

# Hate speech online and the approach of the Council of Europe and the European Union

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# **Specific Threats to Human Rights Protection from the Digital Reality**

International Responses and Recommendations to Core Threats from the Digitalised World



„All human beings are born free and equal in dignity and rights.“

Art. 1, sentence 1, Universal Declaration of Human Rights (1948),

EU COST Action – CA19143 – Global Digital Human Rights Network

# Specific Threats to Human Rights Protection from the Digital Reality

International Responses and Recommendations to Core Threats from the Digitalised World

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Digital Service Providers' intended to support these actors to take actions to protect and respect the rights, safety, and interests of children.

## Minimization of the threat – recommendations

There is a consensus that minimising the risks for children's rights in the digital environment is a shared responsibility of all stakeholders. The policymakers that have adopted the documents described above all agree that enhancing the potential and limiting the threats that digital technologies pose to children and their rights can only be achieved if policymakers and legislators, regulatory authorities (such as data protection and consumer protection authorities), industry, civil society and the research community work together.

According to the CRC Committee, states, for instance, should 'ensure that, in all actions regarding the provision, regulation, design, management and use of the digital environment, the best interests of every child is a primary consideration'.<sup>216</sup> This can be put in practice by reviewing, adopting and updating national legislation (for instance, strengthening data protection frameworks) to address the challenges for children's rights, and by conducting Children's Rights Impact Assessments (CRIAs) in the course of that process to ensure that the full range of children's rights is taken into account.<sup>217</sup> Business actors in the digital sector also need to conduct such CRIAs as part of child rights due diligence, in order to identify and remedy negative impact of their activities on children's rights.<sup>218</sup> Accountability of industry for ensuring that the child's best interests prevail is considered to be essential in an environment that is very much private sector-driven. In this context, concepts such as safety-by-design and privacy-by-design are often put forward as solutions to ensure that risks are identified and addressed already during the phase in which technologies are conceptualised, designed and offered to children.

More generally, all policy documents also point to the importance of awareness-raising, education and the provision of information about how digital technologies work, aimed at professionals working with children, parents and children themselves. Involving children in the creation of such campaigns, learning material and information is considered essential.

## Hate speech online and the approach of the Council of Europe and the European Union<sup>219</sup>

### Description of the threat

The threat of hate speech has long been recognized by the Council of Europe as an organization with a mandate to protect human rights and fundamental freedoms. Even though there is no universally accepted international legal definition of hate speech, including within the CoE, and what is hateful is often

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<sup>216</sup> United Nations Committee on the Rights of the Child (2021). General Comment No. 25 on the rights of the child in the digital environment, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/25&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/25&Lang=en), para 12.

<sup>217</sup> Ibid. para 23.

<sup>218</sup> Ibid. para 38.

<sup>219</sup> Report section written by Prof. dr. sc. Vesna Crnić-Grotić and Dr. Šejla Maslo Čerkić.

considered disputed or controversial<sup>220</sup>, there is still agreement that most serious abuses of freedom of expression that jeopardize democratic values, social stability and peace need to be properly tackled. Such forms of speech do not enjoy the protection under right of freedom of expression, as defined by international human rights documents.

A number of instruments that have been adopted as well as a consistent case law of the European Court of Human Rights witness to this stance and the efforts undertaken by this organization to prevent and possibly punish hate speech. The situation was, however, exacerbated by the unprecedented spread of the use of social media and online hate speech. The Internet, once perceived as the bastion of free speech and enabler of other rights and freedoms, has provided a platform for discrimination, intolerance, bigotry and hatred towards the most vulnerable minority groups – ethnic, sexual, gender, religious, etc. The advantages of online interaction, including anonymity, accessibility, and affordability have also played in favour of those aiming at spreading hatred.

