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Agency for Audio and Audiovisual Services
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Guide to Monitor Hate speech - Second Amended & Updated Version

AGENCY FOR AUDIO AND AUDIOVISUAL MEDIA SERVICES

The first edition of the Guide to Monitor "Hate speech" was authored by Jelena Surculija Milojevic, Ph.D. and Snezhana Trpevska, Ph.D. as part of the "Enhancing the Administrative Capacities of Telecom and Media Authorities for Efficient Regulation of New Digital and Multiple Play Services" project, funded by the European Commission under the European Union IPA TAIB 2009 Programme.

The modifications and updates incorporated in the Guide to Monitor Hate speech – Second Updated Version were authored by Alexander Schäfer, Ph.D., Claire Moselage and Niels Schulte Ph.D., with support of the staff of the Agency for Audio and Audiovisual Media Services as part of the Twinning Project MK 20 IPA JH 01 23 "Enhancement of Capacities of the Agency for Audio and Audiovisual Media Services and the Public Service Broadcaster".

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1. Introduction

The need for the first edition of the Guide rose when in December 2013, the 2010 Audiovisual Media Services Directive (AVMS Directive) was transposed into the Macedonian media legislation with the adoption of the Law on Audio and Audiovisual Media Services. At that time, the project "Enhancing the Administrative Capacities of Telecom and Media Authorities for Efficient Regulation of New Digital and Multiple Play Services" was conducted, funded by the European Commission under the IPA framework. It was designed to increase the capacity of the regulator - the Agency for Audio and Audiovisual Media Services (AVMU), for implementation of the AVMS Directive. One of the most important activities within this project was to enhance the knowledge and capacity of the AVMU for dealing with hate speech in both linear and non-linear audiovisual media services. In addition to training for the AVMU staff, the experts engaged within the Project produced Guidelines for monitoring hate speech in the audiovisual media services.

In the period after 2014, when the Guide was adopted, the Agency applied it in the analysis of cases in which there were suspicions that the broadcasters' programs spread and/or incited hate speech. It proved to be an excellent tool, and it still is since it was based on the jurisprudence of the European Court of Human Rights, as well as on the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. However, the time brought other developments that needed to be included into the Guide. Hence – the Second Updated Edition of the Guide was prepared.

In the 2023/2024, the Twinning Project "Enhancement of Capacities of the Agency for Audio and Audiovisual Media Services and the Public Service Broadcaster", funded by the European Union, was implemented. Since its aim was increasing the capacity of the Agency for the implementation of legislation harmonized with the revised AVMS Directive (2018), the experts engaged within the Project updated the present "Guide to Monitor Hate Speech" and held trainings for the AVMU staff, as well as for the members of the Macedonian Network for Combating Hate Speech.

What were the developments?

The rise of online platforms and the dynamic media landscape have presented new challenges in tackling hate speech. While traditional broadcasting has long been a concern for European regulators, the dominance of major online platforms has created a complex environment where hate speech thrives. This has shifted the focus of public debate and policy initiatives, with social media regulation becoming a central issue. Recognizing this urgency, European lawmakers and institutions have taken the following action:

In December 2018, the AVMS Directive was revised. Article 6 of the AVMS Directive (2018) 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 violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter. This regulation now extends to video-sharing platforms (VSPs) as well as audiovisual content shared on social media platforms. These services are required to take measures to protect the public from programmes, user-generated videos, and audiovisual commercial communications that incite violence or hatred against groups or individuals.

While VSPs are responsible for adopting the measures outlined in the revised AVMS Directive, regulators are tasked with assessing the adequacy of these measures. This assessment determines the appropriate levels of protection that audiovisual media service providers and VSPs must implement. Regulators must therefore have a comprehensive understanding of content that incites violence, hatred, and terrorism, and its potential impact on the public.

In May 2022, the Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech was adopted. The Recommendation draws on the substantial amount of case law from the European Court of Human Rights. It offers guidance not only for lawmakers, but also for a wide range of actors, including regulators, online platforms, media outlets, and civil society organizations. This framework encompasses both offline and online forms of hate speech.

Also, the Law on Audio and Audiovisual Media Services had two important changes concerning the issue of hate speech. First, in 20218, a broader list of discriminatory grounds was introduced as well as a punitive measure – a fine to be imposed by a court. In July 2023, the revised AVMS Directive (2018) was transposed into the Law on Audio and Audiovisual Media Services. The Law now contains the ban on incitement to terrorism as well as provisions regulating the issue of hate speech on video-sharing platforms.

There is still no universal definition of hate speech, so the Second Edition of the Guide first presents the international standards related to freedom of expression and hate speech (including the Recommendation CM/Rec(2022)16), the Macedonian legal framework in this respect and the principles and relevant cases of the European Court of Human Rights. At the end, it gives recommendations regarding the various aspects to be taken into account by the AVMU when dealing with possible cases of hate speech and conclusions on what should be done to further improve the Agency’s capacities and practices.

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[1] 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[2] 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 the last century, they are still applicable.

[1] Article 19, Universal Declaration of Human Rights: http://www.un.org/en/documents/udhr/index.shtml#a19
[2] Article 10, European Convention of Human Rights: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf

3. The European regulatory framework on hate speech

3.1 Recommendation CM/Rec(2022)16 on combating hate speech[3]

This Recommendation describes what should be done to prevent and combat hate speech, to promote a culture of inclusiveness and to help those targeted by hate speech. It provides guidance to Member States for the implementation of a comprehensive and calibrated set of legal and non-legal measures. It pays particular attention to the online environment where most of today's hate speech is found. It is also addressed to other key stakeholders, including public officials, elected bodies and political parties, Internet intermediaries, media and civil society organisations.

The Recommendation provides a working definition of hate speech distinguishing between different levels in accordance to their gravity: Hate speech is understood as *"all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status such as 'race', colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation."*

While acknowledging that the definition of hate speech differs in respective national laws, the definition should contribute to developing a common understanding of hate speech in the Member States.

As hate speech covers a whole range of hateful expressions which vary in their severity, the harm they cause and their impact on members of particular groups in different contexts, the Recommendation pleads for a range of properly calibrated measures, covering respectively criminal, civil, administrative law and alternative measures, including awareness-raising, education and the use of counter and alternative speech.

The Recommendation, echoing the Court's case-law, emphasizes that member states have a positive obligation to protect individuals targeted by hate speech. To deter potential perpetrators and send a clear message to society, the most severe forms of hate speech should be criminalized. As an example, the Recommendation highlights that national laws should clearly

[3] Recommendation CM/Rec(2022)16 of the Committee of Ministers to Member States on combating hate speech, adopted on 20th May 2022, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a67955 (accessed 21st March 2024).

define incitement to violence and threats of violence as criminal offenses. This positive obligation also encompasses procedural requirements, such as conducting effective investigations into hate speech cases, both online and offline. Special attention should be given to reaching out proactively to vulnerable individuals and groups. In addition to, or as an alternative to, criminal proceedings, civil and administrative measures can be employed. For less severe hate speech cases, civil and administrative procedures may be the sole legal avenue for addressing the issue. Recognizing that criminal prosecution is a last resort, member states should prioritize removing online hate speech to prevent continued victimization. Similarly, civil and administrative proceedings often result in the payment of compensation or the prohibition of engaging in hate speech. The rules on the burden of proof required differ between both avenues and it will often be easier to hold the author of hate speech liable under civil and administrative law.

