

ARTICLE19



# Responding to 'hate speech': Comparative overview of six EU countries

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## ARTICLE 19

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# Executive Summary

This publication presents the comparative overview of the legal framework and practices related to 'hate speech' in six Member States of the European Union (EU): Austria, Germany, Hungary, Italy, Poland and the United Kingdom.

The publication is based on six individual country reports commissioned by ARTICLE 19 in 2017. The country studies were based on a single methodology and follow a uniform structure. Their main objective was to comprehensively assess the legal and policy framework on 'hate speech' in each country, with a particular focus on the media, in order to develop recommendations towards ensuring better protection of both the right to freedom of expression and the right to equality in the EU.

The six country reports identified widespread deficiencies in the respective national frameworks on 'hate speech' in terms of their compatibility with applicable international freedom of expression standards, as well as inconsistencies in the application of existing legislation. In ARTICLE 19's view, these deficiencies render the legal framework open to political abuse, including against precisely those minority groups that the law should protect. Moreover, the respective national frameworks generally fail to provide effective remedies to victims of 'hate speech', and are insufficient to enable instances of inter-communal tensions to be effectively resolved, or to enable poor social cohesion to be addressed.

In this publication, ARTICLE 19 summarises the findings of the six reports. We identify commonalities and differences in national approaches to 'hate speech' and explore good practices that could be replicated. We are fully aware that measures to improve the protection of freedom of expression and equality vary from country to country. However, we believe that this overview and our recommendations can contribute towards ensuring better protection of the rights to freedom of expression and equality at both national and regional level in the future.

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# Introduction

The problem of 'hate speech' is not new in any of the six countries examined in this comparative report, Austria, Germany, Hungary, Italy, Poland, and the United Kingdom (UK).<sup>1</sup> However, the issue is of growing concern in all these countries. Despite significant differences in their history and culture, all have experienced a rise in 'hate speech' incidents, motivated by various grounds, over the last two decades. In some of the countries there has additionally been an increase in the number of hate crimes being recorded. One of the principal drivers of this trend appears to be the long-standing global economic crisis, compounded by the large increase in the number of migrants and refugees arriving in Europe and their subsequent struggle for integration into local communities. A tense political discourse surrounding the role of the European Union (EU) in dealing with the so-called refugee and migration 'crisis' in Europe, and 'Eurosceptic' rhetoric<sup>2</sup> has also played a role in this regard.

The rise in prejudice and intolerance can in many cases be directly linked to the respective governments' own policies and communications strategies. Representatives of prominent political parties, public officials, and, in some countries, even government ministers, have used inflammatory and derogatory language in their public communications, and have targeted various minorities, refugees and migrants, as well as the EU agenda. As a result, there is minimal political will to adequately and appropriately respond to instances of 'hate speech' surfacing in society at large. For example:

- In the UK, 'hate speech' against EU migrants was a prominent feature of the 2016 EU Referendum campaign and was seemingly prevalent in the aftermath of the decision to leave the EU. Politicians, including the Prime Minister, had previously made frequent statements that human rights protections should be changed "if [they get] in the way" of the country's fight against terrorism;
- In both Poland and Hungary, the national governments have been very vocal in their anti-EU and anti-migrant rhetoric. Both countries additionally have a long-standing problem with ensuring racial, ethnic and religious minorities, and LGBT people are protected from discrimination;
- In Italy, Germany and Austria immigration was a focus of public debate during their respective election campaigns. Right-wing parties, politicians and public officials, as well as explicitly xenophobic movements, fuelled hostility towards minorities and migrants and refugees in order to gain political support, and succeeded in gaining

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national and local election victories (in particular, the German Alternative for Germany party and the Austrian People's Party).

Traditional media in all six countries has often played a central role in portraying minorities, migrants, and refugees in a negative light and in scapegoating them for various problems in society. Equally, whilst the positive role played by digital technology companies in society is recognised, social media platforms and Internet intermediaries more broadly are themselves increasingly being seen as enablers of 'hate speech' against these, and other groups. They are often considered to play a role in exaggerating differences in and contributing towards the polarisation of, political opinion; disseminating extremist content to a very wide audience; and expanding the reach or audience for those who wish to sow divisions and hatred. Generally, addressing 'hate speech' online and 'hate speech' enabled by digital technologies is seen as a priority issue for both policy-makers and civil society in these countries.

International human rights law requires States to jointly protect and promote the rights to freedom of expression and the right to equality: one right cannot be prioritised over the other, and any tensions between them must be resolved within the boundaries of international human rights law. As is set out below, States are required to prohibit particularly severe forms of 'hate speech': "incitement to genocide" and "advocacy to discriminatory hatred that constitutes incitement to violence, hostility and discrimination". In exceptional circumstances this can be done through the criminal law. Additionally, States may restrict other forms of 'hate speech', through other types of legislation. They are also obliged to create an enabling environment for the exercise of the right to freedom of expression and the right to equality, and to enact a range of positive measures to ensure the comprehensive protection of these rights.

ARTICLE 19 finds that although the legislation of the six countries contains often robust guarantees for both the right to freedom of expression and the right to equality, the applicable legislation does not necessarily fully comply with international freedom of expression standards. Although the countries differ in their approach to addressing various types of 'hate speech', dependent on its severity, and as mandated by international law, the research shows that they tend to rely on criminalising such expression. At the same time, the application and interpretation of the existing criminal provisions on 'hate speech' is generally inconsistent.

The availability of civil or administrative laws, which provide victims of 'hate speech' with a variety of potential courses of action and remedies, including the pursuit of damages, is positive. However, in all the countries reviewed, bringing a civil or administrative action in

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relation to an incident involving 'hate speech' is typically cumbersome and/or expensive, and these mechanisms therefore remain largely ineffective.

As regards 'hate speech' in the media, the media regulatory authorities and self-regulatory bodies are responsible for promoting pluralism and diversity in the media in all the countries reviewed. These bodies and authorities have adopted codes of conduct and ethical standards that can be applied to 'hate speech' cases involving the media. However, there is limited evidence that these bodies have been able to generate significant improvements to media practices in this area. Typically, regulatory authorities and self-regulatory mechanisms offer complaint proceedings that can be used by victims of 'hate speech', which can result in moral, and, in some cases, financial sanctions being imposed against the media. In practice, such complaints mechanisms are limited in their scope, uncertain with regards to their outcome, and are not always easy to access.

Combating 'hate speech', the negative stereotyping of minorities and vulnerable groups and the problem of prejudice and intolerance, requires sustained and wide-ranging efforts, including strong equality and non-discrimination legislation and policy frameworks. It is positive that all the countries under review have adopted some form of anti-discrimination legislation and have established national equality bodies or national human rights institutions. Together with civil society organisations, these bodies are essential to efforts to promote equality and increase inter-community dialogue, as well as to building trust between communities and enhancing their resilience against messages of hatred. Despite these positive efforts, the scope for the improvement and full realisation of existing equality and non-discrimination frameworks is vast.

This publication summarises and analyses the findings of the six country reports. In the first section we outline the applicable international standards on 'hate speech'. Secondly, we identify commonalities and differences in national approaches to combating 'hate speech' and offer examples of good practices. Special attention is given to the regulatory frameworks through which 'hate speech' in the media is addressed, which is examined in a separate section. Finally, we offer a series of recommendations to improve the protection of the rights to freedom of expression and equality both nationally and regionally. ARTICLE 19 is fully aware that the particular measures required to improve the protection of freedom of expression and equality vary from country to country. However, we believe that this overview of commonalities, problems, and good practices can contribute towards ensuring the enhanced protection of these rights in the future, at both national and regional levels.

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# International human rights standards

The review of the legal and policy frameworks relevant to responding to 'hate speech' in the six countries is informed by international human rights law and standards, in particular regarding the mutually interdependent and reinforcing rights to freedom of expression and equality.

## The right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR)<sup>3</sup> and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR).<sup>4</sup>

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive, or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice. The United Nations (UN) Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States' compliance with the ICCPR, has affirmed the scope extends to the expression of opinions and ideas that others may find deeply offensive,<sup>5</sup> and this may encompass discriminatory expression.

While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19(3) of the ICCPR, provided that the limitation is:

- Provided for by law, so any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly;
- In pursuit of a legitimate aim, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (ordre public), or of public health or morals; or
- Necessary in a democratic society, requiring the State to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>6</sup>



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Thus, any limitation imposed by the State on the right to freedom of expression, including limiting ‘hate speech’, must conform to the strict requirements of this three-part test. Further, Article 20(2) of the ICCPR provides that any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence must be prohibited by law (see below).

At the European level, Article 10 of the European Convention on Human Rights (European Convention)<sup>7</sup> protects the right to freedom of expression in similar terms to Article 19 of the ICCPR, with permissible limitations set out in Article 10(2).<sup>8</sup> Within the EU, the right to freedom of expression and information is guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union.

## The right to equality

The right to equality and non-discrimination is provided in Articles 1, 2, and 7 of the UDHR.<sup>9</sup> These guarantees are given legal force in Articles 2(1) and 26 of the ICCPR, obliging States to guarantee equality in the enjoyment of human rights, including the right to freedom of expression and equal protection of the law.

At the European level, the European Convention prohibits discrimination in Article 14 and, more broadly, in Protocol No. 12.

## Limitations on ‘hate speech’

While ‘hate speech’ has no definition under international human rights law, the expression of hatred towards an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response international human rights law requires from States:<sup>10</sup>

- Severe forms of ‘hate speech’ that international law requires States to prohibit, including through criminal, civil, and administrative measures, under both international criminal law and Article 20(2) of the ICCPR;
- Other forms of ‘hate speech’ that States may prohibit to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias-motivated threats or harassment; or
- ‘Hate speech’ that is lawful and should therefore be protected from restriction under Article 19(3) of the ICCPR, but which nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State.