It is difficult to obtain accurate estimates of the extent of hate speech online due to different regulatory and policy approaches by countries, issues with inconsistent monitoring, “particularly in an internet world which is increasingly user-generated, interconnected, and consisting of multiple forms of content. Personal messages and emails are clearly particularly difficult to track”.<sup>221</sup>

However, it is evident that global social, political and technological developments, such as the immigration wave in 2015 together with web 2.0 technical development further contributed to the spread of hate speech online, this time mostly against the migrants arriving from the Middle East or Africa. People with a different culture, religion and the colour of their skins were easy targets for many social media users spreading the feeling of threat against “European values”.

Within the Council of Europe framework, the most relevant definition of hate speech is provided by the Additional Protocol to the Convention on Cybercrime and it is concerned only with hate speech which is racist or xenophobic, defining “«racist and xenophobic material» as any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors”.<sup>222</sup>

The case law of the Strasbourg system has addressed hate speech in cases concerning, among others, white supremacists telling the others – not white – that they should leave the country; negationism and revisionism of the Holocaust, the use of Nazi symbols, intolerance with respect to Roma, aggressive calls against non-Muslim population, and with regard to digital platforms, the Court considered the failure of state to protect the members of the LGBT community against hate speech as violation of the Convention<sup>223</sup> and sharing prohibited content against ethnic minorities<sup>224</sup>.

With regard to cyberhate, it has been defined as “the use of violent, aggressive or offensive language, focused on a specific group of people who share a common property, which can be religion, race, gender or sex or

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220 UN Strategy and Plan of Action on Hate Speech 18 June SYNOPSIS.pdf

221 Three studies about online hate speech and ways to address it, Council of Europe, October 2014, 16809c85ea (coe.int)

222 Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Strasbourg, 28.1.2003.

223 *Beizaras and Levickas v. Lithuania* (Coe.Int)

224 *Kilin v. Russia* (Coe.Int)

political affiliation through the use of Internet and Social Networks, based on a power imbalance, which can be carried out repeatedly, systematically and uncontrollably, through digital media and often motivated by ideologies.”<sup>225</sup>

The European Commission warned that the hate speech as spread online can have a devastating effect on the fabric of social order, “as it potentially not only negatively affects the groups or individuals that it targets; it also negatively impacts those who speak out for freedom, tolerance and non-discrimination in our open societies and has a chilling effect on the democratic discourse on online platforms.”<sup>226</sup>

In particular, online hate speech brought in the responsibilities of online platforms as providers of services and enablers. While the comprehensive regulatory framework addressing (illegal hate) speech online within the EU is yet to be enacted through the Digital Services Act (DSA), the European Commission has, through the launch of the Code of Conduct on Countering Illegal Hate Speech Online, introduced an important self-regulatory mechanism to combat the proliferation of racist and xenophobic speech.

## Developments in relation to the threat

In May 2022, the Council of Europe adopted a new Recommendation CM/Rec(2022)16 with a set of principles and guidelines to its member states aimed at preventing and combatting hate speech, both online and offline. The document builds on the existing framework, standards, case law and the monitoring efforts of the Council of Europe concerning hate speech so far.<sup>227</sup> For the purposes of this recommendation, hate speech is understood “as all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status such as “race”,<sup>[2]</sup> colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation”. Member states are called to address the rise in hate speech, especially in the online sphere, through adoption of a comprehensive legal and policy framework. The Council maintained the existing notion that the most serious forms of hate speech should be addressed through criminal legislation, while other less severe expressions are to be tackled through other means, including civil and administrative law. Forms of speech which are not serious enough to be considered in violation of the Convention should nevertheless be addressed through alternative responses.

Concerning online hate speech, specific guidelines are given to states to ensure clear and foreseeable provisions for the effective removal of speech that is prohibited under criminal, civil and administrative law. In following the guidelines, member states should ensure that freedom of expression is protected as guaranteed under Article 10 and in accordance with the requirements of the European Court of Human

<sup>225</sup> Sergio Andrés Castaño-Pulgarín, Natalia Suárez-Betancur, Luz Magnolia Tilano Vega, Harvey Mauricio Herrera López, Internet, social media and online hate speech. Systematic review, *Aggression and Violent Behavior*, Volume 58, 2021, 101608, ISSN 1359-1789, <https://doi.org/10.1016/j.avb.2021.101608> (<https://www.sciencedirect.com/science/article/abs/pii/S1359178921000628#ab0010>)

<sup>226</sup> European Commission. 2016b. Code of conduct on countering illegal hate speech online.