When assessing the severity of hate speech and determining the type of liability, if any, Member States should take into account different factors and the interplay between them. The Recommendation mentions the content of the expression, the political and social context at the time of the expression, the intent of the speaker, the speaker's role and status in society, how the expression is disseminated or amplified, the capacity of the expression to lead to harmful consequences, including the imminence of such consequences, the nature and size of the audience, and the characteristics of the targeted group.

Member States should ensure that their legislation, policies and other measures against hate speech are based on evidence by identifying, recording, monitoring and analysing trends. They should take appropriate measures to ensure that law-enforcement services effectively record and monitor complaints concerning hate speech. In accordance with existing human rights and data-protection standards, data, information and analysis of hate speech and on ongoing trends should be made publicly available.

Also, independent national regulatory authorities and media co-regulatory or self-regulatory bodies should play a positive role in addressing hate speech.

The recommendations addressed to the media highlight their role as public watchdog and their contribution to public debate. They should promote a culture of tolerance and understanding, should avoid a negative stereotypical depiction of individuals, groups and communities and should give voice to diverse groups and communities. Given the special mandate of public-service media to serve all sections of society and to enhance societal cohesion, they should make a particularly substantial contribution to this.

The Recommendation calls upon the Member States to ensure that their legislation addressing hate speech particularly covers online hate speech. As far as media operating online are concerned, Member States should establish a legal duty for them not to disseminate hate speech prohibited by

law and to restrict or disable access to hate speech posted by third parties in comment sections or collaborative spaces.

The legislative framework should take into account different characteristics of Internet intermediaries as there are substantial differences in size, nature, function and organisational structure. A separate chapter of this guide deals with the specific aspects and responsibilities referring to hate speech online and thereby, it also contains more details about the Recommendation on hate speech online.

3.2 Recommendation No. R (97) 20 on hate speech

Already in 1997, the Council of Europe has been actively working on combating hate speech when it adopted the Recommendation No. R (97) 20 on hate speech. Back then, it already acknowledged the threat that hate speech posed not just to individuals but to society as a whole. Thereby, it 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.

In 1997, 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.

The Recommendation calls on the governments to *establish or maintain a sound legal framework. In line with the recent Recommendation CM/Rec(2022)16, the Recommendation No. R (97) 20 acknowledges different measures according to the level of severeness of the content concerned. The legal measures consist 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.

As confirmed in the Recommendation CM/Rec(2022)16, the Recommendation No. R (97) 20 called upon the governments 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*[4]*, 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, analyse and explain 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*.

[4] *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.*

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*[5]. 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.

3.3 Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance[6]

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:

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

[5] When prescribed by the law, when the aim is legitimate and when it is necessary in a democratic society.
[6] 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 30th October 1997, available at: www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)21_en.pdf (Accessed on 22nd September 2014.)

3.4 Declaration on Freedom of Political Debate in the Media[7]

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.

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.

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

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.

3.5 Recommendation CM/Rec(2011) 7 on a new notion of media[8]

This Recommendation has the following indicator for hate speech:

"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

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

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.

3.6 Additional Protocol to the Convention on Cybercrime[9]

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."

[9] Additional Protocol to the Convention on Cybercrime, concerning the criminalization 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. Macedonian media regulatory framework and the issue of 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.

4.1 Law on Audio and Audiovisual Media Services[10]

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: AVMU).

Article 48 of the Law, which, in December 2018 and July 2023, underwent significant amendments regarding the issue of hate speech, in *Paragraphs (1) and (2)* defines special prohibitions on hate speech in the way that the audio and audiovisual media services **must not** contain programmes or videos or audio and audiovisual commercial communications that:

1. threaten national safety,
2. call for violent destruction of the constitutional order of the Republic of North Macedonia,
3. call for military aggression or armed conflict,
4. contain content, the spreading of which constitutes illegal activity, including public provocation to commit a terrorist offence, offences concerning child pornography and offences concerning racism and xenophobia,
5. incite or spread discrimination, intolerance, violence or hatred based on race, skin colour, origin, nationality or ethnicity, sex, gender, sexual orientation, gender identity, belonging to a marginalised group, language, citizenship, social background, religion or religious belief, political conviction, other beliefs,

[10] Law on Audio and Audiovisual Media Services, available at: https://avmu.mk/%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD-%D0%B7%D0%B0-%D0%B0%D1%83%D0%B4%D0%B8%D0%BE-%D0%B8-%D0%B0%D1%83%D0%B4%D0%B8%D0%BE%D0%B2%D0%B8%D0%B7%D1%83%D0%B5%D0%BB%D0%BD%D0%B8-%D0%BC%D0%B5%D0%B4%D0%B8%D1%83%D0%BC/

disability, age, family or marital status, property status, health status, personal capacity and social status, or any other grounds.

Article 48, Paragraph 3, states that:

The specific prohibitions of Paragraphs (1) and (2) of Article 48 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.

The (dis)respect of Article 48 is prescribed as one of the grounds on which the Agency may undertake adequate measures to provisionally restrict the freedom of reception, or retransmission of audio or audiovisual media services from other states (in accordance with conditions and in a procedure stipulated in Article 45 of the Law).

In a case when audiovisual media service provider under jurisdiction of a member country of the European Union violates the provisions stipulated in the Macedonian Law that are stricter and more detailed that the ones in the EU country in question, the Agency is entitled to require from the said service provider to respect the provisions prescribed by the Articles 48 (among others).

The special prohibitions from Article 48 must also be respected by the providers of video-sharing platform services under Macedonian jurisdiction, as prescribed with the Articles 144-c Paragraph (1) Lines 2 and 3 and 144-d Paragraph (2), (4) and (5).

Namely, according to Articles 144-c, the providers of video sharing platforms "must undertake specific measures to protect…:

"…- the general public from programmes, user-generated videos and audio-visual commercial communications which spread, justify, incite and/or create a clear and immediate risk of inciting hatred, violence or discrimination against persons or groups based on race, the colour of skin, origin, national or ethnic origin, sex, gender, sexual orientation, gender identity, membership of a marginalised group, language, nationality, social origin, religion or religious belief, political belief, other belief, disability, age, family or marital status, material status, health condition, personal trait and social status or any other grounds and

- the general public from programmes, user-generated videos and audio-visual commercial communications the dissemination of which constitutes an activity that is criminal offense according to the Criminal Code, including public provocation to commit a terrorist offence, offences concerning child pornography and criminal offences concerning racism and xenophobia, in line with Article 48 of this Law."