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## Obligation to prohibit

Article 20(2) of the ICCPR obliges States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. In General Comment No. 34, the HR Committee stressed that while States are required to prohibit such expression, these limitations must nevertheless meet the strict conditions set out in Article 19(3).<sup>11</sup>

The Rabat Plan of Action,<sup>12</sup> adopted by experts following a series of consultations convened by the UN Office of the High Commissioner for Human Rights (OHCHR), advances authoritative conclusions and recommendations for the implementation of Article 20(2) of the ICCPR.<sup>13</sup>

- Incitement. Prohibitions should only focus on the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence, rather than the advocacy of hatred without regard to its tendency to incite action by the audience against a protected group.
- Six-part threshold test. To assist in judicial assessments of whether a speaker intends and is capable of having the effect of inciting their audience to violent or discriminatory action through the advocacy of discriminatory hatred, six factors should be considered:
  - Context: the expression should be considered within the political, economic, and social context prevalent at the time it was communicated, for example the existence or history of conflict, existence or history of institutionalised discrimination, the legal framework, and the media landscape;
  - Identity of the speaker: the position of the speaker as it relates to their authority or influence over their audience, in particular if they are a politician, public official, religious or community leader;
  - Intent of the speaker to engage in advocacy to hatred; intent to target a protected group on the basis of a protected characteristic, and knowledge that their conduct will likely incite the audience to discrimination, hostility, or violence;
  - Content of the expression: what was said, including the form and the style of the expression, and what the audience understood by this;

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- Extent and magnitude of the expression: the public nature of the expression, the means of the expression, and the intensity or magnitude of the expression in terms of its frequency or volume; and
  - Likelihood of harm occurring, including its imminence: there must be a reasonable probability of discrimination, hostility, or violence occurring as a direct consequence of the incitement.
  - Protected characteristics. States' obligations to protect the right to equality more broadly, with an open-ended list of protected characteristics, supports an expansive interpretation of the limited protected characteristics in Article 20(2) of the ICCPR to provide equal protection to other individuals and groups who may similarly be targeted for discrimination or violence on the basis of other recognised protected characteristics.

Proportionate sanctions. The term "prohibit by law" does not mean criminalisation; the HR Committee has said it only requires States to "provide appropriate sanctions" in cases of incitement.<sup>14</sup> Civil and administrative penalties will in many cases be most appropriate, with criminal sanctions an extreme measure of last resort.

The Committee on the Elimination of all forms of Racial Discrimination (the CERD Committee) has also based their guidance for respecting the obligation to prohibit certain forms of expression under Article 4 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) on this test.<sup>15</sup>

At the European level, the European Convention does not contain any obligation on States to prohibit any form of expression, as under Article 20(2) of the ICCPR. However, the European Court of Human Rights (European Court) has recognised that certain forms of harmful expression must necessarily be restricted to uphold the objectives of the European Convention as a whole.<sup>16</sup> The European Court has also exercised particularly strict supervision in cases where criminal sanctions have been imposed by the State, and in many instances it has found that the imposition of a criminal conviction violated the proportionality principle.<sup>17</sup> Recourse to criminal law should therefore not be seen as the default response to instances of harmful expression if less severe sanctions would achieve the same effect.

At the EU level, the Council's framework decision "on combating certain forms and expressions of racism and xenophobia by means of criminal law"<sup>18</sup> requires States to sanction racism and xenophobia through "effective, proportionate and dissuasive criminal penalties". It establishes four categories of incitement to violence or hatred offences that

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States are required to criminalise with penalties of up to three years. States are afforded the discretion of choosing to punish only conduct which is carried out in “a manner likely to disturb public order” or “which is threatening, abusive, or insulting”, implying that limitations on expression not likely to have these negative impacts can legitimately be restricted. These obligations are broader and more severe in the penalties prescribed than the prohibitions in Article 20(2) of the ICCPR, and do not comply with the requirements of Article 19(3) of the ICCPR.<sup>19</sup>

### Permissible limitations

There are forms of ‘hate speech’ that target an identifiable individual, but that do not necessarily advocate hatred to a broader audience with the purpose of inciting discrimination, hostility, or violence. This includes discriminatory threats of unlawful conduct, discriminatory harassment, and discriminatory assault. These limitations must still be justified under Article 19(3) of the ICCPR.

### Lawful expression

Expression may be inflammatory or offensive, but not meet any of the thresholds described above. This expression may be characterised by prejudice and raise concerns over intolerance, but does not meet the threshold of severity at which restrictions on expression are justified. This also includes expression related to the denial of historical events, insult of State symbols or institutions, and other forms of expression that some individuals and groups might find offensive.

This does not preclude States from taking legal and policy measures to tackle the underlying prejudices of which this category of ‘hate speech’ is symptomatic, or from maximising opportunities for all people, including public officials and institutions, to engage in counter-speech.

## Freedom of expression online

### International law

At the international level, the UN Human Rights Council (HRC) recognised in 2012 that the “same rights that people have offline must also be protected online”.<sup>20</sup> The HR Committee has also made clear that limitations on electronic forms of communication or expression disseminated over the Internet must be justified according to the same criteria as non-electronic or ‘offline’ communications, as set out above.<sup>21</sup>

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While international human rights law places obligations on States to protect, promote, and respect human rights, it is widely recognised that business enterprises also have a responsibility to respect human rights.<sup>22</sup> Importantly, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on FOE) has long held that censorship measures should never be delegated to private entities.<sup>23</sup> In his June 2016 report to the HRC,<sup>24</sup> the Special Rapporteur on FOE enjoined States not to require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extra-legal means. He further recognised that “private intermediaries are typically ill-equipped to make determinations of content illegality”,<sup>25</sup> and reiterated criticism of notice and take-down frameworks for “incentivising questionable claims and for failing to provide adequate protection for the intermediaries that seek to apply fair and human rights-sensitive standards to content regulation”, i.e. the danger of “self- or over-removal”.<sup>26</sup>

The Special Rapporteur on FOE recommended that any demands, requests, and other measures to take down digital content must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under Article 19(3) of the ICCPR.<sup>27</sup>

In their 2017 Joint Declaration on “freedom of expression, ‘fake news’, disinformation and propaganda”, the four international mandates on freedom of expression expressed concern at “attempts by some governments to suppress dissent and to control public communications through [...] efforts to ‘privatise’ control measures by pressuring intermediaries to take action to restrict content”.<sup>28</sup> The Joint Declaration emphasises that intermediaries should never be liable for any third party content relating to those services unless they specifically intervene in that content or refuse to obey an order adopted in accordance with due process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it, and they have the technical capacity to do so. They also outlined the responsibilities of intermediaries regarding the transparency of and need for due process in their content-removal processes.

## European law

At the EU level, the E-Commerce Directive requires that Member States shield intermediaries from liability for illegal third party content where the intermediary does not have actual knowledge of illegal activity or information and, upon obtaining that knowledge, acts expeditiously to remove or disable access to the content at issue.<sup>29</sup> The E-Commerce Directive prohibits Member States from imposing general obligations on intermediaries to monitor activity on their services.<sup>30</sup> The regulatory scheme under the

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E-Commerce Directive has given rise to so-called ‘notice-and-takedown’ procedures, which have been sharply criticised by the special mandates on freedom of expression for their lack of clear legal basis and basic procedural fairness.

The limited shield from liability for intermediaries provided by the E-Commerce Directive has been further undermined by the approach of the European Court. In *Delfi AS v. Estonia*, the Grand Chamber of the European Court found no violation of Article 10 of the European Convention where a national court imposed civil liability on an online news portal for failure to remove “clearly unlawful” comments posted to the website by an anonymous third party, even without notice being provided.<sup>31</sup> A joint dissenting opinion highlighted that this “constructive notice” standard contradicts the requirement of actual notice in Article 14 para 1 of the E-Commerce Directive, necessitating intermediaries to actively monitor all content to avoid liability in relation to specific forms of content, thus additionally contradicting Article 5 of the E-Commerce Directive.<sup>32</sup>

Decisions subsequent to *Delfi AS* appear to confine the reasoning to cases concerning ‘hate speech’.<sup>33</sup> More recently, the European Court rejected as inadmissible a complaint that the domestic courts had failed to protect the applicant’s right to privacy by refusing to hold a non-profit association liable for defamatory comments posted to their website by a third party. The Court noted that the comments were not ‘hate speech’ or direct threats and were removed upon notice (though a formal notice-and-takedown procedure was not in place).<sup>34</sup> The position and resources of the intermediary were also relevant factors.<sup>35</sup>

Lastly, the 2016 European Commission’s Code of Conduct on Countering Illegal Hate Speech,<sup>36</sup> developed in collaboration with some of the major information technology companies, constitutes a (non-legally binding) commitment to remove “illegal hate speech”, defined on the basis of the Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law,<sup>37</sup> within 24 hours. While the Code of Conduct is ostensibly voluntary, it is part of a concerning trend whereby States (including through intergovernmental organisations) are increasing pressure on private actors to engage in censorship of content without any independent adjudication on the legality of the content at issue.<sup>38</sup>

In short, the law on intermediary liability remains legally uncertain in Europe, with tensions between the European Court’s jurisprudence and the protections of the E-Commerce Directive, as well as the guidance of the international freedom of expression mandates.

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# Comparative analysis of the legal framework on 'hate speech'

## Basic legal guarantees of the right to freedom of expression and equality

The Constitutions of Austria, Germany, Hungary, Italy and Poland provide for both the protection of the right to freedom of expression and the right to equality. The right to freedom of information is additionally recognised either in a dedicated law or, in the case of Italy, in the jurisprudence of the Constitutional Court. The Constitutions in these countries also provide the framework for permissible restrictions of the right to freedom of expression, usually along the lines of Article 19(3) of the ICCPR.