European Commission document. [http://ec.europa.eu/justice/fundamental-rights/files/hate\\_speech\\_code\\_of\\_conduct\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf). Accessed August 12, 2017.

<sup>227</sup> Existing CoE treaties and other relevant standard-setting instruments, relevant case law of the European Court of Human Rights and the findings and recommendations of the Council of Europe's monitoring bodies, in particular Recommendation Rec(97)20 of the Committee of Ministers to member States on “hate speech”, Recommendation Rec(97)21 of the Committee of Ministers to member States on the media and the promotion of a culture of tolerance and General Policy Recommendation No. 15 on combating hate speech of the European Commission against Racism and Intolerance, as well the broader international and European human rights standards.

Rights. As regards the recent case law of the Court and concerning justified restrictions of online speech, in the recent case of *Lilliendahl v. Iceland* (29297/18), the European Court of Human Rights (ECHR) for the first time posed a direct question of whether applicant's comments (about LGBT population) amounted to hate speech. The Court provided a lengthy explanation of the question in the light of the existing Court's case law. Finding that the speech amounted to less grave forms of hate speech, and therefore considered under Article 10, the Court nevertheless sided with the national court, which noted that the applicant's comments were "serious, severely hurtful and prejudicial", and even though there was no direct call or incitement to violence, it fell outside the protections of the ECHR. Concerning criminal liability of online users for comments posted on social media, in the recent case of *Sanchez v France*, the Fifth Section of the Court of Human Rights held that the conviction of a politician for failing to promptly delete unlawful comments (hateful and racist comments directed at Muslims in France) published by third parties on the public wall of his Facebook account did not breach his rights under Article 10 despite his apparent lack of knowledge of the comments.<sup>228</sup> The decision is based on the principles established in *Delfi v. Estonia* that pertain to the liability of intermediaries. However, interventions by third parties claim that these principles are not suitable to be applied in case of individual users on social media.<sup>229</sup> The decision has been accepted for referral to Grand Chamber in January 2022<sup>230</sup>, but some scholars have already assessed it as "underprotection" of freedom of expression.<sup>231</sup> The Court has previously established in *Kilin v. Russia* that criminal sanction of individual users for racist content posted online whose author was not the user and without personal comments to signify the attitude towards the content is justified and proportionate, even if it was made available to a limited audience on a social network.<sup>232</sup>

In addition to the CoE, the efforts taken by the European Union show the necessity to try to give its own contribution to combatting hate speech online. The EU definition of hate speech that is put forth in the Council Framework Decision 2008/913/JHA of 2008 confines hate speech to "all conduct publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin" (Council of the European Union 2008), essentially neglecting such characteristics as sex, gender identity and sexual orientation.<sup>233</sup>

The European Commission reacted by concluding the Code of Conduct with several media platforms like Google, Facebook, Microsoft and Twitter prompting them to act against hate speech in 2016.<sup>234</sup> In 2020, the Commission made an assessment of its impact.<sup>235</sup> It concluded that "in summary, the Code of conduct has contributed to achieve quick progress, including in particular on the swift review and removal of hate speech content"<sup>236</sup> In October 2021, the results of the 6<sup>th</sup> periodical evaluation have been published to show

<sup>228</sup> Case Law, Strasbourg: *Sanchez v France*, Politician fined for failing to delete Facebook hate speech, no violation of Article 10 – Inforrm's Blog

<sup>229</sup> Media Defence and EFF intervene in *Sanchez v France* - Media Defence

<sup>230</sup> Grand Chamber Panel's decisions - January 2022.pdf

<sup>231</sup> Liability for Facebook-comments: Why the ECtHR underprotected Freedom of Speech – Leuven Blog for Public Law (leuvenpubliclaw.com)

<sup>232</sup> *KILIN v. RUSSIA* (coe.int)

<sup>233</sup> (Council Framework Decision 2008/913/JHA) Framework Decision on Combatting Racism and Xenophobia through Criminal Law, prohibiting racist and xenophobic hate crime and hate speech and the efforts needed by competent national authorities to investigate and prosecute hate motivated offences, both offline and online

<sup>234</sup> Fn. supra.

