in constitutional law, and ECtHR may often reference more than one of such legitimate aims. For example, Article 116 of the Constitution of the Republic of Latvia (hereinafter – the Constitution of Latvia) *expressis verbis* provides for the possibility for the State to restrict the right to freedom of expression established in Article 100 of the Constitution of Latvia. Article 116 lists the rights of persons who “*may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals*”,⁹⁹ including the right to freedom of expression guaranteed to every person. At the core of any restriction of a fundamental right must be the circumstances which indicate why the restriction is unnecessary.¹⁰⁰ Therefore, restriction of hate speech is mainly legitimised on the grounds of protecting disorder or crime and protection of rights of others. Article 10 (2) of the ECHR also allows a State to restrict the right to freedom of expression guaranteed by the Convention. It stipulates the legitimate aims for the protection

⁹⁶ Artūrs Kučs, *Vai pamattiesību ierobežojums ir noteikts ar likumu? Satversmes tiesas, Eiropas Cilvēktiesību tiesas un administratīvās tiesas prakse* [in Latvian], available here: <https://juristavards.lv/biblioteka/277646-vai-pamattiesibu-ierobezojums-ir-noteikts-ar-likumu-satversmes-tiesas-eiropas-cilvektiesibu-tiesas-u/>. Accessed 10 May, 2022.

⁹⁷ *Sunday Times v. the United Kingdom*, no. 6538/74, para. 9., *Perinçek v. Switzerland* [GC], no. 27510/08.

⁹⁸ *Kilin v. Russia*, no. 10271/12, ECHR 2021-III.

⁹⁹ Latvijas Republikas Satversme (The Constitution of the Republic of Latvia) (15 February 1922). Available on: <http://www.saeima.lv/en/legislation/constitution/>. Accessed 30 April, 2022.

¹⁰⁰ Latvijas Republikas Satversme. Satversmes tiesas atziņas. Rīga, Latvijas Vēstnesis, 2019, 149. lpp

of which the scope of the right contained in the first paragraph of Article 10 of the Convention may be limited to, such as:

*“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.”*¹⁰¹

One of such cases in which the Court ruled in favour of protecting crimes arising from online hate speech, *Levickas v. Lithuania*¹⁰², in which Mr. Beizaras posted a photograph of him and his boyfriend, a same-sex couple kissing on his Facebook page, the ECtHR based its judgments on state authorities' affirmative obligation to ensure the effective enjoyment of the rights and freedoms protected by the ECHR, which is especially important for people who hold unpopular views or belong to minorities, who are particularly vulnerable to victimisation.¹⁰³ According to the ruling, authorities must use criminal legislation to combat hate speech and homophobic hate crimes, which is seen as a justifiable and essential interference with the right to freedom of expression in such instances.¹⁰⁴ Overall, the ECtHR does not put a lot of pressure on determining legitimate aim but rather leaves it for domestic courts to provide the analysis. In some cases, such as *Morice v. France*¹⁰⁵ and *Stoll v. Switzerland*¹⁰⁶, the Court may choose to hold on to only one of the State's legitimate goals while dismissing the others.

¹⁰¹ Council of Europe. “Convention for the Protection of Human Rights and Fundamental Freedoms.” Council of Europe Treaty Series 005, Council of Europe, 1950.

¹⁰² *Levickas v. Lithuania*, no. 41288/15, ECHR 2020-II.

¹⁰³ Milkaite, Ingrida. "A picture of a same-sex kiss on Facebook wreaks havoc: Beizaras and Levickas v. Lithuania." *Strasbourg Observers* 07/02/2020 (2020).

¹⁰⁴ *Levickas* case, *supra* note 100.

¹⁰⁵ *Morice v. France* [GC], no. 29369/10, ECHR 2015.

¹⁰⁶ *Stoll v. Switzerland*, no. 69698/01, ECHR 2007-IV.

