

European Measures to Address Hate and Discrimination in Social Media and Information Communication Technologies
Draft version

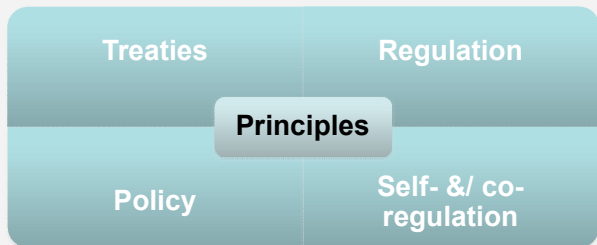
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Outline

- Changing patterns of online content regulation at the European level
- Council of Europe – “hate speech”
- Council of Europe – internet intermediaries
- European Union – sector-specific regulation
- Time to rethink?
- Threats and challenges

European-level regulatory geometry



Council of Europe: selected focuses

Article 10, ECHR

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

***Handyside* judgment: tolerance and democratic society**

“[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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”

Handyside, para. 49.

Article 17 – Prohibition of abuse of rights

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.

“Hate speech” ... or not?

- *Jersild v. Denmark* (1994) – “Green jackets” – role/freedom of media
- *Garaudy v. France* (2003) – Holocaust denial
- *Seurot v. France* (2004) – article by teacher in school newspaper about immigrants
- *Norwood v. United Kingdom* (2004) – member of extreme right-wing party, poster in window very offensive for Muslims
- *Féret v. België* (2009) – Member of Parliament, anti-immigrant pamphlets in election period
- *Vejdeland v. Zweden* (2012) – homophobic pamphlets distributed in school
- *Perinçek v. Switzerland* (2015) – Armenian genocide
- *Belkacem v. Belgium* (2017) – YouTube videos, incitement to discrimination, hatred and violence

No ECHR protection for:

- Racism
- Nazism
- Neo-Nazism
- Holocaust denial
- “Hate speech”
- *Homophobic speech*

The Council of Europe versus “hate speech”

- ECHR/ECtHRs
- Committee of Ministers
- Parliamentary Assembly
- Commissioner for Human Rights
- Framework Convention for the Protection of National Minorities
- European Commission against Racism and Intolerance (ECRI)
- Additional Protocol to the Cybercrime Convention

Hate speech: an approximation of a definition

For the purposes of the Council of Europe's Committee of Ministers' Recommendation (97) 20 to Member States on "Hate Speech":

"[...] the term "hate speech" shall be understood as covering 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."

ECRI GPR No. 15 on Combating Hate Speech

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

Broad lines of the ECtHR's “internet” case-law

- Intermediation
- Public interest & public debate (substance & structure)
- Effective rights & remedies
- State obligations – negative & positive
- Rights, duties and responsibilities
- Regulatory values & purposes
- Regulatory design (State, self- and/or co-regulation)

***Delfi* and its progeny**

- *Delfi AS v. Estonia*
- *MTE & Index.hu v. Hungary*
- *Pihl v. Sweden*
- *Tamiz v. the United Kingdom*
- *Savva Terentyev v. Russia*
- *Magyar Jeti Zrt. v. Hungary*

Revisiting the ECtHR's assessment criteria

- Context and content of impugned comments
- Liability of authors of comments
- Measures by applicants and conduct of injured party
- Consequences of comments for injured party
- Consequences for applicants

From Delfi > MTE & Index

European Union: selected focuses

EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (2008/913/JHA)

Article 1: Offences concerning racism and xenophobia

1. 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;
- (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;
- (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes [...]

Electronic Commerce Directive

- Preamble, Recitals 17 & 18; Articles 1 and 2 > Information society services

- Articles 12 – 14 > ‘safe harbour’ provisions/exemptions from liability for intermediary service providers concerning third-party content via their services, under certain conditions:
 - Provider has no actual knowledge of illegal nature of activity or information...; or
 - Provider, upon obtaining such knowledge, acts expeditiously to remove/disable access to the information

- Article 15 > Member States shall not impose a general obligation on providers to monitor the information they transmit or store...

(Revised) Audiovisual Media Services Directive*

Article 6

1. Without prejudice to the obligation of Member States to respect and protect human dignity, Member States shall ensure by appropriate means that **audiovisual media services provided by media service providers** under their jurisdiction do not contain any:

(a) incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter;

(b) public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541.

2. The measures taken for the purposes of this Article shall be necessary and proportionate and shall respect the rights and observe principles set out in the Charter.

* Official Journal of the European Union, 28/11/2018

(Revised) Audiovisual Media Services Directive

Article 28b

1. Without prejudice to Articles 12 to 15 of Directive 2000/31/EC, Member States shall ensure that **video-sharing platform providers** under their jurisdiction take appropriate measures to protect: [...]

(b) the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter;

(c) the general public from programmes, user-generated videos and audiovisual commercial communications containing content the dissemination of which constitutes an activity which is a criminal offence under Union law, namely public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541, offences concerning child pornography as set out in Article 5(4) of Directive 2011/93/EU of the European Parliament and of the Council (*) and offences concerning racism and xenophobia as set out in Article 1 of Framework Decision 2008/913/JHA.

Code of conduct on countering illegal hate speech online

- The IT Companies to have in place clear and effective processes to review notifications regarding illegal hate speech on their services so they can remove or disable access to such content. The IT companies to have in place Rules or Community Guidelines clarifying that they prohibit the promotion of incitement to violence and hateful conduct.
- Upon receipt of a valid removal notification, the IT Companies to review such requests against their rules and community guidelines and where necessary national laws transposing the Framework Decision 2008/913/JHA, with dedicated teams reviewing requests.
- The IT Companies to review the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary.
- [...]

Time to rethink?

- Expanding contours of hate speech (new focuses)
- Analogous types of speech (activities)
 - Terrorism (incl. incitement, apology, glorification)
 - Radicalisation (incl. strategic communication)
- Fluctuations in tolerance (incl. globalization, populism, exclusionary nationalism)
- ICT-driven developments (incl. participatory potential, new gatekeepers, new functionalities and roles)
- Changing criteria for liability for online hate speech



Google

You Tube



WIKIPEDIA
The Free Encyclopedia



facebook

twitter



New forms of hate speech (activities)?

- dissemination of propaganda, other types of (dis-)information, conspiracy theories and hate spam;
- exchange of information and ideas, e.g. via social media networks, discussion groups, listservs and communities of interest;
- search engine optimisation techniques, such as hyperlinking strategies and algorithmic manipulation designed to generate better search results;
- attracting inadvertent users by “usurping domain names” and “using misleading meta-tags”;
- organisational purposes such as the coordination of activities, planning of events, training, recruitment drives;
- commercial ends such as fund-raising, the sale of publications, videos, memorabilia and paraphernalia;
- trolling, use of bots and other such disruptive practices;
- Live-streaming, deep-fakes and other new formats;
- various offences against the person and other criminal or invasive behaviour, e.g. the targeting of (potential) victims, **cyber-bullying, cyber-stalking.**

Remaining threats and challenges

- Privatised enforcement/censorship
- Legal uncertainty
- Lack of due process
- Financial consequences for creative industry
- Chilling effect: freedom of expression; freedom to conduct a business, etc.

Thank you for your attention.

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