<sup>235</sup> Progress on combating hate speech online through the EU Code of conduct 2016-2019.

<sup>236</sup> (28% of content removed in 2016 vs. 72% in 2019; 40% of notices reviewed within 24h in 2016, 89% in 2019)."



“a mixed picture” of the activity of companies. As reported, IT companies reviewed 81% of the notifications within 24 hours and removed an average of 62.5% of flagged content. These results are lower than the average recorded in 2019 and 2020.<sup>237</sup>

Finally, in her 2020 State of the Union speech, Ms Ursula van der Leyen proposed to introduce hate speech and hate crime on the list of EU crimes as a response to their rise in recent years.<sup>238</sup> Based on that the European Commission took the initiative in December 2021, stating that “hate crime and hate speech are going against the fundamental European values set out in Article 2 of Treaty on EU”. Pursuant to Article 83(1) of the Treaty on the Functioning of the EU (‘TFEU’), the European Parliament and the Council may establish minimum rules on the definition of criminal offences and sanctions in areas of particularly serious crime with a cross-border dimension.” Online hate crime is such trans-border crime by definition.

While the Code of Conduct has brought innovative and fairly comprehensive framework that aimed at tackling hate speech in the EU and was endorsed by the biggest global private actors, its self-regulatory nature and the lack of transparency in decision-making remained its biggest shortcomings. To overcome this, the Digital Service Act (DSA), that is awaiting formal adoption and that will be directly applied in the EU member states is hoped to introduce landmark rules to effectively tackle the spread of illegal content online and protect people's fundamental rights in the digital sphere.<sup>239</sup> With regards to combatting online hate speech, the overarching aim is to ensure more responsibility of intermediary services – social media and marketplaces – which will have to take effective measures to better protect users in the digital environment.

### **Minimization of the threat – recommendations**

The initiative to make (online) hate crime one of EU crimes may bring about uniformity in the European treatment of hate crime. So far, the Member States had a different approach – from a more lenient one in the Western Europe to the stricter approach in the former socialist countries.<sup>240</sup> Criminalization, however, could not be the only approach. It has to be accompanied with more education and training especially of young people on how to be aware of hate crime, how to recognize it and how to fight it online. In addition, self-regulation remains to be one of the options – however, a more comprehensive regulatory framework will be introduced by the DSA.

The consistent policy with respect to examples of hate crime online is also a prerequisite regardless of its author. Technical difficulties in identifying the author are not easy to overcome so attempts to at least minimize the presence of hate crime in some of the controlled media should be maximized, such as comments on articles in media.

The stances of the European Court of Human Rights in the recent decisions concerning online hate speech also show a trend of narrowing of scope of protected speech under Article 10. This development seems to be a reflection of the global social and political context of migrations and the Covid-19 pandemic. More countries introduce more stringent rules on online speech, in efforts to address numerous concerns, relating

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<sup>237</sup> EU Code of Conduct against illegal hate speech online: results remain positive but progress slows down - EU monitor

<sup>238</sup> [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en)

<sup>239</sup> Digital Services Act: agreement for a transparent and safe online environment | News | European Parliament (europa.eu)

<sup>240</sup> Online Hate Speech in the European Union, ed. Stavros Assimakopoulos *et al.*

not only to hate speech, but also complex misinformation narratives and conspiracy theories' effects on public order and safety. These needs may also be reflected in the future decisions of the European Court of Human Rights.