These constitutional protections are then given force through dedicated laws, namely media laws, equality and non-discrimination laws, and legislation on the protection of the rights of national, ethnic, linguistic or religious minorities or on equality in educational settings. In some countries (for example Germany and Italy), dedicated legislation has additionally been adopted at regional level.

The United Kingdom is distinct in that it does not have a written constitution. Various legislative initiatives related to protection against discrimination have been unified in the dedicated Human Rights Act, which also protects the right to freedom of expression. The Human Rights Act has also played a significant role in the development of the common law as it applies in particular to the balance between the right to freedom of expression and equality.

As previously mentioned, provisions aimed at restricting 'hate speech' can be found in a wide range of national laws and regulations. In general, the extent of an individual's liability for conduct involving 'hate speech' is, variously, demarcated by:

- The criminal law – in which criminal sanctions, including custodial sentences, are imposed by the courts;
- The administrative law (in civil law countries) – in which the courts or public authorities impose administrative sanctions (including fines, and injunctions restraining or requiring particular conduct); and

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- The civil law – in which victims of ‘hate speech’ may seek redress from the other party through the courts, and a court may order the payment of damages or impose other measures to regulate the parties’ conduct towards each other.

The following sections examine state practices in each of these three areas. Media laws are examined separately.

## Prohibitions of ‘hate speech’ in the criminal law

Criminal provisions directly restricting the most serious forms of ‘hate speech’ are provided in the criminal laws of all six countries, primarily in the criminal or penal codes. The English criminal law does not have a single governing instrument, such as a penal code, rather criminal offences are regulated through various pieces of legislation (for example, the Public Order Act, Protection from Harassment Act, Crime and Disorder Act or Offences against the Person Act).

When assessed in light of the requirements of international standards, in particular the requirements on Article 20(2) of the ICCPR and the recommendations outlined in the Rabat Plan of Action, ARTICLE 19 finds that the criminal laws and jurisprudence related to the prohibition of incitement can be best characterised as a patchwork. There are significant variations across the six countries in how incitement is approached and defined in legislation, and in how these concepts are then applied. The inconsistencies in approach and application exist even within the countries under review and are further compounded by the range of specified protected characteristics in those countries. The available case-law also shows that the legal reasoning deployed by the courts is often vague, ad hoc and seemingly lacking in conceptual discipline or rigour.

In particular, ARTICLE 19 identified the following key issues in the criminal law provisions:

### The scope of incitement provisions

The wording of Article 20(2) of the ICCPR is not replicated in any national legislation of the six countries. The term “incitement to hatred” or “incitement to violence or hatred” is used in some cases (for example, England and Wales, Germany, Austria and Hungary).



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Typically, the relevant provisions prohibit various types of incitement and are often vague and overbroad. These include, inter alia: “the use of unlawful threats directed against groups or individuals” or “public insult of group of people or individuals” on protected grounds (Poland); “instigating” or “provoking violence” based on protected grounds or “public instigation to disobedience of public order or hatred amongst social classes” (Italy); “hatred with intentional harming of human dignity” (Austria); publically “promoting” certain ideologies (Poland); the “dissemination” of certain ‘propaganda’ (Germany); “racialist chanting at football matches” or belonging to certain proscribed organisations, including some Nazi organisations, in the country or overseas (UK).

The absence of a reference to the exact wording of Article 20(2) of the ICCPR in domestic legislation may suggest that States are either unwilling to take on the language of the ICCPR, or tend to approach its interpretation in very broad terms. This situation may also be the result of the authorities’ greater familiarity and reliance on the rather inconsistent jurisprudence of the European Court in this area (see below).

### Protected characteristics

The protected characteristics found in the criminal law provisions vary widely across the six countries:

- The criminal laws of Austria and Hungary provide a non-exhaustive list of protected characteristics. Additionally it is of note that in Hungary, protection is also explicitly provided to “the Hungarian nation”; whilst it is possible to incite hatred and violence against a majority population, the rationale for the inclusion of this specific protection is unclear;
- The German criminal law provides protection to “national, racial, religious groups defined by their ethnic origin” and “segments of the population;” however, what encompasses “segments of the population” is not entirely clear and is open to interpretation;
- In the remaining three countries, the legislation only criminalises ‘hate speech’ targeting people on certain exhaustive grounds. These include “race, ethnic origin, nationality or religion” (Italy), “nationality, ethnicity, race or religion or belief” (Poland); or “race” and “religion and sexual orientation” (England and Wales).

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## Interpretation of incitement provisions

The research shows that the interpretation of criminal provisions on incitement is also varied across the six countries. The available jurisprudence indicates that none of the courts apply a specific incitement test, as recommended in the Rabat Plan of Action. It is unclear whether the courts and judicial authorities are even aware of the guidance provided in the Rabat Plan of Action with the research showing no reference to it.

The analysis of the available case-law shows that:

- The Hungarian courts consider themselves bound by the test of “clear and present danger of violent actions or to individual rights” in incitement cases, and the courts interpret when the threshold of clear and present danger is reached;
- Under English criminal law, the Crown and Prosecution Service (CPS) guidelines apply a two stage test to proceed with the prosecution of any crime: the second “public interest” stage requires giving due regard to any discriminatory motivation or “demonstrated hostility toward the victim” based on one of the protected grounds;
- In the other four countries, the courts do not seem to either apply uniform criteria or refer to a specific incitement test. They seem to assess incitement cases on a case-by-case basis, taking into account a variety of criteria, in particular, the intent and motivation of the speaker; the type of speaker; the harm caused; and, whether the expression reached the targeted audience (such as if it was communicated to the public).

There have been a number of cases in which online expression has been prosecuted under incitement or other criminal law provisions. Unfortunately, ARTICLE 19 was unable to ascertain through the research in any of the six countries whether specific criteria are applied in these cases and/or whether law enforcement considers different aspects of the case as compared to ‘hate speech’ committed offline. Only the English CPS Guidelines on prosecuting cases involving communications sent via social media provide specific and detailed guidelines for prosecutions under the relevant provisions.

ARTICLE 19 assumes that the lack of consistency in decision-making at the national level can be a partially attributed to the lack of consistent guidance on how to approach ‘hate speech’ provided by the jurisprudence of the European Court. The inconsistent approach of the European Court is echoed in ‘hate speech’ jurisprudence within the six countries under review. As noted previously, the European Convention does not contain any

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provisions equivalent to Article 20(2) of the ICCPR. Consequently, the European Court is not tasked with determining whether statements qualify as “incitement” when deciding on relevant cases. Instead, it assesses whether restrictions comply with the three-part test, based on the provisions of Article 10(2) of the European Convention. The European Court thereby employs a case-by-case approach to ‘hate speech’. Although the European Court has held on multiple occasions that certain elements of the particular expressive conduct at issue do not constitute ‘hate speech’ it has not defined the precise meaning of ‘hate speech’, and has not adopted any specific ‘hate speech’ test.

Under this approach, the European Court has either a) found applications inadmissible (often on procedural grounds); b) found no violation of freedom of expression; or c) relied on Article 17 of the European Convention, which stipulates that the rights guaranteed by the Convention may not be interpreted as granting the right to engage in any activity aimed at the destruction of any of the rights contained in the European Convention. In its jurisprudence the European Court has sometimes excluded the most extreme forms of expression, as well as expression related to the denial of historical events, such as the Holocaust, from the Convention’s protection all together. For example:

- In *W.P. and Others v. Poland* (2 September 2004) – a case concerning the Polish authorities’ refusal to allow the creation of an association whose statutes included anti-Semitic statements – the European Court held that the applicants could not benefit from the protection afforded by Article 11 (freedom of assembly and association) of the Convention;
- *Norwood v. the United Kingdom* (16 November 2004) concerned the conviction, under the Public Order Act, of a regional organiser for the British National Party (an extreme right-wing political party). The organiser had displayed a poster depicting the Twin Towers in flame, the words “Islam out of Britain – Protect the British People”, and a symbol of a crescent and star with a cross through them, in the window of his flat. The European Court found the application to be inadmissible, holding that the act fell within the meaning of Article 17 and concluding that the conviction did not breach Article 10 of the European Convention.
- The European Court (and previously the European Commission) declared a number of cases from Germany and Austria, which concerned the expression of support for or endorsement of totalitarian doctrines or the restoration of totalitarian regime, elements of Nazi ideology or activities inspired by Nazism, to be inadmissible on the grounds of incompatibility with the values of the Convention. These include, for example, *Communist Party of Germany v. the Federal Republic of Germany* (20 July

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1957), B.H, M.W, H.P and G.K. v. Austria (12 October 1989), Honsik v. Austria (18 October 1995), Nachtmann v. Austria (9 September 1998) or Schimanek v. Austria (1 February 2000);

- Conversely, in the case *Fáber v. Hungary* (24 July 2012), the European Court found that sanctions imposed on an individual for displaying a flag with controversial historical connotations (the striped Árpád flag) near a demonstration against racism and hatred violated his rights under Articles 10 and 11 of the European Convention. The European Court found that although the display of the flag may be considered disrespectful or create unease amongst some people, such sentiments could not by themselves set limits on freedom of expression. The Court also relied on the fact that the offender had acted in a non-violent manner and that there was no proven risk to public security;
- The case of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (2 February 2016) concerned the liability of a self-regulatory body of Internet content providers and an Internet news portal for vulgar and offensive online comments posted on their websites. The European Court found that the Internet intermediary should not be liable for third party content, and held that there had been a violation of Article 10 of the European Convention. In comparison to the European Court's earlier case-law, the Hungarian case was notably devoid of the pivotal elements in the aforementioned *Delfi AS* case concerning 'hate speech' and incitement to violence.

