



# Guide to Monitor “Hate speech”

Agency  
for Audio and Audiovisual Media Services





# **C o n t e n t s**

- 1. Introduction**
- 2. Freedom of expression**
- 3. European regulatory framework on “hate speech”**
  - 3.1 Recommendation No. R (97) 20 on “hate speech”
  - 3.2 Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance
  - 3.3 Declaration on Freedom of Political Debate in the Media
  - 3.4 Recommendation CM/Rec(2011) 7 on a new notion of media
  - 3.5 Additional Protocol to the Convention on Cybercrime
- 4. European Court of Human Rights approach towards “hate speech”**
- 5. European Court of Human Rights case law on “hate speech”**
  - 5.1 Handyside v the United Kingdom
  - 5.2 Jersild v Denmark
  - 5.3 Muslum Gunduz v. Turkey
- 6. Macedonian regulatory framework on “hate speech”**
  - 6.1 Law on Audio and Audiovisual Media Services
  - 6.2 Criminal Code
  - 6.3 Law on Prevention of and Protection against Discrimination:
- 7. Guidelines for monitoring “hate speech”**
  - 7.1 What was the context of the expression?
  - 7.2 Who was the person expressing him/herself?
  - 7.3 Was there an intention to provoke hate speech?
  - 7.4 What was the content of the expression?
  - 7.5 What were the extent and the magnitude of the expression?
  - 7.6 What was the likelihood of impact on the audience and its future actions?
- 8. An Overview of Other Regulatory Bodies’ Practices in Monitoring Hate Speech**
- 9. Conclusions and Recommendations**

## 1. Introduction

With the adoption of the Audiovisual Media Services Directive, the European Union has taken specific action to deal with hate speech in the audiovisual media services. Article 6 of the Directive states the authorities in each member state “must ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality”.

In addition, the AVMS Directive stresses the role of the independent regulatory authorities in the audiovisual field in the enforcement of the national legislation transposing the rules of the Directive<sup>1</sup>. Regulators in the field of audiovisual media services are given powers to supervise audiovisual programmes’ compliance with the AVMS Directive.

In December 2013, the Audiovisual Media Services Directive was transposed into the new Law on Audio and Audiovisual Media Services of the Republic of Macedonia. The project titled “Enhancing the Administrative Capacities of Telecom and Media Authorities for Efficient Regulation of New Digital and Multiple Play Services“, funded by the European Commission under the IPA framework, aims at increasing the capacity of the new regulator - the Agency for Audio and Audiovisual Media Services (AAAMS), for implementation of the AVMS Directive. One of the most important activities within this project is to increase the knowledge and capacity of the AAAMS for dealing with hate speech in both linear and non-linear audiovisual media services. In addition to training for the AAAMS staff, the experts engaged within the Project had a task to produce Guidelines for monitoring hate speech in the audiovisual media services.

There is no universal definition of “hate speech”. There are many guidelines and explanations as to what should be defined as hate speech and what should fall under the protection of freedom of expression. This document first presents the international standards related to freedom of expression and “hate speech”, the principles and relevant cases of the European Court of Human Rights and the Macedonian legal framework in this respect. At the end, it gives recommendations regarding the various aspects that are to be taken into account by the AAAMS when dealing with possible cases of hate speech and conclusions on what should be done to further improve the Agency’s capacities and practices.

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<sup>1</sup> For more details visit: <http://ec.europa.eu/digital-agenda/en/avmsd-audiovisual-regulators>

## 2. Freedom of expression

Freedom of expression is one of the basic human rights and the foundation of modern democratic society. Although protected by a considerable number of international documents, countries are given the freedom to define its scope and content within their national legislations, depending on their cultural, historical, religious, political, and many other differences.

One of the first important international treaties to regulate freedom of expression is surely Article 19 of the Universal Declaration of Human Rights<sup>2</sup> that states:

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

Further on, Article 10 of the European Convention on Human Rights<sup>3</sup> reads:

*“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.*

*“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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.*

Although both of these treaties date from the middle of last century, they are still applicable.

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<sup>2</sup> Article 19, Universal Declaration of Human Rights: <http://www.un.org/en/documents/udhr/index.shtml#a19>

<sup>3</sup> Article 10, European Convention of Human Rights: [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf)

### 3. The European regulatory framework on “hate speech”

As said before, there is no universal definition of “hate speech”. The meaning of the term has a long history of jurisprudence in various Council of Europe and European Union Member States, along with the case law of the European Court on Human Rights (hereinafter referred to as “the Court”).

The Council of Europe has developed various definitions of “hate speech” depending on the context. In this chapter, some of the most important ones will be presented.

#### 3.1 Recommendation No. R (97) 20 on “hate speech”<sup>4</sup>

The Recommendation on hate speech recommends that the member states’ governments take the steps for fighting hate speech laid down in the document. This refers particularly to hate speech disseminated through the media.

The Recommendation tries to define the term “hate speech” in the following manner:

*The term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.*

Further on, the Recommendation in particular calls on *the member states’ governments to stipulate that public authorities and public institutions at the national, regional and local levels, as well as their officials*, have a special responsibility to refrain from statements - *particularly in front of the media* - which may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimizing, spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance. Such statements should be prohibited and publicly disavowed whenever they occur.

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<sup>4</sup> Recommendation No. R (97) 20 on “hate speech” adopted by the Committee of Ministers of the Council of Europe on 30 October 1997, available at: [www.coe.int/t/dghl/standardsetting/hrpolicy/other\\_committees/dh-lgbt\\_docs/CM\\_Rec\(97\)20\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf) (accessed on 22th September 2014)

The Recommendation calls on the governments to *establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech* that would allow administrative and judicial authorities to decide that freedom of expression and human dignity are respected and the reputation or the rights of others are protected in every case.

The governments are also called upon to examine ways and means *to stimulate and co-ordinate research into the effectiveness of existing legislation and legal practice; review the existing legal framework in order to ensure that it applies in an adequate manner to the various new media and communications services and networks; develop a coordinated prosecution policy based on national guidelines respecting the principles set out in this Recommendation; add community service order to the range of possible penal sanctions; enhance the possibilities to combat hate speech through civil law<sup>5</sup>, and provide the public and media professionals with information on the legal provisions which apply to hate speech.*

The governments should also make sure that, in their legal frameworks, *interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria.* Then, in accordance with the fundamental requirement of the rule of law, *any limitation of or interference with freedom of expression must be subject to independent judicial control.* This requirement is particularly important in cases where freedom of expression must be reconciled with respect for human dignity and the protection of the reputation or the rights of others.

National law and practice should allow the courts to bear in mind that specific instances of hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at destroying the rights and freedoms laid down in the Convention or at limiting them to a greater extent than provided therein.

Principle 5 of the Recommendation calls for national laws and practices *to allow the competent prosecution authorities to give special attention, as far as their discretion permits, to cases involving hate speech.* In this regard, these authorities should, in particular, give careful consideration to the suspect's right to freedom of expression given that the imposition of criminal sanctions generally constitutes a serious interference with that freedom. The competent courts should, *when imposing criminal sanctions on persons convicted of hate speech offences, ensure strict respect for the principle of proportionality.*

National law and practice in the area of hate speech should take appropriate measures concerning the role of the media in communicating information and ideas *which expose, analyze and explain*

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<sup>5</sup> For example, by allowing interested non-governmental organisations to bring civil law actions, providing for compensation for victims of hate speech and providing for the possibility of court orders allowing victims a right of reply or ordering retraction.

*specific instances of hate speech and the underlying phenomenon in general, as well as the right of the public to receive such information and ideas.*

One of the most important distinctions that should be made clear by national laws and practice in order to *distinguish clearly between the responsibility of the author of expressions of hate speech on one hand, and any responsibility of the media and media professionals contributing to their dissemination* as part of their mission to communicate information and ideas on matters of public interest, on the other.

The important principle that the Recommendation points out is that the national laws and practices should bear in mind that *reporting on racism, xenophobia, antisemitism or other forms of intolerance is fully protected by Article 10, Paragraph 1, of the European Convention on Human Rights and may only be interfered with under the conditions set out in Paragraph 2 of that provision*<sup>6</sup>. Further on, ***the standards applied by national authorities for assessing the necessity of restricting freedom of expression must be in conformity with the principles embodied in Article 10, as established in the case law of the Convention's organs, having regard, inter alia, to the manner, contents, context and purpose of the reporting.*** And finally, the respect for journalistic freedoms also implies that it is not for the courts or the public authorities to impose their views on the media as to the types of reporting techniques to be adopted by journalists.

### **3.2 Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance<sup>7</sup>**

This Recommendation asks from the governments of the member states to inform the following target groups of the content of the Recommendation and its Appendix in order to implement them, as well as *to examine in a positive spirit any request for support for initiatives* arising from this document. The target groups are the following:

- press, radio and television enterprises, as well as the new communications and advertising sectors;
- the representative bodies of media professionals in these sectors;
- regulatory and self-regulatory bodies in these sectors;
- schools of journalism and media training institutes.

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<sup>6</sup> When prescribed by the law, when the aim is legitimate and when it is necessary in a democratic society.

<sup>7</sup> Recommendation No.R (97) 21 on the media and the promotion of a culture of tolerance, adopted by the Committee of Ministers of the Council of Europe on 30<sup>th</sup> October 1997, available at: [www.coe.int/t/dghl/standardsetting/hrpolicy/other\\_committees/dh-lgbt\\_docs/CM\\_Rec\(97\)21\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)21_en.pdf) (Accessed on 22<sup>nd</sup> September 2014.)