Necessity in a democratic society

For most cases, determining whether the restriction is necessary in a democratic society amounts to the most important part of analysis and determines the Court's conclusion in a given case.¹⁰⁷ In its case law, the ECHR has not developed a definition of the term "necessary in a democratic society" for the set of rights weighed in Article 10 of the Convention.¹⁰⁸ The Court points out that the word 'necessary' means 'there is an urgent social need', so that the balance between the rights of the individual and the public interest must be assessed.¹⁰⁹ The Court relies on the "limits of assessment" set by the Member state and examines how the State has applied the proportionality limits, as well as whether these reasons have been according to the circumstances of the case.¹¹⁰

When there is no exclusion from the protection of the Convention by Article 17, restriction is based on the evaluation of proportionality. Often, determining necessity in a democratic society calls for the legal interpretation of the parties, with the Court assessing their argumentation and deciding the judgement based on arguments presented. It can also be defined more narrowly. Some of the interpretation methods are defined, used and articulated in the Court's reasoning to assess the necessity of a given interference with freedom of expression, such as existence of a "pressing social need", assessment of the nature and severity of the sanctions, and the requirement of relevant and sufficient reasons.¹¹¹

The ruling of the ECtHR in the case of *Jersild v. Denmark* has had a significant impact on the Court's jurisprudence on the link between freedom of expression and hate speech. Jens Olaf Jersild, a Danish journalist, was found guilty of aiding and abetting the dissemination of racist words in a televised interview he performed.¹¹² The words in question were made by members of the "Greenjackets," an extreme right-wing group, and the journalist was convicted partly because he failed to explicitly refute or separate himself from the interviewees' racist and xenophobic statements.¹¹³ Jersild's conviction was not "necessary in a democratic society," according to the ECtHR, and thus breached his rights under Article 10 of the ECHR. This

¹⁰⁷ Council of Europe, Guide on Article 10 of the European Convention on Human Rights, available on: https://www.echr.coe.int/documents/guide_art_10_eng.pdf. Accessed 21 April, 2022.

¹⁰⁸ Gerards J. How to improve the necessity test of the European Court of Human Rights. *International journal of constitutional law*, Vol.11, Issue 2, 2013, p. 467.

¹⁰⁹ *Gawęda v. Poland*, no. 26229/95, ECHR 2002-II para. 39.

¹¹⁰ *Gawęda* case, *supra* note 107.

¹¹¹ *Supra* note 105.

¹¹² *Jersild v. Denmark* (dec.), no. 15890/89, ECHR 1994-V.

¹¹³ *Ibid.*

conclusion was based mostly on context in (news) reporting and the need of journalistic liberty for democratic functioning. The journalist's right to freedom of expression had been violated, according to the Court, because it was not up to the courts to decide whether journalistic approaches (such as "objective and balanced reporting") should be employed. Regarding journalism and its increasing presence in an online environment, the Court stated in the case *Timpul Info-Magazin and Anghel v. Moldova*¹¹⁴ that national authorities must be careful to respect the duty of journalists to disseminate information on questions of general interest, even if they have recourse to a degree of exaggeration or provocation as media independence is a crucial part of democratic society.¹¹⁵ In *Mosley v. the United Kingdom*, the Court established that political reporting and investigative journalism attract a high level of protection under the Article, therefore strengthening protection of journalism activity in a democratic society.¹¹⁶

As it has been established so far however, the Court has different views when it comes to generating hateful comments online by social media users opposed to professional journalism, dividing professional and commercial activity apart from expressing individual thoughts and ideas. In *Kilin v. Russia*, the Court stated that the sharing of hateful content in a manner within an online group (even a relatively small one) of like-minded persons might have the effect of reinforcing and radicalising their ideas without being exposed to any critical discussion or different views, even if access to the material had depended on the account user's acceptance of those witnesses as "friends" of the account.¹¹⁷ Therefore, not only does the court analyse content and impact of hate speech, it also takes into account who the "speaker" is. When comparing *Mosley* or *Jersild* case with *Kilin v. Russia*, although the impact of the latter was much smaller, the hateful content posted by Mr. Kilin served no democratic purpose and was considered purely defaming content.