It should be noted that in January 2018, the Austrian Supreme Court referred a case concerning online 'hate speech' to the European Court of Justice (CJEU). The case concerns proceedings brought by the former Austrian Green party leader Eva Glawischnig, who was subjected to offensive comments (termed 'hate speech') posted by a fake account on Facebook. Glawischnig first brought a suit against Facebook in 2016. The court of first instance ordered Facebook to remove the posts and all verbatim copies, and an appeals court also ruled that Facebook must apply the injunction globally. Glawischnig appealed, claiming Facebook should also have to find and remove similar posts. The Austrian Supreme Court decided to ask the CJEU for clarification as to whether such an order would conflict with the provisions of the E-Commerce Directive. The CJEU proceedings are pending at the time of the publication of this study but may be crucial towards determining future practices in this area.

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## Criminal provisions indirectly restricting 'hate speech'

The legislation of the six countries contains a number of criminal offences that might indirectly criminalise some types of 'hate speech'. These provisions have indeed been applied in 'hate speech' cases, although they were not specifically or originally intended to be used in such circumstances. The respective provisions include, but are not limited, to:

- Criminal defamation: Defamation is a criminal offence in Austria, Germany, Italy, and Poland. Germany also allows for the prosecution of "group" defamation, which is the most clearly applicable to 'hate speech' cases. Otherwise, it seems that criminal defamation provisions are used in 'hate speech' cases only rarely; for example, in Italy, the courts often consider racial or ethnic bias as an aggravating circumstance in cases of online defamation. In Poland, attempts to bring prosecution for 'hate speech' cases under defamation provisions have been unsuccessful;
- Some countries also criminalise "insult" (Poland and Germany); "malicious communications" (UK) which applies to communication that is, inter alia, "indecent, grossly offensive... or which conveys threat"; the improper use of electronic communication to send such messages (inter alia, "offensive" or "menacing" messages); and "threats" with bias motivation (UK, Germany, Italy, Poland);
- In Italy, the courts have applied the crime of "criminal conspiracy" to a case concerning the promotion of neo-Nazi ideology online, and the coordination of an online group;
- Several countries also include offences criminalising the denial of historical events or the endorsement of certain ideologies. These include, for example, "apology of fascism" and "denial of the Shoah or of genocide crimes, war crimes and crimes against humanity" (Italy); "crimes against the nation" (Poland); "public denial of sins of national socialist or communist regimes" and the crime of "the use of symbols of totalitarianism" (Hungary); various crimes related to the denial of the Holocaust and crimes committed under Nazi rule (Germany); and various crimes related to the incriminating denial, appreciation or justification of the crimes of the Nazi-regime or attempting to reinstate such a regime (Austria). These provisions are used in some 'hate speech' cases, especially in Germany;
- Defamation of religion is a criminal offence in Austria ("degradation of religious teachings"), Germany ("dissemination of written materials that defames the religion

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or ideology of others in a manner that is capable of disturbing the public peace, and Poland (“insult of religious beliefs or offending religious feelings”). Although prosecutions under these provisions are relatively low in number, they nevertheless create a chilling effect on freedom of expression.

ARTICLE 19 notes that these provisions raise serious concerns for their compatibility with international freedom of expression standards, as they should not be criminal offences in the first place.

### Efforts to amend existing criminal legislation on ‘hate speech’

There have been a number of initiatives to amend the criminal law provisions applicable to ‘hate speech’ in the countries under review. These efforts, however, do not appear to be motivated by a desire to improve the compliance of these provisions with international freedom of expression standards, or to align them more closely with recommendations contained in the Rabat Plan of Action.

In countries where the list of protected grounds under criminal law is non-exhaustive, there have been efforts to expand the list of protected characteristics found under the incitement provisions. For example, in Poland and Italy, there have been efforts to expand the protection to include the grounds of sexual orientation and gender identity, and disability. So far, these efforts have been unsuccessful.

Also, in 2017, an inquiry by the Home Affairs Parliamentary Select Committee in the UK examined the effectiveness of the existing legislation for offences committed online. The inquiry found that “the laws against online hate speech” were vague and out of date or unclear, and recommended the UK Government to “review the entire legislative framework on hate speech, harassment and extremism to ensure that the laws are up to date.”

In some countries, recent amendments to the criminal law are very problematic from a freedom of expression perspective, as they introduce provisions that fail to meet international freedom of expression standards. For example, in Italy, a 2017 proposal to adopt a law on the prevention of ‘fake news’ included several extremely vague and overbroad communication offences. In 2018, Poland adopted a very problematic amendment to the law on historical memory, which criminalises, inter alia, attributing responsibility or joint responsibility for Nazi crimes either to the Polish people or the Polish State.

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## Measures against 'hate speech' in administrative law

Measures relevant to addressing 'hate speech' in administrative laws vary across the six countries. There are no offences under English law that are recognisable as administrative, with protection instead provided through the criminal and civil law. The administrative law of the five civil law countries, however, contains a number of administrative offences that can be used in 'hate speech' cases in various scenarios. For example:

In some countries, provisions in the law on assemblies can be applied against assemblies seeking to spread hateful messages. For example, in Austria an assembly can be prohibited by the public authorities if its purpose, inter alia, "violates criminal laws" or if it "poses a threat to the public good." In Germany, an assembly can be banned if it is organised by a political party that has been declared unconstitutional, and associations whose actions violate incitement prohibitions can also be banned. Other examples of relevant administrative offences include:

- In Poland, the owners or administrators of buildings can be sanctioned under the Construction Law if their buildings do not meet certain "technical and aesthetic standards." The Polish Ombudsperson (the equality institution) concluded that the Construction Law can be applied in cases where "hateful" inscriptions appear on the buildings;
- In 2017, Italy adopted new legislation prohibiting cyber-bullying that can be used in cases of related to the incitement of hatred online towards single individuals, on various protected grounds. Italian legislation also contains administrative offences on the defamation of religion (which in 1999 replaced pecuniary criminal sanctions);
- In Hungary, protections against harassment provided in the Equality Act have been applied in some cases of 'hate speech', in particular in relation to statements made by public officials. There have been several cases in which the Hungarian Equal Treatment Authority has dealt with complaints under these provisions. Although the Authority did not always find in favour of the complainants (the victims of 'hate speech'), the Authority did not exclude these types of cases on principle;
- In Germany, the 2017 Network Enforcement Act (NetzDG) can be used to target online 'hate speech'. The Law established an intermediary liability regime that incentivises, through severe administrative penalties of up to 5 million EUR, the removal and blocking of "clearly violating content" and "violating content", within

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time periods of 24 hours and 7 days respectively. As regulatory offences, it is possible for the maximum sanction to be multiplied by ten to 50 million EUR. Though the NetzDG does not create new content restrictions, it compels content removals on the basis of select provisions from the German Criminal Code. Many of these provisions raise serious freedom of expression concerns in and of themselves, including prohibitions on “defamation of religion”, broad concepts of ‘hate speech’, and criminal defamation and insult. The NetzDG has been widely criticised for two key reasons. First, it deputises private companies to engage in censorship on the basis of the provisions that do not meet international freedom of expression standards. Second, it imposes the obligation to remove or block content applies without any prior determination of the legality of the content at issue by a court, and with no guidance to Social Networks on respecting the right to freedom of expression.

In general, there are no dedicated studies or statistics on the usage of administrative law sanctions in ‘hate speech’ cases. Largely, information is only available when high profile cases are reported in the media or when information is published by non-governmental organisations in their reports (for example Hungary or Poland). The German NetzDG Law has only been in force since January 2018 and assessing its implementation is therefore not possible; however, it can be noted that the entry into force of the NetzDG has already sparked a number of controversies, as the social media platforms have removed legitimate content (for example satirical material) under its provisions.

### Civil causes of action against ‘hate speech’

In all the countries under review, there are a number of civil causes of action that may be applied in cases involving ‘hate speech’. These may provide access to a remedy for ‘hate speech’ victims, depending on the circumstances. For example:

- In Austria, civil protection against ‘hate speech’ can be sought under the Law Against Discrimination; victims are able to seek pecuniary and non-pecuniary damages (compensation for pain and suffering) in civil law actions. However, this route is only possible in cases of discrimination on the grounds of gender or ethnicity. Damages can also be sought under the civil cause of “honourable insult.”
- In Hungary, victims of ‘hate speech’ have two types of remedies available to them under the civil law (only one type of action can be pursued for in relation to a single matter, however). They can either:



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o Initiate a civil action under the provisions on “hate speech against a community” in the Civil Code. Any member of the targeted community can bring a claim against expression that resulted in injury to the reputation of his or her community. In terms of remedies, any member of the affected community may ask the court to declare a violation, issue an injunction to stop the violation, and to seek restitution (damages). However, the legislation limits the protected groups to the Hungarian nation, and national, ethnic, racial and religious groups, and the civil action must be initiated within a 30 day statutory period.

o Initiate a civil action before the courts for harassment under the provisions of the Equal Treatment Act, together with the provision on fundamental rights under the Civil Code.

- In Poland victims of ‘hate speech’ can bring a civil action under the provisions on the protection of “personal interests of a human being” and can seek various remedies, including compensation.
- In Italy, victims of ‘hate speech’ can pursue a civil claim to seek compensation for moral and pecuniary damages caused by a crime. They can also take this action if they were victims of ‘hate’ related offences. They can also pursue civil defamation cases, but the research suggests that this possibility is rarely pursued.
- Similarly, in Germany, if a perpetrator has been found guilty of insult or defamation under the criminal law, civil liability can also be established. Additionally, the Civil Code provides for the protection of “other rights”, which include the right to personality. These provisions can be relied on by victims of ‘hate speech’ if they wish to bring a civil law action and seek remedies in the form of compensation for material damages and, in some cases, also non-pecuniary damages and/or the retraction of a false assertion of fact.
- In England and Wales, civil causes of action are established under several laws. These include harassment (under the Protection from Harassment Act) and protection against discrimination (in the Equality Act), which covers instances of discriminatory ‘hate speech’ targeted at service users, users of premises, and potential users. Employees are, in certain circumstances, entitled to protection from ‘hate speech’ by fellow employees, and the law recognises that employers may sanction workers – including through dismissal – who engage in ‘hate speech’ towards their colleagues and/or third parties. The emerging tort of misuse of private information and the statutory mechanism by which personal and sensitive personal data are governed may

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in certain circumstances engage issues of ‘hate speech,’ although only collaterally.