### 3.3 Declaration on Freedom of Political Debate in the Media<sup>8</sup>

This Declaration draws particular attention to the following principles concerning the dissemination of information and opinions in the media about political figures and public officials:

#### *I. Freedom of expression and information through the media*

Pluralist democracy and freedom of political debate require that the public is informed about matters of public concern, which includes the right of the media to disseminate negative information and critical opinions concerning political figures and public officials, as well as the right of the public to receive them.

#### *II. Freedom to criticise the state or public institutions*

The state, the government or any other institution of the executive, legislative or judicial branch may be subject to criticism in the media. Because of their dominant position, these institutions as such should not be protected by criminal law against defamatory or insulting statements. Where, however, these institutions enjoy such a protection, this protection should be applied in a restrictive manner, avoiding in any circumstances its use to restrict freedom to criticise. Individuals representing these institutions remain furthermore protected as individuals.

#### *III. Public debate and scrutiny over political figures*

Political figures have decided to appeal to the confidence of the public and accepted to subject themselves to public political debate and are, therefore, subject to close public scrutiny and potentially robust and strong public criticism through the media over the way in which they have carried out or carry out their functions.

#### *IV. Public scrutiny over public officials*

Public officials must accept that they will be subject to public scrutiny and criticism, particularly through the media, over the way in which they have carried out or carry out their functions, insofar as this is necessary for ensuring transparency and the responsible exercise of their functions.

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<sup>8</sup> Declaration on Freedom of Political Debate in the Media adopted by the Committee of Ministers of the Council of Europe on 12<sup>th</sup> February 2004. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=118995&Site=CM> (accessed on 22<sup>nd</sup> September 2014)

## *V. Freedom of satire*

The humorous and satirical genre, as protected by Article 10 of the Convention, allows for a wider degree of exaggeration and even provocation, as long as the public is not misled about facts.

## *VI. Reputation of political figures and public officials*

Political figures should not enjoy greater protection of their reputation and other rights than other individuals, and thus more severe sanctions should not be pronounced under domestic law against the media where the latter criticise political figures. This principle also applies to public officials; derogations should only be permissible where they are strictly necessary to enable public officials to exercise their functions in a proper manner.

## *VII. Privacy of political figures and public officials*

The private life and family life of political figures and public officials should be protected against media reporting under Article 8 of the Convention. Nevertheless, information about their private life may be disseminated where it is of direct public concern to the way in which they have carried out or carry out their functions, while taking into account the need to avoid unnecessary harm to third parties. Where political figures and public officials draw public attention to parts of their private life, the media have the right to subject those parts to scrutiny.

## *VIII. Remedies against violations by the media*

Political figures and public officials should only have access to those legal remedies against the media which private individuals have in case of violations of their rights by the media. Damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others, taking into consideration any possible effective and adequate voluntary remedies that have been granted by the media and accepted by the persons concerned. Defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech.

### **3.4 Recommendation CM/Rec(2011) 7 on a new notion of media<sup>9</sup>**

This Recommendation has the following indicator for hate speech:

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<sup>9</sup> Recommendation CM/Rec(2011) 7 of the Committee of Ministers to member states on a new notion of media, adopted on 21<sup>st</sup> September 2011, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1835645&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> (accessed 22<sup>nd</sup> September 2014).

“Media should refrain from conveying hate speech and other content that incites violence or discrimination for whatever reason. Special attention is needed on the part of actors operating collective online shared spaces which are designed to facilitate interactive mass communication (or mass communication in aggregate). They should be attentive to the use of, and editorial response to, expressions motivated by racist, xenophobic, anti-Semitic, misogynist, sexist or other bias. Actors in the new media ecosystem may be required (by law) to report to the competent authorities criminal threats of violence based on racial, ethnic, religious, gender or other grounds that come to their attention.”

On the other hand, media can provide a balanced (or positive) image of the various groups that make up society and contribute to a culture of tolerance and dialogue. Other than in the cases prescribed by law with due respect to the provisions of the European Convention on Human Rights, no group in society should be discriminated from in the exercise of the right to association which, in the new media ecosystem, includes online association.

### **3.5 Additional Protocol to the Convention on Cybercrime<sup>10</sup>**

In the Additional Protocol to the Convention there is an important definition of “racist and xenophobic material” stating:

“For the purposes of this Protocol, *“racist and xenophobic material”* means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.”

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<sup>10</sup> Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, CETS No.: 189, available at: <http://www.conventions.coe.int/treaty/EN/treaties/html/189.htm> (accessed 22nd September 2014)

#### 4. European Court of Human Rights (ECHR)' approach towards "Hate Speech"

The European Court of Human Rights was established in Strasbourg in 1959 by the Council of Europe Member States to deal with alleged violations of the European Convention on Human Rights. It judges in particular on the basis of Article 10 of the European Convention on Human Rights<sup>11</sup> and on the three-partite test of whether the restriction of freedom of expression is prescribed by law, its aim is legitimate, and is necessary in the democratic society.

Every private person or organization who believe that their human rights have been infringed by the state can apply to the Court. However, prior to this, all national remedies have to be exhausted, the application has to be submitted within six months after the final decision has been reached and the infringement has to be committed by public authorities<sup>12</sup>.

Although the path to the Court is sometimes very long, and could take several years from the moment when the human right was infringed until the application is submitted to the Court, it is still worth applying. The decision of the Court is binding for the state in question and whoever wins the case is entitled to reimbursement of costs and expenses. The Committee of Ministers is responsible for verifying whether the state has taken adequate remedial measures to comply with the obligations of the judgment. Very often, the side effects of the Court's decision are modification of the national legislation, development of the judicial system and change in the prosecution policy.

The Court has a very difficult task whenever measuring if there was "hate speech" in a concrete case. Therefore, with time, the Court has developed three most common responses to the "hate speech" issue:

- Hate speech can be justified by reference to the context,
- Hate speech cannot be justified,

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<sup>11</sup> "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.

*"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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"*

<sup>12</sup> How to make a valid application? See: <http://www.echr.coe.int/Pages/home.aspx?p=applicants> (accessed on 25<sup>th</sup> September 2014)

- Total absence of hate speech<sup>13</sup>.

In measuring hate speech, the Court measures several various aspects. The first one is the balance between the context of the expression and its content. Furthermore, the Court judges the applicant's function and his/her role in society, where the expression was made, in which form. Some of the judges of the Court have openly given greater importance to context rather than to content when measuring "hate speech"<sup>14</sup> However, in all cases, the ECHR suggests that **spreading hate speech using mass media may be more problematic**<sup>15</sup> than hate speech in poems, books, posters, leaflets, etc.

When it comes to the distinction between politicians and private individuals, the Court's standpoint is that "the limits of acceptable criticism are wider when the target is a politician than if it is a private individual"<sup>16</sup>. Therefore, politicians have to show a greater degree of tolerance for the criticism they receive from journalists and the general public.

The Court's stand regarding the "hate speech" cases that involve religious feelings is the following: *"those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism! They must tolerate and accept the denial by others of their religious beliefs and even the propagation by other of doctrines hostile to their faith"*. In most of its judgements, the Court has ruled that "there was no violation of Article 10" and considered that the restriction of freedom of expression by the state in question was necessary to protect the rights of others. In other cases, ECHR has found no violation of freedom of expression and accepted that certain expressions which may have been "shocking" or "offensive" should not be restricted as long as they were not gratuitously offensive, the insulting tone did not target directly specific believers, the expressions were insulting neither to the believers nor with respect to the sacred symbols, they did not infringe the believers' rights to manifest or practice their religion and did not denigrate their faith and, in particular, did not incite disrespect, hatred or violence.

The Court has ruled that restrictions to freedom of expression are only acceptable "if they respond to a 'pressing social need'," and if the means used are proportionate to the legitimate aim pursued. Nevertheless, it has stated that national authorities enjoy a certain "margin of appreciation" to do this, which varies from case to case, and will in any event be supervised by the ECHR. The ECHR has also held that Article 10 is applicable not only to "information" or "ideas" that are favourably

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<sup>13</sup> For more details, see: Mario Oitheimer, Protecting Freedom of Expression: "The Challenge of Hate Speech in the European Court of Human Rights Case Law", Cardozo Journal of International & Comparative Law, 9<sup>th</sup> November 2009, page 8.

<sup>14</sup> Ibid, page 15.

<sup>15</sup> Ibid, page 14.

<sup>16</sup> Council of Europe Manual on Hate Speech, Factsheet, Council of Europe, November 2008, page 4.

received or regarded as inoffensive or as a matter of indifference, but also “to those who offend, shock or disturb the state or any sector of the population”<sup>17</sup>.

Another fact the Court takes into serious consideration is whether the “hate speech” was uttered during a live programme. The Court looks, in particular, whether the author had a chance to correct the language that he or she used. Thus, in the case of verbal declarations made during a live TV debate, the Court underlines that the applicant had no possibility of “reformulating . . . , refining or . . . retracting them before they were made public”<sup>18</sup>. This format of debate allows for “an exchange of views or even an argument in such a way that the opinions expressed would counterbalance each other and the debate would hold the viewers’ attention”<sup>19</sup>. The Court’s judges always bear in mind that there is a risk that the media will “become a vehicle for the dissemination of hate speech and the promotion of violence”<sup>20</sup>.

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<sup>17</sup> Ibid, page 3.

<sup>18</sup> For more details see: Mario Oitheimer, Protecting Freedom of Expression: “The Challenge of Hate Speech in the European Court of Human Rights Case Law”, Cardozo Journal of International & Comparative Law , 9<sup>th</sup> November 2009, page 14.

<sup>19</sup> Ibid.

<sup>20</sup> For more details see Surek and Ozdemir v. Turkey case.