Regarding satire and criticism, the Court believes that this type of speech can play a critical role in the open discussion of public issues, which is an essential component of a democratic society.¹¹⁸ In the case *Eon v. France*, in which the claimant was found guilty of the crime of insulting the president (Mr. Eon had waved a poster that said "Casse toi pov'con" ("Get lost, you sad prick"), a statement spoken by the President himself few months before at the International Agricultural Show when a farmer refused to shake his hand), the Court found

¹¹⁴ *Timpul Info-Magazin and Anghel v. Moldova* (dec.), no. 42864/05, ECHR 2007-IV.

¹¹⁵ *Supra* note 51.

¹¹⁶ *Mosley v. the United Kingdom*, no. 48009/08, § 129, ECHR 2011-IV.

¹¹⁷ *Kilin* case, *supra* note 98.

¹¹⁸ *Ernst August von Hannover v. Germany*, no. 53649/09, ECHR 2015-II.

that criminal penalties for satirical commentary on topical issues are likely to have a chilling effect *inter alia*, and therefore found violation of Article 10.¹¹⁹

3.1.2. Derogation from Article 10

The Council of Europe report shows that 10 of its Member States declared full or partial states of emergency while the Covid-19 outbreak had taken over the world.¹²⁰ Out of these countries, 9 had issued notifications of derogation from the Convention provided for under Paragraph 1 of Article 15 (Derogation in time of emergency). However, none of the member states have so far derogated from national laws in accordance with Article 10, protecting the right to freedom of expression. If an applicant alleges that his or her Convention rights were violated during a period of derogation, the Court will first consider whether the measures taken are justified under the substantive articles of the Convention; only if they are not, will the Court consider whether the derogation is valid.

One of the most recent cases in which the derogation arising from Article 15 had been enforced - *Terheş v. Romania* - deals with the question of government-imposed lockdown in the times of Covid-19, in which the claim was filed comparing epidemiological measures with house arrest under Article 5.¹²¹ The Court ruled that the level of restrictions on the applicant's freedom of movement had not been such that the general lockdown ordered by the authorities could be deemed to constitute a deprivation of liberty, therefore finding the application inadmissible.¹²² The Court did not need to consider the circumstances from the perspective of Article 15 as the applicant's concerns were made primarily under Article 5, which had been found *ratione materiae* inapplicable.¹²³ Therefore, it can be said that the derogation from Article 10 does not constitute great significance when assessing claims in accordance with recent case-law by the Court.

¹¹⁹ *Eon v. France*, no. 26118/10, ECHR 2013-V.

¹²⁰ Council of Europe, Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic, available here: <https://www.coe.int/en/web/conventions/derogations-covid-19>. Accessed 30 April, 2022.

¹²¹ *X v. the Czech Republic*, no. 64886/19, ECHR 2022-V.

¹²² Council of Europe, The lockdown ordered by the authorities to tackle the COVID-19 pandemic not to be equated with house arrest, available on: <file:///C:/Users/eaverchenko/Downloads/Decision%20Terhes%20v.%20Romania%20-%20lockdown%20ordered%20by%20the%20authorities%20to%20tackle%20the%20COVID-19%20pandemic%20could%20not%20be%20equated%20with%20house%20arrest.pdf> Accessed 6 May, 2022.

¹²³ *Terheş v. Romania*, no. 49933/20, ECHR 2021-IV.