Article 144-d stipulates that:

"(2) If the video-sharing platform provider is aware of the presence of content specified in Article 144-c it is obliged to immediately remove the programme, user-generated videos or audio-visual commercial communication from the video-sharing platform or block access thereto…

(4) Video-sharing platform providers shall prescribe in the terms of use of their services the appropriate measures to prevent the dissemination of content outlined in Article 48 of this Law, as prohibited under Article 144-c of this Law.

(5) Measures from Paragraphs ...(2).. and (4) should include:

…

- establishing and operating easy-to-use systems allowing users of video-sharing platforms to rate the content referred to in Article 144-c of this Law;…

- establishing and operating transparent and user-friendly mechanisms for users of a video-sharing platform to report or flag to the video-sharing platform provider concerned the contents offered on its platform, referred to in Article 144-c of this Law;

- establishing and operating systems through which video-sharing platform providers explain to users of video-sharing platforms what effect has been given to the reporting and flagging referred to in line 4;

- establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints to the video-sharing platform provider in relation to the implementation of the measures referred to in lines 4 and 5 of this Article;

- providing for effective media literacy measures and tools and raising users' awareness of those measures and tools".

The Law provides clear competence of the Agency to sanction hate speech. It starts with Article 6 (Competences) where Paragraph (1) Line 4 states that the regulatory body is 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 requirements and obligations arising from the licenses".

According to Article 23, if **the Agency establishes violation of the provisions of the Law and the bylaws adopted thereof**, as well as the **conditions and obligations laid down in the license and other Agency acts,** the Agency's Council may undertake against media publisher, provider of on demand audio and audio-visual service, provider of video-sharing platform service or operator of electronic communication network which retransmit programme services, the following measures:

1. **adopt a decision to issue a public warning**;
2. **file a request to initiate a misdemeanour procedure** in cases where, despite the previously issued public warning, the same violation continues throughout the year;
3. **adopt a decision to revoke the license**, or
4. **adopt a decision to carry out a procedure for deletion from the respective Registry** in accordance with the Law.

Prior to adopting the decision to issue a public warning, the Council must ask the media publisher to give a written explanation concerning the committed violation. Prior to adopting a decision to revoke the license, or to carry out a procedure for deletion from the respective Registry, the Council is obliged to hold a public session during which, a representative of the medium will give explanation and arguments for the activities and reasons that resulted in the actions leading to finding itself faced with these measures.

Lastly, the Law provides fines to be issued by the Court if there are violations of Articles 48 144-c and 144-d.

Article 147 prescribes a fine from Euro 1.000 to Euro 5.000 (in Denar counter value) for the legal entity and Euro 500 for the person responsible for the program, as well as Euro 250 for physical entity or sole trader that has committed a violation of Article 48[11].

Article 148 prescribes a fine from Euro 2.500 to Euro 3.000 (in Denar counter value) for the legal entity and Euro 250 for the person responsible for the program, the responsible person in the legal entity, the physical entity or sole trader for a violation of Articles 144-c, and 144-d of the Law.

4.2 Law on Media[12]

The other piece of legislation that regulates the media sphere is the Law on Media (adopted in late 2013, and amended in 2014 and 2024.

It refers to media the in general not just the audio and audiovisual media services, and it guarantees (Article 3) the freedom of expression and the freedom of the media, with the latter particularly including: "freedom to express opinions, independence of the media, freedom to collect, research, publish, select and transmit information for the purpose of informing the public, pluralism and media diversity, freedom of flow of information and openness of the media towards various opinions, beliefs and content, access to public information, respect of human individuality, privacy and dignity, freedom to establish legal persons for providing public information, publishing and distributing printed media and other domestic and foreign media, production and broadcasting of audio/audiovisual programmes, independence of the editor, the journalist, the authors or creators

[11] This fine was introduced with the Law Amending the Law on Audio and Audiovisual Media Services (Official Gazette of the Republic of Macedonia" no.247/18).
[12] Law on Media, available at: https://avmu.mk/law-on-media/

of contents or programme associates and other persons in accordance with rules of the profession". It also stipulates that the freedom of the media may only be limited in accordance with the Macedonian Constitution, as well as that "the media publisher shall be independent in the editorial policy, i.e. in the implementation of the programme concept of the medium and is responsible for his/her work in accordance with this law and other law.

It also prescribes special prohibitions (Article 4) that forbid the publishing and transmission of media content that threaten the national safety, call for violent destruction of the constitutional order, call for military aggression or armed conflict, "incite or spread discrimination, intolerance or hatred based on race, sex, religion or nationality. Very much like the Law on Audio and Audiovisual Media Services, the Law on Media stipulates that these prohibitions must be in accordance with the practice of the European Court of Human Rights".

When this Law was adopted, it was aligned with both the Law on Audio and Audiovisual Media Services and the 2010 Audiovisual Media Services Directive. However, these two documents have evolved through time, and so should Article 4 of the Law on Media.

5. 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[13] 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[14].

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.

[13] "*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"

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

The Court has a very difficult task whenever measuring if there was hate speech in a concrete case. It uses two approaches which are provided for by the Convention. The first approach is based on Article 17 that states the prohibition of abuse of rights:

> *"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."*

As a consequence, comments that amount to hate speech and negate the fundamental values of the Convention – in particular tolerance, social peace and non-discrimination – are excluded from the protection of the Convention. In such cases, the application is rejected as inadmissible.

The second approach refers to Article 10, paragraph 2:

> *"The exercise of these freedoms [freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

This approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention. The Court examines in a triple test whether the interference by a national authority in question was prescribed by law, whether it pursued one of the legitimate aims within the meaning of Article 10, paragraph 2, and lastly whether the interference was necessary and proportionate in a democratic society.[15]

It may also happen that the exercise of the right to freedom of expression interferes with other rights protected by the Convention. In such cases, the Court examines whether the national authority struck a proper balance between both rights that retains the essence of both rights. Such conflicting rights can be the right to respect for private and family life in Article 8 and the prohibition of discrimination in Article 14.[16]

[15] For more details, see: ECHR, Guide on Article 10 of the Convention – Freedom of expression, updated on 31st August 2022, §§ 61-107, available at: https://rm.coe.int/guide-on-article-10-freedom-of-expression-eng/native/1680ad61d6 (accessed 21st March 2024).
[16] Ibid, §§ 108-112.