## 5. European Court of Human Rights Case Law on “Hate Speech”

The Republic of Macedonia ratified the European Convention on Human Rights in 1997, thus accepting not only the implementation of the Convention, but also the case law of the European Court of Human Rights. Further on, Article 48 of the Law on Audio and Audiovisual Media Services, in its Paragraph 2, prescribes that “the specific prohibitions of Paragraph (1) of this Article shall be **in accordance with the practice of the European Court of Human Rights**”. Therefore, here will be presented some of the cases that are the cornerstone of the Court’s jurisprudence, while all the other cases are available at the official web site of the European Court of Human Rights and in many publications containing the most important and influential judgments<sup>21</sup>.

### 5.1 Handyside v the United Kingdom

In its judgement in the case of Handyside v the United Kingdom, the Court found that a ban imposed by the British authorities under the Obscene Publications Act on a book called *Little Red School Book* was in accordance with the exception laid down in Article 10, Paragraph 2, regarding protection of morals. The Court further emphasized the importance of freedom of expression in a democratic society by stating:

*“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Paragraph 2 of Article 10,, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society”.*

This is the most cited case so far, where the Court stated the fundamental role of freedom of expression in all democratic societies for the first time, emphasizing that freedom of expression is “one of the essential foundations” of a democratic society. The Court also underlined that this freedom “constitutes . . . one of the primary conditions for its progress and for the development of every man.” This approach entails a high level of protection afforded to “‘information’ or ‘ideas’ which are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that hurt, shock or disturb the State or any sector of the population.”

The judgement in the case of Handyside v the United Kingdom has definitely created the cornerstone of the protection of political speech, which is defined as speech “that contributes

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<sup>21</sup> Such as: Freedom of Expression in Europe, Case-law concerning Article 10 of the European Convention on Human Rights, Human Rights file No. 18, Council of Europe Publishing, March 2007.

significantly to an exchange of information and ideas in a democratic society”, and it is strongly protected by the Court. Therefore, the Court will more readily accept restrictions being placed on other kinds of speeches than limits/limitations on political speech.

## 5.2 Jersild v. Denmark

The applicant, a journalist, made a documentary containing extracts from a television interview he had conducted with three members of a group of young people calling themselves "the Greenjackets", who made abusive and derogatory remarks about immigrants and ethnic groups in Denmark. The applicant was convicted of aiding and abetting the dissemination of racist remarks. He alleged a breach of his right to freedom of expression.

The Court drew a distinction between the members of the “Greenjackets”, who had made openly racist remarks, and Mr. Jersild, who had sought to expose, analyse and explain this particular group of youths, and deal with “the specific aspects of an issue that had already been a matter of great public concern”. The documentary as a whole had not been aimed at propagating racist views and ideas, but at informing the public about a social issue. Accordingly, the Court held that there had been a **violation of Article 10** (freedom of expression).

## 5.3 Muslum Gunduz v. Turkey

In this case, the criminal proceedings were instituted against Mr. Gunduz following his appearance, in his capacity as a leader of *Tarikat Aczmendi* (a community that describes itself as an Islamic sect), on a television programme broadcast by the *HBB* channel. The programme was broadcast live on 12 June 1995 and lasted approximately four hours. On 1 April 1996, a state security court found him guilty of inciting people to hatred and hostility on the basis of a distinction founded on religion, and sentenced him to two years’ imprisonment and a fine.

The Court found that he had described contemporary secular institutions as “impious”, criticized the secular and democratic principles, openly called for the introduction of the shariah. Mr. Gunduz complained to the ECHR that his criminal conviction had entailed a violation of Article 10 of the Convention.

The Court found that the applicant’s conviction amounted to interference with his right to freedom of expression. The interference was **prescribed by the Turkish Criminal Code, and it had a legitimate aim** – to prevent disorder or crime and protect the morals and the rights of others.

The “hate speech” at issue was stated in a live programme and it was about a sect whose followers had caught the public eye. Mr Gunduz, whose ideas the public was already familiar with, was invited onto the programme to present the sect and its nonconformist views, including the notion that democratic values were incompatible with its conception of Islam. The topic was the subject of a widespread debate in the Turkish media and constituted a problem of general interest. Some



of the **comments** for which the domestic courts had convicted the applicant did demonstrate an intransigent attitude towards and profound dissatisfaction with the contemporary institutions in Turkey. However, these **could not** be regarded as a call to violence or as “**hate speech**” based on religious intolerance. Furthermore, in view of the context in which they had been made, when weighing up the competing interests of freedom of expression and the protection of the rights of others in order to determine whether the interference was necessary for the purposes of Article 10 (2), the Turkish courts should have given greater weight to the fact that **the applicant was actively engaged in a lively public debate**.

Therefore, the Court confirmed with no doubt that the speech in question called to propagate, incite or justify hatred based on intolerance, including religious intolerance, and it did not enjoy the protection of Article 10 of the Court. However, in the Court’s view, merely defending the shariah, **without calling for the use of violence to establish it, could not be regarded as “hate speech”**. In view of the context, the Court found that it had not been convincingly established that the restriction was necessary. For the purposes of Article 10, there were **insufficient reasons** to justify the interference with the applicant’s right to freedom of expression. The ECHR found **there was violation of Article 10 of the Convention**.

To conclude this case: although the prohibition of hate speech was **prescribed by law, and although the Court agreed** with the Turkish Court that the ban of the programme was in accordance with the Turkish Law and concluded that the national courts had **a legitimate aim** when banning the programme – the Court still found that the ban itself **was not necessary in a democratic society**.

## 6. Macedonian regulatory framework for “hate speech”

It should be noted that the Macedonian regulatory framework follows the guidelines by the European Convention on Human Rights to allow “hate speech” regulation through administrative, civil and criminal codes.

### 6.1 Law on Audio and Audiovisual Media Services

Article 4 of the Law on Audio and Audiovisual Media Services (hereinafter referred to as “the Law”) states that the “competent authority on matters under this Law shall be the Agency for Audio and Audiovisual Media Services” (hereinafter: AAAMS).

Article 48 of the Law defines special prohibitions on “hate speech” in the following way: *“The audio and audiovisual media services **must not** contain programmes that:*

- *threaten national safety,*
- *call for violent destruction of the constitutional order of the Republic of Macedonia,*
- *call for military aggression or armed conflict,*
- *incite or spread discrimination, intolerance or hatred based on race, sex, religion or nationality.*

Article 48, Paragraph 2, states that:

*The specific prohibitions of Paragraph (1) of this Article shall be in accordance with the practice of the European Court of Human Rights.*

This provision gives the Agency the authority to use the case law of the European Court of Human Rights in every decision it makes, and in accordance with these Guidelines.

Further on, Article 6 provides the AAAMS with the competence, among other things, to **“undertake measures in accordance with this Law in cases of violation of the provisions of this Law** or the regulations adopted thereof, and the conditions and obligations arising from the licenses”. That clearly gives the AAAMS the authority to react to breach of any Article of the Law, including Article 48 and the recognition of “hate speech”. However, it seems that the legislator has missed to precisely regulate the specific measures that the Agency could use against the audio and audiovisual media service providers in Macedonia, due to which there is a precisely regulated PART “to undertake measures for timely termination of the transmission and reception of audio and audiovisual media services from third countries on the territory of the Republic of Macedonia in accordance with Article 45 of this Law”.

In accordance with Article 7, the “operation of the Agency shall be regulated in more details in the Agency’s Rules of Procedure”, which means that the Agency can develop the procedure **for adopting the bylaws and other acts arising from this Law**, which, in turn, can be the bylaw to further regulate “hate speech”.

“If the **Agency establishes violation of the provisions of this Law and the bylaws adopted thereof**, as well as the **conditions and obligations laid down in the license and other Agency acts**, the Agency Director may undertake measures against the media publisher, the audio and audio-visual service provider on demand or the operators of electronic communication networks which retransmit programme services”, according to Article 23.”

It further prescribes that the Agency shall:

- **adopt a decision with written warning;**
- **file a request to initiate a misdemeanour procedure** in cases where, despite the adopted warning decision, the same violation that incurred the written warning continues throughout the year;
- **submit a proposal to the Council for revoking a license**, or
- **adopt a decision for deletion from the Registry** in accordance with this Law.

The problem that the Agency may face is the case of a serious “hate speech” broadcast by the media, when the written warning may not be enough and when the Agency needs to have a stronger tool to react, such as the one for re-transmission of foreign programs.

## **6.2 Criminal Code**

As regards the criminal regulation of “hate speech”, it is prescribed in details by the Criminal Code. There are several criminal acts that are connected to “hate speech” and they will be presented below.