3.2. Rejection arising from Article 17

The second category of the Court's case-law on 'hate speech' is comprised of the gravest forms of 'hate speech', which the Court has considered to fall under Article 17 (Prohibition of abuse of rights¹²⁴) and thus excluded entirely from the protection of Article 10. Such provision is aimed at preventing persons from inferring from the Convention any right to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms set forth in the Convention, applying to either state, groups and individuals. Article 17 ensures that the rights enshrined in the Convention are not abused to infringe on other rights, which is particularly important in the context of Article 10 and hate speech, as violations of hate speech can be disguised under the right to freedom of expression. The Court held that any remark directed against the Convention's underlying values would be removed from the protection of Article 10 by Article 17 (*Seurot v. France*¹²⁵), such as portraying Jews as the source of evil in Russia and calling for their exclusion from social life (*Pavel Ivanov v. Russia*¹²⁶), promoting a terrorist organisation on television broadcast (*Roj TV A/S v. Denmark*¹²⁷), denying facts of the Holocaust (*Garaudy v. France*¹²⁸, *Honsik v. Austria*, *Marais v. France*, *Williamson v. Germany*, *Pastörs v. Germany*¹²⁹) or giving promotion to denialism through a controversial comedy play (*M'Bala M'Bala v. France*¹³⁰), as well as promoting white supremacy (*Glimmerveen and Haagenbeek v. the Netherlands*¹³¹), or religious hate (*Norwood v. UK*¹³²).

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.*” Therefore, it may be to

¹²⁴ Article 17: “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.”

¹²⁵ *Seurot v. France*, no. 57383/00, ECHR 2004-II.

¹²⁶ *Pavel Ivanov v. Russia*, no. 35222/04, ECHR 2007-I.

¹²⁷ *Roj TV A/S v. Denmark*, no. 24683/14, ECHR 2018-II.

¹²⁸ *Garaudy v. France*, no. 65831/01, ECHR 2003-IV.

¹²⁹ *Honsik v. Austria*, no. 25062/94, *Marais v. France*, no. 31159/96, *Williamson v. Germany*, no. 64496/17, *Pastörs v. Germany*, no.: 55225/14.

¹³⁰ *M'Bala M'Bala v. France*, no. 25239/13, ECHR 2015-V.

¹³¹ *Glimmerveen and Haagenbeek v. the Netherlands*, no. 8348/78, ECHR 1979-V.

¹³² *Norwood v. the United Kingdom*, no. 23131/03, ECHR 2004-IV.

prohibit abuse of rights protected by the Convention, which can be also found in Article 30 of the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the Charter of Fundamental Rights of the European Union (2000).

3.2.1. Article 17 and online environment

There has not been sufficient case-law under the ECtHR to discuss how rejection arising from Article 17 has been applied specifically in an online environment. In the case *Kilin v. Russia*, in which the applicant was convicted of public appeals to violence against non-Russian nationalities using video and audio files that he had uploaded via an online social network account, the Russian government argued on inadmissibility arising from Article 17. The Court held that Article 17 is only applicable on an exceptional basis and in extreme cases and should, in cases concerning Article 10 of the Convention, only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention.¹³³ Although no violation or admissible reasoning under Article 17 was found, the case is significant in establishing that the Court is not bound by the domestic courts' finding and such a finding will not automatically entail the application of Article 17 by the Court.¹³⁴

Another case in which the spread of hatred content was distributed via an online news article, *Lilliendahl v. Iceland*, the Court found no violation of Article 17. However, the ECtHR stated that despite the fact that the applicant's comments did not expressly advocate for violence, the use of disparaging language and unmistakable feelings of disgust amounted to inciting homosexual intolerance, and thus constituted hate speech. The Court did not deem the interference with the applicant's right to freedom of expression to be excessive and unnecessary in a democratic society under Article 10, despite the harshness of the fine imposed and the lack of contribution to public discourse.

Although in some cases the spread of hate speech has been issued in various online platforms and through its intermediaries, the cases brought before the ECtHR do not take into account any of the specific characteristics of how the online environment differs in order to evaluate the case in accordance with violation of Article 17. Available case-law is also

¹³³ *Kilin* case, *supra* note 96.

¹³⁴ Council of Europe, Guide on Article 17 of the European Convention on Human Rights, available on: https://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf Accessed 29 April, 2022.

insufficient to conclude any further conclusions regarding effectiveness on how limitations of Article 17 can be implied to successfully combat online hate speech.