In measuring hate speech, the Court measures several various aspects. Not simply one factor taken alone is decisive in a particular case, but the interplay between these various factors:[17]

- the content of the speech (*Leroy v. France*, no. 36109/03, 2 October 2008, §§ 38 et seq.);
- the political and social context at the time the speech was made (*Leroy v. France*, cited above, § 38 et seq.; *Delfi AS v. Estonia*, no. 64569/09, 16 June 2015, §§ 142-146; *Perinçek v. Switzerland*, no. 27510/08, 15 October 2015, § 205);
- the intention of the speaker (*Jersild v. Denmark*, no. 15890/89, 23 September 1994, §§ 31-37);
- the speaker's role and status in society (*Féret v. Belgium*, no. 15615/07, 16 July 2009, §§ 63 et seq.);
- the form of its dissemination (*Savva Terentyev v. Russia*, no. 10692/09, 28 August 2018, § 79; *Delfi AS v. Estonia*, cited above, § 110; *Stomakhin v. Russia*, no. 52273/07, 9 May 2018, § 131; and *Jersild v. Denmark*, cited above, §§ 32-33);
- the manner in which the statements are made, and their capacity – directly or indirectly – to lead to harmful consequences, including imminence (*Perinçek v. Switzerland*, cited above, § 205; *Savva Terentyev v. Russia*, cited above, §§ 32-33);
- the nature and size of the audience (*Vejdeland and Others v. Sweden*, no. 1813/07, 9 February 2012, §§ 51-58; and *Lilliendahl v. Iceland*, no. 29297/18, 11 June 2020, §§ 38-39);
- the characteristics of the targeted group, for instance its size, its degree of homogeneity, its particular vulnerability or history of stigmatisation, and its position vis-à-vis society as a whole (*Budinova and Chaprazov v. Bulgaria*, no. 12567/13, 16 February 2021, § 63).

One aspect to consider 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[18] However, in all cases, the ECHR suggests that **spreading hate speech using mass media may be more problematic**[19] 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

[17] For an overview see Explanatory Memorandum to Recommendation CM/Rec(2022)16 on combating hate speech, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a6891e (accessed 21st March 2024).
[18] 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, 9th November 2009, page 15.
[19] Ibid, page 14.

private individual"[20]. 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 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"[21].

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[22]. 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"[23]. 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"[24].

[20] Council of Europe Manual on Hate Speech, Factsheet, Council of Europe, November 2008, page 4.
[21] Ibid, page 3.
[22] 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 , 9th November 2009, page 14.
[23] Ibid.
[24] For more details see Surek and Ozdemir v. Turkey case.

6. European Court of Human Rights Case Law on hate speech

The Macedonian Parliament ratified the European Convention on Human Rights in 1997, thus the country accepted 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 3, prescribes that "the specific prohibitions of Paragraphs (1) and (2) 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. The Court has many more cases that can be useful when determining the balance between the freedom of expression and its misuse. However, not all of them can be described here nor can a comprehensive list of such case law be provided. Nevertheless, a list with data necessary to obtain more information of the aforementioned as well as of more other cases is provided as an **annex** to this guide. The data referring to the described cases below are marked with *.

All cases are available at the official web site of the European Court of Human Right. Furthermore, many publications contain the most important and influential judgments[25].

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*".

[25] Such as: ECHR, Factsheet Hate speech, November 2023, available at: https://www.echr.coe.int/documents/d/echr/fs_hate_speech_eng (accessed 19th May 2024); for in-depth information see also: ECHR, Guide on Article 10 of the European Convention on Human Rights – Freedom of expression, Updated on 31 August 2022, available at: https://www.echr.coe.int/documents/d/echr/Guide_Art_10_ENG (accessed 19th May 2024).

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 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.

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)**.**

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**.

4. DELFI AS V. ESTONIA

In its judgement in the case of Delfi AS v. Estonia, the Court ruled that there was no violation of Article 10 and that the Estonian courts were right when they ruled that Delfi AS was liable.

The core issue in this case revolved around the obligations and responsibilities of Internet news portals that provided, on a commercial basis, a platform for user-generated comments on previously published content. The applicant, Delfi AS, operator of a commercial news portal, contested liability for offensive comments (e.g., "Estonian State, led by scum [and] financed by scum, of course does not prevent or punish antisocial acts by scum") posted by readers below one of its online news articles about a ferry company.

The Court concluded that the Estonian courts' determination of liability against Delfi constituted a justified and proportionate restriction on the portal's freedom of expression. This was mainly due to the extreme nature of the comments, which were posted in reaction to an article published by Delfi on its professionally managed, commercially driven news portal. Additionally, Delfi's steps to remove the offensive comments promptly after publication were deemed insufficient.

The Delfi case did not encompass other Internet forums where third-party comments could be disseminated, such as Internet bulletin boards or social networks.

5. MAGYAR TARTALOMSZOLGÁLTATÓK EGYESÜLETE AND INDEX.HU ZRT V. HUNGARY

In its judgment in Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary the Court found a violation of Article 10, i.e. the Hungarian Courts were not right when they found Magyar Tartalomszolgáltatók Egyesülete and Index.hu liable for the content of the comments under content they shared or generated.

The applicants (a self-regulating body for internet content providers - Magyar Tartalomszolgáltatók Egyesülete, and a news portal - Index.hu Zrt) shared content and occasionally generated it themselves, providing users with the opportunity to comment. The case centred on whether the applicants were accountable for vulgar comments posted online.

Both applicants objected to being held liable by Hungarian courts for comments criticizing the business practices of real estate websites. The Court acknowledged that news portals hold some responsibility for comments.

However, the Court also found fault with the lack of a proper balancing test. The Hungarian courts failed to adequately weigh the applicants' right to free expression against the real estate websites' right to reputation. Notably, the courts automatically deemed the comments unlawful without assessing their true impact on the websites'' reputation.

This case is distinct from the Delfi AS v. Estonia judgment. Here, the comments, while offensive, lacked the hate speech and violence present in Delfi. Additionally, Index.hu, a major media outlet, has economic interests, while MTE is a non-profit organization with no known economic involvement.

6. SANCHEZ V. FRANCE

In its judgement in the case of Sanchez v. France, the Court found that the applicant's conviction for not immediately deleting illegal comments on Facebook did not violate his right to freedom of expression.

The applicant was a local politician of the French party "Rassemblement National". He was fined by the French courts for inciting hatred and violence against Muslims, as he had failed to delete Islamophobic comments made by third parties on his Facebook wall. After becoming aware of the Islamophobic comments, the applicant called on users to be mindful of the content of their comments.

The Court found no violation of Article 10 in the conviction. Following the "duties and responsibilities" that Article 10 may impose on the speaker in certain circumstances, the Court underscored the responsibility of politicians when they open a public forum accessible to the general public through their account. Liability of the account holder was compatible with Article 10, as long as the liability of the third party who posted the hate comments was also ensured. The Court highlighted the risk of abuse if the account holder were exempted from liability. Consequently, the Court developed several factors to determine the extent of the account holder's liability. These factors included (among other things): the nature and context of the comments; the number of users of the account; awareness of third-party hate comments; and the status of the account holder as a public figure.

Referring to its judgment in Delfi AS v. Estonia, the Court took the view that the applicant's Facebook "wall" was not comparable to a "large professionally managed Internet news portal run on a commercial basis".

7. SMAJIĆ V. BOSNIA AND HERZEGOVINA

The Court declared Mr. Smajić's application against Bosnia and Herzegovina inadmissible. Mr. Smajić contested his 2010 conviction for online posts on the publicly accessible Internet forum of a website called Bosnahistorija. The conviction was for discussing potential military action against Serbs, which Bosniacs would have to take in the event of a war and the following secession of the Republika Srpska.