The first one is “jeopardizing safety” (Article 144), which states:

*Whosoever jeopardizes the safety of another, **by a serious threat to attack his life or body or the life or body of a person closely related to him**, shall be fined or sentenced to six months’ imprisonment.*

*Whosoever commits the crime referred to in Paragraph 1 while committing family violence shall be sentenced to an imprisonment of three months to three years.*

*The sentence stipulated in Paragraph 2 shall be imposed on the person that commits the crime stipulated in Paragraph 1 against an official while performing his/her duty, or against several persons.*

*Whosoever, **by means of an information system, threatens to commit a crime entailing a sentence of five years’ imprisonment or a more serious sentence against a person because of their gender, race, colour of the skin, class, membership of a marginalized***

*group, ethnic background, language, nationality, social origin, religious belief, other beliefs, education, political affiliation, personal or social status, mental or physical impairment, age, family or marital status, property status, health condition, or any other ground foreseen by law or a ratified international agreement, shall be sentenced to an imprisonment of one to five years.*

In addition, Article 319 describes the crime that is **causing hatred, discord or intolerance on national, racial, religious or any other discriminatory grounds** in the following way:

*Whosoever by force, maltreatment, endangering the security, mocking the national, ethnic, religious and other symbols, by burning, destroying or in any other manner damaging the flag of the Republic of Macedonia or the flags of other states, by damaging other people's objects, by desecrating monuments, graves, or in any other discriminatory manner, directly or indirectly, causes or excites hatred, discord or intolerance on the grounds of gender, race, colour of the skin, membership in a marginalized group, ethnic membership, language, nationality, social background, religious belief, other beliefs, education, political affiliation, personal or social status, mental or physical impairment, age, family or marital status, property status, health condition, or on any other ground foreseen by law or a ratified international agreement, shall be sentenced to an imprisonment of one to five years.*

*Whosoever commits the crime referred to in Paragraph (1) of this Article by abusing his position or authorization, or if these crimes led to riots and violence against people or property damage of great proportions, shall be sentenced to imprisonment of one to ten years.*

Article 394(g) describes the criminal act of **spreading racist and xenophobic material via an information system, and prescribes the following:**

*Whosoever spreads via a computer system racist and xenophobic written material, photo or other representation of an idea or theory helping, promoting or stimulating hatred, discrimination or violence in the public against any person or group, based on sex, race, skin colour, class, membership in a marginalized group, ethnic background, language, nationality, social background, religious belief, other types of beliefs, education, political affiliation, personal or social condition, mental or physical disability, age, family or marital status, property status, health condition, or any other ground foreseen by law or a ratified international agreement, shall be sentenced to imprisonment of one to five years.*

*The sentence referred to shall also be imposed against whosoever commits the crime via other public information means.*

*Whosoever commits the crime under Paragraphs (1) and (2) of this Article by abusing his position or authorization or if these crimes result in disorder and violence against people or in property damage of greater extent, shall be sentenced to an imprisonment of one to ten years.*

Article 407a prevents **approving or justifying genocide, crimes against humanity or war crimes, by regulating it in the following way:**

*Whosoever publicly negates, roughly minimizes, approves and justifies the crimes stipulated in Articles 403 to 407, through an information system, shall be sentenced to one to five years' imprisonment.*

*If the negation, minimizing, approval or justification is performed with the intent to instigate hate, discrimination or violence against a person or a group of persons due to their national, ethnic or racial origin or religion, the offender shall be sentenced to at least four years' imprisonment.*

The crimes related to **racial or other discrimination** are regulated by Article 417:

*Whosoever violates, based on the difference in sex, race, skin color, class, membership in a marginalized group, ethnic background, language, nationality, social background, religious belief, other types of beliefs, education, political affiliation, personal or social condition, mental or physical disability, age, family or marital status, property status, health condition, or any other ground foreseen by law or a ratified international agreement, the basic human rights and freedoms acknowledged by the international community, shall be sentenced to six months to five years' imprisonment.*

*The sentence referred to in Paragraph 1 shall also be imposed upon whosoever prosecutes organizations or individuals because of their efforts towards people's equality.*

*Whosoever spreads ideas about the superiority of one race over another, or advocates racial hate, or instigates racial discrimination, shall be sentenced to six months to three years' imprisonment.*

### **6.3 Law on Prevention of and Protection against Discrimination**

Finally, there is a **Law on Prevention of and Protection against Discrimination** which, in its Article 4, states that “this Law shall be applied by all state bodies, bodies of the local self-government units, **legal entities with public legal competences**, and legal entities and natural persons in the field of ....”**public information and media**”. According to this, the AAAMS should also be in charge of implementing the Law on Prevention of and Protection against Discrimination, due to which one of the recommendations at the end of the text proposes close cooperation between the AAAMS and the relevant regulator for this law in fighting discrimination.

Article 5, Point 3 defines the meaning of **discrimination** as “any unjustified legal or factual, direct or indirect, differentiation or unequal treatment, i.e. omission (exclusion, limitation or giving priority) with respect to persons or groups based on sex, race, colour, gender, belonging to a marginalized group, ethnic origin, language, nationality, social background, religion or religious beliefs, education, political affiliation, personal or social status, mental and physical impediment,

age, family or marital status, property status, health condition or any other ground”. It should be précised whether the AAAMS should also use this definition in its daily work when monitoring the programme.

## 7. Guidelines for monitoring “hate speech”

When determining hate speech, most of the regulatory authorities in the audiovisual field use the case-law of the European Court of Human Rights (ECHR) and the domestic courts as their guiding principles. The basic premise of both the ECHR and the national courts is that all incitement cases should be considered on a case-by-case basis.

The main challenge for an audiovisual regulator while working with the prohibitions of hate speech in the linear and non-linear audiovisual media services under its jurisdiction is to determine how to draw the line between the forms of public speech (offensive, rude, abusive, etc.) that should be tolerated in a democratic society and speech that has to be restricted and sanctioned in order to protect the right of individuals and groups not to be discriminated, or speech that may lead towards violence, public disorder and crime.

The ECHR and the domestic courts will always base their decisions on the particular circumstances of each individual case. This means that there are many decisive factors which have to be taken into consideration when drawing “...the dividing line between what is allowed and what is not: it is rather a set of variable elements, which must be combined on a case by case basis.”<sup>22</sup>

The difficulties and dilemmas that surround the assessment of a particular public communication as a form of speech that has to be restricted arise from the fact that “hate speech” is not always expressed in an explicit form but is also present in the statements that are perceived differently by different social or cultural groups. Research evidence shows that sometimes even messages that contain implicit forms of stereotyping of different ethnic, religious or other cultural groups can trigger violence and harassment.

The main aim of the Guidelines presented below is to equip the Agency of Audio and Audiovisual Media Services with a summary of basic principles or methodologies to be followed while detecting and analyzing messages disseminated through linear and non-linear audiovisual media services in respect to the prohibition of incitement to hatred stipulated in the Law on Audio and Audiovisual Media Services. The provision contained in the Law is aligned with Article 6 of the AVMS Directive and gives the Agency legal ground to prevent dissemination of hate speech in the AVM services. These principles are actually implemented in the case-law of the European

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<sup>22</sup> See p.24 of the CoE Manual on Hate Speech. Available at:  
[http://www.coe.int/t/dghl/standardsetting/hrpolicy/publications/hate\\_speech\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/publications/hate_speech_en.pdf)

Court of Human Rights and the domestic courts or are elaborated in different forms in various manuals, guidelines and other documents published by the international organizations<sup>23</sup>.

### **7.1 What was the context of the expression?**

The first question that the court takes into consideration when reviewing the presence of “hate speech” in a particular case is a comprehensive evaluation of the *context of the expression*<sup>24</sup>. Any analysis of the context should place the specific ‘message’ within the wider social and political context in which this message was created and disseminated. Media reports that frequently contain messages calling for violence against individuals or groups belonging to different communities would have different consequences in different contexts. There are countries with a long history of interethnic and interreligious tensions or with more conservative and autocratic social environments. On the other hand, there are countries with fairly peaceful political history and a greater level of tolerance towards diverse communities and opposing views in their society.

Therefore, the analysis of the historical, political and social circumstances in a country should provide answers to the following questions:

- Is there a history of conflicts in the society? What is the current situation in the country? Are there still conflicts or post-conflict tensions among the relevant groups? What were the most recent occurrences of violence resulting from other examples of incitement to hatred? Are there other risk factors in the society that may lead to violence against a specific group?
- Are all groups in the society equally protected at the legal and institutional levels? How have the relevant institutions reacted in cases of discrimination and incitement to violent behavior against specific individuals or groups? What is the broader political climate and level of tolerance towards diverse groups and communities in society?
- What is the overall socio-economic status of the community at whom the speech is targeted? Do the members of this community suffer from economic insecurity, unemployment, difficult access to resources, etc.?

### **7.2 Who was the person expressing him/herself?**

The next level of analysis is the identity and status of the person who is the source of the expression. In general, an individual with a higher social status and official position in the society

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<sup>23</sup> The main sources used while developing the Guidelines were: the case-law of the European Court of Human Rights, Article 19, document “Prohibiting Incitement to Discrimination, Hostility or Violence” (December 2012), CoE Manual on Hate Speech (September 2009) and other documents and academic articles.

<sup>24</sup> For more on this see: Oetheimer, M. (2009). Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law. *Cardozo J. Int'l & Comp. L.*, 17, 427.



can also have greater influence on the public opinion. Several questions should be answered at this stage:

- Is the person who gave the public speech/statement in a position to influence the public opinion? Does he/she have the authority to influence significant parts of the audience?
- Is the person a public official and was the statement made in his/her official capacity? Is he/she a politician or prominent member of a political party, having in mind that public officials and politicians have to refrain from making provocative and intolerant statements?
- Is the person a public figure with a particular status in society (a religious or charismatic leader) that gives him/her stronger influence on the audience? How the audience perceives this person? Do they show excessive respect for authority and are, as such, more susceptible to incitement?

### **7.3 Was there an intention to provoke hate speech?**

The next important component of the assessment is the presence of intention on the part of the speaker. Article 19 defines intent as a “volition (purposely striving) to engage in advocacy to hatred, ... aimed at a protected group on the basis of prohibitive grounds, while being aware of the consequences of his/her action and knowing that the consequences will occur or may occur in the ordinary course of events.”<sup>25</sup>

The presence of intent is difficult to be proven unless the person admits explicitly his/her intentions. The ECHR and other courts decide about intent based on an assessment of the case and its circumstances as a whole. Other important aspects examined by the ECHR include the following questions:

- What specific language (wording or expression) did the speaker use? How explicit was the language? What was the tone of the speech and the circumstances in which it was disseminated?
- Given the context, was the speaker’s intent unambiguous and clear to its audience? Could it be that the speaker had something else in mind rather than to incite hatred? Was the speaker’s aim to inform the public about a matter of general interest (objective journalistic reporting, historical or documentary)?
- What was the scale and number of repetitions of the message? Did the speaker repeat the discriminatory speech over time and on several occasions?