4. FUTURE/PLANNED LEGAL FRAMEWORK WITHIN THE EU

As of 2022, there is currently no unified framework at the EU-level for imposing sanctions on hate speech and hate crimes. Even so, in contrast to the U.S.'s *laissez-faire* (where a large number of online intermediaries are registered) approach toward the platforms, several European nations have adopted stronger regulatory measures, in particular the European Commission Code of conduct on countering illegal hate speech online.¹³⁵

In response to the challenges described in Chapter 2.1. of the Thesis, the European Commission has put forward a preliminary legislative proposal for a Digital Services Act reforming the legal framework of the provisions of digital services and the liability regime of online intermediaries. The rapid digitalization of society and the economy has resulted in a situation in which a few major platforms control important digital economy ecosystems. They have emerged as digital market gatekeepers, with the authority to operate as private rule-makers.

4.1. Digital Services Act

As of 2022, there is currently no unified framework at the EU-level for imposing sanctions on hate speech and hate crimes. In response to the challenges described in Chapter 2.1. of the Thesis, the European Commission has put forward a preliminary legislative proposal for a Digital Services Act, a Regulation reforming the legal framework of the provision of digital services and the liability regime of online intermediaries.¹³⁶ The Digital Services Act package provides for a new framework containing due diligence obligations that will apply to all digital services that connect consumers to goods, services, or content, including new procedures for faster removal of illegal content as well as comprehensive protection for users' fundamental rights online, amending the Directive on electronic commerce. The DSA imposes new requirements for risk assessment of automated filtering tools, as well as the creation of appropriate risk management and auditing systems, to protect the integrity and transparency of services provided by very large online platforms against the use of manipulative techniques that would jeopardise the digital economy's functioning.¹³⁷ The European Commission

¹³⁵ Nurik, Chloe. "“Men are scum”": Self-regulation, hate speech, and gender-based censorship on Facebook." *International Journal of Communication* 13 (2019): p. 21.

¹³⁶ *Supra* note 61.

¹³⁷ *Supra* note 61.

confirmed on April 23, 2022, that the European Parliament and Council have reached political agreement regarding the DSA and the framework is expected to come into force on 1 January, 2024.¹³⁸

4.1.2. Scope

The DSA applies to (i) online intermediary services such as internet providers, (ii) hosted service providers, and (iii) online platform providers such as online marketplaces, app stores, and social media platforms, including such entities that offer their services within the European Union, regardless of whether they are established inside or outside the European Union. Their responsibilities under the DSA are determined by their position, size, and influence in the online ecosystem. Among the internet intermediary services are:

- Intermediary services that provide network infrastructure, such as internet access providers and domain name registrars;
- Cloud computing and web hosting services;
- Large online search engines having more than 10% of the EU's 450 million subscribers, and hence more responsibility in preventing unlawful information on the internet;
- online platforms that connect merchants and buyers, such as online marketplaces, app shops, collaborative economy platforms, and social media platforms;
- Large online platforms, with a reach of more than 10% of the EU's 450 million customers, reflecting specific dangers in terms of illicit content dissemination and societal consequences.¹³⁹

4.1.3. Initial assessment

In general, the DSA appears to be successful in addressing the gaps and challenges that have arisen since the adoption of the Directive on electronic commerce by implementing harmonised notice-and-takedown mechanisms, creating additional measures for online intermediaries to provide detailed reports to ensure that transparency and accountability measures are followed with respect to online content moderation, and ensuring compliance

¹³⁸ European Commission, *Digital Services Act: Commission welcomes political agreement on rules ensuring a safe and accountable online environment*, available here: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2545. Accessed 8 May, 2022.