Mr. Smajić argued the conviction violated his right to free speech, claiming he expressed an opinion on a public matter. However, the Court sided with the domestic courts. The Court acknowledged a thorough review of his case, highlighting the use of highly offensive language towards Serbs, a sensitive topic in Bosnia's post-conflict ethnic landscape.

8. NIX V. GERMANY

In its decision, the Court declared Mr. Nix's application against Germany inadmissible.

Mr. Nix contested his 2015 conviction for sharing a blog post featuring an image of the SS leader Heinrich Himmler in uniform. German courts convicted Mr. Nix for violating laws against displaying symbols of unconstitutional organizations. Mr. Nix argued his conviction violated his right to free expression as the post aimed to protest discrimination against migrant children.

The Court acknowledged that Article 10 protections applied to expressions of freedom of speech on the internet as well. However, the Court also highlighted that restrictions on free speech can be justified under certain circumstances, particularly when considering "necessity in a democratic society" (Article 10 § 2). Germany's history with Nazi symbols was a significant factor in this case.

While acknowledging Mr. Nix's stated purpose, the Court ultimately agreed with the German courts' assessment. The use of the Himmler image with a swastika, especially for attention-grabbing purposes, was considered a legitimate reason for applying the law against such symbols. The Court concluded that German authorities presented relevant justifications for limiting Mr. Nix's free speech in this case. The German courts had acted within their "margin of appreciation" in upholding the conviction.

9. KABOĞLU AND ORAN V. TURKEY

The Court ruled in Kaboğlu and Oran v. Turkey that Turkey had violated Article 8.

The case involved two academics who faced threats and hate speech in newspaper articles after submitting a government report on minority and cultural rights. Turkish courts dismissed their complaints, citing freedom of expression protections for the articles.

The Court emphasized the severity of the attacks. Verbal assaults and threats of physical violence aimed to silence the academics, causing fear, anxiety, and vulnerability. The Court saw the intent to humiliate and deter them from expressing their views. The Court found the Turkish courts had failed to properly weigh the competing rights. The Court questioned whether freedom of the press justified the harm caused by hate speech and potential violence. The domestic courts had not adequately balanced the academics' right to privacy against freedom of the press.

This ruling highlights the need for European countries to protect freedom of expression while ensuring individuals can express their views without fear of intimidation or violence.

10. TAGIYEV AND HUSEYNOV V. AZERBAIJAN

The Court ruled in Tagiyev and Huseynov v. Azerbaijan that Azerbaijan violated Article 10. The case involved two applicants convicted for inciting religious hatred and hostility due to remarks about Islam in a 2006 article. The article compared Western and Eastern values and spoke pejoratively of Islam, which spurred strong criticism from religious groups and prompted a religious leader to issue a fatwa.

The Court took issue with the lack of justification for the conviction. The Court argued the article contributed to a public debate on the role of religion in society. The Court criticized the reliance on a single report concluding the remarks were hateful. The report lacked context and failed to balance free expression with respecting religious beliefs. The domestic courts did not adequately consider this balance.

This case highlights the importance of protecting free speech, even when discussing religion. Criticism and comparisons of ideas should be allowed as part of public discourse.

11. KILIN V. RUSSIA

In Kilin v. Russia, the Court ruled that the applicant's conviction for incitement to violence against non-Russians constituted no violation of Article 10 because it was "necessary in a democratic society".

The applicant was convicted for public calls to violence and ethnic discord because of video and audio files that had been made accessible via a social network (VKontakte). The accusations against him pertained to the posting and sharing of racist video and audio content ("mocking documentary", "mockumentary"). These materials included neo-Nazi themes, racial slurs and calls to extremism.

The Court recognized that sharing third-party content on social media platforms is a common form of communication and social interaction, which may not always serve a specific communicative purpose, particularly when the individual does not provide any accompanying commentary or indication of their stance on the content. However, the Court acknowledged that such sharing could still potentially influence public awareness.

The applicant did not provide any explanation for why he made the disputed material available on his VKontakte account. The Court found no indication that the applicant intended to contribute to any public discourse by sharing the material on his account.

12. LENIS V. GREECE

In its decision, the Court declared Mr. Lenis application against Greece inadmissible.

Mr. Lenis, a senior official of the Greek Orthodox Church, was sentenced for incitement to hatred and discrimination after posting a homophobic article on his personal blog in December 2015. He depicted homosexuality as a "social felony", a "sin" and called homosexuals "the scum of society". The text was picked up by various websites, news organizations, and social media platforms. Back then, the Greek Parliament had been about to propose legislation introducing civil unions for same-sex couples.

Mr. Lenis claimed a violation of his freedom of expression under Article 10. The Court, however, applied Article 17, declaring the application inadmissible. It found that Mr. Lenis was attempting to misuse the freedom of expression for ends that were clearly contrary to the values of the Convention.

The ruling is remarkable in that it marks the first instance where Article 17 was applied to homophobic hate speech.

13. PERINÇEK V. SWITZERLAND

The Court determined that the applicant, the Chairman of the Turkish Workers' Party, did not abuse his rights under Article 17 and concluded that there was a breach of Article 10.

The case revolved around the criminal conviction of the applicant for publicly disputing the occurrence of the Armenian genocide. The applicant labelled the genocide as an "international lie by the imperialists of the EU and US" during several (press) conferences in Switzerland.

The Court determined that the applicant was engaging in discourse on a topic of public interest and his remarks did not amount to inciting hatred or intolerance. The Court referred to its existing legal principles on denying the Holocaust. These principles include statements that portray the Holocaust as a lie or fabrication. However, the Court emphasized that its judgment on whether to intervene in statements about historical events is made on a case-by-case basis. This assessment considers the nature and potential impact of such statements, along with the context in which they were made. The Court observed that the country in which the applicant made these statements (Switzerland) was not characterized by heightened tensions, and they did not undermine the dignity of Armenians to an extent that warranted criminal prosecution.

7. Hate Speech online

In recent years, hate speech has increasingly been spread through the internet. Preventing and combating online hate speech poses specific challenges, as it can be disseminated as never before across the world in a matter of seconds.

In connection to this, the Recommendation CM/REC(2022)16 acknowledges the central role of internet intermediaries for the functioning of the internet and online communication. The term internet intermediaries is defined *as a wide, diverse, and rapidly evolving range of players, facilitating interactions on the internet between natural and legal persons by offering and performing a variety of functions and services*. Some connect users to the internet, enable the processing of information and data, or host web-based services, including for user-generated content. Others aggregate information and enable searches; they give access to host and index content and services designed and/or operated by third parties. Some facilitate the sale of goods and services, including audio-visual services, and enable other commercial transactions, including payments. Intermediary services may also be offered by traditional media, for instance, when space for user-generated content – such as comments – is offered on their platform.

Member States should define and delineate on the roles and responsibilities of internet intermediaries, the duties and responsibilities of State and non-State actors in addressing online hate speech. Especially the removal procedures and conditions as well as related responsibilities and liability rules imposed on internet intermediaries should be transparent, clear and predictable and those procedures should be subject to due process. Providers should guarantee its users the right to an effective remedy delivered through transparent oversight and timely, accessible and fair appeal mechanisms, which are ultimately subject to independent judicial review.