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<sup>25</sup> For more details, see: “Prohibiting Incitement to Discrimination, Hostility or Violence” Article 19, December 2012. Available at: <http://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>

- Could the speaker predict the likely impact of his/her speech? Was the speaker aiming at any specific minority/religious group? Was the speaker's intent unambiguous and clear to its audience?

#### **7.4 What was the content of the expression?**

The content of a specific expression is the next critical aspect to be analyzed. It is concerned with: what was said, the form and style of the language, the presence of explicit calls for violence or discrimination, etc. This level of analysis includes the following questions:

- What did the individual say? Did the sentence involve direct encouragement of the audience to act in certain direction? Did the message unambiguously call for violence, hostility or discrimination or it could have been interpreted in another way?
- Who was targeted? Was it the groups whom the speech was intended to incite? Did the message contain specific linguistic references common to the groups that were being incited?
- Who was targeted? Was it the potential victims of discrimination, violence or hostility? Did the language used contain specific negative references to the 'Other' group (of victims)? Was this group directly or indirectly named?
- How was it said, i.e what was the tone? To what degree was the speech provocative and direct? Did it include mitigating references? Did the expression contain emotional references that can stimulate illegal reactions by the audience?
- What was the form of expression, taking into account that certain forms of expression are subject to greater protection under Article 10 (artistic expression, political speech, religious speech, academic research)? Did the journalist intend to present "hate speech" as a phenomenon?

#### **7.5 What were the extent and the magnitude of the expression?**

The next important issue to be examined is the public nature of the expression, the means of its dissemination and its magnitude. This level of assessment involves the following questions:

- Was the speech directed to a certain number of individuals or to the members of the general public?
- Was it said via an electronic medium? Was it said in a live show? When a message is disseminated through audiovisual media the impact is much more immediate and powerful.

- What was the frequency, amount and extent of communication? Was the message broadcasted once or repeated on several occasions?

## **7.6 What was the likelihood of influencing the audience and its subsequent actions?**

The last point of analysis is to assess the probability of harm that may occur as a consequence of the expression. In other words, it should be predicted how the audience will receive the message and what actions may follow as a negative consequence. The criteria for assessing the risk of negative actions have to be established on a case-by-case basis, by answering several questions<sup>26</sup>:

- Was the speech understood by its audience as a call to acts of discrimination, violence or hostility?
- Was the speaker able to influence the audience?
- Did the audience have the means to perform the advocated action, and commit acts of discrimination, violence or hostility?
- Had the targeted group suffered or been the target of discrimination, violence or hostility shortly before this?

The reporting format of the results of the monitoring should follow the way the European Court of Human Rights measures whether there is a need to restrict the freedom of expression or not, in every individual case. This means that the respective departments should prepare a proposal stating that there is “hate speech” in media, quoting not only the Law on Audio and Audiovisual Media Services, but also explaining the legitimate aim for their decision and why such a restriction of the freedom of expression is necessary in a democratic society.

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<sup>26</sup> These are the criteria suggested by Article 19 in the document “Prohibiting Incitement to Discrimination, Hostility or Violence” (December 2012).

## 8. An Overview of Other Regulatory Bodies' Practices in Monitoring Hate Speech

The scope and mandate of regulatory authorities in the audiovisual field, as civil administrations, when dealing with cases of hate speech, were discussed at the 39<sup>th</sup> meeting of the European Platform of Regulatory Authorities (EPRA) held in Budva in June 2014. The summary of conclusions presented below is drawn from the analysis presented during the second plenary session in Budva<sup>27</sup>.

The evidence presented in the EPRA analysis shows that the issue of hate speech has been an extremely important topic for the audiovisual regulators in Europe, especially taking into account the emergence of plenty of new non-linear TV services distributed via new technological platforms. It is also emphasized that the issue of hate speech needs very careful and detailed consideration on the audiovisual regulators' part in order to be classified as such.

- In most of the countries, hate speech is subject to both media legislation and criminal laws. National broadcasting laws, as a rule, contain an explicit provision prohibiting 'incitement to hatred', but rarely provide a detailed definition of the notion. The provisions in the broadcasting laws also provide information on the various grounds on which the incitement of hatred is prohibited: race, gender, religion and nationality, national or social origin, belief, ethnic background, skin colour, language, morals, sexual identity/expression/orientation/preferences, education, disability, etc.
- The provisions in media legislation apply to both linear and non-linear media services, with the exemption of the United Kingdom where non-linear services are subject to self-regulation. Ofcom has powers to react against non-linear TV services only in cases of extreme hate speech.
- Legal derogations from the general prohibition of hate speech exist only in cases of broadcast content that is part of scientific and feature documentaries or part of journalistic reporting in which hate speech is analyzed as a negative phenomenon from a critical perspective.
- When determining hate speech, most of the regulatory authorities use the case-law of the European Court of Human Rights and their domestic courts as their guiding principles. Several regulators have adopted their own guidelines integrated in the programme standards codes (Ofcom, Gibraltar). In a few countries the regulators cooperate with special bodies which determine whether a specific content published in

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<sup>27</sup> EPRA Draft Background Paper: Summary of the Answers to the Hate Speech Questionnaire, presented at the Plenary Session 2: Hate Speech – Old Enemy, New Battles, 39<sup>th</sup> EPRA meeting, Budva 4-6 June 2014.

the audiovisual media incites hate on various grounds (Inspector of Journalist Ethics in Poland and Lithuania, Inter-federal Center for Equal Opportunities in Belgium).

- In the last two years, a significant number of regulators<sup>28</sup> have dealt with various cases of hate speech: gender discrimination, religious-fundamentalistic matters, anti-Semitic and xenophobic language, derogatory language against immigrants, language targeting LGBT population, Roma etc.
- Sanctions that the audiovisual regulators have at their disposal are various: warning, order to publish the findings of the regulator, order to issue correction, fines and, in very severe cases, decision to shorten or terminate the license.

In the following paragraphs, the legislative framework and overview of practices of five regulators are presented in more details. In addition, relevant cases were selected to present how each regulator proceeded in determining hate speech and types of sanctions that were imposed.

## **1. United Kingdom**

### *1.1. Constitutional and legal framework*

The three countries that are part of the main island of Great Britain have different legal systems. England and Wales share the same legal system, whereas Scotland's legislation is quite different and administered by a separate judiciary<sup>29</sup>.

The United Kingdom does not have a codified constitution, but many aspects of the constitutional law can be found in the UK jurisprudence, the writings of leading commentators and the practice of the different branches of government.

The UK Criminal Law contains several acts dealing with racist offences: the *Protection from Harassment Act 1997* which establishes the offence of harassment; the *Public Order Act (POA) 1986* which also includes harassment offences based on insulting, abusive or threatening behavior; the *Crime and Disorder Act 1998* which contains provisions on racially motivated forms of the offences of harassment.

Section 22 of the POA makes it an offence to include any programme involving visual images or sounds that are threatening, abusive or insulting within any broadcast or any cable television or radio service, if this is intended or likely to stir up racial hatred. This offence may be

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<sup>28</sup> In the EPRA Analysis, it is stated that 19 regulators reported existence of various cases of hate speech.

<sup>29</sup> The legal system of Northern Ireland is not subject of this overview. Although it is administered by representatives of the central government under the direction of the executive government and legislature in London, it exists separately from Great Britain.

committed, simultaneously or separately, by the broadcaster or cable distributor, by any or all producers and directors of the programme and by the performers who are actually engaged in the offending conduct. Section 22 provides specialised defences for each of these possible categories of accused persons. Broadcasters and cable distributors will escape liability only if they prove that it was not reasonably practicable for them to remove the offensive material from the programme.

In the UK Civil and Administrative Law there are several acts that introduce norms with regard to discrimination: The Employment Equality (Religion or Belief) Regulations 2003, The Employment Equality (Sexual Orientation) Regulations 2003, the Disability Discrimination Act 1995 (Amendment) Regulations 2003, the Race Relations Act 1976 and the *Human Rights Act* 1998.

The Human Rights Act (HRA) incorporates the European Convention on Human Rights ("ECHR") into UK law. It provides that all legislation (past and future) is to be read and given effect as far as possible in a manner which is compatible with the ECHR.

The UK broadcasting sector is subject to a more detailed regulation, while the press and online media are self-regulated. The main legislative document on broadcasting is the 2003 *Communications Act*, which regulates both broadcast content and telecommunications. Besides the *Communications Act*, provisions of the *Broadcasting Acts* 1990 and 1996 are still relevant. The three regulatory bodies which previously dealt with content issues (the Independent Television Commission (ITC), the Radio Authority (RA) and the Broadcasting Standards Commission (BSC)) have been merged (together with the spectrum agency RCA and the telecom regulator Oftel) into one body: Ofcom. Consequently, statutory regulation of the UK broadcasting sector is performed by OFCOM, which is a converged regulatory body for both telecommunications and broadcasting. The *Communications Act* makes it clear that Ofcom has no remit over Internet content in general.

### *1.2. Ofcom powers and practices related to hate speech*

Ofcom regulates the independent television services in accordance with the terms of the Communications Act and the 1990 and 1996 Broadcasting Acts, respectively. Section 319 of the Communications Act requires Ofcom to produce Standards Codes, as well as to review and revise such standards for the content of programmes to be included in television and radio services. Section Three of the Broadcasting Code<sup>30</sup> introduces standards related to Crime. Rule

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<sup>30</sup> Available at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>, Accessed on September 10<sup>th</sup> 2014.

3.1 stipulates that: “Material likely to encourage or incite the commission of a crime or to lead to disorder must not be included in television or radio services.”

In addition to its authorization to produce standards codes, Ofcom also develops Guidelines aimed at assisting broadcasters in interpreting and applying the Broadcasting Code. In the Guidelines on Section 3 – Crime<sup>31</sup>, more detailed explanation is given regarding the Rule 3.1: “‘crime’ relates to offences under criminal law punishable by a fine or imprisonment. ‘Disorder’ may relate to the criminal offence of civil disorder or may be more generic, including acts that might lead to or provoke the commission of crime.”