Additionally, several countries give standing to non-governmental organisations (NGOs), in particular those working on equality issues, to bring claims under some of the above-mentioned provisions (for example Poland and Italy); or allow NGOs to provide legal representation to victims in these cases.

The possibility of victims of ‘hate speech’ seeking civil law remedies is a positive aspect of ‘hate speech’ frameworks in the countries under review. At the same time, the research shows that in practice, victims of ‘hate speech’ only rarely bring actions under these provisions. The case-law of civil courts in ‘hate speech’ cases (as compared to cases of discrimination more broadly) is extremely limited. The courts may be reluctant to apply anti-discrimination legislation in ‘hate speech’ cases. Moreover, victims who want to pursue these remedies might be deterred by problems such as the cost of legal representation and the excessive length of the civil proceedings. The limited information available, however, does not allow specific conclusions to be drawn on the effectiveness of these provisions.

### The role of equality institutions in relation to public discourse and ‘hate speech’

Under international law, in order to combat ‘hate speech,’ States should adopt a wide range of positive measures to implement and promote the right to equality in practice and take positive steps to ensure diversity and pluralism in society. The research shows that in all the countries under review, national human rights institutions play an important role in implementing these obligations. These institutions are either national human rights bodies (whose mandate includes coverage of equality and non-discrimination issues) or dedicated equalities’ bodies.

Importantly, the equality or human rights bodies in all the countries under review have undertaken activities countering ‘hate speech.’ Typically, these institutions provide assistance to victims of ‘hate speech,’ receive complaints from victims or carry out investigations into such cases or practices under their own initiative. Several of them also are mandated to undertake studies and research, and issue recommendations regarding areas of particular concern. Some of these bodies also issue guidance on the legal framework related to freedom of expression, which also includes reference to the legal framework in respect to ‘hate speech.’ Some of these bodies also organise communication campaigns aimed at the promotion of tolerance and diversity, often in cooperation with civil society and other stakeholders.

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As regards 'hate speech' in the media, the following initiatives by national human right bodies and equality institutions can be highlighted:

- In Poland, the Commissioner for Citizens' Rights (the Ombudsperson) maintains contact with the National Broadcasting Council, the editorial boards of the Polish media, the Council of Media Ethics and representatives of social media platforms. The Ombudsperson frequently raises his concerns in relation to their activities, including 'hate speech' in the media or media practices in regards to their coverage of minorities. The Ombudsperson has organised meetings with the media boards on the portrayal of minorities in the media. He also actively cooperates with social media platforms, especially with Facebook, in relation to 'hate speech' on their platforms, including on the implementation of the European Code of Conduct on countering illegal 'hate speech' online, drafted by the European Commission in 2016. The Ombudsperson has also organised debates for various media stakeholders on the topic of 'hate speech' and has set up Anti-Hate Platforms to operate at national and local levels.
- In Italy, the National Office Against Racial Discrimination (UNAR) employs two experts in the field of new media and social media research; these experts are also responsible for the National Observatory Against Discrimination in the Media and on the Internet (the Observatory). The Observatory collects data and analyses new and emerging forms of discrimination in online media and on social networks.
- In Hungary, the Commissioner for fundamental rights has issued several thematic studies on 'hate speech,' including in the media, and has critically assessed the 'hate speech' case law of the Hungarian Media Council, the media regulatory body. The Commissioner has also launched ex officio proceedings in connection to two specific media cases, when the Media Council failed to launch official proceedings against media outlets that had violated the law.

ARTICLE 19 believes that it is important for States to continue supporting the efforts of these institutions. This should encompass ensuring respect for the institutions, strengthening their independence and providing them with adequate resources to perform their mandate. The human rights institutions should themselves consider developing dedicated policies aimed at promoting plurality, diversity and the inclusion of minorities and vulnerable groups in the media.

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# Comparative analysis of media regulation and ‘hate speech’

## Media regulation and ‘hate speech’

The media regulation framework is an important aspect of States’ positive obligation to create an enabling environment for freedom of expression and equality. As a part of this obligation, States should take positive steps to promote diversity and pluralism in society. They should also enable the development of a media landscape that represents and reflects society as a whole and presents a maximum diversity of voices, viewpoints and languages.

In terms of responding to these obligations, the countries under review typically differentiate between types of media in their legal and regulatory frameworks. Typically, there is distinct legislation which governs broadcast media and print media. The only exceptions are Hungary, which provides one type of legislation to cover all “media services” and press products (two acts address different aspects of media regulation); and the UK, which does not have any statutory legislation on the print press. Additionally, dedicated legislation in each country gives public service media the remit to serve the public interest, and to promote diversity and pluralism and special requirements concerning minorities.

It should be noted that in some countries, content restrictions found in media legislation go beyond what is permissible under international law. Importantly, the media framework in each country has to be viewed in the context of the current political situation in each country. This, in some countries, includes efforts to limit the independence of the regulatory authorities, to control public service media, and to limit media freedom as such (in particular, Poland and Hungary).

## Broadcast media

The broadcast regulations examined in all six countries contain negative and positive obligations for the media that are applicable in relation to ‘hate speech’. These include but are not limited to the following:

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- In Austria, legislation on audio-visual services, which regulates commercial TV and radio stations, prohibits any discrimination on the grounds of race, gender, religion, disability, nationality, ethnicity or sexual orientation. The Communications Regulatory Authority (KommAustria) can order the temporary suspension of the reception and re-transmission of radio and audio-visual programmes originating from any EU Member State in the case of any “explicit and serious violation of the ban to contain incitement to hatred based on the difference of race, sex, religion and nationality” committed at least two times within the previous twelve months. Thus far, there have been no cases where these provisions have been applied. Commercial broadcasters additionally must not broadcast content that “incites to hatred on the basis of race, gender, religion, gender, physical disability or nationality” or any programmes “that instigate intolerant behaviours based on differences of race, sex, religion or nationality.” Otherwise, rules which are indirectly applicable to ‘hate speech’ can be found in guidelines on the funding of private broadcasting organisations. These rules are very vaguely formulated, however, making reference to ensuring diversity with no clear benchmarks, for example. Additional content requirements are imposed on the public service broadcaster ORF: for example, it is required to promote equal rights and exclude programmes which “incite to hatred on the grounds of race, gender, age, disability, religion or nationality.”
  - In Germany, the Interstate Broadcasting Treaty (the Treaty), which serves as the umbrella law setting the framework for public and private broadcasting in all 16 German federal states, obligates all national and regional broadcasters with a nationwide footprint to respect and protect human dignity and the moral and religious beliefs of the population in their programming. It also obliges broadcast media outlets to follow recognised journalistic ethical standards and apply due diligence in their reporting. The Treaty makes reference to the provisions on ‘hate speech’ in the criminal law and prohibits a broad set of ‘hate speech’ conduct, including incitement to hatred against parts of the population or against a national, racial, religious or ethnic group; and the denial or downplaying of acts committed under the National Socialist regimes. The federal state broadcasting and media laws elaborate on these obligations in greater detail, and in some instances, extend the scope of the Treaty provisions. The Bavarian media law, for instance, requires all Bavarian broadcasters to ensure that all programmes not only respect human dignity and the moral, religious and ideological beliefs of others, but also marriage and family. The media law of North-Rhine Westphalia further requires private broadcasters, inter alia, to promote effective gender equality and the equal participation of persons with disabilities, and the integration of people with diverse cultural backgrounds through their programming.

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- In Hungary, the legislation obliges media service providers to respect human dignity in the content that they publish; prohibits content that incites hatred against “any nation, community, national, ethnic, linguistic or other minority or any majority as well as any church or religious group”; and prohibits their exclusion on these grounds. Additionally, the legislation prohibits content that “offends religious or ideological convictions”. The positive obligations of public media service providers and community media services include: the obligation to provide comprehensive pluralistic media content, in both the social and the cultural sense, with the aim that they address as many social classes and culturally distinct groups and individuals as possible; to support, sustain and enrich national, community and European identity, culture and the Hungarian language; a set of obligations on public media service providers to fulfil the linguistic and cultural rights of national and ethnic minorities recognised by Hungary; and a further series of obligations for linear community media services, regarding minorities, communities and groups.
  - In Italy, audio-visual media services are prohibited from transmitting programmes that contain incitement to hatred on any grounds. Legislation bans programmes “that instigate intolerant behaviours based on differences of race, sex, religion or nationality” and “any incitement to hatred based on race, sex, religion or nationality”. The legislation also includes measures aimed at protecting “linguistic minorities”, and obligations for the regional branches of the public service broadcaster, RAI, to air programmes and news dedicated to the recognised historical linguistic minorities residing in the respective regions.
  - In Poland, broadcasting legislation prohibits broadcasting that propagates attitudes or beliefs contrary to the moral values and social interests of the country. Specifically, it also bans the broadcasting of content that incites to hatred or discrimination on the grounds of race, disability, sex, religion or nationality.
  - In the UK, Ofcom, which regulates amongst others broadcast media and the BBC (public service broadcaster), has legal obligations to promote plurality, diversity and inclusion of minorities in the media. This entails giving due regard to the different interests of persons in different parts of the UK and to the interests of different ethnic communities, and promoting the development of opportunities and ensuring equality of opportunity between, men and women, persons of different ethnic backgrounds groups and persons with disabilities, in relation to employment and training in the media.
  - The Ofcom Broadcasting Code offers comprehensive guidelines to broadcasters in

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a number of areas. It prohibits the broadcasting of “material likely to encourage or incite the commission of crime or to lead to disorder,” including “hate speech which is likely to encourage criminal activity or lead to disorder”. ‘Hate speech’ is defined as “all forms of expression which spread, incite, promote or justify hatred based on intolerance on the grounds of disability, ethnicity, gender, gender reassignment, nationality, race, religion, or sexual orientation.” The guidance on the contextual factors to be considered under these provisions incorporates some elements of the Rabat test. For example, the guidance provides that significant contextual factors may include (but are not limited to): the editorial purpose of the programme; the status or position of anyone featured in the material; and/or whether the material at issue is challenged sufficiently. The Broadcasting Code also contains two additional restrictions of ‘hate speech’ and derogatory treatment, in circumstances where it is unlikely to amount to a criminal offence but is nonetheless potentially in breach of other people’s rights. Again, the guidance provided on the meaning of “context” under these rules reflects some of the elements of the Rabat test. Ofcom’s regulation of ‘hate speech’ in broadcast media is usually praised as particularly effective by relevant stakeholders.