Member States should establish by law that internet intermediaries must take effective measures to fulfil their duties and responsibilities. Overall, the legal duties and responsibilities of Internet intermediaries should consist in:

- rapid processing of reports on hate speech;
- removing hate speech without delay;
- giving reasons for their decision to individuals and institutions concerned;
- securing evidence relating to hate speech prohibited under criminal law;
- reporting cases of such criminal hate speech to the authorities;
- referring unclear and complex cases to self-regulatory or co-regulatory institutions;
- provisional measures such as deprioritisation or contextualisation.

When devising, interpreting and applying the legislative framework governing the liability of internet intermediaries, Member States should take into account the substantial differences in the

size, nature, function and organisational structure of internet intermediaries. In addition, the Member States' legislation regarding online hate speech should cover rules and procedures for effective co-operation between State and non-State actors, a system for the disclosure of subscriber information, reports on hate speech by the Member States and Internet intermediaries and a regular assessment and improvement of content moderation systems.

In line with the Recommendation CM/REC(2022)16, the Court acknowledges the crucial role that the internet plays in disseminating unlawful speech, including defamatory remarks, hate speech and speech inciting violence. *Online content can be disseminated as never before, worldwide, in a matter of seconds, and with the potential danger to persistently remain available online. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms is certainly higher than that posed by the press; it is thus essential for the assessment of the potential influence of an online publication to determine the scope of its reach to the public* (*Savva Terentyev v. Russia*, 2018, § 79; *Delfi AS v. Estonia*, § 133).

However, the Court has acknowledged that the electronic network, serving billions of users worldwide, *is not and potentially will never be subject to the same regulation and control, and that the policies governing reproduction of material from the printed media and the Internet may differ. In the light of the technology's specific features, the rules governing printed publications may have to be adjusted in order to secure the protection and promotion of fundamental rights and freedoms* (*Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, 2011, § 63).

Still, the general principles applicable to offline publications also apply online. To assess the weight of an applicant's interest in the exercise of his right to freedom of expression, the nature of the statement as well as the context need to be assessed by including all relevant contextual factor.

Taking into consideration the effects of mass communication, also the specific features of the internet needs to be considered when ruling on the level of seriousness (Arnarson v. Iceland, 2017, § 37). It is essential for the assessment of a potential influence of an online publication to determine the scope of its reach to the public as the reach and thus potential impact of a statement released online with a small readership is certainly not the same as that of a statement published on mainstream or highly visited web pages. (Savva Terentyev v. Russia, 2018, § 79). At the same time, the Court specified that, *in reality, millions of Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. Where comments online may be undoubtedly offensive, at the same time, they may be regarded as little more than "vulgar abuse" of a kind which is common in communication on many Internet portals and which especially politicians would be expected to tolerate* (*Tamiz v. the United Kingdom*, § 81).

Regarding the specific features of some online media, the Court pointed out that using the "Like" button could not be considered as carrying the same weight as sharing content. It further observed

that it is important whether the applicants are public figures or not and whether it is shown if their "Likes" were noticed by a large number of the social network users or could have provoked any detrimental consequences at the applicant's working place (*Melike v. Turkey*, no. 35786/19, 15 June 2021, §§ 51-53).

As to the liability of a publisher for third-party content, the Court considers the responsibility conferred on an Internet news portal may differ to some degree from those of a traditional publisher (Delfi AS v. Estonia, 2015, § 113). The Court has been careful to distinguish the responsibilities of news portals from other fora on the Internet where user content can be disseminated, for example a social media platform where the platform does not take any editorial decisions (Delfi AS v. Estonia, 2015, §§ 115-116).

Safeguards to journalists in relation to reporting on issues of general interest, and their duties and responsibilities in that regard, play a particularly important role, given the influence wielded by the media. Against the background of the vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance (Stoll v. Switzerland [GC], 2007, §§ 103-104)

Regarding a notice-and-take-down-system, the Court has found that if accompanied by effective procedures allowing for rapid response it may function in many cases as an appropriate tool for balancing the rights and interests of all those involved. Nevertheless, in cases where third-party user comments take the form of hate speech and direct threats to the physical integrity of individuals, the rights and interests of others and of the society as a whole might entitle Contracting States to impose liability on Internet news portals if they failed to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties (Magyar Tartalomszolgáltatók Egyesülete and Index.Hu Zrt v. Hungary, 2016, § 91; Delfi AS v. Estonia, 2015, § 159).

Finally, when authorities choose to block access to an Internet site in order to prevent impermissible speech, they should take into consideration, among other elements, the fact that such a measure renders large quantities of information inaccessible. Therefore, it may substantially restrict the rights of Internet users and have a significant collateral effect (Ahmet Yıldırım v. Turkey, 2012, § 66; Engels v. Russia, 2020, § 33).

Within the European Union the Digital Services Act (DSA)[26] together with the Digital Markets Act[27] aim to create a safer digital space where the fundamental rights of users are protected and to

[26] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), available on: https://eur-lex.europa.eu/eli/reg/2022/2065/oj.
[27] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R1925.

establish a level playing field for businesses. The DSA contains various compliance obligations for any intermediary service providers, that offer its services in the EU. As a regulation the DSA is directly applicable in all Member States of the EU since 17 February 2024. The DSA fully harmonises the rules applicable to intermediary services in the internal market with the objective of ensuring a safe, predictable and trusted online environment, addressing the dissemination of illegal content online and the societal risks that the dissemination of disinformation or other content may generate.

A key element of the DSA is the obligation to set up a notice and action mechanism (article 16). Providers of hosting services have to put easily accessible and user-friendly notice and action mechanisms in place that facilitate the notification of specific items of information that the notifying party considers to be illegal content to the provider of hosting services concerned ('notice'), pursuant to which that provider can decide whether or not it agrees with that assessment and wishes to remove or disable access to that content ('action'). The provisions of the DSA do not refer explicitly to hate speech but to the notion of illegal content that contains any information that does not comply with EU or Member States' law

Very large online platforms and search engines (e.g. X, Facebook, YouTube, TikTok and Instagram) with more than 45 million monthly users in the EU are additionally obliged to carry out risk management with regard to so-called systemic risks stemming from the design or functioning of their service (articles 34 and 35) Besides the dissemination of illegal content, systemic risks also refer to negative effects on democratic processes, civic discourse and electoral processes as well as to any manipulative use of the systems. Systemic risks may also contain disinformation below the threshold of illegal content ('awful but lawful content'). However, providers of intermediary services should not be subject to a monitoring obligation with respect to obligations of a general nature (article 8). Nothing within the DSA should be construed as an imposition of a general monitoring obligation or a general active fact-finding obligation, or as a general obligation for providers to take proactive measures in relation to illegal content.

In order to enforce the obligations of the DSA the European Commission is primarily responsible for the supervision of the providers of very large online platforms and search engines. For any other providers, the competences of the Member States depend on the main establishment of the provider concerned. Due to its harmonising approach, in general Member States should not adopt or maintain additional national requirements relating to the matters falling within the scope of the DSA.