Ofcom has adopted detailed procedures for investigating breaches of content standards for television and radio<sup>32</sup>. Ofcom may launch investigations on its own initiative as well as investigate complaints. The procedures in a complaint-led investigation and an Ofcom-initiated investigation are the same. In the first case, Ofcom will first consider whether a complaint raises potentially substantive issues under the Code, by reference to the gravity and/or extent of the matter complained of. If Ofcom considers that it should assess the matter further, it may ask the broadcaster for a copy of the relevant programme, which must be provided within five working days. Based on an initial assessment of the complaint and a review of the relevant content, Ofcom will consider whether there may have been a breach of particular provisions of the Code. If not, Ofcom will decide not to investigate further and will publish its decision in its Broadcast Bulletin. The initial assessment has to be completed within 15 days.

In case of an opened investigation, Ofcom will summarize the material parts of the complaint/case, set out the relevant provisions of the Code and invite the broadcaster to make representations in response and file an appeal (and provide any relevant evidence in support) within 10 working days. It will also publish details on the programmes under investigation on its website. Ofcom aims to complete the cases under investigation within 50 working days.

On receipt of the broadcaster’s representations, Ofcom prepares its preliminary view which is only provisional and may be subject to change in the light of subsequent submissions by the broadcaster. This preliminary view contains:

- a summary of the case;
- a summary of the parts of the programme to which the case relates;
- relevant provisions of the Broadcasting Code applicable to the case;
- Ofcom’s preliminary assessment on the breaches of those provisions and justification for this assessment.

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<sup>31</sup> Available at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section3.pdf>, Accessed on September 10<sup>th</sup> 2014.

<sup>32</sup> Available at: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>, Accessed on September 10<sup>th</sup> 2014.

The broadcaster is requested to give its official reply related to the preliminary view within 10 working days. Ofcom will reach its final decision taking into consideration the broadcaster's representation of the case. The broadcaster is provided with a copy of the decision (for factual corrections only) before it is published in the Broadcast Bulletin and on the website.

In general, Ofcom has powers to impose statutory sanctions if the breaches of the Broadcasting Code or Licence Conditions are: serious, deliberate, repeated and reckless. There are several possible penalties that can be imposed: Direction not to repeat a programme; Direction to broadcast a correction/statement of Ofcom's findings; Shortening or suspension of a licence (only applicable to certain types of licence); Fine and revocation of licence. According to Section 239 of the Communications Act 2003, for very serious cases of hate speech, Ofcom has powers to immediately suspend a license. There have been several cases where OFCOM has intervened:

- Radio Asian Fever (November 2011) – against a small community radio station in Northern England, for broadcasting language that was likely to encourage violent behaviour against homosexuals;
- DM Digital (July 2013) – against a TV Channel aimed at UK Asian audience, for the statement of an Islamic scholar who said that “all Muslims have a duty to kill or attack those seen to have insulted the Prophet” (£85,000 fine);
- Sangat TV (August 2013) – against a TV channel aimed at the UK Sikh community, for an indirect call to take violent action against a retired general of the Indian Army, in a discussion related to a violent attack in London (£30,000 fine);
- Noor TV (August 2013) – against a TV channel which broadcasts programmes about Islam in various languages, for the statement of an Islamic scholar who said that “it is acceptable, even the duty of Muslims, to murder any one thought to have shown disrespect to the Prophet” (£85,000 fine).

## **2. France**

### *2.1. Constitutional and legal framework*

France guarantees the equality of all citizens before the law, without distinction as to origin, race or religion. Fundamental rights and freedoms in France are guaranteed in the preamble to the 1958 Constitution, which refers back to the preamble to the 1946 Constitution which is based on the Declaration of Human Rights of 1789. Article 2 of the 1958 Constitution states that France "...shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs."



France has adopted several antiracist laws. The Act of 1 July 1972 forms the basis of this body of law. This Act is contained both within the Criminal Law (repression of discriminatory acts: article 416) and in the Act of 29 July 1881 on the freedom of the press. It was added to further Acts adopted in 1975, 1977, 1983, 1985 and 1987. Finally, the new Press Act of 13 July 1990 (Section 24a) completed the body of law by creating the offence of disputing crimes against humanity.

The new Criminal Code, which came into force on 1 March 1994, amends, supplements and even creates a number of provisions on racism. On the whole, it introduced more stringent penalties for racist offences. Article 225-1 of the new French Criminal Code provides a definition of discrimination as “any distinction resting on origin or the membership (or non-membership) of a particular ethnic group, nation, race or religion.” This article also covers the punishment for discrimination against legal persons for the same reasons. Other provisions of the Criminal Code ban other types of offenses as well: genocide, other crimes against humanity, racism, non-public incitement to discrimination, hatred or racial violence, etc.

The new Criminal Code does not amend the offences defined by the Act of 29 July 1881 on the freedom of the press, which remains in force. The 1881 Act contains measures which make it an offence to defend or dispute crimes against humanity, instigate discrimination, hatred or violence or engage in the defamation or abuse of a race, ethnic group, nation or religion. People who write racist graffiti and inscriptions on public or private buildings are liable to prosecution not only for willful damage or desecration of graves, but also for racist offences, when these are proven. In order for one of the above-mentioned offences to exist, the acts must have been *brought to the attention of the public* by one of the means of publicity: printed matter, drawings, engravings, paintings, emblems, images or any other written, oral or visual medium, sold or distributed, placed on sale or exposed to public view, as well as any audiovisual means of communication. The 1881 Act punishes not only the offender, but also the persons who have contributed to the manifestation of the offence, even if they did not take direct part in committing it. Under Section 42, the following persons are liable to punishment: publishers or editors, printers, distributors, vendors, etc. As far as audiovisual communications are concerned, the Act of 13 December 1985, which supplements the Act of 29 July 1982, systematizes the criminal liability of these kinds of offenders in the same way (Section 93-3).

The Freedom of Communication Act (*Loi relative à la liberté de communication*) of September 1986 contained the most important principles regulating the content offered by public services and commercial broadcasters. It was amended by the Act of 5 March 2009 on audiovisual communications and the new public service which also included the regulation of the content offered by on-demand audiovisual services. According to Section 2(3) of the Act, both television services and on-demand audiovisual services fall within the scope of the term “audiovisual communication”. Section 1(2), Sections 3-1(1) and (5) and Section 15 of the Act

provide that CSA (Superior Audiovisual Council) shall ensure freedom of communication, but this may be subject to restrictions on grounds of incitement to hatred.<sup>33</sup> The CSA can issue recommendations to audiovisual media service providers, which are published in the Official Gazette.

## 2.2. *CSA powers and practices related to hate speech*

The *Conseil supérieur de l'audiovisuel* (CSA) was established under the Law of 17 January 1989 with the powers of guaranteeing broadcasting freedom in France. It is the successor to the *Haute Autorité de la communication audiovisuelle* (1982-1986) and to the *Commission nationale de la communication et des libertés* (1986-1989). The CSA's responsibilities are wide-ranging: ensuring plurality of opinions expressed in the audiovisual sector, monitoring the coverage of electoral campaigns, allocating frequencies to operators, minors' protection, ensuring human dignity, protecting consumers etc. The *Conseil* is also in charge of preserving the French language and culture. More recently, the CSA has received new charges: making television programmes accessible to hearing or visually impaired persons, ensuring that media reflect the diversity of French society, supporting public health protection policies, etc.

One of the main missions of the CSA is to ensure that audiovisual contents of the broadcasters and the nonlinear audiovisual services respect the fundamental principles contained in the Act of 30 September 1986 on freedom of communication. These principles include respect for human dignity, the fight against discrimination, the maintenance of public order and the honesty of information. While Article 1 of the Law of 30 September 1986 on freedom of communication gives the CSA general power to ensure respect for these principles, other laws enable it to undertake various actions. For example, the Act of 29 July 1881 on the freedom of the press punishes slander and defamation, and Article 9 of the Civil Code governs respect for privacy. These laws give legitimacy and ground to CSA's actions.

This legal basis is reflected in particular in the obligations that the CSA incorporates into the agreements signed by audiovisual media service providers. These agreements contain clear provisions on ethical dimensions and respect to human rights in the programmes offered by audiovisual media services. Thus, the agreements contain obligations: to avoid presentation of human suffering, to respect different political, cultural and religious sensitivities of the public, to promote the values of integration and solidarity, to verify information and to present the

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<sup>33</sup> Article 15 provides that: "...programmes made available to the public through an audiovisual communication service must not contain any incitement to hatred or violence for reasons of race, sex, morality, religion or nationality." Available at: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000512205&fastPos=1&fastReqId=78965485&categorieLien=cid&oldAction=rechTexte>

various sources, to be rigorous in the presentation and processing of information, to avoid misleading the viewer, to respect the human rights of a person, etc.

The Council adopted a recommendation in 2004 on the treatment of international conflicts<sup>34</sup>, requiring from audiovisual operators: to verify the accuracy of the information and quote the source and date of proceeding; to publish correction in case of disseminating inaccurate information; to take into consideration, with due attention and rigor, that international conflicts are likely to fuel tensions or lead to attitudes of rejection or xenophobia, etc.