The respective provisions related to the broadcast media are overseen by national broadcast regulators, who are empowered to impose sanctions for violations. In all the countries under review, only a limited number of complaints reported were pursued by the broadcast regulators under the above-mentioned provisions. As a result, it was not possible to identify a clear set of criteria applied by the regulatory bodies in ‘hate speech’ cases. Some of the regulators (for example in Hungary and the UK) apply the criteria outlined in the three-part test, however, and refer to the issue of proportionality when imposing sanctions.

## Press regulation and ‘hate speech’

Self-regulation in the countries under review is very much conditioned by the specific media environment in each. The research shows that these mechanisms have been largely ineffectual in dealing with ‘hate speech’ in the media. This is largely because the press regulators are either captured by political or commercial interests, are designed to be toothless and self-serving, or both.

The way in which these mechanisms address the problem of ‘hate speech’ can be summarised as follows:

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## Austria

The print press in Austria is entirely self-regulated. The National Press Council is a voluntary institution, established by the industry itself in 2010. Its Code of Conduct includes general requirements to respect the fundamental rights of all people. It prohibits discrimination on the basis of age, disability, gender, ethnicity, nationality, religion, sexual orientation or political view or other status. Failure to comply with these obligations is sanctioned by the Press Council but has no further legal consequences, since the only sanction available is the publication of the Council's decision in the print media. The Press Council also has a complaint procedure, which requires that complaints be filed only by those "individually affected" by the content at issue. This prevents complaints in 'hate speech' cases being filed in situations where individuals are not specifically targeted. Historically, the Press Council has found violations of the Code of Conduct only in a small proportion of the complaints received. Moreover, the reasoning offered by the Council for their conclusions is usually very vague. Despite the number of decisions finding a violation of the Code of Conduct increasing in the last few years, this mechanism is considered ineffective at addressing the grievances of victims.

## Germany

In Germany, legislative competence in the field of the print media lies with the federal states, which have adopted their own press laws (some of them include their press law provisions in the media laws that govern the private broadcast media). The German Press Council, established in 1950, is a unified body composed of four publishing and journalism unions. Its Press Code prohibits any discrimination on the basis of sex, disability, or membership of an ethnic, religious, social or national group. It does not contain any specific provisions on 'hate speech', however, it does ask the media to take care not to contribute to the creation or fostering of stereotypes and prejudices. It requires the media to respect the truth, ensure respect for human dignity and aim for truthful reporting. As part of its enforcement mechanisms, the Press Code establishes rules on providing a right of reply.

The issue of negative stereotyping of minorities in the media came into the spotlight in 2017, when the Press Council loosened its guidelines on the reporting of crimes. Previously, specifying the ethnic, religious or other minority identity of a perpetrator when reporting a crime was only permitted if their identity had concrete relevance to the criminal act. Under the new rules, specifying their identity is permitted when it is in the 'public interest'.

A primary task of the Press Council is to investigate and decide on individual complaints received, concerning particular publications in the press. It has a general complaints



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committee and a complaints committee focused on editorial data protection. In the majority of cases, the Press Council mediates between the concerned parties and complaints are dealt with without a formal decision by the complaints committee. If a resolution cannot be reached through mediation, the complaints committee issues editorial notes, censures and – in the case of severe journalistic infringements – public reprimands, which must be published by the concerned media outlet.

The principal criticism of the Press Council is that in cases where the complaint is formally considered by the complaints committee, the decision is not issued promptly. The complaints committee only meets four times a year and their decisions are issued with a considerable delay, without the possibility of influencing the public discourse at a time of often heightened debate on a particular issue. The Press Council does not publish statistical data as to the nature of the complaints received, so it is not clear how many of its cases concerned ‘hate speech’.

## Hungary

The Hungarian media law permits media outlets (excluding television and radio media services) to establish self-regulatory bodies with particular legal powers. Four principal self-regulatory bodies have been established, each of which has its own Code of Conduct and its own disciplinary mechanism (dealing with violations of the rules set out in their respective Code of Conduct or in applicable legislation).

Each self-regulatory body has also entered into a so-called “public administration agreement” with the Media Council. These agreements establish that complaints regarding alleged breaches of certain provisions of the media law and Codes of Conduct are to be handled primarily by the committee of experts of the self-regulatory body (not the Media Council). If a complaint is submitted to the Media Council, it must be transferred to the self-regulatory body subject to certain conditions being satisfied. The self-regulatory bodies’ remit to conduct disciplinary procedures in relation to complaints extends to both their registered members (except those that expressly objected to being bound by the co-regulatory mechanism), and the media content providers that agreed to be bound by the respective Code of Conduct. The self-regulatory bodies perform the tasks within their own sphere of competence, and are not overseen by any higher authorities. The existence of these agreements means there is no clarity regarding the status of the Codes of Conduct or the scope of the self-regulatory bodies’ powers. This framework has been subject to international criticism. Moreover, it is notable that the initiation of disciplinary proceedings by the self-regulatory bodies does not halt proceedings by other enforcement mechanisms, meaning that a media organisation could additionally be held liable under administrative, criminal or civil law.

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Beyond the above-mentioned criticism of the relevant legislation and its application, the system of self-regulation and co-regulation has not been very effective in practice at addressing 'hate speech' in the media. The existing self-regulatory and co-regulatory bodies have received very few complaints, primarily due to the changing media landscape in the country, and other societal, social and cultural factors, including a lack of awareness of the self- and co-regulatory complaints system, and the absence of a culture of alternative dispute resolution in Hungary.

## Italy

The print media overall, and the regulation of the profession of journalism in Italy, are governed by the Press Law. The Press Law provides a definition for "professional journalists" and "publicists", and requires all journalists to be registered with the Association of Journalists, and comply with specific requirements established by law. The Press Law also provides for the creation of a National Press Council and Regional or Inter-regional Press Councils. The Regional or Inter-regional Press Councils oversee the implementation of the Press Law, as well as the enforcement of self-regulatory Codes of Conduct amongst their members. They may also undertake disciplinary action against their members when they breach the Codes of Conduct.

The updated 2016 Journalists' Ethical Code of Conduct includes, inter alia, an obligation to respect the right of every person not to be discriminated against on the grounds of race, religion, political opinion, sex, personal, physical or mental disability. The 2016 Code incorporates the "Charter of Rome," which is a specific Code of Conduct for journalists who write on migration and refugee-related themes. Failure to comply with the duties contained in the Code is punishable by administrative pecuniary sanctions, as established by law. The disciplinary sanctions available to the competent Press Councils range from simple warnings to formal reprimands and, in serious cases, suspension from the exercise of the profession for no less than 2 months and up to one year, or permanent expulsion from the professional register. Expulsion from the professional register is automatically applied whenever a journalist is convicted of a crime and, in sentencing, is subject to a permanent ban on holding public office. In practice, however, such sanctions have only very rarely been applied by the competent Regional or Inter-regional Councils, prompting widespread criticism of and concern regarding their therefore limited deterrent effect.

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## Poland

The Polish press is regulated through the Press Law, which also mandates the establishment of a Press Council. The Press Council is envisioned as a consultative body that serves the Prime Minister, and is mandated to deal with complaints concerning all matters related to the press and its role in the country's social and political life. The Press Council has not yet been established, however, and there are no signs that this will be done in the near future.

There is an overlap between the provisions of the Press Law and the Civil Code, and aggrieved individuals can simultaneously seek protection under both pieces of legislation. The Press Law provides for only one remedy: the right to corrections. This remedy does not provide particularly effective protection in the case of 'hate speech', however, due to its limited application to cases which concern "facts" and "imprecise or untrue information included in the press release". Formulating a request to correct 'hate speech' directed against a particular person or group of people, which may be more likely to be based on a value judgement or opinion, would make using this remedy more challenging. Overall, victims of 'hate speech' tend not to make use of the Press Law to seek redress for 'hate speech' in the Polish print media, as the available remedies are not considered effective. Moreover, the Press Law itself, adopted in the communist era, is widely criticised as being out of step with the present times and changes in the print media landscape.

Polish journalists and the media community more broadly are sharply divided along political and ideological lines. This is a primary reason why a nation-wide code of ethics (ethical code) for journalists and media-workers has not been adopted. Various journalists' associations and media outlets have, however, adopted their own ethical codes. Some of these codes make reference to principles of non-discrimination, respect and tolerance. Individual media and journalistic associations and outlets have included provisions in their codes that set out sanctions for violations, such as admonition, reprimands, and temporary suspension of membership or permanent expulsion.

In practice, it is extremely rare for disciplinary action to be taken against members of the various journalists' associations and media outlets. According to the research, many have yet to receive any complaints relating to 'hate speech' published or broadcast by their members.