¹³⁹ *Ibid.*

through steep fines and injunctions in the event of non-compliance.¹⁴⁰ The DSA seems to tackle the issues Directive on electronic commerce introduced and the lacking legal framework regulating online platform liability, for example risk-based action for large media platforms to prevent the misuse of their systems and undergo independent audits of their risk management systems. Apart from the content of the DSA, effectiveness of the Regulation will also depend on harmonisation on the EU-level and the subsequent legislation adopted by European and national legislative and regulatory bodies as well as substantive decisions taken by judicial authorities, which will determine in detail what constitutes illegal online content and the extent as to how to balance the competing fundamental rights in order to create a stable and functioning digital economy.¹⁴¹

4.2. Other alternatives: Self-regulation

As concluded in Chapter 2.1.3. of the Research, the current framework has rather initiated a proactive approach of the online intermediaries. Now, online platforms have freedom to design and implement decentralised moderation systems, but the rules set in their architecture and community guidelines must comply with procedural boundaries established by the efficacy of fundamental rights between private parties. On one hand, the efficacy of self-regulatory tools in incentivizing online platform proper management of illegal and harmful content, as well as their capacity to protect users' fundamental rights and freedoms, is severely limited due to limitations in the range of participants, vaguely formulated commitments, lack of clear objectives and measurable progress indicators, as well as the voluntary nature of self-regulation and lack of significant incentives.¹⁴² However, the demand and criticism of online platform users, especially for giant intermediaries like Facebook, leave the platforms no choice but to introduce community guidelines and take a proactive stance in order to safeguard their reputation and relevance. After all, online intermediaries, like any other business entity, care for their customer satisfaction and are committed to outrun the competition. Since 2016, Facebook has come under increased scrutiny for a series of scandals, including its possible facilitation of Russian interference in the U.S. 2016 presidential election, its privacy leaks, and

¹⁴⁰ MADIEGA, Tambiama André. "Reform of the EU liability regime for online intermediaries: Background on the forthcoming digital services act." (2020).

¹⁴¹ Savin, A. (2021). "The EU DSA: Towards a More Responsible Internet". In: Journal of Internet Law, vol. 24, no. 7, pp. 15-25. Available on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786792. Accessed 4 May, 2022.

¹⁴² *Supra* note 56.

its transgression of user rights and research ethics.¹⁴³ Consequently, there have been calls for individuals to leave the platform as a means of protecting themselves and their data, affecting the company's bottom line.¹⁴⁴

Nevertheless, external monitoring should be considered as a necessary alternative to self-regulation, in addition to continuous pressure on platforms through activism and CSR standards. Many underlying issues have been compounded by the lack of outside oversight, as social media companies have been given carte blanche to develop arbitrary criteria, adjudicate them unfairly and inconsistently, and hide their operations from the public and lawmakers.¹⁴⁵ Introduction of internal company corporate social responsibility policies can also lead to successful prevention of hate speech related offences by filling regulatory gaps. In order to enhance the positive experience in use of social media and other online platforms, companies may introduce mechanisms to report and block hateful content, be vocal and impose the importance of mental health of its customers and employees in addition to improving their brand image.

4.3. Legal framework developments in CoE

One of the recent developments that also link to the surfacing issues of lack of clarity in the area of hate speech is the newly-appointed activity of the Committee of Experts on Combating Hate Speech of the Council of Europe (hereinafter also - ADI/MSI-DIS). The ADI/MSI-DIS is working towards a draft Recommendation on a comprehensive approach to addressing hate speech, providing advisory guidance to the Member states and other stakeholders. Interestingly, due to the complexity of the issue of tackling hate speech, ADI/MSI-DIS is sub-ordinated to two Steering Committees: the Steering Committee on Anti-Discrimination and Inclusion (CDADI) and the Steering Committee on Media and Information Society (CDMSI).¹⁴⁶ Therefore, although the Recommendation of ADI/MSI-DIS is still in the

¹⁴³ Kraus, Sascha, Dominik K. Kanbach, Peter M. Krysta, Maurice M. Steinhoff, and Nino Tomini. "Facebook and the creation of the metaverse: radical business model innovation or incremental transformation?." *International Journal of Entrepreneurial Behavior & Research* (2022).