The CSA also has powers to initiate a procedure after a complaint is lodged by individuals or associations concerning an alleged breach of the legal provisions of the Law on Freedom of Communication or the obligations undertaken in the license agreement. Several cases are published on the CSA's web site, among which a few are related to violation of the provisions on respect for human dignity:

- In June 2014, the CSA warned Canal + about the programme *La Nouvelle Edition* of 10 April 2014, in which a columnist made comments that tended to minimize the scope of the abuses that occurred in 1992 in Maragha against the Armenian population. CSA determined that such statements, even if expressed with a humorous tone, do not take into account the obligations under Articles 1 and 15 of the Law of 30 September 1986 related to respect for human dignity<sup>35</sup>.
- In February 2013, the CSA issued a warning to France 2 regarding the current affairs magazine *Envoyé Special* of 7 February 2013. CSA found the images shown in the magazine in a report dedicated to the conflict in Mali represented an infringement of the human dignity of the victims and were likely to disturb young viewers. The CSA supported its decision with the fact that the images of deceased persons were very extensive, were repeated and explicitly showed the bodies of the victims. At its Plenary Session, the CSA decided to issue a warning to the editors of France against the repetition of such violations<sup>36</sup>. The warning was issued on the basis of Article 1 of the Law of 30 September 1986 on freedom of communication and Article 16-1-1 of the Civil Code.
- In the course of 2003, the Lebanese Channel Al Manar broadcasted programs all over Europe without a license. Several times, it broadcasted various programmes containing anti-Semitic elements. The Channel was licensed by CSA in November 2004, under a very strict agreement which contained obligations not to broadcast discriminatory

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<sup>34</sup> Available at: [http://www.csa.fr/related to en/Television/Le-suivi-des-programmes/La-deontologie-de-l-information-et-des-programmes/Les-fondements-juridiques](http://www.csa.fr/related%20to%20en/Television/Le-suivi-des-programmes/La-deontologie-de-l-information-et-des-programmes/Les-fondements-juridiques)

<sup>35</sup> Available at: <http://www.csa.fr/en/Television/Le-suivi-des-programmes/La-deontologie-de-l-information-et-des-programmes/Chronique-dans-l-emission-La-Nouvelle-Edition-Canal-mise-en-garde>

<sup>36</sup> Available at: <http://www.csa.fr/Television/Le-suivi-des-programmes/La-deontologie-de-l-information-et-des-programmes/Images-de-guerre-au-Mali-le-CSA-met-en-garde-France-Televisions>

content or any other form of hate speech. However, in December 2004, CSA made a decision to revoke the license following several further infringements. The CSA also referred the matter urgently to the *Conseil d'État* (the French Supreme Court for administrative justice), on the basis of the new Article 42-10 of the amended Act of 30 September 1986, to undertake measures to stop the retransmission of Al Manar over the satellite platform Eutelsat<sup>37</sup>. The *Conseil d'État* established that, despite the warnings issued by the CSA and its signing of the agreement with the CSA, Al Manar had continued to broadcast content that was blatantly in contradiction with the provisions of Article 15 of the Act of 30 September 1986 prohibiting the broadcasting of any programme containing incitement to hatred or violence on the basis of religion or nationality. At the same time, the CSA embarked on a sanction procedure that resulted in terminating the agreement on 17 December 2004.

### 3. Poland

#### 3.1. *Constitutional and legal framework*

The Polish Constitution contains several provisions related to equality of all persons before the law. All persons shall have the right to equal treatment by public authorities. No one shall be discriminated against in political, social or economic life for any reason whatsoever (Article 32). Polish citizens belonging to national or ethnic minorities have the freedom to maintain and foster their own language, to maintain customs and traditions and to develop their own culture. National and ethnic minorities shall have the right to establish educational and cultural institutions, institutions designed to protect religious identity, as well as to participate in the resolution of matters connected with their cultural identity (Article 91).

The Polish Penal Code<sup>38</sup> clearly defines different types of hate speech and prohibits public incitement “to initiate a war of aggression” (Article 117), and no one shall publicly promote “... a fascist or other totalitarian system of states or incite hatred based on national, ethnic, race or religious differences or lack of any religious denomination” (Article 256). In addition, the Code stipulates that no one can publicly insult “...a group within the population or a particular person because of his national, ethnic, race or religious affiliation or because of his lack of any religious denomination” (Art. 257).

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<sup>37</sup> For more details on the case visit: <http://merlin.obs.coe.int/iris/2005/2/article21.en.html>

<sup>38</sup> Available in English at: [https://www.imolin.org/doc/amlid/Poland\\_Penal\\_Code1.pdf](https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf)

Hate speech is also banned by the Polish Broadcasting Act of 1992<sup>39</sup>, where Article 18 stipulates that programmes or other broadcasts “...may not encourage actions against the law or Poland’s *raison d’Etat* (national interest)... in particular, they may not include contents inciting to hatred or discriminating on grounds of race, disability, sex, religion or nationality.”

### 3.2. *KRRiT powers and practices related to hate speech*

The Polish regulatory authority (KRRiT - *Krajowa Rada Radiofonii i Telewizji*) is empowered to monitor the content of both commercial and public broadcasters and to issue sanctions against audiovisual media services for breaching the Broadcasting Law (warnings, fines and revocation of licenses). If a broadcaster fails to comply with the obligations laid down in Article 18, the Chairperson of the KRRiT shall issue a decision imposing a fine against the broadcaster at issue in the amount of up to 50% of the annual fee for the right to use the frequency allocated for providing the programme service (Article 53).

In 2012, following a complaint from two citizens, the KRRiT fined a rock radio station from Warsaw (Eska Rock SA)<sup>40</sup> (50,000 zł) for broadcasting a morning satirical show in which journalists made racist statements about a Polish citizen of Indian origin (Alvin Gajadthur). The programme was related to the coming end of the parliamentary election campaign. The journalists mentioned the name “Alvin Gajadthur” several times, using the adjective “black” in frequently used phraseological combinations (black coffee, black humor, etc.) and reminded the audience that Gajadthur had offended them some time ago and had spread hatred. In the next entry, journalists presented the opinions of experts who justified their earlier statements made on the air. In the summary, the journalists connected the negative nature of the characteristics of a particular race and highlighted the otherness of the race and its inferior qualities.

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<sup>39</sup> Available at:

[http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/angielska/Documents/Regulations/broadcasting\\_act\\_28022013.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/angielska/Documents/Regulations/broadcasting_act_28022013.pdf)

<sup>40</sup> Available in the Polish language at: [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/konsultacje/decyzja-eska-rock-2012-.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/konsultacje/decyzja-eska-rock-2012-.pdf)

## 4. Bosnia and Herzegovina

### 4.1. *Constitutional and legal framework*

The Constitution of Bosnia and Herzegovina (BiH) was adopted as Annex 4 of the Dayton Peace Agreement and came into force with its signing in Paris on 14 December 1995. The Constitution of Bosnia and Herzegovina provides that BiH shall be a democratic state operating under the rule of law and obliges the state and entity governments to ensure the highest level of internationally recognised human rights and fundamental freedoms.

The provisions related to hate speech can be found in four different acts that are part of the Criminal Law of Bosnia and Herzegovina. These are Article 145a of the BiH Criminal Code, Article 163 of the Criminal Code of the Federation of BiH, Article 294a of the Criminal Code of the Republic of Srpska and Article 160 of the Criminal Code of the Brčko District. Although different in their formulations and scope, all these provisions prohibit hate speech in the four jurisdictions of BiH.

The Law on Communications of Bosnia and Herzegovina gives powers to the Council of the Communications Regulatory Agency (CRA) to adopt by-laws and codes on different regulatory topics. The Code on Audiovisual and Radio Media Services<sup>41</sup>, adopted by CRA in November 2011, implements the provisions of the AVMS Directive into the national legislation. In its basic provisions related to general programme principles (Article 3), the Code explicitly stipulates that audiovisual and radio media services shall respect the dignity of the human being and the fundamental rights of others and shall ensure that their content respects ethnic, cultural and religious differences in Bosnia and Herzegovina. Further on, the Code stipulates that media content providers shall not provide any content that includes any discrimination or prejudice based on sex, race, ethnicity, nationality, religion or belief, disability, special needs, age, sexual orientation, social background, or any other content which has the purpose or effect to nullify or to impair the recognition, enjoyment or exercise, on an equal footing, of any person's rights and freedoms (Article 3). In addition, audiovisual and radio media services are not allowed to convey any material which carries a clear and immediate risk of causing harmful effects, including, but not limited to death, injury, damage to property or other types of violence, or the diversion of police, medical services or other forces of public order from their normal duties (Article 3).

The Code contains a separate article with a detailed definition of hate speech (Article 4). Providers of audiovisual media services “shall not demean or intimidate anyone and shall not incite to violence or discrimination against a person or a group based on sex, race, ethnicity, nationality, religion or belief, disability, special needs, age, sexual orientation, social background or any other circumstance which has the purpose or effect to nullify or to impair the recognition, enjoyment or exercise, on an equal footing, of any person's rights and

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<sup>41</sup> Available at: <http://rak.ba/eng/index.php?uid=1328108149>

freedoms”. In its second paragraph, Article 4 stipulates that audiovisual media services “shall not include material which carries a clear and immediate risk of inciting ethnic or religious hatred in Bosnia and Herzegovina, or which could be interpreted by the public as incitement to violence, disorder or rioting, or which could lead to or encourage criminal activities.”

#### 4.2. *CRA powers and practices related to hate speech*

The Communications Regulatory Agency (CRA) was established in 2001, undertaking the competences of the Independent Media Commission and the Telecommunications Regulatory Agency. The CRA mandate is defined by the Law on Communications of Bosnia and Herzegovina as a regulator with combined competencies, developed on the model of similar regulators in other European countries. In the field of broadcasting, CRA has explicit powers to conduct monitoring over the programme standards and impose measures against the audiovisual media service providers who do not comply with the provisions of the Law on Communications. The Agency has legislative powers as well, i.e. it can develop and adopt by-laws (rules, codes etc.) related to programmes standards.