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## The UK

In the UK, the print media is self-regulated either by one of two independent regulators, the Independent Press Standards Organisation (IPSO) and the Independent Monitor of the Press (IMPRESS), or by the media organisation itself (e.g. the Financial Times and the Guardian). The 2013 Royal Charter on self-regulation of the press is the overarching regulation in respect of the print media. It established the membership of and the criteria used by an independent panel, the Press Recognition Panel, to decide whether to recognise a self-regulatory body. However, to date, the reach of the Royal Charter has been limited. Whilst IMPRESS is the only regulator that has been recognised by the Royal Charter, it does not yet regulate any national newspaper.

Both IPSO and IMPRESS require the publications they regulate to comply with their own Code of Practice or Standards Code. IPSO's Editors' Code of Practice does not contain any provision specifically dealing with 'hate speech'. It does, however, include provisions about accuracy and non-discrimination which may be relevant to the regulation of 'hate speech'. It also has a page on its website dedicated to providing guidance to journalists and editors; thus far, it has developed only one specific guidance document, on researching and reporting stories involving transgender individuals. IMPRESS' Standards Code includes provisions about accuracy and non-discrimination. It also contains one provision specifically dealing with 'hate speech' but only to the extent that it constitutes incitement to hatred.

There are different procedures regarding the enforcement of these codes, as follows:

- IPSO hears the complaints of any complainants in circumstances where the complaint against a publication relates to a significant inaccuracy, which has been published on a general point of fact. Where the complaint relates to other clauses of its Code or an alleged inaccuracy not on a general point of fact, IPSO can only take forward a complaint from someone who is directly affected by the article or journalistic conduct, or their authorised representative. It can also hear complaints from representative groups where the relevant group is in a position to explain: (a) how the group it represents has been affected; (b) that the alleged breach is significant; and (c) that the public interest would be served by IPSO considering the complaint. IPSO can also undertake a standards investigation to investigate where it has serious concerns about the behaviour or actions of one or more of its members (for example, in relation to serious and systemic breaches of the Code). Examples of recent complaints relevant to 'hate speech' demonstrate that accuracy provisions can be useful in countering 'hate speech', when the scope of the discrimination provisions is limited, in that it is

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concerned only with preventing pejorative or prejudicial references to an individual's race or religion, as opposed to that of a group. In general, IPSO has been widely criticised by various stakeholders, including the National Union of Journalists and groups representing victims of some illegal press practices, for being ineffective in addressing victims' concerns.

- IMPRESS accepts complaints regarding alleged breaches of their Code from individuals personally affected by a potential breach of the Code and from representative groups (for example, charities or NGOs) where the relevant organisation represents a group affected by a potential breach of the Code and there is some public interest in the complaint. Furthermore, where a complaint concerns an issue of accuracy, third parties, including any individual or group may bring a complaint before IMPRESS. IMPRESS has the power to impose appropriate and proportionate sanctions. These may include fines, corrections or apologies.

## Approaches to media convergence

Each country report highlighted different concerns regarding media convergence, which builds on the previously discussed areas relevant to the print and broadcast media. The following issues can be highlighted:

- In Austria, legislation has in some cases extended the scope of existing provisions to the online editions of such media. Namely, the broadcasting and media law is also applicable to the online news websites of the respective companies. It does not apply to social media platforms, however; it applies to the sites that traditional media outlets have on the social media platforms (for example, it would apply to a specific Facebook page of a particular media outlet).
- In Germany, the majority of press laws extend their scope to the online content produced by traditional media outlets. The media regulatory authorities were also given the authority to license Internet radio services through an amendment to the Interstate Broadcasting Treaty. The 2007 Telemedia Law applies to almost all online services and content, including search engines, podcast, chatrooms, web-portals, private sites, information websites and blogs. The Telemedia Law includes provisions on legal information to be displayed on websites on liability for illegal online content and on data protection and the handing over of personal information to law enforcement and the courts. The Telemedia Law extends its jurisdiction to online services and content provided by service providers outside of Germany in cases where it is warranted to maintain public safety and order to prevent, investigate,

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and prosecute crimes and administrative offences, including those pertaining to the protection of minors and the combating of incitement to hatred based on race, gender, religion or nationality; to prevent the violation of human dignity; and to protect national security.

- In Italy in 2014, the regulator AGCOM set up a “Permanent Observatory of Guarantees and Protection of Minors and of the Fundamental Rights of the Person on the Internet”. The areas specifically monitored by the Observatory are “incitement to hatred, threats, harassment, bullying, hate speech and the dissemination of deplorable content”. It should be noted that AGCOM does not have any legal powers to regulate or impose sanctions for content hosted by online intermediaries or platforms. However, AGCOM is planning to use the Inter-Institutional Technical Roundtable, established after the entry into force of the law on “cyber-bullying”, to propose various legislative amendments. These amendments would empower AGCOM to take part in drafting co-regulatory codes of conduct on the fundamental rights of Internet users, which would be binding on all social media platforms and Internet providers, to supervise their implementation and impose sanctions in case of their violation.
- Under Hungarian law, the print and broadcast media are all subject to the same regulation. Content on social media and most other online content are not subject to media regulation. However, theoretically, should any media providers that are covered by media regulation publish hyperlinks or undertake other forms of electronic republication to content that violates provisions of the Press Act, the media provider can be sanctioned. The Media Council has not yet issued a decision on this matter, though. Civil or criminal procedures, including for ‘hate speech’, can be initiated for posts and comments made by third parties on websites hosted by media outlets, as well as for posts and comments on their own social media pages.

Intermediary liability for comments posted by third parties is a growing area of concern in Hungary, with several cases initiated before the courts. The civil courts have adopted an approach to intermediary liability whereby media providers who enable the publication of posts or comments by third parties on their sites are also held liable for such content. The Hungarian courts have further held that media service providers can be held liable for posting a hyperlink to a video or article containing unlawful content. Liability is construed objectively in such cases, meaning that the content provider is held liable even if it is not aware of the unlawful content. The application of this approach has been recently challenged at the European Court, in the above-mentioned MTE-Index case, in which the European Court found a violation of the right to freedom of expression.

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- In Poland, the Law on the Provision of Electronic Services regulates digital media. The Law provides immunity to Internet intermediaries, provided that they comply with certain requirements, and establishes a general notice and take down system for intermediaries to implement. The Law does not refer directly to the issue of 'hate speech', or refer to specific measures which might be taken to prevent and address the phenomenon of 'hate speech' appearing in digital media. Content on social media and the majority of online content is not subject to existing legislation related to media regulation. However, recent but now established court practice has determined that online press of any type (including blogs) are considered part of the 'electronic press'. This means that the Press Law is applicable to all websites; site administrators are therefore required to register their websites in the press registry, and the site administrator may be recognised as editors under the law. The ineffectiveness of the Press Law in addressing 'hate speech' offline is echoed online: no relevant court cases involving digital media and 'hate speech' have yet been reported.

The civil courts have applied Civil Code provisions on the infringement of legitimate personal rights to cases concerning online content and have held that a website administrator can be liable for online content. These cases related to defamatory statements, however, and no 'hate speech' cases have been reported under these provisions.

- Since 2016, in the UK, Ofcom has regulated on-demand programme services, which includes the on-demand offer of the numerous broadcast media outlets that it regulates. The relevant rules and guidance are contained in the Rules and Guidance, Statutory Rules and non-Binding Guidance for Providers of On-Demand Programme Services, which prohibit any material likely to incite hatred based on race, sex, religion or nationality. The scope of this rule is more limited than that of the Broadcasting Code, in that it does not explicitly refer to 'hate speech' or discrimination. It is nevertheless broader than the mere prohibition of 'hate speech' where it constitutes a crime of encouragement or incitement to the commission of a crime, in that it merely refers to incitement of hatred. Ofcom has specific procedures in place for investigating breaches of the rules for on-demand programme services. They are broadly similar to the proceedings for the broadcast media.

There is no general regulation relating to 'hate speech' on online platforms and the UK government does not appear to be in favour of statutory regulation of these platforms. However, in 2016, the Labour MP Anna Turley presented a bill entitled the Malicious Communications (Social Media) Bill 2017 to make provision about offences, penalties and sentences in relation to communications containing threats transmitted or broadcast using online social media and for connected purposes. The bill was not ultimately adopted.

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## 'Hate speech' and advertising

In all six countries under review, the relevant advertising self-regulatory or independent bodies have adopted codes of conduct or advertising codes. All the codes include some form of non-discrimination provisions for advertising, and guidance on an effective approach to equal treatment. The research was not able to identify any statistics on 'hate speech' cases dealt with by these bodies. It appears, however, that the majority of cases where discrimination provisions of the respective codes of conduct were breached related to gender discrimination and the use of gendered stereotypes. Only the research on the UK identified breaches related to discrimination on the basis of ethnicity and/or race.



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# Conclusions and recommendations

This comparative study demonstrates that ‘hate speech’ is addressed in a variety of laws and regulations. In all six countries, even the criminal provisions relevant to the most serious forms of ‘hate speech’ are myriad and complex, and would benefit from greater rationalisation. In some cases, individuals have succeeded in bringing civil actions in ‘hate speech’ cases. Such actions are, however, reasonably rare, and are unlikely to act as an effective restraining force on ‘hate speech’, including on media practices. Pursuing a civil action is additionally generally costly and uncertain. The media regulatory authorities and national human rights bodies are often carrying out important activities in terms of positive measures in response to ‘hate speech’. Whilst these efforts should be strengthened, the response of media regulators to complaints on ‘hate speech’ in the broadcast media is highly variable. In relation to the print media, the regulatory framework is fragmented, and the available complaints procedures often operate in such a way as to discourage individuals from bringing claims.