Regarding the impact of 'influencers', the Council of the European Union has provided conclusions on ways to support influencers as online content creators in the EU.[28] It acknowledges that influencers, meaning online creators who post content on social media and video-sharing

[28]The Council of the European, Union, Council conclusions on support for influencers as online content creators, 9301/24, available at https://data.consilium.europa.eu/doc/document/ST-9301-2024-INIT/en/pdf.

platforms, are having an increasing impact on the online content and information that people consume on a daily basis. While this impact is often positive it can potentially be harmful, both to individuals' mental health and at a societal level in areas such as democracy. The impact of influencers extends clearly beyond their commercial activities as it can affect democratic attitudes, values and political opinions, as well as health, personal attitudes and career decisions. In its conclusions, the Council encourages Member States to engage with influencers and their emerging representative organisations to ensure that they are aware of their role in the media ecosystem and the legislation that applies to them. The Council calls on both the Commission and member states to develop policies and instruments to foster responsible behaviour on the part of influencers and to support the development of self-regulatory bodies or mechanisms. It needs to be ensured that influencers are involved in the development of those aspects of media policy that may impact them, including the increased use of AI.

8. Guidelines for monitoring hate speech

When determining hate speech, most of the regulatory authorities in the audiovisual field use the criteria from the "Rabat Action Plan"[29], the case-law of the European Court of Human Rights (ECHR) and the domestic courts as their guiding principles.

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.

Taking into account national political, historical, social, and economic circumstances, while also recognizing the importance of permissible forms of freedom of expression, assessments should be made on a case-by-case basis, utilizing the Rabat Plan of Action as a guiding framework, inclusive of: "(1) the social and political context, (2) status of the speaker, (3) intent to incite the audience against a target group, (4) content and form of the speech, (5) extent of its dissemination and (6) likelihood of harm, including imminence".

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 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."[30]

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

[29] United Nations Human Rights Office of the High Commissioner, Freedom of expression vs. incitement to hatred available at: https://www.ohchr.org/en/freedom-of-expression.
[30] 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 (accessed on May 19th 2024).

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 analysing 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 (2018) 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 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[31].

8.1 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*[32]. 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

[31] The main sources used while developing the Guidelines were: ECHR, Factsheet Hate speech, November 2023, available at: https://www.echr.coe.int/documents/d/echr/fs_hate_speech_eng (accessed 19th May 2024); ECHR, Guide on Article 10 of the European Convention on Human Rights – Freedom of expression, Updated on 31 August 2022, available at: https://www.echr.coe.int/documents/d/echr/Guide_Art_10_ENG (accessed 19th May 2024) and other documents and academic articles.

[32] 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.

behaviour 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.?

8.2 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 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?

8.3 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."[33]

[33] 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

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?

- 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?

8.4 What was the content of the expression?

The content of a specific expression is the next critical aspect to be analysed. 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?

8.5 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?

8.6 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[34]:

- 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?

[34] These are the criteria suggested by Article 19 in the document "Prohibiting Incitement to Discrimination, Hostility or Violence" (December 2012).

- 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.

9. Conclusions and Recommendations

- The phenomenon of hate speech presents a challenge that makes both comprehensive prevention (e.g. administrative enforcement orders) and (repressive) sanction mechanisms (e.g. fines) necessary.

- The assessment of potential hate speech content is complex. The different forms hate speech takes and the various contexts in which it appears complicates the establishment of a universally accepted definition. However, the variety of existing definitions and international standards provides practical support for identifying and sanctioning hate speech in audiovisual media.

- The present Guide provides practical guidance when dealing with potential hate speech cases. It takes into account both the relevant criteria of the Rabat Action Plan, the case law of the ECHR as well as the Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech.

- Still, the Guide should not be viewed as the only tool for addressing hate speech cases. Rather, a comprehensive approach including additional support tools (instructions, explanatory tools, examination schemes) is key in regulating audiovisual media providers.

- Both the Guide and the support tools need to be regularly reviewed to reflect the latest legislative developments and considering both the technological advances and market dynamics in audiovisual media.

- Success in regulating online platforms (e.g. video-sharing content) depends, inter alia, on the interplay between the regulatory authorities on the one hand and the users of the respective platform on the other hand. User feedback is a valuable source with regard to violations of the law. Therefore, measures may be necessary to increase public awareness of AVMU' competences with regard to hate speech in audiovisual media. Such measures may include: Regular workshops with civil society organizations, an easy-to-access section of the homepage dedicated exclusively to the fight against hate speech as well as an easy-to-use electronic complaint submission form.

- Cooperation between journalists' associations, self-regulatory bodies, NGOs and education institutions is of high importance when it comes to hate speech topics, in order to develop a comprehensive and coordinated protection against discrimination on various grounds.

- The special prohibitions from Article 48 of the Law on Audio and Audiovisual Media Services must (also) be respected by the providers of video-sharing platform services under Macedonian jurisdiction, as prescribed with the Articles 144-c Paragraph (1) Lines 2 and 3 and 144-d Paragraph (2), (4) and (5). It should be noted that many providers reside outside North Macedonia (e.g., USA, Russia). Against this background, it should be scrutinised if the status of an EU candidate country may prevent North Macedonia to broaden the scope of the Law. At least providers form third countries outside the EU may be included since the restrictions by the country of origin principle of the eCommerce Directive 2000/31/EC do not apply on them.

- In line with the AVMS Directive (2018), the AVMU currently does not have competences against providers of online platforms and social media other than video-sharing platforms. As online media play a crucial role in spreading hate speech online, and against the backdrop of the new EU Digital Services Act, the current legislative framework may be reconsidered so as to extend the scope of application beyond video-sharing platforms and audiovisual content.

10. Annex: Sources of ECHR Case Law

The following list provides the necessary data to obtain more information of the cases mentioned in the guide as well as of more other related cases. The data referring to the cases, that are described in the guide are marked with *. The list is in a chronological order.