The detailed provision on hate speech in the Code on Audiovisual and Radio Media Services gives the CRA ground to assess thoroughly whether some specific content involves hate speech. In this, CRA takes into account: the *source* of such speech, the *context* in which it has been made available to the public - whether the journalist/editor has emphasized that such speech does not reflect their editorial policy; whether the journalist/editor has pointed out that such hate speech could have negative consequences in society; or, on the contrary, whether the journalist/editor has made a commentary that has added fuel to that specific form of hate speech. Broadcasters’ responsibility is the heaviest when the journalist/reporter knowingly or deliberately provokes or uses hate speech.

So far, CRA has reported several cases of identified hate speech in the audiovisual media:

- In 2012, the CRA undertook measures<sup>42</sup> against the TV station TV Pink (BiH) for broadcasting the talk-show titled “Forbidden Forum” focused on gender change, during which viewers’ SMS messages were displayed on the screen. Some of the SMS messages contained extremely hateful and discriminatory language and, according to the CRA Code, the broadcaster is responsible for all content including the SMS messages sent by the audience. The CRA assessed that the TV station should have predicted the consequences of the discussion on such a sensitive topic and should have organised itself to review the messages in order to prevent statements that may incite to hatred and violence. The TV station refused to take responsibility for the violation, arguing that its role was only to convey the messages, which added to the severity of

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<sup>42</sup> See the CRA Annual Report for 2012, available at: <http://rak.ba/bos/index.php?uid=1272548169>



the violation. Several months later, the TV station broadcasted the same TV show again, but this time it was focused on the topic of gay marriages. Again, SMS messages with provocative speech were aired on the screen, but this time some of the messages were read by the host of the TV show. The broadcaster admitted the second violation, justifying it as a technical oversight.

## 5. Ireland

### 5.1. *Constitutional and legal framework*

Article 40.1 of the Constitution of Ireland provides that “All citizens shall, as human persons, be equal before the law.” The Prohibition of Incitement to Hatred Act 1989 creates five different offences concerning incitement to hatred. In this Act, ‘hatred’ means “hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.”

The 2009 Broadcasting Act states that every broadcaster shall ensure that anything which may reasonably be regarded as causing harm or offence, or as being likely to encourage or incite crime or as tending to undermine the authority of the State, is not broadcast by the broadcaster (Section 39d).

Section 42 of the [Broadcasting Act 2009](#) instructs the Broadcasting Authority of Ireland to prepare and revise the Broadcasting Codes that govern the standards and practices to be observed by the broadcasters. The Code of Programme Standards<sup>43</sup> and the respective Guidance<sup>44</sup> address the concepts of taste, decency, harm and offence with regard to radio and television broadcasting.

Rule 3.4 of the Code refers to the representation of Persons and Groups in the society. It stipulates that programme material shall not support or condone discrimination against any person or section of the community, in particular on the basis of age, gender, marital status, membership of the Traveller community, family status, sexual orientation, disability, race or religion. In addition, broadcasters are obliged to prevent undue offence in the treatment of religious views, beliefs or images during programme material, but this is not intended to prevent the critical scrutiny of religion.

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<sup>43</sup> Available at:

[file:///C:/Documents%20and%20Settings/strpevska/My%20Documents/Downloads/bci\\_cops\\_Mar07.pdf](file:///C:/Documents%20and%20Settings/strpevska/My%20Documents/Downloads/bci_cops_Mar07.pdf)

<sup>44</sup> Available at:

[file:///C:/Documents%20and%20Settings/strpevska/My%20Documents/Downloads/20070410\\_COPS\\_GuidanceNotes\\_vFinal.pdf](file:///C:/Documents%20and%20Settings/strpevska/My%20Documents/Downloads/20070410_COPS_GuidanceNotes_vFinal.pdf)



Rule 3.5 relates to factual programming, news, current affairs and documentaries. First, it is stated that factual programming shall not contain material that could prejudice respect for human dignity. Next, the same article provides that factual programming shall not contain material that could cause undue distress or offence unless it is editorially justified and in the public interest. It further stipulates that factual programming shall emphasize age, colour, gender, national or ethnic origin, disability, race, religion or sexual orientation only when such references are justified in the context of the programme or in the public interest. Also, deceased persons have to be treated with respect. The moment of death shall not be shown nor shall the deceased be shown in close-up, unless, in exceptional circumstances, it may be justified in the public interest.

## *5.2. BAI powers and practices related to hate speech*

For serious and repeated breaches of the Broadcasting Act, the Code of Programme Standards or provisions of the license contract, the regulatory authority can impose financial sanctions, suspend or even terminate the license. The BAI Compliance Committee can start an investigation into the affairs of a broadcaster where it is of the opinion that there are circumstances suggesting that it is appropriate to investigate and report on any apparent breach. It is the duty of the broadcaster concerned to co-operate in any such investigation and provide the investigating officers with such information they consider necessary for the purposes of the investigation.

Where the Compliance Committee finds that there has been a breach by the broadcaster concerned, it may recommend to the Regulatory Authority to notify the broadcaster. The notification sets out the reasons for the notification, states that the Authority intends to apply to the Court for a determination that there has been a breach and indicate the amount of the financial sanction (not exceeding €250,000) that it proposes.

- In January 2013, the BAI upheld the complaint by the Galway One World Centre against the Classic Hits 4FM radio station<sup>45</sup> alleging that racist comments went unchallenged on an edition of the David Harvey Show. The show included a discussion on a report by the ESRI about whether African people living in Ireland are subject to discrimination when seeking employment. The BAI committee concluded that, as the programme developed, statements that it considered racist and prejudicial were permitted to be aired by callers to the programme: “Blacks” are “very lazy”, “Black Africans” always “get up on their high horse”, “Blacks” have a certain DNA related to their work ethic and practices, Filipinos in Ireland are “scammers”. etc. The committee decided that, in this case, the

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<sup>45</sup> More details on this at: [http://www.bai.ie/wordpress/wp-content/uploads/201310\\_October2013\\_vFinal.pdf](http://www.bai.ie/wordpress/wp-content/uploads/201310_October2013_vFinal.pdf)

broadcaster had failed to meet the statutory requirements and that the listeners could reasonably assume that racist and prejudicial remarks of some callers to the programme were reasonable and acceptable positions to hold in the contemporary Irish society.

- In May 2013, the [BAI](#) upheld a complaint against the Cork 96FM radio station concerning the Neil Prendeville Show<sup>46</sup>. A listener had objected to comments the presenter had made about foreign nationals during a debate about inequality in society in a programme broadcast on 14 May. The complainant stated that the presenter's comments had, in his opinion, been "vile accusations, laced with prejudice and with no veracity in reality whatsoever". The complainant stated that, by making these statements on air, the presenter "puts non-Irish members of society at risk by associating them with what has been taking place in this country over the previous five years". The BAI upheld the complaint in part. It said the presenter's comments had lacked impartiality and objectivity, and were not counterbalanced by an alternative perspective.

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<sup>46</sup> For more details, visit: [http://www.bai.ie/wordpress/wp-content/uploads/CCECFDecisions\\_Sept2013\\_vFinal.pdf](http://www.bai.ie/wordpress/wp-content/uploads/CCECFDecisions_Sept2013_vFinal.pdf)

## 9. Conclusions and Recommendations

- The Audiovisual Media Services Directive stresses the role of the independent regulatory authorities in the audiovisual field in enforcing the national legislation transposing the rules of the Directive<sup>47</sup>. Regulators in the field of audiovisual media services all around Europe are given powers to supervise the audiovisual programmes' compliance with the national legislation which is harmonized with the AVMS Directive.
- Article 6 of the AVMS Directive stipulates that “Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.” The authorities in every EU country must ensure that audiovisual media services do not contain any incitement to hatred based on race, sex, religion or nationality. They should act both against the channels using an uplink in an EU country and a satellite capacity used for hate speech broadcasts by channels licensed in other EU countries.
- When determining hate speech, most of the regulatory authorities in the European countries<sup>48</sup> use as guiding principles the case-law of the European Court of Human Rights and their domestic courts. The sanctions that the audiovisual regulators have at their disposal are various: warning, order to publish the findings of the regulator, order to issue correction, fines and, in very severe cases, decision to shorten or to terminate the license.
- The definition in the Law on Audio and Audiovisual Media services is aligned with Article 6 of the AVMS Directive and Article 10 of the European Convention on Human Rights. However, the main issue remains that the AAAMS does not have sufficient measures to react when there is a need to prevent “hate speech” in the audio and audiovisual media. Therefore, there is still room for progress in allowing the Agency to have more competencies when combating hate speech in practice.
- As Article 19 stipulates, “the states should apply a variety of legal means, including civil, administrative and other measures, when prohibiting incitement. The application of Criminal Law penalties should be limited only to addressing the most severe forms of incitement”. At the same time, Article 19 concludes that “in most of the current instances, this is not the case”.

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<sup>47</sup> For more details visit: <http://ec.europa.eu/digital-agenda/en/avmsd-audiovisual-regulators>

<sup>48</sup> EPRA Draft Background Paper: Summary of the answers to the Hate speech Questionnaire, presented at the Plenary Session 2: *Hate Speech – Old Enemy, New Battles*, 39<sup>th</sup> EPRA meeting, Budva 4-6 June 2014.

- It should be noted as well that Article 19 recommends that “consideration should be given to administrative sanctions, in particular to enforce rules established by communication, media and press councils, consumer protection authorities, or any other regulatory bodies.”
- It is important that the Agency establish cooperation with the Antidiscrimination Commission in accordance with the Law on Antidiscrimination. It may be efficient to draft and sign a Memorandum of Understanding where both agencies’ competencies should be defined in accordance with the two Laws.
- Cooperation between journalists’ associations, self-regulatory bodies, NGOs and higher education institutions is of extreme importance when it comes to “hate speech” topics, in order to develop a comprehensive and coordinated protection against discrimination on various grounds.