Given these commonalities, ARTICLE 19 proposes that, at a minimum, the following measures should be undertaken at national level:

- All the relevant legislation – in particular the criminal law provisions – should be revised for its compliance with the international human rights standards applicable to ‘hate speech;’
- The advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination or violence should be prohibited in line with Articles 19(3) and 20(2) of the International Covenant on Civil and Political Rights (ICCPR), establishing a high threshold for limitations on free expression, as set out in the Rabat Plan of Action, as well as prohibitions of direct and public incitement to genocide and incitement to crimes against humanity;
- The protective scope of any measures to address ‘hate speech’ should encompass all those protected characteristics recognised under international human rights law. It should not be narrowly limited to the protected characteristics of race, ethnic origin, nationality and religion or belief. In particular, the list of protected characteristics should be revised in line with the right to non-discrimination as provided under Article 2(1) and Article 26 of the ICCPR;

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- The judiciary, law enforcement agencies and public bodies should be provided with comprehensive and regular trainings on relevant international human rights standards applicable to 'hate speech'. Guidelines on the prosecution of incitement cases and the assessment of the cases, based on international human rights law, should be developed. States should ensure that all law enforcement agencies are made aware of the guidelines during their trainings and in their work;
  - States should fully decriminalise defamation, insult, memory crimes and other speech offences that can be inappropriately applied in cases of 'hate speech' and which fail to meet international freedom of expression standards;
  - States should ensure that civil law procedures and sanctions provide for a more victim-centred approach in offering redress in 'hate speech' cases. Available remedies should include compensation in the form of pecuniary and non-pecuniary damages, and the right of correction and reply (as per international standards) if incitement occurred through the mass media. States should also allow NGOs to bring civil claims in relevant cases and should provide for the possibility of bringing class actions in discrimination cases. This should form part of a comprehensive anti-discrimination framework;
  - States should ensure that a regulatory framework for a diverse and pluralistic media is in place. In particular, such frameworks should provide that any regulation of the media should only be undertaken by bodies which are independent of the government, are publicly accountable, and operate transparently;
  - Media regulators and self-regulatory bodies should develop and publish clear policy guidelines on 'hate speech' and apply these clear policy guidelines in their decision-making. They should actively promote an easily accessible complaint procedure and invite the public to use alternative dispute resolutions in media related 'hate speech' cases;
  - Public officials, including politicians, should realise that they play a leading role in recognising and promptly speaking out against intolerance and discrimination, including 'hate speech'. This requires recognising and rejecting the conduct itself, as well as the prejudices of which it is symptomatic; expressing sympathy and support to the targeted individuals or groups; and framing 'hate speech' incidents as harmful to the whole of society. These interventions are particularly important when inter-communal tensions are high, or are susceptible to being escalated, as well as when political stakes are running high, such as in the run-up to elections;

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- All media outlets should, as a moral and social responsibility, play a role in combating 'hate speech' and in promoting intercultural understanding. In particular, they should promote diversity of content by reporting on different groups or communities and reflecting the perspectives of those groups or communities; take care to report in context and in a factual and sensitive manner; and be alert to the danger of discrimination or negative stereotypes of individuals and groups being furthered by the media. Importantly, media companies should guarantee resources to their staff to allow accurate and fair reporting and effectively deal with the challenges related to 'hate speech'; especially, this should include comprehensive trainings, and the provision of adequate technical and human resources;
  - Journalists' organisations should recognise that they play an important role in this area and intensify their efforts to provide adequate responses. In particular, they should organise regular training courses and updates for professional and trainee journalists on the internationally binding human rights standards on 'hate speech' and freedom of expression and on relevant ethical codes of conduct. Journalists' organisations should also ensure that ethical codes of conduct on 'hate speech' are effectively implemented. Codes of conduct should be widely publicised and internalised by journalists and media organisations in order to ensure full compliance, and effective measures should be taken to address any breaches of their provisions.

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# End Notes

<sup>1</sup> The United Kingdom of Great Britain and Northern Ireland (UK) consists of four countries: England, Wales, Scotland and Northern Ireland. Some law applies throughout the whole of the UK; some applies in only one, two or three countries. Due to these differences in the legal framework, the focus of the report is mostly on the applicable frameworks in England and Wales (in particular the area of criminal and civil law).

<sup>2</sup> Euroscepticism refers to criticism of the EU and the European integration. The Eurosceptic right-populist parties include, for example, Lega Nord in Italy, Freedom Party in Austria, Alternative for Germany, Jobbik in Hungary, Congress of the New Right in Poland or UKIP in the UK.

<sup>3</sup> Through its adoption in a resolution of the UN General Assembly, the UDHR is not strictly binding on States. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2<sup>nd</sup> circuit).

<sup>4</sup> The ICCPR has 167 States parties.

<sup>5</sup> See Human Rights Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 11.

<sup>6</sup> *Op cit.*, para 22.

<sup>7</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950.

<sup>8</sup> Article 10 (1) of the European Convention

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; Article 10 (2), The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

<sup>9</sup> Article 1 of the UDHR states that “All human beings are born free and equal in dignity and rights;” Article 2 provides for the equal enjoyment of the rights and freedoms contained in the declaration “without distinction of any kind;” and Article 7 requires protection from discrimination.

<sup>10</sup> For a full explanation of ARTICLE 19’s policy on “hate speech,” see Hate Speech Explained: A Toolkit; available at <http://bit.ly/1UvUQ9t>.

<sup>11</sup> General Comment 34, *op.cit.*, para 52.

<sup>12</sup> The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, Appendix, adopted 5 October 2012; available at <http://bit.ly/1UvUQ9t>.

[ly/2fTNMG6](http://bit.ly/2fTNMG6)

<sup>13</sup> The Rabat Plan of Action has been endorsed by a wide range of special procedures of the UN Human Rights Council; see, e.g. the Report of the Special Rapporteur on FOE on hate speech and incitement to hatred, A/67/357, 7 September 2012; Report of the Special Rapporteur on freedom of religion or belief on the need to tackle manifestations of collective religious hatred, A/HRC/25/58, 26 December 2013; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism on the Internet and social media, A/HRC/26/49, 6 May 2014; and the contribution of the UN Special Advisor on the Prevention of Genocide to the expert seminar on ways to curb incitement to violence on ethnic, religious, or racial grounds in situations with imminent risk of atrocity crimes, Geneva, 22 February 2013.

<sup>14</sup> HR Committee, General Comment 11: prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983, para 2.

<sup>15</sup> UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 35: Combating racist hate speech, 26 September 2013, paras 15 - 16. The CERD Committee specifies that five contextual factors should be taken into account: the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; and the objectives of the speech. The CERD Committee also specifies that States must also consider the intent of the speaker and the imminence and likelihood of harm.

<sup>16</sup> European Court, *Erbakan v. Turkey*, App. No. 59405/00 (2006), para 56; or *Gündüz v. Turkey*, App.No. 35071/97 (2004), para

22.

<sup>17</sup> European Court, *Jersild v. Denmark*, App. No 15890/89 (1992), para 35.

<sup>18</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law; available at <http://bit.ly/2nTmRAi>.

<sup>19</sup> For a full analysis, see ARTICLE 19, Submission to the Consultations on the EU Justice Policy, December 2013.

<sup>20</sup> HRC Resolution 20/8 on the Internet and Human Rights, A/HRC/RES/20/8, June 2012.

<sup>21</sup> General Comment No. 34, op cit., para 43.

<sup>22</sup> Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework (The Ruggie Principles), A/HRC/17/31, 21 March 2011, Annex. The HRC endorsed the guiding principles in HRC resolution 17/4, A/HRC/RES/17/14, 16 June 2011.

<sup>23</sup> Report of the Special Rapporteur on FOE, 16 May 2011, A/HRC/17/27, paras 75-76.

<sup>24</sup> Report of the Special Rapporteur on FOE, 11 May 2016, A/HRC/32/38; para 40 - 44,

<sup>25</sup> Ibid.

<sup>26</sup> Ibid., para 43.

<sup>27</sup> Ibid.

<sup>28</sup> Joint Declaration on Freedom of Expression and "Fake News," Disinformation and Propaganda, adopted by the UN Special Rapporteur on FOE, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African

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Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017.

<sup>29</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Article 14(1).

<sup>30</sup> *Ibid.*, Article 5.

<sup>31</sup> Grand Chamber of the European Court, *Delfi AS v. Estonia*, No. 64569/09, 16 June 2015.

<sup>32</sup> *Ibid.*, Judges Sajó and Tsotsoria's Joint Dissent Opinion. See also ARTICLE 19, *Delfi AS v Estonia Case Comment: Strasbourg Undermines Freedom of Expression*, 1 October 2015; available at <http://bit.ly/2zQTEur>.

<sup>33</sup> For example, in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, No. 22947/13, 2 February 2016, the European Court found a violation of Article 10 of the European Convention where a self-regulatory body of Internet content providers and an owner of an online news portal were held liable for defamatory comments posted by a third party, which the parties removed on receipt of notice.

<sup>34</sup> European Court, *Pihl v. Sweden*, No. 74742/13, 9 March 2017.

<sup>35</sup> For further analysis, see: Dirk Voorhoof, *Pihl v. Sweden: non-profit blog operator is not liable for defamatory users' comments in case of prompt removal upon notice*, *Strasbourg Observers*, 20 March 2017; available at <http://bit.ly/2zMUQB8>.

<sup>36</sup> European Commission, *Code of Conduct on Countering Illegal Hate Speech*, signed

on 31 May 2016; available at <http://bit.ly/1XLcJVo>.

<sup>37</sup> Council Framework, *Decision op.cit.*

<sup>38</sup> For the criticism of the Code of Conduct, see ARTICLE 19, *EU Commission Code of Conduct for Countering Illegal Hate Speech Online and the Framework Decision*, June 2016.