¹⁴⁴ Dwoskin, Elizabeth. "Quitting Instagram: She's One of the Millions Disillusioned with Social Media. But She Also Helped Create It.; Bailey Richardson, One of Instagram's Original 13 Employees, Says the Company Has Lost Its Identity." *Washington Post* (2018).

¹⁴⁵ *Ibid.*

¹⁴⁶ Council of Europe, ADI/MSI-DIS Committee of Experts on Combating Hate Speech, Available here: <https://www.coe.int/en/web/committee-on-combating-hate-speech/home>. Accessed 4 April, 2022.

making, a verification that Council of Europe is working towards the issue links to the arising relevance of tackling hate speech crimes.

4.4. German Network Enforcement Act - pioneers in Europe

Taking into account activity in the European Union, it can be concluded that efforts to shift more liability onto the shoulders of social media networks are being made. The German Network Enforcement Act is an amendment on the NetzDG¹⁴⁷, which is considered to be the first law in Europe to tackle hate speech and crimes of abuse on social networks. According to the Ministry of Justice of the Republic of Germany, the new law “aims to fight hate crime, criminally punishable fake news and other unlawful content on social networks more effectively, including insult, malicious gossip, defamation, public incitement to crime, incitement to hatred, disseminating portrayals of violence and threatening the commission of a felony.”¹⁴⁸ Main novelty the amendment proposes is that it obliges social media platforms to establish a procedure to respond to notifications and remove or block certain illegal hate speech posts within 24 hours.¹⁴⁹ However, experts claim that the Act has not successfully balanced out issues of effectiveness and over-censoring as scope is too broad, its sanctions are asymmetric and with short timing, encouraging over blocking and providing insufficient redress of correction to the authors.¹⁵⁰

¹⁴⁷ Germany. Gesetz zur Änderung des Netzwerkdurchsetzungsgesetzes (Network Enforcement Act) available on:https://www.bgbl.de/xaver/bgbl/start.xav#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl121s1436.pdf%27%5D_1652361004325.

¹⁴⁸ Ministry of Justice of the Republic of Germany, “Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act, NetzDG) - Basic Information”. Available on:https://www.bmj.de/DE/Themen/FokusThemen/NetzDG/NetzDG_EN_node.html;jsessionid=4F13EB036B125260BA9137B306DC170D.2_cid334. Accessed 12 May, 2022.

¹⁴⁹ European Parliament Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies, Hate speech and hate crime in the EU and the evaluation of online content regulation approaches, available on:[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655135/IPOL_STU\(2020\)655135_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655135/IPOL_STU(2020)655135_EN.pdf). Accessed May 13, 2022.

¹⁵⁰ De Streel, A. et al., Online Platforms’ Moderation of Illegal Content Online, Study for the committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, p. 89.

CONCLUSIONS

So far, the ECtHR does not derive any specific apportionments when it comes to platforms in which hateful content has been promoted. However, in its judgments, the Court has implied that the extent, speed, and permanence of hate speech online are all important factors to consider when deciding a case.¹⁵¹ By virtue of such argumentation, it can be concluded that ECtHR, when justifying their judgment on hate speech crimes online, take into consideration the characteristics of what the digital environment imposes.

Due to the gaps and irregularities within the legal framework and precedents under the Court of Justice of the European Union, social media platforms and other online intermediaries encounter the incentive of proactive approach in preventing hate speech from happening. Although such motives can be evaluated as positive, the newly introduced draft Digital Services Act seems to provide solutions to the existing flaws in the framework.

There are no statutes or regulations protecting incitement to hatred on other forms of intolerance (such as attacks on sexual orientation or gender identity) in any of the EU legal frameworks reviewed, resulting in an arbitrary and illogical hierarchy of hate that is judged worthy of legislative address on a European scale.

¹⁵¹ *Delfi* case, *supra* note 35.

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