**Handyside v. the United Kingdom, no. 5493/72, 7 December 1976*
Protection of political speech
No violation of Article 10
https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57499%22]}

**Jersild v. Denmark, no. 15890/89, 23 September 1994*
Information of the public about a public issue
Violation of Article 10
https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-10556%22]}

**Gunduz v. Turkey, no. 35071/97, 4 December 2003*
Hate speech in a live programme
Violation of Article 10
https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61522%22]}

Stoll v. Switzerland, no. 69698/01, 10 December 2007
Conviction of a journalist for the publication of a diplomatic document on strategy classified as confidential:
No violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-83870

Féret v. Belgium, no. 15615/07, 16 July 2009
Conviction of the applicant, chairman of the political party "Front National", for publicly inciting discrimination or hatred
No violation of Article 10
https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-1407%22]}

Aleksey Ovchinnikov v. Russia, no. 24061/04, 16 December 2010
No violation of Article 10
file:///C:/Users/e.petreska/Downloads/001-102322%20(1).pdf

Editorial Board of Pravoye Delo and Shtekel v. Ukraine, no. 33014/05, 5 May 2011
Ukrainian newspaper's staff sanctioned wrongly for a publication of material obtained from the Internet
https://hudoc.echr.coe.int/eng?i=001-104685

Ahmet Yıldırım v. Turkey, 2012, no. 3111/10, 18 December 2012
Interim court order incidentally blocking access to host and third-party websites in addition to website concerned by proceedings
Violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-115705

Tierbefreier e.V. v. Germany, no. 45192/09, 16 January 2014,
No violation of Article 10
No violation of Article 14 taken in conjunction with Article 10
https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-140016%22]}

**Delfi AS v. Estonia, no. 64569/09, 16 June 2015 (Grand Chamber)*
No violation of Article 10
User-generated comments on an Internet news portal
https://hudoc.echr.coe.int/eng?i=001-155105

**Perinçek v. Switzerland, no. 27510/08, 15 October 2015 (Grand Chamber)*
Mass deportations and massacres suffered by the Armenians in the Ottoman Empire
Violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-158235

M'Bala v. France, no. 25239/13, 20 October 2015
Inadmissible
https://hudoc.echr.coe.int/fre?i=001-158752

**Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, no. 22947/13, 2 February 2016*
Liability of a self-regulatory body of Internet content providers and an Internet news portal for vulgar and offensive online comments
Violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-160314

Pihl v. Sweden, no. 74742/14, 7 February 2017
Inadmissible
https://hudoc.echr.coe.int/eng?i=001-172145

Belkacem v. Belgium, no. 34367/14, 27 June 2017
Inadmissible
https://hudoc.echr.coe.int/fre?i=001-175941

Arnarson v. Iceland, no. 58781/13, 13 June 2017
Proceedings against a journalist for defamation following the publication of an article accusing the chief executive officer of the Icelandic Federation of Fishing Vessel Owners ("the LIU") of accounting deception and fraud
No violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-174404

Tamiz v. the United Kingdom, no. 3877/14, 19 September 2017
Respect for private life
Refusal of leave to serve defamation proceedings outside the jurisdiction on grounds that alleged damage to reputation was minimal: inadmissible
https://hudoc.echr.coe.int/eng?i=001-178106

GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland, no. 18597/13, 9 January 2018
Defamation verdict violated Swiss NGO's free-speech rights amid debate on minaret referendum
https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-179882%22]}

**Smajić v. Bosnia and Herzegovina, no. 48657/16, 18 January 2018*
Posts on an Internet forum describing military action which could be undertaken against Serb villages
Inadmissible
https://hudoc.echr.coe.int/eng?i=001-180956

**Nix v. Germany, no. 35285/16, 13 March 2018*
Picture of a Nazi leader and swastika in a blog
Inadmissible
https://hudoc.echr.coe.int/eng?i=001-182241

Ibragim Ibragimov and Others v. Russia, nos. 1413/08 and 28621/11, 28. August 2018
Violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-185293

Savva Terentyev v. Russia, no. 10692/09, 28 August 2018
Violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-185307

**Kaboğlu and Oran v. Turkey, nos. 1759/08, 50766/10 and 50782/10, 30 October 2018*
Newspaper articles containing threats and hate speech
Violation of Article 8
https://hudoc.echr.coe.int/eng?i=001-187529

Williamson v. Germany, no. 64496/17, 8 January 2019
Inadmissible
https://hudoc.echr.coe.int/eng?i=001-189777

Šimunić v. Croatia, no. 20373/17, 22 January 2019
Inadmissible
https://hudoc.echr.coe.int/eng?i=001-189769

Pastörs v. Germany, no. 55225/14, 3 October 2019
Inadmissible
https://hudoc.echr.coe.int/eng?i=001-196148

**Tagiyev and Huseynov v. Azerbaijan, no. 13274/08, 5 December 2019*
Remarks on Islam in an article
Violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-198705

Beizaras and Levickas v. Lithuania, no. 41288/15, 14 January 2020
Hate comments on a Facebook page because of a homosexual relationship
Violation of Articles 8, 13 and 14
https://hudoc.echr.coe.int/eng?i=001-200344

Atamanchuk v. Russia, no. 4493/11, 11 February 2020
Statements about non-Russians in an article published in a local newspaper
No violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-200839

Altıntaş v. Turkey, no. 50495/08, 10 March 2020
No violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-201897

Lilliendahl v. Iceland, no. 29297/18, 11 June 2020
Inadmissible
https://hudoc.echr.coe.int/eng?i=001-203199

Engels v. Russia, no. 61919/16, 23 June 2020
Website owner compelled to remove information on filter-bypassing tools, which was arbitrarily banned by court, in order to avoid blocking of his entire website
Violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-203180

Budinova and Chaprazov v. Bulgaria, no. 12567/13, 16 February 2021
Violation of Articles 8 and 14
https://hudoc.echr.coe.int/eng?i=001-207928

Behar et al. v. Bulgaria, no. 29335/13, 16 February 2021
Violation of Articles 8 and 14
https://hudoc.echr.coe.int/eng?i=001-207929

**Kilin v. Russia, no. 10271/12, 11 May 2021*
Racist video and audio files involving neo-Nazis, racial epithets, people of apparently Caucasian descent
No violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-209864

Association ACCEPT and Others v. Romania, no. 19237/16, 1 June 2021
Violation of Articles 8 and 14
https://hudoc.echr.coe.int/eng?i=001-210362

Melike v. Turkey, no. 35786/19, 15 June 2021
Dismissal without entitlement to compensation of contractual employee of national education authority for putting "likes" on certain Facebook
Violation of Article 10
https://hudoc.echr.coe.int/eng?i=002-13303

Yefimov and Youth Human Rights Group v. Russia, nos. 12385/15 and 51619/15, 7 December 2021
Violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-213913

Standard Verlagsgesellschaft mbH v. Austria (No. 3), no. 39378/15, 7 December 2021
Violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-213914

Bonnet v. France, no. 35364/19, 25 January 2022
Inadmissible
https://hudoc.echr.coe.int/eng?i=001-216050

Zemmour v. France, no. 63539/19, 20 December 2022
No violation of Article 10
https://hudoc.echr.coe.int/fre?i=001-221837

Valaitis v. Lithuania, no. 39375/19, 17 January 2023
No violation of Article 13
https://hudoc.echr.coe.int/eng?i=001-222318

Ossewaarde v. Russia, no. 27227/17, 7 March 2023
Violation of Articles 9 and 14
https://hudoc.echr.coe.int/eng?i=001-223365

**Sanchez v. France, no. 45581/15, 15 May 2023 (Grand Chamber)*
Comments posted by others on the wall of someone's Facebook account
No violation of Article 10
https://hudoc.echr.coe.int/eng?i=001-224928

**Lenis v. Greece, no. 47833/20, 27 June 2023*
Homophobic article on a personal blog
Inadmissible
https://hudoc.echr.coe.int/eng?i=001-226442